Issuer Guideline
of the Federal Financial Supervisory Authority (BaFin)

Disclaimer
Please note that this Guideline is a convenience translation for information purposes only. The original German text is binding in all respects. The legal provisions and the administrative procedures may have been subject to amendments since the date of publication of this Guideline.
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Abbreviations
I Introduction

This Guideline is aimed at domestic and foreign issuers whose securities are admitted to trading on a German stock exchange. It revises the areas of ad hoc disclosure, directors’ dealings and insider lists. Explanations on major holdings of voting rights, information on exercising rights attached to securities, monitoring of financial statements (enforcement) and financial reporting duties were added as new sections. The Guideline now takes account of the provisions amended and newly introduced by the Transparency Directive Implementation Act (Transparenzrichtlinie-Umsetzungsgesetz – TUG) and the entry into force of the Financial Reporting Enforcement Act (Bilanzkontrollgesetz – BilKoG). The Guideline is designed as a hands-on guide in dealing with the new and amended securities trading law provisions without, however, constituting a legal commentary. It provides an introduction to these legal issues and explains BaFin’s administrative practice.

In January 2009, BaFin consulted on the revised and new sections of the Guideline. The Guideline now reflects many of the suggestions and recommendations of representatives from the industry and of investors as well as the experience gathered by BaFin in the above areas and the latest court rulings.

The European and German legislators are continuing their efforts towards strengthening the integrity of the capital market. The focus is on investor confidence in functioning capital markets. This confidence can be achieved through strong investor protection, notably through greater transparency on the part of capital market participants. In this connection, market participants have to be able to rely on ad hoc and voting rights notifications being clear, informative and accurate as well as on accounting standards being observed. The purpose of this Guideline is to show practical solutions to the legal issues arising in this context.
II  

## Legal framework

The submitted revision and amendment of this Guideline became necessary because of the far-reaching amendments to the Securities Trading Act (Wertpapierhandelsgesetz – WpHG) introduced by the Transparency Directive Implementation Act (Transparenzrichtlinie-Umsetzungsgesetz – TUG)\(^1\) and the Regulation Implementing the Transparency Directive (Transparenzrichtlinie-Durchführungsverordnung – TranspRLDV)\(^2\).

The Transparency Directive\(^3\) was transposed into German law by the TUG which came into force on 20 January 2007. This Directive is designed to enhance transparency on the European capital markets and to harmonise the corresponding rules throughout Europe. Its objective is to ensure that important company information is disclosed and kept available in databases on a pan-European basis. Thus, the Transparency Directive is intended not only to promote the development of an efficient, transparent and integrated securities market as part of the European Single Market but also to enhance investor protection.

At the European level, Directive 2007/14/EC (Implementing Directive)\(^4\) clarifies the requirements of the Transparency Directive inter alia with regard to the disclosure of major holdings by investors, the minimum standards for public distribution of mandatory information across Europe, and minimum requirements for the recognition of the equivalence of regulations of “third countries” (countries that are neither members of the EU nor members of the EEA.)

As far as possible, the Implementing Directive that was in the draft stage during the legislative process was already taken into account in drafting the TUG. Additional implementing measures, to the extent these required amendments to existing legislation, were made within the framework of the Act Amending the Investment Act (Investmentänderungsgesetz – InvÄndG) of 21 December 2007\(^5\) which entered into force on 28 December 2007. With the TranspRLDV, which entered into force on 21 March 2008, the remaining requirements of Directive 2007/14/EC have now been transposed into national law.

Additional amendments result from the Risk Limitation Act (Risikobegrenzungsgesetz – RBG) of 18 August 2008\(^6\). The purpose of this Act is to further enhance transparency on the financial markets so as to limit risks arising from financial investments. Here, measures were taken in particular with regard to notification duties. Moreover, the provisions in the WpHG as well as in the Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz – WpÜG) on the co-ordinated conduct of investors (“acting in concert”) were expanded and clarified.

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3. OJ L 390, p. 38
4. OJ L 69, p. 27.
Also newly included were provisions on the monitoring of financial statements (enforcement) subject to sections 37n to 37u of the WpHG. These were introduced into the WpHG by the Financial Reporting Enforcement Act (Bilanzkontrollgesetz – BilKoG) of 15 December 2004\(^7\). These tasks, which have been exercised by BaFin\(^8\) since 1 July 2005, were introduced too late to be included in the previous edition of the Issuer Guideline.

This third issue of the Guideline builds up on the content of the second issue from 2005. At that time, a revision was required by the amendment of the WpHG by Article 1 of the Act Improving Investor Protection (Anlegerschutzverbesserungsgesetz – AnSVG)\(^9\) – in force since 30 October 2004 – and by the regulations issued on this by the Federal Ministry of Finance based on European requirements, namely Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (Market Abuse Directive).\(^10\) The EU Market Abuse Directive is the first EU financial markets directive in which the Lamfalussy Procedure was used. For its clarification, the European Commission issued the following implementing regulations:


The Member States of the European Union were required to transpose the European legislative framework into national law by October 2004. In Germany, the Directive was transposed by the AnSVG.

The provisions of the WpHG thus amended, to the extent they relate to the content of this Guideline, were clarified by regulations issued by the Federal Ministry of Finance:

- Regulation specifying reporting, notification and publication requirements as well as the obligation to maintain insider lists pursuant to the Securities Trading Act (Wertpapierhandelsanzeige- und Insiderverzeichnisverordnung – WpAIV) of 13 December 2004\(^15\), last amended by Article 5 of the RBG
- Regulation Clarifying the Prohibition of Market Manipulation (Verordnung zur Konkretisierung des Verbots der Marktmanipulation – MaKonV) of 1 March 2005.\(^16\)

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7 Federal Law Gazette I 2004, p. 3408. This Guideline takes account of the amendments resulting from the Act to Modernise Accounting Law (Bilanzrechtsmodernisierungsgesetz – BilMoG), which was due to be announced in the Federal Law Gazette shortly after the editorial deadline for the Guideline.
8 Section 45 sentence 2 of the WpHG
10 OJ L 96, p. 16
11 OJ L 336, p. 33
12 OJ L 339, p. 70
13 OJ L 339, p. 73
14 OJ L 162, p. 70
15 Federal Law Gazette 2004 I, p. 3376
16 Federal Law Gazette 2005 I, p. 515
III Insider surveillance

The insider surveillance provisions of the WpHG (sections 12, 13 and 14), together with the provisions on criminal offences and administrative fines (sections 38 and 39) provide the legal framework governing trading in insider securities using inside information. As a general rule, nobody having gained knowledge of inside information is permitted to make use of such information for trading in insider securities, regardless of the sources from which such information was obtained. These provisions moreover regulate the disclosure of inside information. By law, anyone gaining access to inside information is required to use such information responsibly.

III.1 Insider securities pursuant to section 12 of the WpHG

III.1.1 Financial instruments

The definition of insider securities (section 12 (1) of the WpHG) is based on the new concept of financial instruments as legally defined in section 2 (2b) of the WpHG. These include:

- securities as defined in section 2 (1) of the WpHG, i.e.
  - shares, certificates representing shares, debt securities, profit-participation certificates, or warrants, provided that such instruments are admitted to trading on a market;
  - other securities that are similar to shares or debt securities, provided that they are admitted to trading on a market;
  - units in investment funds (Investmentvermögen) issued by asset management companies (Kapitalanlagegesellschaften) or foreign investment companies (Investmentgesellschaften);

- money market instruments as defined in section 2 (1a) of the WpHG, i.e. receivables which are not covered by the definition of securities in section 2 (1) of the WpHG and which are usually traded on the money market;

- derivatives as defined in section 2 (2) of the WpHG, i.e. forward contracts in the form of firm contracts or option contracts, the price of which depends directly or indirectly on
  - the stock exchange or market price of securities;
  - the stock exchange or market price of money market instruments;
  - interest rates or other yields;
  - the stock exchange or market price of commodities or precious metals; or
  - foreign exchange rates;
• securities subscription rights;

• other instruments admitted to trading on an organised market (as defined in section 2 (5) of the WpHG) in Germany or in another member state of the European Union, or in respect of which admission has been applied for.

Hence the new concept of financial instruments, in addition to securities, subscription rights and specific derivatives (which were already covered by section 12 (1) and section 2 of the previous version of the WpHG), now also covers derivatives based on commodities and precious metals.

Commodity futures contracts have been available for trading at the Hanover Commodity Exchange (Warenterminbörse Hannover – "WTB") since April 1998. These contracts can be used to hedge against price fluctuations in the agricultural sector. Prices in this sector are affected not only by weather conditions, vermin or diseases but also by statutory requirements, such as changes in subsidies and tariffs, or bans on the import or export of goods. Any person becoming aware of such changes in legislation before these are made public is in possession of inside knowledge. To prevent such inside knowledge from being used for the purchase or sale of commodity future contracts without sanctions, it is necessary for derivatives based on commodities to also be qualified as insider securities.

Example:

Person A learns about the planned reduction in import tariffs for product X. A knows that this information is not public knowledge. A realises that this will increase the supply of product X and result in the prices for product X falling accordingly. A would be able to make use of this inside knowledge for profit by selling a futures contract and then closing out the position by buying an identical contract at a lower price. The difference between the selling price and the repurchase price represents the profit made by A.

The concept of "commodities" also includes electricity. That means that electricity derivatives, which are traded in Germany at the European Energy Exchange (EEX), constitute insider securities and are thus subject to the prohibition of insider dealing pursuant to section 14 of the WpHG.

III.1.2 Admission to trading

As before, for a financial instrument to be classified as an insider security it must be

• admitted to trading on a German stock exchange; or

• included in the regulated market (regulierter Markt) or the regulated unofficial market (Freiverkehr) of a German stock exchange (section 12 sentence 1 no. 1 of the WpHG)

• admitted to trading on an organised market in another member state of the European Union or another signatory to the Agreement on the European Economic Area (section 12 sentence 1 no. 2 of the WpHG).
The application for admission or for inclusion in trading, or the public announcement of such application, is deemed equivalent to admission or inclusion in trading (section 12 sentence 2 of the WpHG) for the purposes of this classification.

An application for admission is deemed to have been made once it has been received by the competent exchange. The application is deemed to have been publicly announced if the issuer (or another party offering the financial instruments) has issued a statement announcing its intention to have the instruments listed in the relevant market segment, provided that such statement is made known to the general public and published accordingly.

III.1.3 Financial instruments not separately admitted to trading

Section 12 sentence 1 no. 3 of the WpHG extends the scope of financial instruments classified as insider securities (as compared with the previous version of section 12 of the WpHG) to now include all financial instruments the prices of which depend directly or indirectly on financial instruments within the meaning of section 12 nos. 1 or 2 of the WpHG.

As a result, such financial instruments are classified as insider securities regardless of whether or not they are traded on an exchange. This classification is consistent with the express intent of the legislature, and has closed a loophole in the penal provisions of the Act. Previously, insiders aware of the impending loss in the value of their securities based on circumstances known exclusively to them were able to dispose of their securities without incurring losses by concluding an option contract. Since the option contract was not exchange-traded and therefore was not classified as an insider security, penal sanctions for such conduct were excluded based on the old legislation.\(^\text{17}\)

**Examples:**

Under employee stock option programmes (a component of performance-linked executive remuneration), the issuer’s executive employees are granted option rights or warrants vesting them with the right to purchase shares in the issuer. The option rights or warrants granted may be issued directly by the company concerned (as convertible bonds or bonds with warrants) or by third parties (covered warrants). Until now, such stock options have not been deemed insider securities, provided that they had not been admitted to an exchange or included in trading on a regulated unofficial market (Freiverkehr) at the time they were granted to executive employees. With the introduction of section 12 sentence 1 no. 3 of the WpHG, stock options granted under such employee stock option programmes based on exchange-listed shares now also come within the definition of insider securities. Exchange-traded securities themselves are already covered by section 12 sentence 1 no. 1 of the WpHG.

Various providers offer standardised OTC derivative contracts on insider securities (known as “click options”) to retail investors over the Internet. Such (derivative) agreements between an institution and its customers are basically equivalent to options or futures, and can therefore be used for insider dealing, which is prohibited, even

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17 cf. decision of the Higher Regional Court of Karlsruhe (OLG Karlsruhe) of 4 February 2004 – 3 Ws 195/03 as reported in the German legal journal *Wertpapier-Mitteilungen* ("WM", 2004, p. 2486)
though they lack the fungibility typical for securities. In this case, the inside knowledge relates to the agreed underlying or its issuer. In contrast to the previous legal situation, click options are now classified as insider securities provided that their price depends on insider securities pursuant to section 12 nos. 1 and 2 of the WpHG.

However, performance participation rights (Wertsteigerungsrechte), stock appreciation rights and phantom stocks do not constitute insider securities pursuant to section 12 of the WpHG since they are not deemed to be financial instruments.

III.2 Prohibition of insider dealing

The prohibition of insider dealing is set forth in section 14 of the WpHG. Section 38 of the WpHG provides for criminal penalties (imprisonment of five years or a fine), with the fines themselves (of up to €200,000) being provided for in section 39 of the WpHG.

III.2.1 Inside information

Section 13 (1) of the WpHG defines inside information as

- any specific information
- about circumstances which are not public knowledge
- relating to one or more issuers of insider securities, or to the insider securities themselves,
- which, if it became publicly known, would likely have a significant effect on the stock exchange or market price of the insider security.

In section 13 (1) sentence 1 of the WpHG, the term “inside information” (Insiderinformation) is used instead of the old term “insider fact” (Insidertatsache), thus implementing the term “inside information” as originally used in Insider Directive 89/592/EEC (which is now replaced by the Market Abuse Directive) into national law. This serves to harmonise the terminology used with that of other European jurisdictions.

Accordingly, section 13 (1) sentence 1 of the WpHG defines inside information as any specific information about circumstances which are not public knowledge.

III.2.1.1 Any specific information about circumstances

Information is deemed to be specific if it is defined in a way that provides a sufficient basis for an assessment of the future development of the stock exchange or market price of an insider security.
Not every statement constitutes a specific circumstance within the meaning of section 13 (1) sentence 1 of the WpHG. Article 1(1) of Commission Directive 2003/124/EC implementing the Market Abuse Directive requires the information to be “of a precise nature”, stipulating that there has to be a set of circumstances which exists or may reasonably be expected to come into existence.

This definition encompasses the facts previously developed in case law and literature on the concept of inside facts (i.e. all externally recognisable events or situations affecting human beings and their environment), as well as value judgments capable of being verified, assessments, intentions, forecasts and rumours.

III.2.1.1.1 Decision-making processes involving multiple hierarchical levels

In the case of decision-making processes involving multiple hierarchical levels (which may typically fail before the final decision is taken), the question of whether the information is of a specific nature has to be assessed separately for each (interim) level. For instance, if company A has the firm intention to take over company B, such intention already constitutes information of a specific, defined nature. This holds true regardless of the question of whether ultimately the originally intended decision will actually lead to the takeover.

However, a distinction has to be made with regard to the issue of whether the stage of the process has progressed to a sufficient extent that this circumstance will likely have a significant effect on prices. This question has to be assessed from a reasonable investor’s perspective. The further the takeover process has progressed, the greater the potential will be that it will have a significant effect on prices. If company B expresses its willingness to be taken over and if a due diligence review has been conducted to the satisfaction of all parties, this will be a strong incentive for a reasonable investor to purchase shares in company B. This is in no way changed by the fact that the parties may not yet have reached any final agreement on material aspects of the takeover, notably the price, and that the conclusion of the contracts may fail right up to final signing.

The assessment of whether information will likely have a significant effect on prices must always be based on an overall view of all completed decision-making levels. A letter of intent entered into with a view to merely ensuring mutual confidentiality for the time being during takeover negotiations is not sufficient per se for such potential to be assumed. However, the situation may be different for subsequent agreements if such letter of intent is followed by a due diligence review which is completed to the satisfaction of all parties. For example, a due diligence review might be followed by successful negotiations with further major shareholders. If in such situation a further letter of intent is concluded which sets out the framework for the further course of the parties (e.g. regarding negotiations on the acquisition price), a reasonable investor who is aware of all information would usually assume that such information will likely have a significant effect on prices.
III.2.1.1.2 Rumours

Rumours having a grain of truth as their basis may also constitute inside information. The rumour may, e.g., convey the substance of a planned takeover to a company’s free-float shareholders in precise terms. Although such information is not necessarily true, it does constitute specific information as defined in section 12 of the WpHG. The issue of whether a reasonable investor would act on this rumour needs to be clarified only in conjunction with whether the information will likely have a significant effect on prices. This has to be assessed giving due regard to the circumstances of each individual case, notably:

- the source of the rumour;
- the verifiable facts on which such rumour is based; and
- the situation of the market in general, and of the segment to which the company concerned belongs.

Moreover, a reasonable investor will also need to assess the economic situation of the companies concerned.

Future circumstances may constitute inside information pursuant to sentence 3 provided that such circumstances are reasonably likely to actually occur. That means that there have to be specific indications that reasonably suggest that such circumstances will occur. However, a likelihood approaching certainty is not required.

III.2.1.2 Not public knowledge

The factual element of “not public knowledge” must be defined in the negative: inside information is deemed to be public knowledge if such information has been made available to the broad investing public, i.e. an unspecified number of individuals.

In this regard it is irrelevant who made the inside information public. No distinction is made as to whether the circumstances representing the inside information were made public by the issuer (for instance by way of ad hoc disclosure pursuant to section 15 of the WpHG) or made available to the general public in any other way.

It is sufficient, but also required, that the inside information be available simultaneously to the broad investing public. This can be the case, for example, if a generally accessible electronic system for the dissemination of information is used, but does not require publication in the general media. This ensures equal access to information since any interested market participants may apprise themselves of the inside information (a concept referred to as “sectoral publicity”).

18 In its decision of 16 March 1998 (cf. Die Aktiengesellschaft 1998, p. 436), the Higher Administrative Court of Hesse (Hessischer Verwaltungsgerichtshof) found that rumours recognised as constituting inside facts provided that such rumours were based on objectively reliable elements and thus on a grain of truth. In this regard, the concept of inside information would not require any different interpretation.
However, publishing inside information within a stock exchange information service or news board available only to selected participants does not satisfy the requirement of informing the broad investing public.

Likewise, information in question is not deemed to have been made public in the aforementioned sense by being announced at a press conference of the company or at the shareholders’ meeting, since these events are accessible only to a selected group of individuals instead of being addressed to an unspecified number of interested parties. This also rings true if the shareholders’ meeting is transmitted “live” over the Internet, all relevant media are present, or the information is posted on the company’s website. In none of these cases is simultaneous sectoral publicity of the inside information ensured to a sufficient extent.

III.2.1.3 **Circumstances relating to the issuers of insider securities, or to the insider securities themselves**

The inside information must relate to one or more issuers of insider securities, or to the insider securities themselves.

Therefore, the circumstances affecting prices need not have occurred exclusively within the issuer’s scope of activity, nor do they have to relate directly to the issuer or the insider securities. Circumstances relating only indirectly to the issuer may also constitute inside information provided they are likely to have a significant effect on the price of the insider securities.

These may include market data or market information (i.e. information about the general market environment or the markets themselves) which may affect the situation of issuers or insider securities in certain cases, such as:

- interest rate decisions by central banks;
- foreign exchange rates;
- commodity prices;
- sector-specific statistical data; or
- data or other information relating to trading in the respective insider securities (such as order volumes, type of order, identity of the originator as well as inclusion in or removal from an index).

Planned legislation or changes in legislation which may affect the prices of insider securities are also of relevance in this context.

III.2.1.4 **Likelihood of having a significant effect on prices**

Information is deemed to constitute inside information only if the circumstances on which the information is based would, if it became publicly known, likely have a significant effect on the stock exchange or market price of the insider security.
The concept of “likelihood” requires an assessment of the extent to which such circumstances would affect the stock exchange or market price if they were made public. It is therefore irrelevant whether the price of an insider security actually changes after the inside information has become publicly known. From the viewpoint of a reasonable investor who is aware of all available information at the time of making a decision, the definition of “likelihood” is satisfied if there is a reasonable likelihood of a significant impact on prices. However, significant changes in stock exchange and market prices occurring after the inside information has actually been made public may be used as an indicator of the price influencing potential pertaining to the information concerned.

The requirement of materiality is designed to prevent a situation in which every circumstance leading to a minor price movement would be deemed to constitute inside information. Section 13 (1) sentence 2 of the WpHG defines the question of whether a reasonable investor would take account of the information for his or her investment decision as the decisive criterion for assessing the likelihood of such information having a significant impact on prices.

This will generally be the case where such information provides an incentive to buy or sell and a reasonable investor would consider such transaction to be profitable. This excludes all those cases where exploiting information that is not public knowledge would not offer any significant economic benefit in the first place, and thus there is no incentive to make use of it.

The price of securities not only depends on the information relating to the specific company concerned but is also influenced decisively by the situation of the aggregate market, or the specific sector, as well as by other factors. Consequently, no reliable statements on the circumstances of relevance for prices can be made without an assessment of the individual case.

An assessment of whether or not information will likely have a significant effect on prices could comprise the following steps:

The first step is to examine whether such information in and of itself is reasonably likely to have a significant effect on prices. This question has to be assessed ex ante based on the insider’s perspective at the time of the decision being made. Some examples of this include takeover bids, the conclusion of particularly important contracts, important inventions, profit warnings as well as the threat of insolvency, capital reductions or the conclusion of control and profit-and-loss transfer agreements. Other examples are changes in dividends, particularly where dividends are reduced or not paid out at all. By contrast, news about personnel changes are deemed to be likely to have a significant effect on prices only in exceptional cases, particularly where such news relates to staff who are not members of the management board or the supervisory board. However, news about individuals of key importance for the company – such as its founders – may be relevant.

In the next step, all specific circumstances of the individual case existing or foreseeable at the time of the decision being made must be examined in terms of the extent to which they could increase or decrease the potential of prices being significantly affected.

For instance, where the preparation of the annual financial statements reveals an increase in profit or a loss of 50 percent compared with the previous year, this represents new information. However, the issue of whether such information will likely have a significant effect on prices depends decisively on what information or forecasts relating to the company’s earnings position had already been publicly available or issued by the company before the
annual financial statements were prepared. Where the management board continuously
reports on expected results throughout the financial year and such information has been
absorbed by the market (e.g. through press coverage, analyst reports, etc.), such information
is no longer deemed likely to have a significant effect on prices. However, it should be noted
that it is relatively exceptional for all the foregoing conditions to be met at the same time. As a
rule, business figures that surprise the market will likely affect prices.

For further examples that must be classified as price-relevant, please refer to the rules of ad
hoc disclosure described in chapter IV.

**III.2.1.5 Examples illustrating the rules for defining inside information**

Section 13 (1) sentence 4 of the WpHG provides a number of examples showing that
knowledge of certain buy or sell orders (no. 1) or knowledge of certain circumstances relating
to derivatives traded on organised markets (no. 2) may constitute inside information.

In this regard, the provision in no. 1 primarily concerns trading by investment services
enterprises for their own account in the knowledge of customer orders, for example where
a credit institution purchases shares before placing a large customer order with a view to
benefitting from an expected rise in the share price.

However, the reference to sentence 1 ("inside information") clearly shows that the requirement
of the information having a significant effect on the price of the insider security concerned also
applies to information about the order placed by a third party. Such buy or sell order must
be likely to significantly influence the price, for example where the order – by reason of its
unusually high volume or because its limit is not in line with the prevailing bid/ask spreads
– represents an incentive for the order executor to buy or sell such insider securities prior to
executing the order.

The provision set forth in no. 1 also covers a situation where securities are traded based on a
third party’s securities trading because it is concluded from the specific circumstances (such
as the volume, timing, type of transaction, connection of the third party to the issuer) that the
third party is acting on the basis of inside information. That is because in this case also the
trading is performed based on knowledge about a third party’s order.

Even where a credit institution – in the knowledge of a limited order placed by a customer –
deliberately enters into an offsetting transaction to absorb such customer’s order, such credit
institution is deemed to make use of information about an order.

The provision in no. 2 clarifies that information about circumstances that are not public
knowledge may also constitute inside information if such information relates to commodities
derivatives and if market participants would expect to obtain such information in accordance
with the accepted practice of the markets in question. In particular, this refers to information
which is required to be disclosed in accordance with legal or regulatory provisions, market
rules, contracts or customs on the relevant underlying commodity market or commodity

In the area of derivatives based on electricity, inside information may include the failure of
power stations or their planned shut-down due to maintenance work, as well as information on
transmission capacities.
In the case of derivatives on pork or potatoes, knowledge about plagues or changes in subsidy policies may constitute inside information.

Here, too, circumstances indirectly relating to commodity derivatives may constitute inside information provided that these are likely to have a significant effect on prices.

III.2.1.6 Valuation based on publicly known information

Section 13 (2) of the WpHG makes it clear that a valuation based on information about publicly known circumstances is not inside information, even if it could have a significant effect on the price of the relevant insider security.

III.2.2 Prohibitions

Pursuant to section 14 of the WpHG, it is prohibited to make use of inside information to acquire or dispose of insider securities (no. 1), to disclose or make available inside information to a third party without the authority to do so (no. 2), or to recommend, on the basis of inside information, that a third party acquire or dispose of insider securities, or otherwise induce a third party to do so (no. 3).

III.2.2.1 Prohibition of acquisition or disposal of insider securities

Section 14 (1) no. 1 of the WpHG deals with the acquisition or disposal of insider securities, prohibiting such trading in insider securities where the party conducting such transactions makes use of inside information. In this regard it is irrelevant whether the insiders buy or sell such securities for their own account, or for the account of and/or on behalf of a third party (i.e. as a direct or indirect agent, or as commission agent).

III.2.2.1.1 Acquisition or disposal

Acquisition or disposal is deemed to have taken place upon execution of the order, since this secures the insider’s contractual position with regard to any potential profit.

Consequently, the prohibition set forth in section 14 (1) no. 1 of the WpHG also applies to repurchase transactions (i.e. selling a security whilst simultaneously agreeing on a date for repurchasing the same) and securities lending. Securities lending transactions also involve the transfer of title to the borrower in return for payment of an agreed fee. The borrower thus has unrestricted control over the securities borrowed, but has an obligation to return to the lender securities of the same type and quality after a specified period of time.

Inheritance or gifts of securities do not constitute an acquisition or disposal of securities within the meaning of section 14 (1) no. 1 of the WpHG. The same applies to the conditional transfer of insider securities, provided, however, that the condition precedent or subsequent (section 158 of the German Civil Code (Bürgerliches Gesetzbuch – BGB)) is linked to a declaration of intent by the contracting party. In this case the transaction has not yet been completed for the insider to the extent that the profit is contractually secured. In the case of a condition precedent this is only the case if and when the contracting party has made a declaration of
intent to such effect, whereas in the case of a condition subsequent the insider is deemed to have secured the profit by contract only if and when the contracting party can no longer exercise the condition subsequent (e.g. due to expiry of a certain deadline).

### III.2.2.1.2 Use of inside information

Acquisition or disposal of insider securities is prohibited only if inside information is used for such purpose. Insiders are deemed to make use of inside information if they are aware of and guided by such information in their actions.

### III.2.2.1.3 Time of gaining access to information

Use of inside information requires the insider to have had access to such information at the time of the order being placed. Where a market participant places a binding order without having access to inside information, he or she is not deemed to make use of inside information even if he gains access to inside information prior to executing the order. This is unchanged compared with the previous legislation.

Consequently, prohibition of insider dealing does not apply to transactions which a person has undertaken to perform prior to gaining access to inside information. Section 14 of the WpHG transposes Article 2(3) of the Market Abuse Directive into German law. This may be relevant, for example, in cases where an individual decides to regularly buy an insider security without being in possession of inside information, places a corresponding standing order with his or her bank, and then becomes aware of the inside information only after the order has been placed. In such cases, the insider has not acted in the knowledge of the inside information since the legal obligation to acquire the shares precedes the time when the inside information was obtained. Consequently, this does not constitute a breach of section 14 (1) no. 1 of the WpHG.

Employee stock option programmes (ESOPs) must be assessed in a similar way. Where the shares and/or options are credited to the employee’s account “automatically” upon expiry of the programme or where profits from a virtual option programme are credited, the employee is not deemed to have acted within the meaning of section 14 (1) no. 1 of the WpHG at the moment when the credit was made. Even if at that moment the employee were in possession of inside information, this would be of no relevance for the prohibition of insider dealing. However, a different assessment applies to the time of participating in an ESOP: if employees have access to inside information when declaring their participation, and provided that such information represents at least part of their motivation to participate in the programme, such employees are deemed to make use of inside information within the meaning of section 14 (1) no. 1 WpHG. However, since the vast majority of a company’s employees generally do not gain access to inside information, it does not appear necessary to specifically inform them about the prohibition of insider dealing when they subscribe to an ESOP (for example by handing them a leaflet). The situation is different for members of corporate bodies and decision-makers within the company who, as a rule, have access to inside information by reason of their duties. In this case, it may be appropriate to include a reference to section 14 of the WpHG in the subscription offer.

The same thing applies if a market participant not having access to inside information enters into a commitment to sell to another party a specified quantity of shares at a specified date and for a defined price without holding those shares. As the seller first needs to purchase
the shares to perform its contractual obligation, based on the prior legal obligation to sell a
specified quantity of shares on a certain date, the seller will not act in breach if it gains access
to inside information after conclusion of the contract but prior to purchasing the shares.

III.2.2.1.4 No use of inside information

To satisfy the definition of use of inside information, an offender must make use of such
information in purchasing or selling an insider security, i.e. be guided by such information in
his or her actions. Specifically, this had the following impact on the legal situation before the
AnSVG entered into force:

III.2.2.1.4.1 Realisation of collateral by a lender

A lending bank which accepts insider securities as collateral for a loan and wishes to realise
such collateral after the loan has become impaired is generally not deemed to make use of
inside information if it would have concluded the transaction on the same terms had it been
aware of such information. This also applies where the individuals acting had access to inside
information. The confidence of market participants in the functioning of the capital market
is not damaged by the realisation of collateral. Otherwise the party providing the collateral
could easily prevent it from being realised by deliberately disclosing inside information to the
collateral recipient.

III.2.2.1.4.2 Acquisition of a stake of shares following due diligence

Investors intending to acquire a large stake of shares below the 30 percent threshold for
controlling stakes as a general rule conduct a due diligence review prior to the acquisition in
order to assess the risk associated with their investment. Although the acquiring party may
gain access to inside information as part of such due diligence review, the assessment of
whether a punishable offence has been committed pursuant to section 14 of the WpHG must
also give due regard to the protective purpose of such penal provision. As already set forth in
Recital 3 of the Insider Directive (89/592/EEC) and in Recital 13 of the Market Abuse Directive
(2003/6/EC), the purpose of insider legislation is to protect public confidence in the integrity
and the smooth operation of the capital market. A market’s smooth operation might be
jeopardised, for example, if individual market participants enjoy unfair advantages over others
by having exclusive access to information. In the case of share stakes acquired outside the
stock exchange in which both the buyer and the seller of the share stake have the same level
of knowledge after the due diligence review, such protective purpose is not impaired provided
that the buyer acquires the stake of shares as planned prior to the due diligence review.
Such an acquisition therefore is not subject to section 14 of the WpHG even where the inside
information obtained as part of the due diligence review is used in such connection. However,
any “alongside purchases”, i.e. those made in addition to the stake originally planned,
constitute a punishable use of inside information.

Essentially, the legal situation has not changed as a result of the entry into force of the AnSVG.
III.2.2.1.4.3 Company purchase/acquisition of control

The takeover of companies and the acquisition of a controlling stake of more than 30 percent of a company’s voting rights within the meaning of section 29 (2) of the WpÜG must be assessed in the same way as the acquisition of other stakes after a due diligence review. In this case also, the legal situation described above remains unchanged.

In the course of the due diligence review the bidder may gain access to inside information which it may use for the purposes of the contemplated acquisition. However, if the bidder (as described under III.2.2.1.4.2.) changes its bid after gaining access to inside information, this may constitute punishable insider dealing even in the event of a controlling interest being acquired, since this results in the necessary transparency being withheld from the market.

Recital 29 of the Market Abuse Directive, according to which use of inside information in the context of a public takeover bid should not in itself be deemed to constitute insider dealing, therefore does not represent an exception. The purpose of this Recital is to ensure that the exchange of information between the bidding company and the execution of takeover procedures subject to the Takeover Directive (2004/25/EC) is not impaired by the harmonisation of insider legislation. This is also ensured under the amended legislation. As before, target companies may generally disclose all information to the bidder as part of a due diligence review, even where such information in individual cases contains inside information. The bidder is moreover permitted to use such information in preparing its public takeover bid without breaching the provisions of insider legislation.

However, submission of a public takeover offer in the context of which the bidder uses inside information according to the definition above is conditional on the issuer’s prior publication of a corresponding ad hoc disclosure pursuant to section 15 of the WpHG.

The Market Abuse Directive does not provide for an extensive exemption for the area of takeover legislation. As a result, section 14 of the WpHG is therefore generally also applicable to takeover bids pursuant to the WpÜG.

Companies contemplating a takeover transaction should therefore ensure comprehensive and accurate documentation of each step, from the planning stage right through to the execution of their corporate decision.

III.2.2.1.5 Buy-back programmes and price stabilisation measures

III.2.2.1.5.1 Treatment of buy-back programmes and price stabilisation measures

To a certain extent, the prohibition of insider dealing does not extend to trading in own shares within the context of buy-back programmes and price stabilisation measures. Section 14 (2) of the WpHG exempts such dealing from the prohibition of insider dealing if performed in compliance with the relevant Implementing Regulation (EC) No 2273/2003. This Regulation provides, among other things, for share buy-backs being exempt from the prohibition of insider dealing only if their sole purpose is to reduce the issuer’s capital, or to meet obligations arising from debt financial instruments exchangeable into equity instruments (such as convertible bonds, bonds with warrants or profit-participation certificates) or from employee stock option programmes or other allocations of shares to employees of the issuer or an associate company.
Furthermore, buy-back programmes must satisfy the conditions set forth in Articles 4 and 5 of the Implementing Regulation. In addition to the requirement for the prior disclosure of the buy-back programme, these conditions include further disclosure duties concerning the transaction as well as several trading conditions for trades executed under the buy-back programme (notably in respect of prices, volumes and the programme’s term). Article 6 of the Implementing Regulation provides for additional restrictions on trading. Pursuant to Article 6(3), however, these do not apply to time-scheduled buy-back programmes, or to buy-back programmes which are lead-managed by an investment firm or a credit institution which makes its trading decisions in relation to the issuer’s shares independently of, and without being influenced by, the issuer with regard to the timing of the purchases.

The conditions for permitted price stabilisation measures are set forth in Articles 8 to 10 of the Implementing Regulation. According to these provisions, stabilisation measures are permitted only for a limited period of 30 days from the commencement of trading (in the case of IPOs); or from the date of adequate public disclosure of the final price of the relevant insider securities, and not later than 30 calendar days after the date of allotment (in the case of secondary offers). Moreover, the fact that price stabilisation may be undertaken must be disclosed before opening of the offer period. After the end of the stabilisation period, disclosure must be made as to whether such measures were actually taken. Lastly, the Implementing Regulation also provides for requirements in respect of prices and volumes relating to the stabilisation measures.

**III.2.2.1.5.2 Share buy-backs for other reasons**

By contrast, share repurchases for reasons other than those defined in the Implementing Regulation are governed by the rules of insider legislation. For example, the Implementing Regulation does not cover cases where a company decides to buy back shares with a view to subsequently using these as acquisition currency. Likewise, the Implementing Regulation does not deal with share buy-backs which the company intends to use for an employee stock option programme but does not wish to make prior disclosure of the programme.

For this reason, such transactions have to be assessed on an individual basis to determine whether or not they constitute prohibited insider dealing.

Given the lack of specific details, resolutions adopted by the issuer’s management board and supervisory board to propose to the shareholders’ meeting the adoption of a resolution authorising the repurchase of the company’s own shares, as well as any resolution adopted by the shareholders’ meeting for that purpose, do not constitute inside information.

However, a management board resolution adopted to exercise such buy-back authorisation may (if it has the potential to have an effect on prices) constitute inside information.

In this connection is should be noted that the actual implementation of the share buy-back resolution does not present any problems for the company. In accordance with Recital 30 of the Market Abuse Directive, the carrying out of such acquisition should not be deemed in itself to constitute use of inside information.

However, problems may arise where the general decision to buy back shares has been made but where the company, at the time of actually placing the order, is in possession of other inside information which will likely have a significant positive effect on the price. In this case
the company would be acting in the knowledge of said information, even when implementing the share buy-back, making use of such inside information within the meaning of section 14 (1) no. 1 of the WpHG.

Prior to executing any buy-back transactions it is therefore recommended to establish, with the bank instructed with executing the buy-back programme or with an independent third party, a binding legal obligation to acquire a quantity of shares defined in advance, over a specified period. Provided that the institution or third party thus instructed then performs the buy-back independently without being influenced by the issuer, particularly with regard to the timing of order placement, the company is not deemed to commit any breach where it gains access to inside information during the period, e.g. prior to the third or fourth order, since the legal obligation to acquire the shares was established before knowledge of inside information was obtained. However, this applies only if the person responsible for executing the individual orders does not hold any relevant inside information on the shares to be acquired and the company’s obligation was established at a point in time when the company did not possess any inside information.

A company may suspend a buy-back programme at any time. A company’s decision not to perform a planned buy-back based on inside information does not fall under the prohibition because no legal transaction is involved. When a buy-back programme is resumed, however, it must be ensured that no inside information is available which would be used for subsequent purchases within the scope of the programme.

III.2.2.2 Unauthorised disclosure and prohibited recommendations

Section 14 (1) no. 2 of the WpHG provides for the prohibition of disclosure of inside information to third parties, and section 14 (1) no. 3 of the WpHG prohibits making recommendations to third parties to acquire or dispose of insider securities.

The purpose of prohibiting disclosure or recommendations to third parties is to protect the orderly conduct of securities trading at an early stage. Since the risk of insider dealing increases with the rising number of insiders, the objective is to prevent the inside information from being distributed in the first place.

III.2.2.2.1 Disclosing or making available inside information

"Disclosure" within the meaning of section 14 (1) no. 2 of the WpHG refers to direct disclosure of information to a third party. In addition, the "making available" of such information also covers cases in which merely the basis for obtaining the information is created for third parties, for example where an insider gives a third party access to protected data by disclosing passwords.

Disclosure of inside information is deemed unauthorised whenever it is made outside an insider’s normal scope of work or professional duties, or not in such insider’s performance of other duties on behalf of the issuer. This also applies if such information is disclosed within the company or to persons outside the company.

Therefore, disclosing inside information to the company’s external advisers, such as lawyers, auditors, tax advisers, credit institutions and financial services providers or rating agencies, does not constitute unauthorised disclosure provided that such entities actually need such
information to perform the duties entrusted to them. In this context, the issue of whether the person to whom inside information is disclosed is subject to a confidentiality obligation, either by law or contract, is not relevant.

Where inside information is disclosed as part of a due diligence review, this is not deemed to constitute unauthorised disclosure provided that such disclosure is required to support a specific intention to acquire a stake or controlling interest (see III.2.2.1.4.2. and III.2.2.1.4.3.). Particularly where the acquisition of voting rights exceeding the legal notification requirements is involved, the economic interests of both the issuer and the acquirer justify a higher level of transparency to be met by the issuer than is the case for ordinary share purchases via the stock exchange. For this reason, the issuer’s disclosure of inside information as part of such due diligence review is not deemed to constitute unauthorised disclosure. However, such cases require special care in complying with the legal confidentiality obligation pursuant to section 15 (1) sentence 3 of the WpHG.

III.2.2.2.2 Recommendation or other inducement

Lastly, section 14 (1) no. 3 of the WpHG prohibits both recommending and otherwise inducing a third party to acquire or dispose of insider securities on the basis of inside information.

Inducing a third party to acquire or dispose of insider securities means influencing that party’s will by any means. Since a recommendation may also constitute an inducement, it is a special way in which to influence someone’s will. This definition is met if the insider indirectly suggests a third party to buy or sell an insider security, even where such inside information is not disclosed. Whether or not the person thus influenced commits insider dealing by following the “advice” of another is a different issue: this depends on whether such person actually received inside information from the insider and was aware that the information constituted inside information.

III.2.2.2.3 Intent

For offenders to act with intent, they must be aware that the transaction concerned involves insider securities, know that they are making use of inside information and intend to acquire or dispose of such insider securities.

The concept of intent requires awareness of the fact that the information has not yet been made public. The offender must moreover act in the realisation that such information, if it were made public, would be likely to significantly affect the price of the insider security. To satisfy the conditions for acting with intent, it suffices for the offender to have identified the circumstances constituting inside information and to seriously consider their potential for having a significant effect on prices.

However, it is not necessary for the offender to be capable of accurately assessing such price influencing potential.
III.2.3  Provisions concerning criminal penalties

Insider dealing is punishable pursuant to section 38 (1) and (3) to (5) of the WpHG. In addition to the prohibition of acquiring or disposing of insider securities, the prohibition of unauthorised disclosure, or the prohibition of inducing another to acquire or dispose of insider securities, any attempt to acquire or dispose of such insider securities is also punishable.

III.2.3.1  Offences arising from acquisition or disposal of insider securities

Pursuant to section 38 (1) no. 1 of the WpHG, violations of the prohibition of acquiring or disposing of insider securities under section 14 (1) no. 1 of the WpHG are punishable by imprisonment of up to five years, or by a fine. This range of punishments applies for all insiders, regardless of how they obtained the inside information.

III.2.3.2  Punishment in the event of violation of the prohibition to disclose inside information or to make recommendations on the basis thereof

Although the concepts of primary and secondary insiders are not defined in the wording of the WpHG, such distinction is applied to punishment of other offences.

Disclosing inside information and inducing a third party to acquire or dispose of insider securities are punishable offences only for those insiders who meet the special personal criteria as defined in section 38 (1) no. 2a to 2d of the WpHG. In accordance with section 38 (1) no. 1 of the WpHG, these offences, when committed by such persons, are likewise punishable by imprisonment of up to five years, or by a fine.

However, given the lesser degree of wrongdoing assumed, disclosing inside information and inducing a third party to acquire or dispose of insider securities are only deemed administrative offences pursuant to section 39 (2) nos. 3 and 4 of the WpHG if committed by persons who possess inside information but do not meet any of the personal criteria as defined in section 38 (1) no. 2a to 2d of the WpHG. Such administrative offences are punishable by a fine not exceeding €200,000.

III.2.3.2.1  Members of corporate bodies and personally liable partners

Primary insiders include members of management and supervisory bodies, personally liable partners of the issuer and of its affiliated companies as well as all members of the corporate bodies of companies having control over or being controlled by the issuer within the meaning of sections 15 et seq. of the Stock Corporation Act (Aktiengesetz – AktG), regardless of whether or not such entities are listed on an exchange or are organised as a stock corporation (section 38 (1) no. 2a of the WpHG).

III.2.3.2.2  Shareholders

Also deemed primary insiders are persons or entities having gained access to inside information by virtue of their holding in the issuer's capital or a company affiliated with the issuer (section 38 (1) no. 2b of the WpHG).
The decisive element in this context is for the inside information to have been obtained “by virtue of” an existing equity interest. This means that the equity interest must have been the cause of obtaining such information, i.e. that the insider would not have obtained the information had there been no equity interest. One example of this is the situation where the issuer inquires with a major shareholder whether the latter intends to exercise its subscription rights in the context of a planned capital increase. However, the amount of the equity interest in the capital of the issuer or the capital of a company affiliated with it is not relevant in this regard.

III.2.3.2.3 Insiders by virtue of profession, activities or duties

Pursuant to section 38 (1) no. 2c of the WpHG, the definition of primary insiders also extends to any persons obtaining access to inside information as intended recipients by virtue of their profession, activities or duties. In this area, the principles developed in case law and teaching with regard to the previous legal situation continue to apply.

This definition therefore firstly requires the existence of a causal link between the person’s profession, activity or duty concerned on the one hand, and the obtaining of the inside information on the other. Moreover, the person in question must hold the inside information because he is an intended recipient of such information, and not by having come into the possession of the same by accident or coincidence.

Consequently, in addition to the employees of the issuer and its affiliated companies, those persons or entities who may be intended recipients of inside information include credit institutions and financial services providers, as well as any auditors and tax advisers, lawyers, corporate consultants, rating agencies, etc. that may have been engaged by such persons or entities. By contrast, a chauffeur learning of inside information by hearing a conversation between two board members sitting in the back seat is not deemed to have obtained access to such information as an intended recipient of the same. The same applies to third parties travelling alongside an insider and happening to take notice of the files being studied by such insider, or to the cleaning lady who reads the papers lying on the insider's desk.

But even for persons working for the issuer (whether as employees or by reason of the activities performed by their company or organisation), it must be examined in each individual case whether they qualify as primary insiders based on the duties they perform. Any employees or third parties gaining access to inside information illegally (for example by infringing their access authorisation) are not deemed to be intended recipients of such inside information.

III.2.3.2.4 Preparation or perpetration of a criminal offence

Lastly, pursuant to section 38 (1) no. 2d of the WpHG any person having gained access to inside information by preparing or perpetrating a criminal offence is deemed to be a primary insider. Criminal offences of particular relevance in this context are offences involving property (sections 242 et seq. of the Criminal Code (Strafgesetzbuch – StGB)) or relating to data protection (sections 201 et seq. of the StGB). In this regard it should be noted that preparing or perpetrating a criminal offence may in itself constitute inside information.
III.2.3.3 Punishability of attempting to commit an offence

The punishability of attempts to commit an offence has been added in section 38 (3) of the WpHG by the AnSVG. This new provision is based on Article 2(1) sentence 1 and Article 14 of the Market Abuse Directive providing for a prohibition of attempts to commit insider dealing, including related sanctions. Punishability of attempts to commit an offence extends to the acquiring and disposing of insider securities (section 38 (1) no. 1 of the WpHG) and, in the case of primary insiders, to the unauthorised disclosure of inside information and/or recommending that a third party acquire or dispose of insider securities or to otherwise induce a third party to do so (section 38 (1) no. 2a to 2d of the WpHG).

III.2.3.3.1 Attempting to acquire or dispose of insider securities

A person has satisfied the definition of attempted insider dealing if such person, according to the idea he has formed of such act, thereupon sets out to realise the elements of the offence (section 22 of the StGB). This is the case where, for example, the insider has placed an order with a custodian bank.

III.2.3.3.2 Attempting to make unauthorised disclosure or to recommend that a third party acquire or dispose of insider securities or to otherwise induce such party to do so

If an insider uses inside information to commit acts directly intended to result in a third party obtaining such inside information, or intended to result in such third party acquiring or disposing of insider securities, this is deemed an attempt to make unauthorised disclosure of inside information or an attempt to recommend that a third party acquire or dispose of insider securities or to otherwise induce a third party to do so.

III.2.3.4 Negligent acquisition or disposal of insider securities

Pursuant to section 38 (4) of the WpHG, the definition of the prohibited acquisition or disposal of insider securities is satisfied where the insider suspected of doing so fails to recognise, in gross negligence, that he holds inside information. Such offences are punishable by imprisonment of up to one year or by a fine.

In this context, the definition of gross negligence is fulfilled where a person’s conduct is characterised by an unusual lack of due care. Under section 38 (4) of the WpHG, grossly negligent insider dealing is punishable for all insiders, irrespective of the existence of any particular personal criteria. The primary objective of this rule is to cover those cases where a member of a board of management has engaged in trading on the assumption that the inside information had already been published because of an instruction issued to this effect, but failed to exercise reasonable care in ascertaining this fact despite being aware, for example, that it is not unusual for publications to be delayed.
III.2.4  Administrative offences

Section 39 (2) of the WpHG extends the prohibition of insider dealing to include the following administrative offences:

- wilful or grossly negligent act of disclosing or making available inside information in contravention of section 14 (1) no. 2 of the WpHG (section 39 (2) no. 3 of the WpHG);

- wilful or grossly negligent act of recommending that a third party acquire or dispose of insider securities or otherwise inducing such party to do so in contravention of section 14 (1) no. 3 of the WpHG (section 39 (2) no. 4 of the WpHG).

Section 14 (1) nos. 2 and 3 of the WpHG prohibits anyone possessing inside information from disclosing, or making available, such information to third parties without authorisation, or recommending, on the basis of inside information, that a third party acquire or dispose of insider securities or otherwise inducing a third party to do so. Consequently, the following persons are subject to such disclosure or recommendation prohibition:

- primary insiders: these are persons who possess inside information as the intended recipients thereof, for example in their capacity as members of the managing or supervisory body of an issuer or a company affiliated with the issuer, or by virtue of their equity interest in an issuer, or by virtue of their profession, activities or duties, such persons also including those having obtained inside information due to the preparation of perpetration of a criminal offence; and

- secondary insiders: these are persons having obtained inside information in any other manner, such persons also including employees having gained access to inside information without authorisation, for example by infringing their access authorisation.

Therefore, the sanctions for primary and secondary insiders are applied as follows:

- The act of wilfully disclosing inside information, or making it available, and wilfully recommending third parties to acquire or dispose of insider securities or otherwise inducing such party to do so is punishable as a criminal offence if committed by a primary insider (section 38 (1) no. 2, section 39 (2) nos. 3 and 4, section 14 (1) nos. 2 and 3 of the WpHG). Grossly negligent infringements committed by a primary insider are deemed to be an administrative offence. For secondary insiders, however, both wilful and grossly negligent infringements constitute administrative offences (section 39 (2) nos. 3 and 4, section 14 (1) nos. 2 and 3 of the WpHG).

Examples:

*During their holidays at a country cottage, the common-law spouse of the spokeswoman of the Y AG Management Board obtains inside information by overhearing several telephone conversations between her and Board Member A. He understands from these conversations that X AG is about to launch a takeover offer to Y AG. As a result, the spokeswoman’s common-law spouse becomes a secondary insider. He commits an administrative offence if he recommends or otherwise encourages others, e.g. by extolling the share without specifying the inside information, to purchase shares in Y AG (section 39 (2) no. 4 in conjunction with section 14 (1) no. 3 of the WpHG). The spokeswoman of the Y AG Management Board*
committed an administrative offence because she acted at least negligently by making inside information available to her common-law spouse (section 39 (2) no. 3 in conjunction with section 14 (1) no. 2 of the WpHG).

A cleaner finds a draft memo from a Supervisory Board Member containing inside information and marked as confidential in a wastepaper basket. By reading this information, she becomes a secondary insider. She commits an administrative offence if she encourages others to purchase shares in the company mentioned therein. If she purchases such shares, she will be liable to prosecution pursuant to section 38 (1) no. 1 and section 14 (1) no. 1 of the WpHG.

Pursuant to section 39 (2) nos. 3 and 4 and section 39 (4) of the WpHG, breaches of section 14 (1) nos. 2 and 3 of the WpHG are punishable by a fine of up to €200,000. Breaches of the prohibitions of section 14 (1) nos. 2 and 3 of the WpHG by insiders who do not fulfil the personal criteria specified in section 38 (1) nos. 2a to 2d are classified only as administrative offences given the lesser degree of wrongdoing assumed from an objective viewpoint compared with the criminal offences set forth in section 38 of the WpHG.
IV Ad hoc disclosure pursuant to section 15 of the WpHG

IV.1 Preliminary remarks

The obligation to make ad hoc disclosures (section 15 of the WpHG) is one of the core elements of the WpHG. Subject to this requirement, domestic issuers of financial instruments must publish inside information, where they are directly concerned by such information, without undue delay.

The purpose of the ad hoc disclosure obligation is to ensure that all market participants enjoy the same level of information by providing the market with such information promptly and equally so as to avoid a situation of inappropriate stock exchange or market prices arising as a result of the market being provided with inaccurate or incomplete information. The ad hoc disclosure requirement thus serves the interests of the entire investing public, ensures the functioning of the capital market and creates equal opportunities through transparency. At the same time, the requirement to make ad hoc disclosures is a key measure for preventing abuse of inside information.

Both section 15 of the WpHG and section 13 of the WpHG (which sets forth the legal definition of inside information) contain numerous undefined legal concepts derived from European legislation.

Any determination of whether a disclosure obligation applies must be made according to the specific circumstances of the individual case. In cases of doubt, the interpretation that best fulfils the Act’s objectives of preventing insider dealing and ensuring the greatest possible equality of opportunities should be applied.

IV.2 Prerequisites for an ad hoc disclosure obligation

This chapter explains the individual elements forming the basis for the obligation to publish and disclose inside information pursuant to section 15 (1) of the WpHG.
IV.2.1 Entities subject to the obligation

IV.2.1.1 Domestic issuers

Pursuant to section 15 (1) sentence 1 of the WpHG, domestic issuers of financial instruments are subject to the ad hoc publication obligation.

IV.2.1.1.1 Definition of domestic issuer

The definition of a domestic issuer is essentially based on the member state principle which was introduced in the WpHG when transposing the Transparency Directive into national law. According to this principle, the issuer’s domicile in the Federal Republic of Germany is the decisive point of reference for assessing whether or not it is subject to transparency requirements. But even issuers domiciled abroad may, under certain circumstances, have Germany as their home country. The objective of the member state principle is to ensure that, as a rule, an issuer is required to deal with only one legal jurisdiction and one supervisory authority.

Pursuant to section 2 (7) of the WpHG, domestic issuers are issuers of financial instruments

a) whose home country is the Federal Republic of Germany (see IV.2.1.1.2.).

However, an exception is provided for issuers whose securities are admitted to trading not in Germany but exclusively in another member state of the European Union (EU) or another signatory to the Agreement of the European Economic Area (EEA), provided that they are subject to disclosure and notification requirements in accordance with the Transparency Directive in such country (section 2 (7) no. 1 of the WpHG).

If securities of an issuer whose home country is the Federal Republic of Germany are admitted to trading on an organised market in several EU or EEA countries, reference to the issuer’s home country again prevails, with the result that the issuer is deemed a domestic issuer in the Federal Republic of Germany.

b) whose home country is not the Federal Republic of Germany but another member state of the EU or of the EEA, but whose securities are exclusively admitted to trading on an organised market in Germany (section 2 (7) no. 2 of the WpHG).

Examples:

Where a company is domiciled in Germany but its financial instruments are exclusively admitted to trading on an organised market in Austria, this company’s home country within the meaning of section 2 (6) of the WpHG is Germany, but the company does not qualify as a “domestic issuer” within the meaning of section 2 (7) of the WpHG.

Where a company is domiciled, for example, in Austria but the company’s financial instruments are exclusively admitted to trading on an organised market in Germany, this company is deemed a domestic issuer under German law. Such company is therefore required to fulfil its ad hoc obligation in Germany and in this regard is subject to supervision by BaFin.
Domestic organised markets are the regulated markets of the German securities exchanges. When the Markets in Financial Instruments Directive (MiFID) was transposed into German law, the distinction made in the Stock Exchange Act (Börsengesetz – BörsG) between an official market (amtlicher Markt) and regulated market (geregelter Markt) was abandoned in favour of the uniform concept of “regulated market” (regulierter Markt). In contrast with the provision on insider securities in section 12 of the WpHG, the issuers of securities merely included in trading on the regulated unofficial market (Freiverkehr) or in the regulated market (regulierter Markt) are not subject to the ad hoc publication obligation\(^9\).

A list of the regulated markets of the EU and the EEA is available at: http://ec.europa.eu/internal_market/securities/isd/mifid_en.htm

**IV.2.1.1.2 Issuers whose home country is the Federal Republic of Germany**

Since domestic issuers are generally all issuers whose home country is the Federal Republic of Germany (apart from the two exceptions as described under IV.2.1.1.1.), this concept is of particular importance.

Pursuant to section 2 (6) of the WpHG, issuers whose home country is the Federal Republic of Germany are

- all issuers of shares and issuers of debt securities – where the respective securities have a denomination of less than €1,000 –
  - which are domiciled in the Federal Republic of Germany and whose securities are admitted to trading on an organised market in the EU or the EEA (section 2 (6) no. 1 (a) of the WpHG); and
  - which are domiciled outside the EU of the EEA (third country) and whose securities are admitted to trading on an organised market in an EU or EEA country and are required to file the annual document within the meaning of section 10 of the WpPG with BaFin (section 2 (6) no. 1 (b) of the WpHG).\(^{20}\)

- issuers of financial instruments other than shares or debt securities – where the respective securities have a denomination of less than €1,000, provided that
  - the issuers are domiciled in the Federal Republic of Germany or a third country; and
  - whose securities are admitted to trading on an organised market exclusively in the Federal Republic of Germany and not in another EU or EEA country (section 2 (6) no. 2 of the WpHG).

- issuers of financial instruments other than shares or debt instruments with a denomination of less than €1,000, provided that they have a reference to the Federal Republic of Germany and another EU or EEA country – whether by reason of domicile or stock exchange listing – and have chosen the Federal Republic of Germany as their home country pursuant to section 2b of the WpHG (section 2 (6) no. 3 of the WpHG). If such

\(^{19}\) Cf. section 33 and section 48 of the BörsG.

\(^{20}\) In accordance with the relevant Directives, section 10 of the WpPG must be interpreted to mean that only those issuers are required to file the annual document with BaFin whose securities are admitted to trading on an organised market and whose home country is Germany pursuant to section 2 no. 13 of the WpPG. A transitional provision in this regard is set forth in section 31 (1) of the WpPG.
issuers have not made any choice, issuers domiciled in the Federal Republic of Germany are generally deemed issuers whose home country is the Federal Republic of Germany, and issuers domiciled in a third country are so deemed if they are required to file the annual document within the meaning of section 10 of the WpPG\textsuperscript{21} with BaFin.

According to the conceptual approach adopted by the Transparency Directive, the member state principle is governed by an issuer-specific perspective, not by a financial instrument-specific perspective. That means that an issuer may never have more than one home country. Thus, if its shares are admitted to trading on an organised market in Germany it may not, for example, choose a home country other than Germany for its debt securities with a denomination of greater than €1,000 because it no longer has any right to choose its home country. If, conversely, an issuer has, for example, chosen a home country other than Germany for its debt securities with a denomination of greater than €1,000 and then has its shares admitted to trading in Germany on an organised market, the previous choice no longer applies, and Germany becomes its home country. The possibility of having different home countries depending on the type of financial instruments (e.g. Germany for shares and Italy for debt securities) is thus excluded.

The diagrams below are provided to illustrate and simplify the assessment as to whether Germany is an issuer’s home country or, as the case may be, whether the issuer is a domestic issuer:

**IV.2.1.2 Assessment diagram – domestic issuer**

\[\text{Diagram showing decision pathways for determining home country status.}\]

\[\text{21 This revives the basic principle of the Transparency Directive according to which the domicile of the issuer or, as the case may be, the place where the annual document within the meaning of section 10 of the WpPG is filed is decisive. In the absence of such point of reference, Germany cannot be the home country for issuers within the meaning of section 2 (6) no. 3 (b) of the WpHG if they have not made any choice. Given that the list set forth in section 2 (6) no. 3 sentence 1 WpHG is exhaustive, this fact is not expressly stipulated in the WpHG.}\]
IV.2.1.3  
Assessment diagram – home country (section 2 (6) of the WpHG)

Issuer of financial instruments under section 2 (6) no. 1 WpHG

Issuer of shares and/or debt securities under section 2 (6) no. 2 WpHG

Germany is home country

Yes

Admission at least in Germany

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Domiciled in third country (not an EU/EEA country)

Yes

Admission only in Germany

Yes

No other EU/EEA country chosen

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Domiciled in EEA or EU

Yes

Admission at least in Germany

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Domiciled in Germany

Yes

Admission only in Germany

Yes

No other EU/EEA country chosen

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Domiciled in third country

Yes

Admission only in Germany

Yes

No other EU/EEA country chosen

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Issuer of shares and/or debt securities under section 2 (6) no. 1 WpHG

No

Admission at least in Germany

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Domiciled in Germany

Yes

Admission only in Germany

Yes

No other EU/EEA country chosen

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Domiciled in third country (not an EU/EEA country)

No

Admission only in Germany

Yes

No other EU/EEA country chosen

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Domiciled in EEA or EU

No

Admission at least in Germany

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Domiciled in Germany

No

Admission only in Germany

Yes

No other EU/EEA country chosen

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Domiciled in third country

No

Admission only in Germany

Yes

No other EU/EEA country chosen

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Issuer of financial instruments under section 2 (6) no. 1 WpHG

No

Domiciled in third country (not an EU/EEA country)

No

Admission only in Germany

Yes

No other EU/EEA country chosen

Yes

Germany is chosen as home country

Yes

Annual document (section 10 WpPG) to be filed with BaFin?

Yes

Domiciled in EEA or EU

No

Issuer of financial instruments under section 2 (6) no. 1 WpHG

No

Domiciled in Germany

No

Issuer of financial instruments under section 2 (6) no. 1 WpHG

No
IV.2.1.3.1 Special features of ad hoc disclosure obligation

Issuers having merely applied for their financial instruments being admitted to trading are, for the purposes of the ad hoc disclosure obligation, deemed equivalent to issuers of financial instruments already admitted to trading. Hence, in order to assess whether the issuer is a domestic issuer and whether Germany is an issuer’s home country, the application for admission to trading pursuant to section 15 (1) sentence 2 of the WpHG is treated like an existing admission.

However, special situations may arise where admission to trading has only been applied for (e.g. in terms of assessing the question of price-influencing potential). These situations are explained below in connection with the further elements of ad hoc disclosure. For convenience, the case of financial instruments already admitted to trading on a domestic organised market will be examined first.

IV.2.1.4 Issuers other than domestic issuers

Issuers whose financial instruments are admitted to trading on an organised market in Germany but who are not domestic issuers are not subject to the scope of application of section 15 of the WpHG. The same applies to issuers of financial instruments quoted on the regulated unofficial market (Freiverkehr) of exchanges and thus to issuers listed in the Entry Standard of Deutsche Börse or similar segment.

IV.2.1.5 Concept of financial instruments

Ad hoc disclosure requirements apply to domestic issuers of all types of financial instruments, including securities such as shares, certificates representing shares, debt securities, profit-participation certificates, warrants and other similar securities, as well as derivatives and other financial instruments such as money market instruments and securities subscription rights. In this regard, reference is made to the definition of financial instruments provided in chapter III.1.1. on insider securities (section 12 of the WpHG). For details on the ad hoc publication obligations of issuers of derivative financial instruments, see IV.2.2.2.

IV.2.1.6 Third parties acting on behalf of domestic issuers or for their account

Moreover, any person acting on behalf of a domestic issuer or for its account, and who discloses or makes available to a third party inside information within the scope of its authority, is required, pursuant to section 15 (1) sentence 4 of the WpHG, to publish such information at the same time unless such third party is bound by a confidentiality obligation. Where the inside information has been disclosed or made available unknowingly, publication must be made without undue delay pursuant to section 15 (1) sentence 5 of the WpHG.

IV.2.1.7 Insolvency of a domestic issuer

Even where a provisional or final insolvency administrator is appointed, a domestic issuer (represented by its board of management) remains subject to the disclosure obligation. However, such insolvency administrator is required under section 11 of the WpHG to make available the financial resources required to fulfil such disclosure obligation.
IV.2.2 Definitions

IV.2.2.1 Inside information

The obligation to make ad hoc disclosure arises when inside information exists which directly concerns the domestic issuer. Both the definition of inside information and the obligation associated with it are derived from Article 1 No. 1 and Article 6(1) of the Market Abuse Directive and section 13 (1) of the WpHG. The prerequisites for information qualifying as inside information were transposed into national law by section 13 of the WpHG (see previous chapter on inside information).

IV.2.2.2 Requirement for issuer to be directly concerned by information

According to the grounds stated for the Act with regard to section 15 (1) of the WpHG, the purpose of the requirement for the issuer to be directly concerned by inside information is to restrict the scope of inside information to be published.

This requirement clarifies that the issuer is not required to publish information of a general nature within the scope of its ad hoc disclosure obligation. Moreover, the information must concern the issuer itself and not only the financial instruments issued by it.

The wording of section 15 (1) sentence 3 of the WpHG (according to which an issuer is directly concerned by inside information particularly if such information relates to developments within an issuer’s sphere of activity) makes clear that all matters subject to ad hoc disclosure up to entry into force of the AnSVG continue to be subject to the publication obligation. However, there is also the case of inside information which had not been subject to the ad hoc disclosure obligation at that time but is now required to be published.

Consequently, inside information arising outside the issuer’s sphere of activity (“external” circumstances), as well as such information not having any impact on the issuer’s net assets, financial position or general business performance may also be subject to disclosure.

As experience with the application of this provision has shown, there are only a few external circumstances that directly concern the issuer. In most cases, an issuer is not directly concerned by external circumstances (e.g. change in interest rates or general regulatory developments) and such circumstances are therefore not subject to disclosure. Some examples of matters that may now be subject to disclosure are the notification of a takeover bid to the target company as part of a company transaction, or the notification to the issuer by the major shareholder about a planned squeeze-out procedure.

Since both the prohibition of insider dealing in section 14 of the WpHG and the ad hoc disclosure obligation as set forth in section 15 of the WpHG are based on the definition of inside information as transposed from European legislation, an ad hoc disclosure obligation generally must be assumed whenever information directly concerning the issuer has become so specific as to establish a prohibition on insider dealing.

For example, according to the recommendations of the Committee of European Securities
Regulators (CESR)\textsuperscript{23} the following inside information only indirectly concerns the issuer:

- general market statistics;
- rating agencies’ reports, research, recommendations and suggestions, due for publication in the future, concerning the value of listed financial instruments;
- general interest rate developments and interest rate decisions;
- decisions taken by government authorities with regard to taxation, regulation, or debt management;
- decisions regarding market supervision rules;
- important measures taken by authorities or other public institutions (e.g. the information that the competent supervisory authority has initiated investigations regarding the issuer’s shares for suspicion of breach of securities law regulations does not establish any ad hoc disclosure obligation);
- decisions on the rules governing the composition and calculation of indices;
- decisions taken by exchanges, operators of OTC trading platforms and by the competent authorities on the relevant market regulation matters;
- decisions by competition and market regulation authorities regarding listed companies;
- buy or sell orders relating to issuer’s financial instruments\textsuperscript{24};
- changes in trading conditions (including change in segment in which securities are admitted or traded, change from the continuous trading to auction only trading model, or a change of market maker).

In addition, BaFin generally assumes that an issuer is only indirectly concerned by information in the following cases:

- information relating to general economic data, political events, unemployment figures, natural disasters or, e.g., changes in oil prices;
- information relating to a change in the situation of a competitor which is of relevance for the issuer (e.g. impending insolvency of a competitor);
- information affecting only the financial instrument itself, such as acquisition or disposal of a large block of shares in OTC transactions as a non-strategic investment;
- share splits.

\textsuperscript{23} CESR’s Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive, CESR/02-089d, margin no. 36
\textsuperscript{24} This is understood to mean the orders situation.
Although information indirectly concerning an issuer is not subject to publication, it is nonetheless governed by the prohibition of insider dealing pursuant to section 14 of the WpHG.

The consequences of a decision issued by a court or competent authority arising for a company (for example, where a decision by a court or administrative authority requires provisions to be formed or forecasts to be revised if these alone are likely to have a significant impact on prices) may also establish an ad hoc disclosure obligation (see IV.2.2.12.).

In the case of financial instruments admitted to exchange trading which are directly or indirectly linked to another underlying (such as warrants or other derivatives), it should be noted that an issuer of derivative financial instruments is only required to disclose information which directly concerns such issuer and which has the potential of having a significant effect on the prices of such derivative financial instruments. Accordingly, such issuer is not required to publish inside information known to it where such information only relates to the underlying. However, the situation is different in cases where the issuer of the derivative financial instrument at the same time is the issuer of the underlying.

**IV.2.2.3 Inside information in the case of application for admission to trading**

In the case of financial instruments in respect of which the issuer has merely applied for admission to trading, the question that frequently arises is what criteria are to be used in assessing the potential for a significant effect on prices for the purpose of defining inside information. In most cases, this question can only be answered on a case-by-case basis. Where financial instruments are already included in trading on the regulated unofficial market (Freiverkehr) or on an OTC trading platform, the price-influencing potential can be assessed using this price information. Where a (base) prospectus has already been published (possibly including a price range quoted with reference to a subscription period), an obligation to publish an ad hoc notification may be established in certain cases if the content of the prospectus has changed materially, where such changes, for example, were to necessitate a supplement to the prospectus or a change in the price range for subscriptions. In addition, market assessments for the expected price range or valuations relating to the company may exist on the basis of which the potential to influence prices significantly may be assessed hypothetically. In all other cases within this document, it is not possible to provide a conclusive assessment of ad hoc disclosure obligations.

**IV.2.2.4 Types of inside information subject to the disclosure obligation**

It is not possible to draw up a generally binding and complete list of the types of inside information subject to the disclosure obligation. For this reason, the examples provided below can serve only as recommendations. In the event that one of the cases outlined exists, issuers need to assess in the individual case whether the inside information is subject to the disclosure obligation. The examples therefore must not be understood to mean that, where such circumstances arise, these are automatically deemed likely to have a significant effect on prices. Rather, it is always necessary to assess the specific circumstances of the individual case.

For example, no significant relevance for prices can be assumed where information is of no particular significance for the issuer in the specific circumstances (e.g. merger of a subsidiary which is immaterial for the group as a whole).
The question of whether information has the potential to have a significant effect on prices will also depend on other factors such as the company’s size and structure, the sector of its activity, its competitive situation, or market expectations. In other words, the information must be of material significance from the issuer’s perspective.

The following situations in which a significant price influence potential will generally be assumed may establish an ad hoc disclosure obligation:

- disposal of, withdrawal from or start-up of core businesses;
- merger agreements, integrations, spin-offs, corporate restructurings or other material structural changes;
- control and/or profit-and-loss transfer agreements;
- acquisition or disposal of major holdings;
- takeover bids, cash settlement offers, or purchase offers;
- capital changes (incl. adjustments to a company’s capital);
- material changes in results of financial statements or interim reports compared with previous results or market forecasts;
- material change in dividend payout rate;
- impending payment moratorium or the threat of overindebtedness, losses reaching the threshold as defined in section 92 of the AktG; withdrawal of material lines of credit on short notice;
- suspected manipulation of financial statements, notice by external auditors of their refusal to execute the audit certificate for the company’s financial statements;
- significant extraordinary expenses (e.g. following events causing major damage, after discovery of criminal activity), or significant extraordinary income;
- default of significant debtors;
- conclusion, amendment or termination of particularly important contractual relationships (including cooperation agreements);
- restructuring measures having a significant impact on the company’s future business activities;
- important inventions, grant of material patents and of material licences (to or by the company);
- significant cases involving product-liability and environmental damage;

The following examples are not exhaustive. Depending on the circumstances of the individual case, other matters requiring disclosure may exist.
• legal disputes of particular importance;
• unexpected changes in key positions held within the company (concerning, e.g., the chairman of the board of management, chairman of the supervisory board; or the resignation of the company’s founder);
• an unexpected change of company’s external auditor;
• application by issuer for revocation of admission to organised market, except where admission to another domestic organised market is maintained;
• wage reductions or increases which concern only the issuer;
• resolutions adopted by the board of management to exercise an authority granted by the shareholders’ meeting to carry out a buy-back programme.

IV.2.2.5 Excursus – inside information and non-dividend paying securities (e.g. debt securities)

When assessing whether inside information is subject to the disclosure obligation by reason of its potential to have a significant effect on prices, issuers must also consider the type of financial instruments admitted to exchange trading or for which the issuer has made an application for admission to exchange trading.

IV.2.2.5.1 Conventional debt securities

A potential to have a significant effect on prices would appear to be less likely for fixed-income securities than for shares admitted to trading on any stock exchange. Provided that an issuer has listed exclusively conventional debt securities\(^{26}\) for trading, a potential to significantly affect prices will have to be assumed in the vast majority of cases only if the performance of the issuer’s obligations attaching to the financial instrument concerned (e.g. redemption, interest payment) would be impaired due to the circumstances on which the information is based.

IV.2.2.5.2 Profit-participation certificates

If the return on a profit-participation certificate depends, for example, on the issuer not reporting a net accumulated loss\(^{27}\), a disclosure obligation would apply only if a net accumulated loss can reasonably be expected to occur.

\(^{26}\) Non-dividend paying securities whose return does not depend on the issuer’s economic results (such as fixed-income or floating-rate securities, Pfandbriefe).

\(^{27}\) These include type “A” profit-participation certificates of credit institutions.
IV.2.2.6 Disclosure of inside information

Pursuant to section 15 (1) sentence 4 of the WpHG, an issuer who, within the scope of its authority, discloses or makes available inside information to a third party has an obligation to publish such information at the same time unless such third party is legally obliged to observe confidentiality. The same applies to any person or entity acting on behalf of or for the account of such issuer.

This does not mean, however, that the obligation to publish inside information without undue delay does not apply where such information is disclosed only to third parties bound by a duty of confidentiality. Rather, issuers, at the time such information arises and thereafter, may disclose or make available such information to third parties only within the scope of their authority to do so. This means that issuers may only disclose such information or make it available to third parties who need such information to perform their duties and who are legally obliged to observe confidentiality.

Contractual agreements (or legal duties) of confidentiality are deemed to suffice in these cases. Contractual penalties are not required.

IV.2.2.7 Decision-making processes involving multiple hierarchical levels

In decision-making processes involving multiple hierarchical levels, the ad hoc disclosure obligation is generally established only once a final decision is taken (e.g. approval by the supervisory board).

According to the provisions on exemptions as set forth in section 15 (3) of the WpHG in conjunction with section 6 of the WpAIV it follows, conversely, from section 6 no. 2 of the WpAIV that inside information arises at the latest when a decision has been taken by the relevant managing body. This gives rise to a disclosure obligation.

In such cases, issuers may examine whether the prerequisites for an exemption pursuant to section 15 (3) of the WpHG have been satisfied. In view of the fact that the role of the supervisory board has been strengthened in recent years in line with the principles of good corporate governance, the supervisory board will generally subject the decisions by the board of management to a thoroughgoing review. This is particularly the case in scenarios with a potential to have a significant effect on prices. Making early publication of a decision taken by the board of management would weaken the supervisory board’s position in discussions with the managing body, and thus undermine its function under company law. It would not be in the general interest of the investing public for the supervisory board’s position to be generally weakened in this way.

Against this background, postponing disclosure of inside information is generally both in the issuer’s and the investors’ legitimate interest, and should therefore not give rise to regulatory objections. However, confidential treatment of the inside information must be ensured during the time of the exemption pursuant to section 15 (3) of the WpHG. Also in the case of exemptions, due regard must be given to the requirement for disclosure to be made without undue delay pursuant to section 15 (1) sentence 1 of the WpHG (see IV.6.3.).

The following description covers only a selection of scenarios of practical relevance. Reference is made to the literature in this regard (e.g. – to select only a few – the commentary literature published by Schwark (Kapitalmarktrechts-Kommentar); Assmann/Schneider (Wertpapierhandelsgesetz); Schäfer (Wertpapierhandelsgesetz, Börsengesetz, Verkaufsprospektgesetz); Hirte/Möllers (Kölner Kommentar zum WpHG). When using such legal commentaries it generally should be checked whether the commentary concerned is still relevant given the new legislation.
IV.2.2.8 Overlapping of ad hoc disclosure provisions with other transparency provisions

Issuers whose securities are admitted to trading on an exchange are subject to obligations relating to capital market transparency or communication under many other legal provisions (e.g. notification of major changes in voting rights, publication requirements under the WpÜG or the WpPG, disclosure obligations in connection with share buy-back programmes, transparency regulations for lodging annulment actions). However, these disclosure and notification obligations do not constitute transparency regulations which would have priority over, let alone replace, ad hoc disclosure unless expressly stipulated by law (e.g. in section 10 (6) of the WpÜG).

In all cases, issuers need to examine in each case additionally whether such information also meets the criteria of inside information. If this is the case (and except where the relevant other provision expressly provides for exemption from an ad hoc disclosure obligation), such inside information must be published without undue delay in the form of an ad hoc notification. Such ad hoc notification must be published without undue delay even if any other relevant provision specifies a different deadline for publication in respect of the transparency requirements set forth in such other provision.

IV.2.2.9 Relationship between ad hoc disclosure and ordinary disclosure requirements

The relationship between ad hoc disclosure and ordinary disclosure requirements is also highly relevant in practice. As ordinary disclosure cannot serve as a substitute for ad hoc disclosure (as clarified by BaFin in the past), transactions may establish an ad hoc disclosure obligation, provided that these give rise to inside information, even before publication is required under ordinary disclosure obligations. This also applies to results of operations.

IV.2.2.9.1 Results of operations

In an announcement issued on 9 July 1996, the Federal Securities Supervisory Office (Bundesaufsichtsamt für den Wertpapierhandel – BAWe) clarified that a single event may already give rise to inside information which must be disclosed, for example, where such event may have a significant impact on profits or losses. This view is also maintained in future.

Inside information may also arise from a combination of several pieces of information each of which alone does not constitute inside information (e.g. result from ordinary activities calculated from single items of the income statement which – seen in isolation – are not subject to the ad hoc disclosure obligation). The disclosure obligation arises as soon as the board of management (or other person or corporate body responsible for disclosure pursuant to section 15 of the WpHG) has gained access to the information concerned. In this regard, the statements below regarding the obligation that disclosure be made without undue delay (see IV.6.3.) apply additionally. The announcement by the BAWe already clarified that disclosure is required at the latest upon preparation of the annual financial statements by the board of management, provided that these statements contain information which might have a significant effect on prices.

For the purposes of ad hoc disclosure, only the inside information (i.e. the information with a potential to have a significant effect on prices) is subject to the disclosure obligation, and not the entire annual financial statements, quarterly financial report or interim report.
Where the issuer has not made any forecasts on interim results of operations, these are generally considered likely to have a significant effect on prices, and are thus subject to the ad hoc disclosure obligation, if they

- significantly depart from the previous year’s figures; or
- represent a break with past business performance (e.g. turnaround after several quarters in loss, sharp drop in sales after growth phase sustained over several quarters); or
- significantly depart from market expectations.

However, where the issuer had made a forecast for the interim results of operations and the interim results of operations are in line with such forecast, the issuer as a rule does not have an ad hoc disclosure obligation in the cases described above.

Where the issuer has merely published a full-year forecast and discovers, when preparing the interim business figures (e.g. as part of quarterly reporting), that these depart from market expectations, such results may then also be subject to the ad hoc disclosure obligation if the original full-year forecast is maintained.

Where such full-year or interim results of operations constitute inside information, these must be published without undue delay in the form of an ad hoc notification, irrespective of any publication deadlines set in advance, or any press or analyst conferences, and independent of exchange trading hours.

Particularly in cases where a further corporate body or committee (supervisory board, supervisory board committee) is involved in the final assessment of the business figures, the company may examine whether the prerequisites for postponing the ad hoc notification pursuant to section 15 (3) of the WpHG are satisfied (see IV.3.).

**IV.2.2.9.2 Forecasts**

As far as forecasts are concerned, BaFin maintains its legal position whereby forecasts may result in a disclosure obligation pursuant to section 15 of the WpHG, provided that the forecast event is reasonably likely to occur. This may be the case, for example, when the issuer prepares its forecasts based on specific indications for the further development of its business. Generally worded expectations or the issuer’s long-term planning (e.g. with a time horizon of three years or more, or internal planning in the form of targets) in many cases do not allow sufficiently specific conclusions to be made with regard to the actual development of the company’s business. Accordingly, they do not fall within the disclosure obligation. In addition, forecasts generally have a potential to significantly influence prices where they significantly depart from past results of operations or from market expectations. The same applies when forecasts are adjusted or changed.

Where the issuer has published a forecast but market expectations subsequently depart significantly from such forecast by reason of factors communicated by third parties, such issuer generally does not have any obligation to correct such market expectations by way of ad hoc disclosure. In other words, issuers are not required to correct market expectations which
they have not brought about, provided that they maintain their published forecast. The same applies to market expectations brought about by third parties’ publication of inaccurate results of operations.

IV.2.2.10 Customary figures

Pursuant to section 15 (1) sentence 6 of the WpHG, the key figures used in publications must be those customarily used in business and must permit comparison with previously used key figures. However, the provision in section 15 (1) sentence 6 of the WpHG does not provide any criteria for defining the concept of “customarily used”.

The purpose of the provision is to ensure that market participants are given a clear picture of any new circumstances having occurred. This applies particularly where an issuer publishes key figures such as EBIT, EBITDA, net profit, or EPS. This is designed to prevent negative developments from being disguised by key figures that have merely been made up, or by changing the key figures used.

The following key figures are the ones companies use most frequently, and are therefore deemed customary within the meaning of section 15 (1) sentence 6 of the WpHG:

- sales or revenue;
- earnings per share (EPS);
- net profit;
- cash flow;
- earnings before interest and taxes (EBIT);
- earnings before taxes (EBT);
- dividends per share;
- earnings before interest, taxes, depreciation and amortisation (EBITDA);
- profit margin (as a percentage of revenues);
- capital ratio;
- result from ordinary activities;
- operating results; and
- operating results excluding extraordinary effects.

This list is a non-exhaustive specification of those key figures satisfying the requirements of section 15 (1) sentence 6 of the WpHG. There may be additional key figures that qualify as customary in certain sectors.
As before, ad hoc disclosures must also state the previous year’s figures and/or the percentage changes versus the previous year’s figures to enable investors to adequately assess the key figures published.

It should also be pointed out whether the issuer’s scope of consolidation or its accounting policies have materially changed compared with the previous period. It is only in this way that market participants and investors are enabled to quickly assess, compare and use such material information.

However, ad hoc disclosure of such key figures is required only if these constitute inside information.

**IV.2.2.11 Changes in membership of corporate bodies**

In individual cases, personnel changes at a company’s top management level may give rise to the ad hoc disclosure obligation. Particularly changes involving the appointment or removal of key members of corporate bodies (for example when such persons have had, or are expected to have, a decisive influence on business performance) may constitute inside information. Hence, the unexpected departure of a corporate body’s chairman or spokesperson or of one of the company’s founder members may have a signal effect for the capital markets. For companies whose performance depends on the innovation or creativity of certain individuals, changes in personnel outside the company’s corporate bodies (for example in the areas of research and development, or design) may also be relevant in this context.

**IV.2.2.12 Administrative and court proceedings**

Ad hoc disclosure provisions apply to administrative and court proceedings involving and directly relating to the issuer. The disclosure obligation arises as soon as the inside information has come into existence. The point in time at which a disclosure obligation arises generally depends on the moment from when the outcome of the proceedings must reasonably be expected to have a significant effect on prices. A disclosure obligation may also arise already when the issuer, irrespective of the outcome of the proceedings, takes measures which in themselves constitute inside information (e.g. formation of provisions).

The public nature of court proceedings (Gerichtsöffentlichkeit) is not deemed equivalent to sectoral publicity (Bereichsöffentlichkeit) as defined in the WpHG, and generally does not discharge issuers from their ad hoc disclosure obligation under section 15 of the WpHG. This principle may be departed from only if the court’s decision has generally been made known to the public.

**IV.2.2.13 Significant extraordinary income/expenditures**

Where significant extraordinary income/expenditures constitute inside information, they may give rise to the ad hoc disclosure obligation.

Extraordinary income/expenditures include:

- gains/losses on the disposal of significant business operations or significant parts thereof, or of major holdings;
impairments by reason of extraordinary events, such as the closure of business operations, expropriation, or destruction of business operations due to catastrophes;

- extraordinary damages (e.g. caused by embezzlement);

- income/expenditures due to the outcome of a litigation of vital importance for the company’s existence;

- compensation paid in the case of collective dismissals;

- gains/losses incurred as a result of corporate restructuring;

- income due to creditors’ general waiver of claims;

- one-off public subsidies for restructuring certain sectors.

**IV.2.2.14 Mergers & acquisitions (M&A)**

When an issuer whose financial instruments are admitted to trading at an exchange in Germany is taken over, the question of when an ad hoc disclosure should be made may arise for both the bidder (provided such bidder itself is subject to the ad hoc disclosure obligation) and the target company. In this context, a distinction must be made between whether one or more companies are involved in the negotiations on the side of the bidder or the target. Given the numerous possible scenarios, it is not possible to provide any exhaustive analysis below.

The internal decision by a bidder to enter into preliminary discussions with a potential target company does not generally constitute inside information. The same applies vice versa. At that stage, such decision generally is not sufficiently specific to qualify as inside information. Similarly, no inside information has arisen, as a rule, by the time advisers (such as lawyers, banks, management consultants) are engaged because this is merely a preparatory act.

Likewise, the issuance of a non-binding indicative offer letter would in many cases also have to be regarded as such a preparatory act.

Experience shows that, at this early stage, the success of a transaction will depend on many different, as yet uncertain, factors. The same applies to the bidder’s preliminary discussions with the target company or its shareholders, even if the parties have already entered into a non-disclosure agreement.

In principle, inside information arises only if and when, from a reasonable investor’s perspective, it can be reasonably expected that the transaction will be concluded and this, together with the prospect of any expected consideration (e.g. a premium), has the potential of constituting inside information. For this purpose, news, rumours or takeover speculation already priced in must also be taken into account.

In cases where only one bidder and one target company are involved in the takeover negotiations, or where one of the parties has been granted exclusivity, an assessment is required, e.g. when a letter of intent with the usual content (e.g. agreement outlining the
key aspects of the contemplated transaction, price range) or other agreement evidencing the parties’ serious intent to conclude an agreement is entered into, as to whether this already constitutes inside information.

The situation is different where several companies are involved on either side of the negotiations (e.g. as in auctions). In these cases, such agreements are frequently entered into by all parties involved in the negotiations. Whereas this may constitute inside information from the perspective of an exchange-listed target company, such information is often not sufficiently specific to qualify as such from the viewpoint of an exchange-listed bidder given the uncertain outcome of the procedure. In these cases the question of whether inside information exists should be assessed at the latest when the negotiations entered into by the parties have reached a specific, exclusive stage.

To prevent a situation during ongoing negotiations where inside information is required to be disclosed without undue delay pursuant to section 15 of the WpHG, the parties involved may want to consider an exemption pursuant to section 15 (3) of the WpHG provided that the prerequisites for this are met. A legitimate interest of an issuer acting as bidder in being exempted from disclosure will usually be assumed if the premature publication of such information is likely to result in a price change which is unacceptable for the bidder, or even in the failure of the transaction (see IV.3.).

In the case of a hostile takeover, the announcement to the target company of plans for an impending public takeover offer may constitute inside information subject to ad hoc disclosure provided that such information is relevant for the stock exchange or market prices of the target company’s financial instruments.

If the issuer needs to be involved in the replacement of already existing shares with a third party, this may also be relevant for ad hoc disclosure. However, a case of inside information directly relating to the issuer would arise only in certain circumstances, for example where the replacement of shares is clearly motivated by strategic objectives which will influence the issuer’s future development and are known to the latter. For example, the conclusion of a business combination agreement is a circumstance that may give rise to the ad hoc disclosure obligation.

**IV.2.2.15 Squeeze-out**

Where a major shareholder adopts a resolution to perform a squeeze-out, this may represent inside information subject to the disclosure obligation as soon as the issuer gains knowledge of this (at the latest when the major shareholder’s request for such procedure has been received by the company’s board of management pursuant to section 327a of the AktG).

**IV.3 Exemption rules**

An issuer has the power to postpone the disclosure of inside information provided that certain prerequisites have been met (section 15 (3) of the WpHG). The wording of section 15 (3) of the WpHG might be understood to mean that such exemption is automatic. However, if section 8 (5) of the WpAIV is included in the assessment, it becomes clear that the issuer must
actively claim the exemption. BaFin deems a resolution adopted by the company's managing body necessary for this purpose. In this connection, at least one ordinary member of the board of management must be involved in the decision reached with regard to the exemption. Where inside information has not been disclosed without undue delay and no resolution on an exemption has been adopted pursuant to section 15 (3) of the WpHG, this constitutes a breach of section 15 of the WpHG, even if, theoretically, it would have been possible to claim an exemption. Prior to claiming an exemption, an issuer must carefully assess whether protecting its legitimate interests outweighs the interest of the capital markets in complete and prompt disclosure, there is no risk of misleading the general public, and the issuer is able to guarantee the confidentiality of such information.

After the end of the exemption period, publication must be made without undue delay provided that inside information subject to the disclosure obligation still exists. Some scenarios are conceivable in which the inside information subject to disclosure either lapses, or ceases to be of relevance, during the exemption period. In drafting the Act, the German legislature consciously accepted the possibility of such inside information not being published and BaFin not being notified of the exemption in these cases.

**Example:**

*A liquidity shortage brought about by termination of the issuer’s line of credit by its principal bank generally constitutes inside information subject to the ad hoc disclosure obligation. The issuer enters into negotiations with its bank and for this reason is initially exempt from its ad hoc disclosure obligation pursuant to section 15 (3) of the WpHG. Following negotiations, the bank revokes such termination of the credit line. Since the liquidity shortage has been remedied, inside information no longer exists.*

In the event of inside information still existing after the end of the exemption period, the issuer is required to disclose such inside information in its version existing at the time of such disclosure.

Along with the preliminary notification (see IV.5.) of the inside information, the issuer is required to disclose to BaFin the reasons for exemption, the date on which a decision regarding postponement was taken, the dates of any subsequent reviews and of the decision taken on the eventual disclosure and publication of inside information. Details for identifying all persons involved in the decision must also be provided.

The extent to which such decisions need to be substantiated needs to be assessed on a case-by-case basis. As a general rule, however, the grounds provided as substantiation should be sufficiently clear and informative as to enable BaFin to assess whether such exemption complies with the relevant legal provisions without the need for further inquiries. Consequently, reasons of a general nature (for example, referring to the requirement for board/committee approval if inside information was not disclosed until approval by the supervisory board had been obtained) are not sufficient for this purpose. Instead, the reasons given should enable BaFin to understand how the competing interests were balanced and what grounds exist for assuming that the issuer has a legitimate interest.

In the event that inside information exists, the issuer is entitled to first examine whether the exemption criteria are met and to seek expert advice for this purpose – without this being construed as causing a culpable delay attributable to the issuer. However, the right to make such examination and the time it takes must not be abused.
The entire process should be sufficiently documented. For a more detailed specification of the information which – in the event of an exemption being claimed – is to be submitted along with the preliminary notification, please refer to section 8 (5) of the WpAIV and to the statements regarding notification to be made following exemptions (see IV.5.2.3.).

IV.3.1 Legitimate interest

The WpAIV provides further clarification of the issuer’s “legitimate interest” in postponing publication of an ad hoc notification which is required to be made without undue delay.

Pursuant to the WpAIV, legitimate interests on the basis of which issuers may be exempt from the requirement for immediate publication exist in particular if

- the outcome or the process of negotiations in course concerning business matters which, if made publicly known, would have the potential to significantly affect the stock exchange or market price, would be likely to be affected by the publication and such publication would seriously jeopardise the interests of investors; or

- contracts made by the managing body of the issuer or other decisions taken had to be made publicly known together with the announcement that the approval of another body of the issuer needed in order for the contract or decision to become effective is still pending, and this would jeopardise the correct assessment of the information by the public.

For example, BaFin may also deem a legitimate interest of the issuer to exist where the publication of a measure already taken by the managing body would jeopardise the pending approval by the supervisory board or the feasibility of the measure concerned.

Issuers may also have a legitimate interest where the development of new products, or patents, inventions, etc. are concerned which, if these were realised, would have the potential to significantly affect prices. In such cases, issuers have a legitimate interest in postponing publication of such inside information until the issuer has taken the measures needed to secure its rights (e.g. by filing a patent application).

An issuer’s “legitimate interest” needs to be weighed up against the interests of the capital markets. An unjustified exemption may result in the inside information being published too late. When making such assessment, only the issuer’s legitimate interests may be considered, and not the interests that any third parties (e.g. negotiating parties) might have in such delay.

To date, the commentary literature has defined very strict requirements regarding issuers’ interests, resulting in a very restrictive interpretation of the possibilities to postpone disclosure. In view of the definition of inside information, which now also applies to ad hoc disclosure and has thus brought forward the disclosure obligation (for example in decision-making processes involving multiple hierarchical levels), such a restrictive interpretation can no longer be sustained. The scope of application of the exemption rule as set forth in section 15 (3) of the WpHG has been significantly broadened compared with the wording that applied before the AnSVG took effect.
In view of the duties incumbent on the supervisory board under company law to supervise the board of management, exemptions are, as a rule, justified in the case of decision-making processes involving multiple hierarchical levels.

However, where an exemption is applied, a final decision should be reached within a reasonable period so as to ensure the required confidentiality. Accordingly, in the case of inside information the resolution should be adopted as soon as possible (if necessary even outside the next regular meeting), for example by circular. In certain cases, the decision may also be taken within the competent committees to ensure timely disclosure.

IV.3.2 No misleading of the public

Pursuant to section 15 (3) sentence 1 of the WpHG, issuers are exempt from the obligation to disclose inside information as long as is necessary to protect their legitimate interests, and provided that there is no reason to expect a misleading of the public, and the issuer is able to ensure that the inside information will remain confidential.

An imbalance of information exists throughout the period in which the issuer has knowledge of inside information but does not disclose it. Although this imbalance of information does not constitute misleading *per se*, issuers must not, during the period of such exemption, actively provide any indications that are in contradiction to the undisclosed inside information. A “no-comment policy” is not regarded by BaFin as misleading in this connection.

IV.3.2 Ensuring confidentiality of inside information

Issuers must take organisational measures to ensure that, during the exemption period, inside information is disclosed only to those persons who need such information to perform their duties.

If, during the period in which the issuer has decided to postpone disclosure, some of the circumstances constituting the inside information are being spread as rumours, or where details (or even the information in its entirety) are made known to the public, confidentiality is no longer ensured if the issuer knows or has reason to assume that the rumours or the making-known of the details to the public are attributable to a breach of confidentiality within its sphere of control. Where the rumours are not spread as a result of a confidentiality breach attributable to the issuer, such issuer may still continue to postpone disclosure, since in such cases the criterion for ensuring confidentiality still applies.

Any significant change in exchange prices, or corresponding rise in trading volumes, may be an indication that details of the circumstances constituting inside information have become known. If the issuer is able to rule out that such details originate from within its sphere of control, it may likewise continue postponing disclosure. Otherwise, it must disclose the inside information without undue delay.

In such scenarios, however, the issuer must not actively issue any contrary statements, or signals (denials), as this might constitute a misleading of the public. In such cases the issuer should restrict itself to a no-comment policy.
IV.4 Form and structure of ad hoc disclosures (publication)

The form and structure of ad hoc disclosures are essentially governed by the provisions of the WpAIV.

IV.4.1 Details regarding the issuer and its financial instruments

The WpAIV requires certain details to be provided with regard to the issuer and its financial instruments. Essentially, the requirements as defined in section 4 of the WpAIV clarify and establish the past practice.

Ad hoc disclosures must contain the following details:

- The heading must contain the clearly-highlighted title “Ad hoc disclosure pursuant to section 15 WpHG”.
- The heading must also contain a keyword which is recognisable as a reference and summarises the essential content of the publication.
- Where several items of inside information are published together in one ad hoc notification, several keywords are required. Typical keywords include: liquidity problems/overindebtedness; mergers & acquisitions; business figures; dividend payments; cooperation/partnership; capital adjustments; strategic corporate decisions; personnel issues; legal issues/litigation; or miscellaneous.
- The issuer’s full (company) name and address.
- The International Securities Identification Numbers (ISINs) of the shares, bonds with warrants, convertible bonds and profit-participation certificates with equity-like features issued by the issuer if they are admitted to trading on an organised market in Germany, or if such admission has been applied for.

If the issuer has issued further financial instruments for which admission to trading has been granted or applied for, it is sufficient to indicate a website at which he shall make available the respective information on these financial instruments in a file which is to be
always kept up to date and complete, with a clearly marked link on the main page to the page containing information for investors, under which the publication must be easy to find.

- The **stock exchange and trading segment** for which admission to trading has been granted or applied for.

### IV.4.2 Disclosure of inside information

The WpAIV specifies the practice to be followed to make complete ad hoc disclosures. According to this practice, the following details must be specified with regard to inside information:

- The date when the circumstances on which the information is based occurred. Where the exemption criteria pursuant to section 15 (3) of the WpHG are satisfied and the circumstances on which the information is based change in the course of the exemption period up to publication of the ad hoc notification, the date when such circumstances changed is deemed the date when the circumstances on which the information is based occurred.

- A short explanation of the extent to which the information directly relates to the issuer, if not apparent from the information to be published.

- An explanation as to why the information would be likely to have a significant effect on the stock exchange or market price if made publicly known, if not apparent from the information to be published.

In line with regulatory practice to date, this at least also includes the amount of consideration in the case of acquisition or sale of companies; or the approximate volume and contract term in the event of significant contracts. This obligation may not be excluded by reason of a confidentiality agreement. However, issuers are not obliged to disclose the details of an agreement (e.g. discounts or the grant of special terms and conditions).

The publication should be kept short, and the information should not exceed 10 to 20 lines if possible. The content of the disclosure of the inside information must be accurate and current as at the date of its publication; the ad hoc notification is not required to include a description of how the inside information developed during the exemption period. Ad hoc notifications should not quote members of corporate bodies, contractual parties, etc. BaFin will not object to certain further information (such as disclaimers) being added at the end of the text of the ad hoc notification should this be required by the capital market rules of other countries in which the issuer’s financial instruments are also admitted to trading. Wherever possible, however, such information should be kept separate from the text of the notification. Moreover, issuers should not provide such additional information if they are not required to do so.

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29 For example, in the case of a single-digit million amount it suffices for the amount to be stated in full millions, rounded up or down to the next million. For larger amounts, an amount or range of amounts must be stated in any case. Alternatively, the impact that the measure is expected to have on earnings may also be stated.
If, pursuant to section 15 (1) sentence 4 and 5 of the WpHG, a person acting on behalf or for the account of an issuer is subject to the publication obligation, such person must inform the issuer thereof without undue delay and must indicate his authorship through inclusion of his name and address in the publication.

**IV.4.3 Marketing notices/abuse of ad hoc disclosure**

Ad hoc disclosure is not intended to be used for public relations purposes. Ad hoc notifications published despite the prerequisites pursuant to section 15 of the WpHG clearly not having been satisfied are considered by BaFin as an abuse of ad hoc disclosure. Such disclosures make it difficult for the general (or sectoral) public to quickly identify and understand genuinely important information.

In this regard it should be noted once again that ad hoc disclosures need to be limited to the content required by law.

For example, repeating information stated at the beginning of an ad hoc notification towards the end of the notification – as verbatim quotes of board of management members or other persons – does not serve the intended purpose of such notifications. The same applies where previously published information is repeated, unless this is required, e.g., as part of a correcting disclosure. Responding to attacks by the company’s competitors, stating one’s own assessment of competitors, or commenting on general economic trends are outside the scope of an ad hoc notification.

Publishing the issuer’s corporate profile or the full length of interim reports and annual financial statements is also deemed an abuse of ad hoc disclosure. Although interim reports and annual financial statements may be subject to ad hoc disclosure, publication must be limited to inside information (e.g. significant growth in profit) or the relevant business figures, but should not include the entire report that may comprise several pages.

**IV.4.4 Ad hoc disclosure in the event of an update being required**

Where information already disclosed has changed to an extent that is of significance for the assessment of investors, such changed information must be made public pursuant to section 15 (1) sentences 1, 3 and 4 of the WpHG. The content of such publication is set forth in section 4 (2) of the WpAIV. BaFin considers such update to be required only if it has the potential to significantly affect prices. In such cases, issuers may choose to publish such information as a “normal” ad hoc notification.

Updates to ad hoc notifications must contain the following details:

- The heading must contain the clearly-highlighted **title** “Update to an ad hoc disclosure pursuant to section 15 WpHG”.
- The heading must also contain a **keyword** which is recognisable as a reference line and summarises the essential content of the disclosure.
• The issuer’s full **(company) name and address.**

• The **International Securities Identification Numbers (ISINs)** of the shares, bonds with warrants, convertible bonds and profit-participation certificates with equity-like features issued by the issuer if they are admitted to trading on an organised market in Germany, or if such admission has been applied for.

If the issuer has issued further financial instruments for which admission to trading has been granted or applied for, it is sufficient to indicate a website at which he shall make available the respective information on these financial instruments in a file which is to be always kept up to date and complete, with a clearly marked link on the main page to the page containing information for investors, under which the publication must be easy to find.

• The **stock exchange and trading segment** for which admission to trading has been granted or applied for.

• The date of the original disclosure and the addressees to whom it was distributed.

  For this purpose it is not sufficient to name merely the electronic information system used to publish the original ad hoc notification as defined in section 5 (1) no. 1 of the WpAIV; rather, the addressees to whom the original notification pursuant to section 3a (1) of the WpAIV was distributed must be specified.

• Information regarding the changed circumstances.

• Date when the circumstances constituting the information occurred.

• A short explanation of the extent to which the information directly relates to the issuer, if not apparent from the information to be published.

• An explanation as to why the information would be likely to have a significant effect on the stock exchange or market price if made publicly known, if not apparent from the information to be published.

**IV.4.5 Ad hoc disclosure in the event of a correction being required**

In cases where false information has been published, section 15 (2) sentence 2 of the WpHG in conjunction with section 4 (3) of the WpAIV requires such information to be corrected without undue delay by publication of another ad hoc notification.

Corrections to ad hoc notifications must contain the following details:

• The heading must contain the clearly-highlighted **title** “Correction of an ad hoc disclosure pursuant to section 15 WpHG”.

• The heading must also contain a **keyword** which is recognisable as a reference and summarises the essential content of the disclosure.
• The issuer’s full (company) name and address.

• The International Securities Identification Numbers (ISINs) of the shares, bonds with warrants, convertible bonds and profit-participation certificates with equity-like features issued by the issuer if they are admitted to trading on an organised market in Germany, or if such admission has been applied for.

If the issuer has issued further financial instruments for which admission to trading has been granted or applied for, it is sufficient to indicate a website at which he shall make available the respective information on these financial instruments in a file which is to be always kept up to date and complete, with a clearly marked link on the main page to the page containing information for investors, under which the publication must be easy to find.

• The stock exchange and trading segment for which admission to trading has been granted or applied for.

• The content and date of the original disclosure, and the addressees to whom it was distributed.

The content of the original disclosure may be abridged, provided, however, that the part containing the false information is not affected and the text must remain comprehensible. For the purpose of specifying the addressees, it is not sufficient to name merely the electronic information system used to publish the original ad hoc notification as defined in section 5 (1) no. 1 of the WpAIV; rather, the addressees to whom the original notification pursuant to section 3a (1) of the WpAIV was distributed must be specified.

• A statement establishing that the information was, in fact, false, and description of the true information.

• Date when the circumstances constituting the true information occurred.

• A short explanation of the extent to which the true information directly relates to the issuer, if not apparent from the information to be published.

• An explanation as to why the true information would be likely to have a significant effect on the stock exchange or market price if made publicly known, if not apparent from the information to be published.
### IV.5 Form and content of preliminary notifications

#### IV.5.1 Required details

A preliminary notification must be submitted, 30 minutes prior to an ad hoc disclosure, to BaFin and the managing bodies of the German exchanges on which financial instruments issued by the company have been admitted or on which derivatives based on such financial instruments are traded. This period prior to disclosure is indispensable to enable the managing bodies of the exchanges to reach a decision with regard to the suspension of price determination, and to coordinate measures among the exchanges involved as required. The period may be shortened only with the consent of the management of the relevant exchange competent in each case. In this context it should be noted that consent can only be given during the usual office hours (60 minutes prior to the start of exchange trading, and during the trading hours of the relevant exchange). Shortening the period between the preliminary notification and publication of the ad hoc notification must remain the exception. The relevant exchange will give its consent only in justified cases. Where said period is shortened without the consent of the home exchange, there is a risk of pricing being suspended without a detailed review being conducted given the shorter time available.

The preliminary notification must include the following:

- the wording of the intended publication;
- the intended time and date of publication; and
- a contact person for the issuer, including the telephone number of such contact person.

To ensure that any queries can be clarified without undue delay, it is indispensable that the contact person specified in the preliminary notification can be reached under the telephone number stated also after the preliminary notification has been submitted.

#### IV.5.2 Additional information accompanying preliminary notifications

Additional information needs to be submitted in the event of corrections of ad hoc disclosures, unknowing or unauthorised disclosure of information, and any ad hoc disclosure made after an exemption has been granted. In such cases, said information is to be submitted to BaFin only.

As far as BaFin knows, all providers of ad hoc disclosure services offer the possibility of submitting such additional information to BaFin together with a preliminary notification. Issuers should avail themselves of such possibility as far as possible.

#### IV.5.2.1 Corrections of ad hoc disclosures

Pursuant to section 8 (2) of the WpAIV, a correction of an ad hoc disclosure must state the grounds for the publication of the false information. As briefly explained under IV.3., the statement should be sufficiently clear and informative to enable BaFin to assess the case at
hand. The statement may be either made together with the preliminary ad hoc notification or, pursuant to section 8 (4) in conjunction with section 8 (2) of the WpAIV, submitted subsequently.

To ensure that the disclosure is indeed made without undue delay, issuers have the option of submitting such statement within 14 days of publication of the correction, in which case it should be submitted to BaFin by fax or post, referring to the ad hoc disclosure concerned.

Any person required to make a disclosure may refuse to disclose the grounds for the publication of the false information as required under section 8 (2) of the WpAIV if by so doing such person would expose him- or herself or any of their relatives as defined in section 383 (1) nos. 1 to 3 of the Code of Civil Procedure (Zivilprozessordnung – ZPO) to the risk of criminal prosecution or proceedings under the Act on Breaches of Administrative Regulations (Gesetz über Ordnungswidrigkeiten – OWiG).

IV.5.2.2 Disclosure of information to third parties

Pursuant to section 15 (1) sentences 4 and 5 of the WpHG, inside information

- which has been disclosed with authorisation to a person not legally obliged to observe confidentiality; or

- which has been inadvertently disclosed to a third party

must be published at the same time as being disclosed or, where said information is disclosed inadvertently, without undue delay.

In such cases, the following additional details must be provided in the preliminary notification:

- the full name of the person to whom inside information has been disclosed or made available, specifying the names of all persons where several persons are concerned;

- the business address of such person or, if such address is not available, his private address;

- the point in time when the information was disclosed; and

- where information has been disclosed inadvertently, the circumstances in which such disclosure of information was made. In this case also, the information should be described in such a way as to enable an assessment of the case at hand.

To ensure that the disclosure is indeed made without undue delay, issuers have the option of submitting the above details subsequently within 14 days. In such cases the statement should be submitted to BaFin by fax or post, referring to the ad hoc disclosure concerned.

Any person required to make a disclosure may refuse to disclose the details as required under section 8 (3) of the WpAIV if by so doing such person would expose him- or herself or any of their relatives as defined in section 383 (1) nos. 1 to 3 of the ZPO to the risk of criminal prosecution or proceedings under the OWiG.
IV.5.2.3 Disclosure following exemption

Together with the preliminary notification pursuant to section 15 (3) sentence 4 of the WpHG, issuers must notify BaFin of the grounds for exemption from the disclosure obligation. Section 8 (5) of the WpAIV specifies the information to be stated.

The following details must be submitted to BaFin:

- the grounds for exemption;
- the point in time at which the decision to delay the publication was made;
- the later dates at which the validity of the grounds was reviewed;
- the point in time at which the decision concerning the notification and publication now to be effected was made; and
- the full name as well as the business addresses and telephone numbers of all persons involved in making the decision about the exemption. For this purpose it is sufficient to state the names of the persons who made the decision with regard to the exemption. Persons having prepared or escorted the decision need not be specified, although such persons as a rule must be named in the insider list (see VII.).

During the exemption from the disclosure obligation pursuant to section 15 (3) sentence 1 of the WpHG in conjunction with section 7 of the WpAIV, issuers must control access to inside information by taking effective measures to ensure that

- only those persons for whom access to inside information is indispensable for the performance of their duties for the issuer actually gain access to such inside information; and
- the issuer can make the information public without undue delay in the event that the issuer should no longer be able to ensure confidentiality of the information.

Hence, all information required for preparing the ad hoc disclosure and all information required to justify an exemption must be kept available in such a way as to enable notification and publication of the inside information and notification of an exemption without undue delay.
IV.6 Publication of ad hoc notifications

IV.6.1 Publication channels

The manner in which inside information must be published is defined in sections 3a, 3b and 5 of the WpAIV. The legislature provides for various types of publication which must be complied with cumulatively and not alternatively:

IV.6.1.1 Requirements pursuant to section 3a of the WpAIV

For the purposes of publication, the inside information subject to disclosure must be forwarded to media which can be assumed to disseminate such information across the entire EU and the other EEA countries.

As a general rule, it is not sufficient for the information to be forwarded only to one medium; it must rather be provided to a pool of different media.

The issuer is not responsible for ensuring that the media actually publish the information forwarded to them. However, this applies only to publication pursuant to section 3a of the WpAIV. Pursuant to section 5 of the WpAIV, it must be ensured that the information is made publicly known by way of an electronic system for the dissemination of information.

The number of different types of media and the media of one media type used is determined by the special circumstances of the individual case including, in particular, the issuer’s shareholder structure, as well as the number and location of stock exchanges to which the issuer’s securities are admitted. In addition to the electronic information system which must be used pursuant to section 5 of the WpAIV as a mandatory requirement, such media channels usually include:

- news providers;
- news agencies;
- major German and European newspapers;
- financial websites.

With a view to informing investors (if possible at the same time) within the entire European Union, the information channels must also include media which ensure that information is disseminated quickly and actively across Europe (see above).

For the purposes of dissemination across Europe, it suffices as a rule for one medium from the pool of media to be capable of disseminating the information across Europe.

Where an issuer is domiciled in Germany and is admitted to a stock exchange only in Germany, such issuer is, as a rule, deemed to have satisfied its duty under section 3a of the WpAIV by forwarding the information concerned to German media, provided that one medium is capable of disseminating the information across Europe.
Depending on the individual case, the issuer may be required to exceed this mandatory minimum standard regarding the number of media of one media type used, or the number of media additionally disseminated abroad.

For instance, where an issuer’s shares are admitted to trading in a further EU or EEA country, such issuer must also transmit the information to those news agencies, news providers, print media and financial market websites that are able to disseminate the information in the country of such further admission to trading. For this purpose, the information must be provided to at least one national print medium and one national website in each further EU or EEA country in which the issuer’s securities are admitted to trading.

Where information is published through the above media, section 3a (2) sentence 1 of the WpAIV requires issuers to ensure that

- the information is received by the media including those that are able to actively disseminate the information as rapidly and as promptly as possible in all member states of the European Union and in all other signatories to the Agreement on the European Economic Area;

- the text of the information is transmitted to the media in such a way that
  - the sender of the information can be clearly identified;
  - there is sufficient protection in place against unauthorised access or amendments to the data, and that confidentiality and safety of the transmission are also guaranteed by the nature of the means of transmission used or by state-of-the-art encryption of the data;

  Transmission by fax is deemed to satisfy the safety requirements pursuant to section 3a (2) no. 2 (b) of the WpAIV. A “normal” e-mail or transmission as a PDF file is not sufficient, since ensuring a safe connection and transmission of data would require further suitable measures to clearly identify the sender.
  - errors or interruptions occurred during the transmission can be remedied without undue delay; and

- during the transmission of the information to the media,
  - the name of the party subject to the publication requirement including its address;
  - a keyword which is recognisable as reference and summarises the essential content of the publication;
  - the day and time of the transmission; and
  - the aim to disseminate the information as prescribed information on a Europe-wide level

  are recognisable.

Pursuant to section 3a (2) sentence 2 of the WpAIV, the party subject to the publication requirement is not responsible for technical system errors occurred in the area of responsibility of those media to which the information was transmitted.
Pursuant to section 3a (3) of the WpAIV, the party subject to the publication requirement must be able, for a period of six years, to notify BaFin of

- the person who transmitted the information to the media;
- the security measures used for the transmission to the media;
- the day and time of the transmission to the media;
- the medium used for the transmission to the media; and
- if applicable, all data pertaining to the delay in the publication.

If the party subject to the publication requirement commissions a third party to arrange for the publication, such party does not thereby transfer such duties to that third party but remains responsible for fulfilling its publication duties. The above requirements must then be fulfilled by the third party. In this context it should be noted that the duty to retain information continues to exist even if the commissioned third party ceases to exist (as a result, e.g., of insolvency or discontinuation of operations) or in the event of a change in identity of such third party. In the event that such third party ceases to exist, the responsibility for ensuring that the requirements are met reverts back to the issuer.

**IV.6.1.2 Requirements pursuant to section 5 of the WpAIV**

In addition to the requirement for dissemination across Europe pursuant to section 3a of the WpAIV, the issuer must also publish the information by way of an electronic system for the dissemination of information which is widely used by credit institutions, enterprises operating under section 53 (1) sentence 1 of the Banking Act (Kreditwesengesetz – KWG), other enterprises domiciled in Germany which are admitted to trading on a German stock exchange and insurance undertakings. For this purpose, it must be ensured that the information is actually published.

By way of exemption pursuant to section 5 (3) of the WpAIV, this requirement does not apply to domestic issuers within the meaning of section 2 (7) no. 2 of the WpHG. These are issuers whose home country is not the Federal Republic of Germany but whose financial instruments are admitted to trading on an organised market only in Germany. Hence, such issuers only have the duty to ensure that the information is disseminated across Europe pursuant to section 3a of the WpAIV. BaFin does not object to voluntary dissemination pursuant to section 5 of the WpAIV.

If the issuer has a website, the notification must be posted for a period of at least one month on a page of such website that is easily accessible from the homepage and made accessible in a section where it is normally expected to be found. This obligation even exists if the issuer has a website consisting of only one homepage. BaFin recommends issuers to set up a separate section for this purpose within the investor relations part of the website.

Disclosure on the website may not take place prior to disclosure via an electronic information system.

Last amended: 28 April 2009
IV.6.2 Language

The language in which the disclosure must be published is governed by the provisions of section 3b of the WpAIV. In this connection, three scenarios are of particular significance:

1. Where securities of an issuer whose home country is the Federal Republic of Germany pursuant to section 2 (6) of the WpHG are only admitted to trading on an organised market in Germany, the information shall be published in German pursuant to section 3b (2) sentence 1 of the WpAIV. Where the securities are admitted to trading on an organised market in Germany and in one or more other member states of the EU or in one or more other signatories to the Agreement on the EEA, the information shall be published in German or in English and, depending on the choice of the issuer, in a language accepted by the competent authorities of the respective member states of the European Union or the respective signatories to the Agreement on the European Economic Area, or in English.

2. A domestic issuer within the meaning of section 2 (7) no. 2 of the WpHG must publish the information in German or in English pursuant to 3b (3) of the WpAIV. An issuer who is domiciled in Germany and whose securities are not admitted to trading on an organised market in Germany but in more than one other member state of the EU or signatory to the EEA shall publish the information, depending on the choice of the issuer, in one of the languages accepted by the competent authorities of the respective member states of the European Union or the respective signatories to the Agreement on the EEA, or in English; in addition, he may also publish the information in German.

3. Issuers who are domiciled abroad or issuers whose home country is the Federal Republic of Germany pursuant to section 2 (6) no. 3 (a) of the WpHG or who have filed with BaFin a prospectus in English for securities to which the information relates may effect the publication exclusively in English pursuant to section 3b (1) of the WpAIV.

Moreover, special provisions apply to issuers having been granted admission to trading financial instruments whose denomination per unit amounts to at least €50,000 or whose denomination per unit is equivalent to at least €50,000 (cf. section 3b (4) of the WpAIV).

In publishing disclosures of inside information in various languages, the requirement for disclosure to be made without undue delay must be observed.

IV.6.3 Requirement for disclosure without undue delay

Both preliminary notifications and publications must be made without undue delay. Issuers have an obligation to submit preliminary notifications and to make publications regardless of exchange trading hours. As far as is currently known, all providers of ad hoc disclosure services offer the option of initiating publication at any time.

Issuers have an obligation to make organisational arrangements to ensure that required disclosures can be published without undue delay. In the case of foreseeable inside information arising, this includes making preparations so as to prevent delays as far as possible. Where inside information arises in a corporate unit which is not authorised to decide on the publication, the organisational structure of the company concerned must ensure that such
information is forwarded without undue delay to such person or corporate body duly authorised to take such decision. This leaves issuers sufficient time to carefully assess the potential effects of an event so as to determine whether it constitutes a circumstance establishing a publication obligation. Issuers should seek expert advice for this if required, however, such allowance for examination must not be abused.

Where inside information is published in several languages, such publication must not be delayed by the translation, i.e. publication must not be delayed until one or all translations are available.

The rules and regulations of certain stock exchanges require the simultaneous publication of ad hoc disclosures in English. However, such provisions are subordinate to the requirement of section 15 of the WpHG for disclosure to be made without undue delay and thus may not be used to justify delays. Even if, based on the wording of the Act, the subsequent publication of the English version or version in another language would not be permitted in the form of an ad hoc notification because the information at such point in time is already publicly known, BaFin does not consider such notification to be impermissible within the meaning of section 15 (2) sentence 1 of the WpHG, provided that the translation is published within 24 hours after publication of the original version.

Issuers domiciled outside Germany may be faced with a particular problem if they are generally prohibited by the jurisdiction of their respective home country from disclosing inside information prior to a publication. Issuers domiciled outside Germany are therefore permitted to submit the notification simultaneously with the publication.

IV.6.4 Transmission to the company register

Published inside information must be transmitted to the company register without undue delay after – but not prior to – publication (cf. section 15 (1) sentence 1 of the WpHG). However, such transmission may not serve as a substitute for publication pursuant to section 15 of the WpHG, but is made in addition to such obligation.

Further information is provided at www.unternehmensregister.de.

IV.6.5 Evidence of publication

Simultaneously with publication, evidence of the publication must be submitted to the managing bodies of the domestic exchanges on which financial instruments issued by the company have been admitted or on which derivatives based on such financial instruments are traded and to BaFin pursuant to section 15 (5) sentence 2 of the WpHG. Evidence of publication through an electronic information system is not sufficient for such purposes. Pursuant to section 3c of the WpAIV, evidence of publication must contain the following:

- the text of the publication;

http://www.bafin.de/dok/2787478
• the media to which the information was transmitted; and

• the exact date and time when the text was transmitted to the respective media.

The evidence may be submitted either in writing or in electronic form. Evidence that the information has been published on the website must not be submitted.

IV.7 Sanctions for breaches of duties

IV.7.1 Notification and publication

Breaches of duties by wilful intent or gross negligence relating to notifications are punishable by a fine of up to €200,000. Breaches of duties by wilful intent or gross negligence relating to publication are punishable by a fine of up to €1,000,000. A breach of duty has been committed where the notification or publication

• has not been made;

• was made incorrectly;

• was made incompletely;

• was not made within the prescribed period; or

• was not made in the prescribed form.

IV.7.2 Submission of evidence

Failure to submit evidence of publication or failure to do so without undue delay may be punishable by a fine of up to €50,000 where such failure takes place by wilful intent or gross negligence.
V Directors’ dealings pursuant to section 15a of the WpHG

V.1 Persons and entities concerned

V.1.1 Applicability to issuers

Section 15a of the WpHG provides for two different definitions of issuers: firstly, those issuers which establish a notification requirement on the part of persons discharging managerial responsibilities and/or parties closely associated with them (issuers establishing a notification requirement), and secondly, those issuers which are under an obligation to make a publication under German law (issuers subject to a publication requirement).

V.1.1.1 Issuers establishing a notification requirement

The notification obligation of persons discharging managerial responsibilities and/or parties closely associated with them exists for issuers of shares provided that one of the following criteria is satisfied for at least part of the issuer’s shares (section 15a (1) sentence 3 and 4 of the WpHG):

- the shares have been admitted to trading \(^{31}\) on a domestic stock exchange;
- application for admission of the shares to trading on a domestic stock exchange has been made;
- the intention to apply for admission of the shares to trading on a domestic market has been publicly announced;
- the shares have been admitted to trading on an organised market in the EU or the EEA\(^{32}\) and the issuer is domiciled in Germany;
- application for admission of the shares to trading on an organised market in the EU or the EEA has been made and the issuer is domiciled in Germany;
- the intention to apply for admission of the shares to trading on an organised market in the EU or the EEA has been publicly announced and the issuer is domiciled in Germany;

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\(^{31}\) Upon entry into force of the Act Implementing the Markets in Financial Instruments Directive (Finanzmarktrichtlinie-Umsetzungsgesetz – FRUG), admission to trading is granted only for the regulated market. Consequently, executives are not subject to the notification obligation if the issuer’s shares are traded only on a regulated market or a regulated unofficial market (Freiverkehr).

\(^{32}\) mifiddatabase.cesr.eu
- the shares have been admitted to trading on an organised market in the EU or the EEA and the issuer is domiciled outside the EU or the EEA and its home country within the meaning of the WpPG is Germany (cf. section 2 no. 13 of the WpPG);

- application has been made for admission of the shares to trading on an organised market in the EU or the EEA and the issuer is domiciled outside the EU or the EEA and its home country within the meaning of the WpPG is Germany (cf. section 2 no. 13 of the WpPG);

- the intention to apply for admission of the shares to trading on an organised market in the EU or the EEA has been publicly announced and the issuer is domiciled outside the EU or the EEA and its home country within the meaning of the WpPG is Germany (cf. section 2 no. 13 of the WpPG).

- With regard to the expression “publicly announced” it should be noted that not any statement on a future initial public offering results in a notification obligation and a publication obligation. Rather, it must be clearly evident that an application for admission of shares to trading on an organised market will be made within the foreseeable future.

V.1.1.2 Issuers subject to the publication requirement

Only domestic issuers (see IV.2.1.1.) are required to publish notifications pursuant to section 15a of the WpHG.

Issuers which have applied for, or announced their intention to apply for their shares being admitted to trading are also deemed domestic issuers within the meaning of this provision.

Even where a provisional or final insolvency administrator is appointed, a domestic issuer (represented by its board of management) remains subject to the publication requirement. However, such insolvency administrator is required under section 11 of the WpHG to make available the financial resources required to fulfil such publication requirement.

V.1.2 Persons subject to the notification requirement

The notification requirement applies to natural persons, legal persons and other organisations (hereinafter: person subject to the notification requirement).33

The notification requirement always applies only to the person who is subject to the notification requirement and has entered into the transaction to be reported, even if such person’s notification requirement has been derived from a person discharging managerial responsibilities. Consequently, persons discharging managerial responsibilities are not responsible for making notifications for any persons closely associated with them.

The notification requirement applies to the persons as specified below.

33 Cf. section 15a (3) sentences 2 and 3 of the WpHG.
V.1.2.1 Persons discharging managerial responsibilities

Persons discharging managerial responsibilities are:

- the members of the management (usually the management board);
- the members of the administrative body;
- the members of the supervisory body;
- personally liable partners; and
- any other persons with managerial responsibilities who are authorised to decide on material corporate matters on behalf of the issuer and who regularly have access to inside information.

It is not possible to make a generalised assessment on the question of which persons are deemed to be “other persons with managerial responsibilities”. Rather, this must be examined on a case-by-case basis. As a general rule, however, not every person discharging managerial responsibilities below the level of the board of management is subject to the notification requirement. For the notification requirement to be established, the person discharging managerial responsibilities must be able to make corporate decisions relating to an issuer’s future developments and business prospects. The notification requirement arises only if such person is authorised to make strategic decisions for the company as a whole. Where the decision in question is subject to approval by the board of management, such person is not subject to any notification requirement. BaFin assumes that for stock corporations established under German law or companies whose organisational structure is similar to that of German stock corporations, the group of persons affected by this provision is very limited. Such a role might be attributed to an issuer’s senior general executives (Generalbevollmächtigte) or members of an extended board of management (erweiterter Vorstand). In the case of stock corporations which have been established under foreign or European law and which, for example, have single-tier management and board systems, situations in which other persons with managerial responsibilities are subject to the notification requirement are likely to be encountered more frequently. The notification requirement may exist even where the person discharging managerial responsibilities is not authorised to make all decisions alone. It suffices for such person to be a member of the body making the decisions in question.

By definition, persons employed not by the issuer but by subsidiaries, parent companies or group affiliates are not deemed to be “other persons with managerial responsibilities”, since the legal provision pertains only to persons who discharge managerial responsibilities within the exchange-listed issuer itself. As a general rule, this also applies to executives seconded by the parent company.

However, the mere fact that a person discharging managerial responsibilities is named in the issuer’s list of insiders does not establish any notification requirement on the part of such person pursuant to section 15a of the WpHG.
V.1.2.2 Natural persons who are closely associated with persons discharging managerial responsibilities (family members)

The following persons are subject to the notification requirement:

- Spouses or registered civil partners.

  The notification requirement applies regardless of whether or not the same household is shared. Even separated spouses or registered civil partners are subject to the notification requirement until the marriage or civil partnership has been dissolved.

- Dependent children.

  Only children towards whom the person discharging managerial responsibilities has a duty to provide maintenance and support are subject to the notification requirement. In this respect, the question of whether such maintenance and support is actually paid is irrelevant. In Germany, the specific maintenance and support duties is governed by sections 1601 et seq. of the BGB. In the case of foreign nationals or persons residing or domiciled abroad, maintenance and support duties may arise under the laws of a foreign jurisdiction. For this reason, it is not possible to lay down a generally applicable and straightforward definition of entitlement to maintenance and support. Children under 18 years of age who do not work, and children who are of full legal age and who are still attending school or are completing their first course of studies or vocational training, as a general rule are subject to the notification requirement pursuant to section 15a of the WpHG.

- Other relatives who, at the time the transaction subject to notification was entered into, have lived in the same household with the person discharging managerial responsibilities concerned for at least one year.

  This provision only covers relatives as defined in section 1589 of the BGB. The criterion of living in the same household has been satisfied if the person discharging managerial responsibilities and the relative share the same accommodation and have a joint budget. In such cases the notification requirement applies regardless of the degree of kinship. The notification requirement also covers non-dependent children still living in the same household.

V.1.2.3 Notification requirement of legal persons and other organisations

The following are subject to the notification requirement:

- legal persons;

- trusts (e.g. foundations);

- partnerships (including non-trading partnerships under the German Civil Code);

  provided that
• the person discharging managerial responsibilities or a natural person closely associated with such person discharges managerial responsibilities within such company (as a member of the management, administrative or supervisory body, or as a personally liable partner); or

• the person discharging managerial responsibilities, or a natural person closely associated with such person,
  o directly or indirectly controls the company;
  o the company was founded for the benefit of such person; or
  o the economic interests of the company are substantially equivalent to those of such person.

Although the wording of section 15a (3) sentence 2 of the WpHG allows for the conclusion that this provision is applicable only to legal persons, an interpretation of section 15a (3) sentence 2 in line with the Directive shows that the group of persons subject to the notification requirement is the same as in section 15a (3) sentence 3 of the WpHG. Thus, pursuant to Article 1(2)(d) of Directive 2004/72/EC, this provision also applies to other entities (such as partnerships and trusts).

If construed literally, the above items would result in an undue extension of the notification requirement, thus defeating the purpose of the provision. For this reason, Article 6(1) of Implementing Directive 2004/72/EC and section 15a (3) of the WpHG, referring to the objectives formulated by CESR, must be limited to their actual purpose.

CESR has included companies in the notification requirement so as to prevent any circumvention of notification requirements. Accordingly, transactions entered into by companies give rise to the notification requirement only if the respective natural person subject to a notification obligation has the opportunity of thereby securing for himself a material economic benefit.

This has the following implications:

V.1.2.4 Transactions by issuers

Any and all transactions by an issuer which is exchange-listed or which has applied for, or announced its intention to apply for, admission to trading are not subject to any notification requirement. This applies in particular to its non-trading portfolio and trading portfolio transactions as well as transactions under buy-back programmes. Otherwise, inclusion of issuers as the primary persons establishing a notification requirement would represent a circular argument.

V.1.2.5 Transactions by non-profit entities

Non-profit entities are not subject to the notification requirement since, given the non-profit nature of such entities, the persons discharging managerial responsibilities and persons closely associated with such persons cannot derive any material economic benefit from such entities.
V.1.2.6  Transactions by other companies

In the case of other companies, the notification requirement depends on whether the person discharging managerial responsibilities, or the natural person who is closely associated with such person, has the possibility of deriving economic benefits for himself through the purchase of financial instruments on the part of such company, which would thus constitute a circumvention opportunity. This result is based on a teleological reduction required to reflect the spirit and purpose of the legal regulation, which is to include only those transactions in respect of which the natural person has the opportunity to secure for himself a material economic benefit. Such material economic benefit may be derived, for example, if the person discharging managerial responsibilities, or the natural person closely associated with such person, holds an equity interest of at least 50 percent in the company, holds at least 50 percent of the company’s voting rights, or is entitled to at least 50 percent of the company’s profits.

If this prerequisite is satisfied, a further examination is required to determine

- whether the person discharging managerial responsibilities, or the natural person closely associated with such person, discharges managerial responsibilities within the company;

- whether the company is directly or indirectly controlled by the person discharging managerial responsibilities or the natural person closely associated with such person;

- whether the company was established for the benefit of the person discharging managerial responsibilities or the natural person closely associated with such person;

- whether the economic interests of the company are substantially equivalent to those of the person discharging managerial responsibilities or the natural person closely associated with such person.

This criterion has been satisfied if, for example, several persons potentially subject to the notification requirement hold equity interests in a company and such interests need to be aggregated for such persons to have the possibility of securing for themselves a material economic benefit. Where the company’s corporate structure has multiple hierarchical levels, the existence of the notification requirement depends on whether or not the control threshold has been exceeded directly or indirectly by the natural person for the company potentially subject to the notification requirement. Another example for the applicability of this provision is the establishment of a specialised fund (Spezialfonds) for the person discharging managerial responsibilities or the natural person closely associated with such person.
V.2 Notification

V.2.1 Financial instruments included

The following transactions are subject to a notification requirement:

- Transactions in shares of the issuer;
  The notification requirement relates to all the shares issued by an issuer, regardless of whether or not they have been admitted to trading.

- Transactions in financial instruments linked to shares of the issuer, notably derivatives.
  It is not necessary for the price of the financial instrument concerned to be directly linked to the exchange price of the issuer’s shares. Consequently, the notification requirement also extends to transactions in financial instruments which are only indirectly dependent on the issuer’s shares. To prevent an unduly broad scope of the financial instruments included, only transactions in those financial instruments whose price is largely dependent on the issuer’s shares are subject to the notification requirement. This is the case where the issuer’s shares have a weighting of at least 50 percent in the calculation of the price of the financial instrument concerned. For example, the purchase of an option or certificate based on a basket in which the issuer’s shares have a weighting of more than 50 percent would be subject to the notification requirement. In the case of financial instruments having a variable link to the issuer’s shares, the assessment must be based on the weighting of the shares at the time of the transaction.

V.2.2 Types of transactions

According to the wording of the Act, all of an issuer’s own-account transactions in the financial instruments specified above are subject to the notification requirement. Within the meaning of this provision, own transactions are all contractual and legal dispositions.

As set forth in Recital 26 of the Market Abuse Directive, the purpose of the notification requirement for persons discharging managerial responsibilities is to prevent market abuse. Where a person discharging managerial responsibilities acquires financial instruments solely as part of his contractually agreed remuneration package, this does not constitute market abuse in view of the off-exchange and usually long-term agreement entered into between the issuer and the person discharging managerial responsibilities. Hence, the purchase of financial instruments by reason of an employment contract or as part of a remuneration package does not constitute a transaction within the meaning of Article 6(4) of the Market Abuse Directive. The same applies to gifts and inheritances.34

Against this background, the purchase and granting of financial instruments by reason of an employment contract or as part of a remuneration package, as well as by way of inheritance or gifts, are exempt from the notification requirement under section 15a of the WpHG (see V.3.7.1.1.). The same applies to the exercise of derivative financial instruments acquired or granted by reason of an employment contract or as part of a remuneration package and to any acquisition of financial instruments which may be associated therewith (see V.3.7.1.2.). However, the acquisition of shares as the prerequisite for participation in such programme is subject to the notification requirement.

Additional information regarding types of transactions that are of particular relevance in practice is provided under V.3.7.

V.2.3  
\textit{De minimis} threshold

All transactions within the meaning of section 15a (1) sentence 1 of the WpHG are subject to the notification requirement as soon as they exceed an aggregate amount of €5,000 by the end of the calendar year. For the purpose of calculating the €5,000 threshold, all transactions of the person discharging managerial responsibilities and of persons closely associated with such person must be considered cumulatively. Transactions whose values cannot be quantified (see V.3.7.5.1.) may be valued at €0.00 for the benefit of persons subject to the notification requirement when determining whether the \textit{de minimis} threshold has been exceeded. That means that no notification is required provided that such persons do not perform any other transactions. However, if a transaction is performed by such persons by which the \textit{de minimis} threshold is exceeded within the calendar year, all transactions of such persons – irrespective of their value – must be notified subsequently.

Netting of purchase and sale transactions is not permitted.

BaFin has no reservations about transactions below the \textit{de minimis} threshold being notified as well.

V.2.4  
Form of the notification

BaFin provides a form designed to facilitate compliance with the notification rules by persons subject to the notification requirement. This form should be used for submitting notifications.

The form, along with an explanation of the formal requirements, is available for download from BaFin’s website at http://www.bafin.de/dok/2784904.

V.2.5  
Submission to BaFin

As a rule, persons or entities subject to the notification requirement are required to submit the notification to BaFin themselves. However, persons subject to the notification requirement may commission a third party to submit the notification on their behalf as long as timely
notification is ensured. In this case, persons subject to the notification requirement also have organisational and monitoring duties, i.e. they are required to ensure and verify that the third party thus commissioned duly satisfies such notification requirement.

As a general rule it is also permissible for the notification and the evidence of publication to be sent at the same time (see V.3.5.) provided that this is done within the statutory time limit for submitting the notification.

Notifications must be submitted in writing. Submission by fax is also sufficient for this purpose. Submission by e-mail does not satisfy the requirements, even where the notification is sent as an attachment to such e-mail. BaFin has set up a dedicated fax number for notifications pursuant to section 15a of the WpHG: +49 228 4108-62963.35

V.2.6 Content of the notification

Pursuant to section 10 of the WpAIV, the notification must contain the following details:

The clearly-highlighted title "Notification of transactions by persons discharging managerial responsibilities pursuant to section 15a WpHG";

Details regarding the person subject to the notification requirement and the issuer:

- full name of the person subject to the notification requirement, or the company name in the case of companies;
- phone number of the person subject to the notification requirement, or that of a contact person who is familiar with the content of the notification;
- business address or, if a natural person has no business address, his/her private address;
- date of birth (in the case of natural persons);
- full name and address of the issuer;
- in the form of a keyword, a description of the position and function of the person discharging managerial responsibilities, irrespective of whether such person himself or a person closely associated with such person as set out in section 15a (3) of the WpHG, is subject to the notification requirement;

Where, in the case of companies, a close association with more than one person exists, it is sufficient for the person having the closest association with the issuer's management to be named in the notification.

- for persons closely associated with a person discharging managerial responsibilities, additionally a brief description of their association in the form of a keyword.

35 For technical reasons, a different number will be shown on the transmission report of the sending fax machine.
For legal persons and organisations closely associated with a natural person, who is in turn closely associated with a person discharging managerial responsibilities as set out in section 15a (3) of the WpHG (e.g. the asset management company of a board member’s spouse), this means that both the legal person’s or organisation’s own association with the natural person and the natural person’s association with the person discharging managerial responsibilities must be disclosed.

Details regarding the transaction:

- an exact description of the financial instrument used in the transaction;
- the International Securities Identification Number (ISIN);
  - for transactions in derivatives additionally:
    - the underlying instrument;
    - the strike price;
    - the price multiplier;
    - the expiration date.
- the nature of the transaction (e.g. purchase or sale, etc.);
- the date of transaction;
- transactions performed on the same day may be aggregated and notified with a weighted average price;
- the place of the transaction;

The notification requirement is established by the transaction creating an obligation to sell, purchase or otherwise transfer an asset. The date when the transaction creating an obligation to sell, purchase or otherwise transfer an asset was concluded is therefore also the date that must be stated. By contrast, the date when the transaction was performed is irrelevant under section 15a of the WpHG. The performance of the transaction does not need to be notified, even if a considerable period elapses between the transaction creating the obligation and the actual performance of that obligation. In the case of exchange transactions, the transaction creating an obligation to sell, purchase or otherwise transfer an asset is not the placement of the order but rather the actually concluded exchange transaction.

For transactions whose description alone does not provide any indication as to whether or not the person subject to the notification requirement has received or sold something, the description must be changed in such a way that this becomes clear (e.g. by adding “disposal” or “addition” to the description).
• the price;

The price is the consideration received or given by the person subject to the notification requirement. In the case of gratuitous transactions, €0.00 may be stated as the price. In exceptional, isolated cases it may turn out that the price cannot be determined using reasonable cost and effort (see V.3.7.5.1.). In such cases, the person or entity subject to the notification requirement – if necessary after consulting with BaFin – may state the price as being “non-quantifiable”. It is then advisable to attach an explanatory note to be published with the notification.

• the currency;

• the quantity;

• the trading volume.

The trading volume is determined by multiplying the transaction price by the transaction quantity. The transaction costs are not included in the calculation of the total volume.

Examples for notifications in special cases are provided under V.3.7.

V.2.7 Deadline for notifications

Notifications must be made within five business days of the transaction date. It must therefore be received by BaFin and by the issuer no later than on the fifth business day from the transaction date (excluding the transaction date). As before, the transaction establishing an obligation to sell, purchase or otherwise transfer an asset is decisive. Business days are deemed to be all days of the week other than Sundays or public holidays. For the purpose of calculating the deadline, public holidays are defined as statutory holidays at the issuer’s registered office or at one of BaFin’s offices (located in the federal states of Hesse and North Rhine-Westphalia).

If the de minimis threshold is exceeded and this results in a subsequent notification requirement for transactions already performed, the time limit of five business days for subsequent notification of such transactions commences on conclusion of the transaction (creating an obligation to sell, purchase or otherwise transfer an asset) which exceeded the de minimis threshold. The person whose transaction exceeds the de minimis threshold should inform the other persons who are associated with the person discharging managerial responsibilities and are potentially subject to the notification requirement that the de minimis threshold has been exceeded so that these persons can comply with the notification requirement within the prescribed period.

Any persons subject to a notification requirement should examine whether, in view of their contemplated business activities in the course of the year, it might be advisable to send any notification immediately following conclusion of a transaction. BaFin has no reservations about transactions below the de minimis threshold being notified as well.
If in individual cases the notification cannot be submitted within the prescribed period, it should be accompanied by conclusive reasons for the delay and documents evidencing these reasons (if any). However, there is no obligation to make disclosures which would expose persons subject to a notification requirement or one of their relatives as defined in section 383 (1) nos. 1 to 3 of the ZPO to the risk of criminal prosecution or proceedings under the OWiG.

V.3 Publication

V.3.1 Nature and place of the publication

V.3.1.1 Publication deadline

Domestic issuers are required to publish the notification without undue delay. As a general rule, the publication should have been effected at the latest on the business day following receipt of the notification.

V.3.1.2 Media

Pursuant to section 3a (1) of the WpAIV, the notification subject to publication, for the purposes of publication, must be forwarded to the media which can be assumed to disseminate such information across the entire European Union and the other EEA countries. The issuer is not responsible for ensuring that the media actually publish the information forwarded to them. For convenience, the term “publication” in this section is used synonymously with “forwarding of the information to the media”.

As a general rule, it is not sufficient for the information to be forwarded only to one medium; rather the information must be provided to a pool of different media.

The number of different types of media and the media of one media type used is determined by the special circumstances of the individual case including, in particular, the issuer’s shareholder structure, as well as the number and location of stock exchanges to which the issuer’s securities are admitted). As a rule, the types of media to which the information must be provided include:

- an electronic information system;
- news providers;
- news agencies;
- major national and European newspapers;
- financial websites.
With a view to informing investors (if possible at the same time) within the entire European Union, the information channels must also include media which ensure that information is disseminated quickly and actively across Europe.

For the purposes of dissemination across Europe, it suffices as a rule for one medium from the pool of media to be capable of disseminating the information across Europe. It is not required to forward the information to national media in all EU/EEA countries.

Where an issuer is domiciled in Germany and is admitted to an exchange only in Germany, such issuer is, as a rule, deemed to have satisfied its duty under section 3a of the WpAIV if one medium is capable of disseminating the information across Europe.

Depending on the individual case, the issuer may be required to exceed this mandatory minimum standard regarding the number of media of one media type used, or the number of media additionally disseminated abroad.

For instance, where an issuer’s shares are admitted to trading in a further EU or EEA country, such issuer must also transmit the information to those news agencies, news providers, print media and financial market websites that are able to disseminate the information in the country of such further admission to exchange trading. For this purpose, the information must be provided to at least one national print medium and one national website in each additional EU or EEA country in which the issuer’s securities are admitted to trading.

V.3.1.3 Security standards and documentation obligations

Where information is published through the above media, section 3a (2) of the WpAIV requires issuers to ensure that

- the information is received by the media which also include those media that are able to actively disseminate the information as rapidly and as promptly as possible in all EU and EEA countries;

- the text of the information is transmitted to the media in such a way that
  - the sender of the information can be clearly identified;
  - there is sufficient protection in place against unauthorised access or amendments to the data, and that confidentiality and safety of the transmission are also guaranteed by the nature of the means of transmission used or by state-of-the-art encryption of the data;

Transmission by fax is deemed to satisfy the security requirements pursuant to section 3a (2) no. 2 (b).

A “normal” e-mail or transmission as a PDF file is not sufficient, since ensuring a safe connection and transmission of data would require further suitable measures to clearly identify the sender.

- errors or interruptions occurred during the transmission can be remedied without undue delay; and
during the transmission of the information to the media
  o the name of the party subject to the publication requirement, including its address;
  o a keyword which is recognisable as reference and summarises the essential content of the publication;
  o the day and time of the transmission; and
  o the aim to disseminate the information as prescribed information on a Europe-wide level

are recognisable.

Pursuant to section 3a (2) sentence 2 of the WpAIV, the person subject to the publication requirement is not responsible for technical system errors occurred in the area of responsibility of those media to which the information was transmitted.

Pursuant to section 3a (3) of the WpAIV, the party subject to the publication requirement must be able, for a period of six years, to notify BaFin of

- the person who transmitted the information to the media;
- the security measures used for the transmission to the media;
- the day and time of the transmission to the media;
- the medium used for the transmission to the media; and
- if applicable, all data pertaining to the delay of the publication.

If the person subject to the publication requirement commissions a third party to arrange for the publication, such person remains responsible for fulfilling the publication requirement. The above specifications must then be fulfilled by the third party. In this context it should be noted that the duty to retain information continues to exist even if the commissioned third party ceases to exist (as a result, e.g., of insolvency or discontinuation of operations) or in the event of a change in identity of such third party. In the event that such third party ceases to exist, the responsibility for ensuring that the requirements are met reverts back to the issuer.

Incomplete notifications must also be published provided that no details prescribed as mandatory for the publication are missing. Publication of the transaction on the issuer’s website is not required.

Pursuant to section 11 (1) of the WpAIV, it is sufficient for the notification to be submitted by fax alone. Provided that there are no justified doubts as to a notification’s authenticity, notifications received by fax must be published without undue delay. Where justified doubts do exist, the issuer may, prior to publication, take such steps as are necessary to determine whether the notification is plausible. However, such allowance for examination must not be abused.
V.3.1.4 Sample text for transmitting information to the media

Notification of transactions by persons discharging managerial responsibilities pursuant to section 15a of the WpHG for dissemination across Europe pursuant to section 15a (4) WpHG in conjunction with section 3a (1) WpAIV

Dear Sir or Madam,

Please find attached a notification pursuant to section 15a of the Securities Trading Act (Wertpapierhandelsgesetz – WpHG).

Pursuant to section 15a (4) WpHG in conjunction with section 3a (1) WpAIV, we are under an obligation to forward notifications pursuant to section 15a WpHG we receive to media which can be assumed to disseminate such information throughout the entire European Union and the other signatories to the Agreement on the European Economic Area.

In this regard, you are hereby provided with the following notification(s) pursuant to section 15a of the WpHG:

Here, the details required under section 12 of the WpAIV are to be stated.

V.3.2 Content of the publication

The publication need not state all details of the notification since the latter also contains sensitive personal data.

The publication must contain the following information (section 12 of the WpAIV):

- the title: “Notification of transactions by persons discharging managerial responsibilities pursuant to section 15a WpHG”;
- Details regarding the person subject to the notification requirement and the issuer:
- full name of the person subject to the notification requirement, or the company name in the case of companies;
- information as to whether the person subject to the notification requirement is a person discharging managerial responsibilities or a person closely associated with such person;
- in the form of a keyword, a description of the position and scope of duties of the person discharging managerial responsibilities;
- full name and address of the issuer;
- Details regarding the transaction:
• an exact description of the financial instrument used in the transaction;
  o the International Securities Identification Number (ISIN);
    for transactions in derivatives additionally:
    o the underlying instrument;
    o the strike price;
    o the price multiplier;
    o the expiration date;

• a precise description of the transaction, including details on the nature of the transaction (e.g. purchase or sale), transaction date and place, as well as the price, currency, quantity and volume of the transaction (see V.2.6.).

If the person subject to the notification requirement has attached an explanatory note intended for publication, such explanatory note should also be published.

V.3.3 Language

The language in which the publication must be effected is governed by the provisions of section 3b of the WpAIV. In this connection, three scenarios are of particular significance:

1. Where the securities of an issuer whose home country is the Federal Republic of Germany pursuant to section 2 (6) of the WpHG are only admitted to trading on an organised market in Germany, the information shall be published in German pursuant to section 3b (2) sentence 1 of the WpAIV. Where the securities are admitted to trading on an organised market in Germany and in one or more other member states of the European Union or in one or more other signatories to the Agreement on the European Economic Area, the information shall be published in German or in English and, depending on the choice of the issuer, in a language accepted by the competent authorities of the respective member states of the European Union or the respective signatories to the Agreement on the European Economic Area, or in English.

2. A domestic issuer within the meaning of section 2 (7) no. 2 of the WpHG must publish the information in German or in English pursuant to section 3b (2) of the WpAIV. An issuer who is domiciled in Germany and whose securities are not admitted to trading on an organised market in Germany but in more than one other member state of the European Union or signatory to the Agreement on the European Economic Area shall publish the information, depending on the choice of the issuer, in one of the languages accepted by the competent authorities of the respective member states of the European Union or the respective signatories to the Agreement on the European Economic Area, or in English; in addition, the issuer may also publish the information in German.

3. Issuers who are domiciled abroad or issuers whose home country is the Federal Republic of Germany pursuant to section 2 (6) no. 3 (a) of the WpHG or who have filed with BaFin a prospectus in English for securities to which the information relates may effect the publication exclusively in English pursuant to section 3b (1) of the WpAIV.
Moreover, special provisions apply to securities of issuers admitted to trading whose denomination per unit amounts to at least €50,000 or an equivalent amount in another currency (cf. section 3b (4) of the WpAIV).

V.3.4 Submission to the company register

The notification must be submitted to the company register without undue delay, but after publication pursuant to section 15a of the WpHG.

Further information is provided at http://www.unternehmensregister.de.

V.3.5 Submission of evidence

V.3.5.1 Nature and form

Pursuant to section 15a (4) of the WpHG, evidence of publication must be submitted to BaFin along with the publication at the same time. For the requirement to submit evidence to be met, section 13a in conjunction with section 3c of the WpAIV requires such evidence to include details regarding the other media to which the information was transmitted.

Evidence of publication must contain the following:

- the text of the publication;
- the media to which the information was transmitted; and
- the exact date and time when the text was transmitted to the respective media.

It is also advisable to confirm submission to the company register to avoid any subsequent queries.

Evidence may be sent by e-mail to paragraph15a@bafin.de, by regular mail, by fax or PC fax to +49 228/4108-6296336.

36 For technical reasons, a different number will be shown on the transmission report of the sending fax machine.
V.3.5.2 Sample cover letter

Dear Sir or Madam,

Please find attached evidence regarding the forwarding of a notification pursuant to section 15a of the WpHG to media for dissemination across Europe pursuant to section 15a (4) of the WpHG in conjunction with section 3a (1) of the WpAIV.

The attached/enclosed notification pursuant to section 15a of the WpHG has been sent to the following media:

<table>
<thead>
<tr>
<th>Name of Medium 1</th>
<th>Fax number of Medium 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of Medium 2</td>
<td>Fax number of Medium 2</td>
</tr>
<tr>
<td>...</td>
<td></td>
</tr>
</tbody>
</table>

Company register (time and date, if no transmission confirmation is available)

Please refer to the attached/enclosed transmission confirmations for the time and date of transmission.

Yours faithfully,

V.3.6 Corrections

Where corrections to notifications or publications become necessary in individual cases, these must be made as soon as possible.

 Corrections to notifications must be made in the form of a new notification to BaFin and to the issuer and, referring to the original notification, must be expressly designated as a correction notification. The corrected information must be specifically identified as such.

A corrected notification must be republished by the issuer. It is advisable to also designate the publication, referring to the original notification, as a correction and to make reference to the changed data.

The notification concerned must also be corrected in the company register.
V.3.7 Specific cases

V.3.7.1 Treatment of options and other derivatives

V.3.7.1.1 Acquisition/granting/sale

Acquisition or sale of options or other derivatives is generally subject to the notification requirement. The option premium must be stated as the price. Only the acquisition or granting of options or other derivatives based on an employment contract or as part of a remuneration package is not subject to the notification requirement. However, the acquisition of shares as the prerequisite for participation in such programme is subject to the notification requirement (see V.2.2.).

V.3.7.1.2 Exercise

The specific aspects of the notification requirement in the case of exercise depend on the structure of the option right or other derivative.

For option rights or other derivatives (such as certificates) solely aimed at cash settlement, the exercise must be classified as a disposal. The price to be stated represents the payment made per option/derivative/share. To avoid misunderstandings, the transaction type should be stated as “exercise against cash settlement”.

In the case of option rights or derivatives aimed at the acquisition of shares, the exercise usually triggers the acquisition of shares. In these cases it is sufficient to notify the acquisition of the shares. A separate notification of the actual exercise is not necessary. The price at which the shares are effectively acquired must be stated.

Where the person subject to the notification requirement may choose between cash settlement and the acquisition of shares, the question of the notification requirement must be decided depending on the type of exercise selected.

The exercise of options or other derivatives acquired or granted by reason of an employment contract or as part of a remuneration package as well as any related acquisition of shares is also exempt from the notification requirement.

The sale of the shares, even if it takes place immediately following the acquisition or exercise, is subject to the notification requirement provided that the sale takes place via a securities account of the person subject to the notification requirement and not directly through the issuer or a bank commissioned by the latter.
V.3.7.2 Subscription rights

The granting of subscription rights issued to shareholders by reason of a capital increase is not subject to notification.

By contrast, trading in subscription rights is subject to the notification requirement. When subscribing shares through the exercise of subscription rights, only the acquisition of the shares must be notified. A separate notification regarding the exercise is not necessary. However, it may be indicated by the type of transaction selected or by an explanatory note that the shares were acquired by exercise of a subscription right. Section V.3.7.7. applies where exercise is subject to a condition precedent.

V.3.7.3 Joint securities account

In specific cases, the existence of joint securities accounts may raise the question as to whether a notification obligation applies and, if so, to what extent.

If the holders of a joint securities account are organised as a non-trading partnership under the German Civil Code (Gesellschaft bürgerlichen Rechts – GbR), the above statement made with regard to companies will apply (see V.1.2.6.).

In the case of joint securities accounts held only by persons subject to the notification requirement (and provided they are not organised as a GbR), all transactions in the financial instruments specified under III.1.1. and the names of all joint securities account holders (see V.1.2.1.) must be stated.

In the case of joint securities accounts held by persons subject to the notification requirement as well as by persons not subject to the notification requirement (and provided they are not organised as a GbR), all transactions in the financial instruments specified under III.1.1. must be stated, but not the names of the persons not subject to the notification requirement.

V.3.7.4 Share dividends

The distribution of a dividend in the form of shares is exempt from the notification requirement provided that the person subject to the notification requirement is not entitled to choose between cash settlement and the granting of shares. Where such person does have a choice, the notification requirement applies if a dividend in the form of shares is chosen.

V.3.7.5 Price indications in special cases

V.3.7.5.1 Prices without quantifiable equivalent

In some cases it may not be possible to determine a price where the consideration cannot be expressed as a euro amount. This may be the case, for example, when financial instruments are transferred to a company in return for the granting of shares in that company. In such cases, the price may be stated as “not quantifiable”. As a general rule, however, a brief explanation should be provided in addition.
V.3.7.5.2 Price for exchange transactions

Where consideration is paid not in the form of money but, for example, in shares, the shares granted must be stated as the consideration. For example, in the case of an exchange of shares of issuer A in return for shares of issuer B at a ratio of 1:4, either the purchase of 4 B shares or the sale of 0.25 A shares must be stated, in which case the 4 shares (0.25 shares) must be stated as the price and the B (A) share as the currency. As a general rule, however, a brief explanation should be provided in addition.

V.3.7.5.3 Price in the event of interest payments

Where an interest payment instead of a specifically quantifiable purchase price is agreed upon conclusion of the transaction, this fact must be stated.

V.3.7.6 Subscription of financial instruments

The successful subscription of shares or other financial instruments is a purchase transaction which is subject to the notification requirement. As a general rule, the transaction creating an obligation to subscribe is deemed to be concluded upon acceptance of the subscription by the company. However, the subscribing party usually has no knowledge of when such acceptance occurs. For this reason, the point in time when the person subject to the notification requirement gains knowledge of the acceptance of its subscription order must be stated as the date of conclusion of the transaction.

V.3.7.7 Conditional transactions

V.3.7.7.1 Conditions subsequent

Transactions entered into subject to a condition subsequent must be treated in the same way as unconditional transactions. The notification must be submitted to BaFin and the issuer within the statutory time limit. Drawing attention to and/or explaining the condition subsequent as part of the explanatory note is permissible.

If the condition subsequent is satisfied, both BaFin and the issuer must be informed of this fact, and the publication is to be amended accordingly.

V.3.7.7.2 Conditions precedent

On entering into transactions subject to a condition precedent, a distinction regarding the person on whom fulfilment of the condition depends must be made.

If fulfilment of the condition precedent depends solely on the person subject to the notification requirement, the notification requirement is deemed to arise already when the transaction is entered into.
If fulfilment of the condition precedent does not depend, or does not depend solely, on the person subject to the notification requirement, the notification requirement is deemed to arise only when the condition is satisfied. In this case, the point in time when the condition is satisfied must be stated as the date when the transaction was entered into.

A brief explanatory note relating to the condition is also permitted in such cases.

Agreement of concurrent execution, i.e. payment on delivery, does not constitute a condition in the sense as described above.

V.3.7.8 Exchange of shares in the event of merger

The non-negotiable exchange of shares within the scope of a merger is not subject to the notification requirement.

V.3.7.9 Discretionary orders

Where settlement of a discretionary order for a customer takes place after full execution at an average price, this must be regarded as an off-exchange transaction and designated accordingly. The date of final settlement must be stated as the date of the transaction.

V.3.7.10 Transactions concluded under an asset management mandate

Transactions which are initiated by an (independent) asset manager are always subject to the notification requirement where such transactions are executed under a granted power of attorney and the person potentially subject to the notification requirement held, or acquires, title to the financial instruments concerned.

V.3.7.11 Transactions performed under trustee agreements

V.3.7.11.1 Notification obligation of trustee

Transactions which a person subject to the notification obligation performs in a capacity as full legal trustee on behalf of a third party who is not subject to the notification obligation are exempt from the notification obligation, since such transactions are not deemed to be own transactions within the meaning of section 15a of the WpHG.

V.3.7.11.2 Notification obligation of trustor

Transactions performed by a trustee for the benefit of a person subject to the notification obligation are subject to the notification obligation pursuant to section 15a of the WpHG. In this regard, the person subject to the notification obligation remains responsible for fulfilling such notification requirement. However, BaFin has no reservations about the trustee being commissioned to submit the notifications on the trustor’s behalf.
V.3.7.12 Securities lending (securities loans)

Securities lending is subject to the notification obligation. In this case, the consideration is the lending fee.

Retransfer at the end of the loan is not subject to the notification requirement.

V.3.7.13 Pledge and transfer as security

A mere pledge, as a transfer for security purposes, is not subject to the notification obligation. The realisation of such security is subject to the notification requirement only if the person effecting the realisation is subject to the notification obligation pursuant to section 15a of the WpHG.

V.4 Sanctions for breaches of duties

V.4.1 Notification and publication

Breaches of duties by wilful intent or gross negligence relating to notification and publication are punishable by a fine of up to €100,000 in each case. A breach of duty has been committed where the notification or publication

- has not been made;
- was incorrect;
- was incomplete;
- was not made within the prescribed period; or
- was not made in the prescribed form.

V.4.2 Submission of evidence

Failure to submit evidence of publication or failure to do so without undue delay may be punishable by a fine of up to €100,000 where such failure takes place by wilful intent or gross negligence.
VI Prohibition of market manipulation

VI.1 Significance for presentation of corporate information

The prohibition of market manipulation as set forth in section 20a of the WpHG also forms part of the legal framework for notification and publication obligations pursuant to sections 15, 15a of the WpHG as well as a company’s overall external communication. Under this provision it is prohibited, among other things, to make false or misleading statements and to withhold important information relating to financial instruments. For this reason, companies also must assess the question of whether to disclose information and, if so, in what way, always with a view to preventing market manipulation. As a result, the prohibition of market manipulation has a broader scope of application as compared with, for example, the provisions on ad hoc disclosure obligations. For example, it notably also covers financial instruments which are only included in trading on a regulated unofficial market (Freiverkehr).

VI.2 Legal framework

The prohibition of market manipulation as set forth in section 20a of the WpHG was amended as part of the Fourth Financial Market Promotion Act (Viertes Finanzmarktförderungsgesetz) and further developed with the AnSVG. At the same time, the AnSVG transposed the Market Abuse Directive, thus harmonising German provisions on market manipulation with a uniform European standard. The Market Abuse Directive was further clarified by implementing directives, namely by Commission Directive 2003/124/EC of 22 December 2003 as regards inter alia the definition of market manipulation, and by Commission Directive 2004/72/EC of 29 April 2004 as regards inter alia accepted market practices. Lastly, a uniform European legal framework outlining the prohibition of market manipulation was ensured with Commission Regulation (EC) No 2273/2003 of 22 December 2003 as regards exemptions for buy-back programmes and stabilisation of financial instruments. Since the provisions of this Regulation were directly applicable, no separate transposition into German law was required.

At the national level, the Regulation Clarifying the Prohibition of Market Manipulation (Verordnung zur Konkretisierung des Verbots der Marktmanipulation – MaKonV) of 1 March 2005 replaced the Regulation Clarifying the Prohibition of Stock Price and Market Manipulation (Verordnung zur Konkretisierung des Verbots der Kurs- und Marktpreismanipulation – KuMaKV). The MaKonV includes more detailed provisions on what circumstances are relevant for the valuation of financial instruments and on when misleading signals, an artificial price level and other deceptive acts may exist.

The prohibition of market manipulation is thus largely born from a legal framework combining national German legislation as well as European and German regulations. In providing guidance to issuers on the prevention of market manipulation, this Guideline focuses on
manipulation by means of information. By contrast, violations of this prohibition as a result of trading transactions (which may be particularly relevant for issuers purchasing own shares) do not fall within the scope of this Guideline. With regard to this issue, reference is made in particular to Articles 3 et seq. of Regulation (EC) No 2273/2003 as regards exemptions for buy-back programmes and stabilisation of financial instruments. For a general overview of the subject of prohibition of market manipulation, BaFin recommends issuers to thoroughly study this Guideline as well as the MaKonV and Regulation (EC) No 2273/2003.

VI.3 Explanations

VI.3.1 Persons and entities concerned

In principle, the prohibition of market manipulation applies to everyone. All of an issuer’s employees as well as any third parties with responsibility for the company’s external communication must ensure that in performing their duties they do not supply any false or misleading information. However, whether or not an offence has been committed does not depend exclusively on who actually makes the false or misleading statement, e.g. by informing the press or distributing texts, but also on who decides on whether or not the information and its content is disclosed. Moreover, persons adopting such information as their own and assuming responsibility for its accuracy are also deemed to supply false or misleading information. Other company employees and third parties may become accessory to the offence if they deliberately assist in supplying false or misleading information. What is decisive, then, is who is responsible for supplying false or misleading information.

Example:

Member A of an issuer’s board of management launches a major sale of shares which is subject to publication by the issuer pursuant to section 15a (3) of the WpHG. Since this board member wishes to launch further sales, but (rightly) fears that, if the sale already executed became public, this would have a negative impact on the share price, he notifies the company of a sales volume which is not correct. The issuer then publishes the false notification. The publication of ad hoc disclosures pursuant to section 15 of the WpHG and directors’ dealings pursuant to section 15a of the WpHG falls within the responsibility of another member of the issuer’s board of management, namely board member B.

In this case, a violation of section 20a of the WpHG was committed by board member A, who disclosed the incorrect sales volume. The member responsible for ad hoc disclosures, member B, did not commit any violation provided that he was not aware nor should have been aware that the information disclosed was not correct.

Where the non-disclosure of valuation-relevant circumstances is concerned, only those persons may commit a violation who themselves are subject to the disclosure obligation (e.g. notification obligation pursuant to section 15a or section 21 of the WpHG) or who are responsible within the company for fulfilling the statutory disclosure obligation incumbent on the issuer. Within a company, responsibility for making mandatory disclosures to the
capital markets (e.g. section 15 of the WpHG, sections 10 and 35 of the WpÜG) as well as for ordinary disclosures under commercial law and accounting regulations (e.g. sections 325 et seq. in conjunction with sections 264 et seq. of the HGB) lies with the members of the administrative body. In the case of stock corporations established under German law, which have two administrative bodies, the board of management in its capacity as executive body has primary responsibility. However, in matters involving the supervisory board (for example the annual financial statements or issuing the statement pursuant to section 27 of the WpÜG), its members may also be responsible for the information disclosed. In performing its duties to make mandatory disclosures to the capital markets (particularly pursuant to section 15 of the WpHG), the executive body may avail itself of the option of assigning responsibility for ad hoc disclosures to a particular (management board) member within the scope of a schedule of responsibilities. But even in this situation, the other (management board) members still have an obligation to ensure ongoing monitoring of communications to the capital markets. They have to intervene where there are any suspicions of the requirements not being duly satisfied. If the specific (management board) member with responsibility for mandatory disclosures to the capital markets should, in turn, delegate certain duties, such (management board) member is responsible for supervising subordinate employees or third parties in the performance of such duties.

In the event that persons other than those specified above are involved, they may be accessory to the violation.

VI.3.2 Definition of manipulation

It is prohibited

- to supply false or misleading information concerning circumstances that are of crucial importance for the valuation of financial instruments; and

- to withhold such information of crucial importance for the valuation of financial instruments in contravention of statutory provisions

if the provision or withholding of the information has the potential to influence the stock exchange or market price of a financial instrument.

VI.3.2.1 Supply false or misleading information

To supply information means to make a statement on verifiable matters (or “circumstances”, according to the wording of the Act).

VI.3.2.1.1 Supply

The definition of “supply information” does not require publication of a statement or its disclosure to a large group of persons. It suffices for the statement to become known externally and for at least one other person to have the possibility of being apprised thereof. In this context, statements include declarations made in compliance with statutory disclosure obligations, voluntary statements made at press conferences or analyst events, statements made during one-on-one meetings with investors or their advisers, or statements made to
representatives from the press and financial news wires. In this regard, it is irrelevant in what manner the statement is made (orally, in writing, or in text form whether by e-mail or publication via the Internet).

VI.3.2.1.2 Information

Information always relates to verifiable circumstances, and thus covers both factual statements and value judgments (including statements of opinion and assessments) as well as forecasts, provided that they can be plausibly derived from a grain of truth. Where the information has been entirely fabricated (as in the case of rumours, or recommendations and warnings made without any objective grounds whatsoever), this constitutes “other deceptive acts” prohibited by section 20a (1) sentence 1 no. 3 of the WpHG (see VI.3.2.6.).

VI.3.2.1.3 False

Information is deemed to be false when it does not reflect the actual circumstances, as in the case of factual statements being made which then prove to be untrue. Value judgments, statements of opinion, assessments and forecasts are deemed to be false where they are made on a false factual basis, or where conclusions based on facts (which may very well be true) are completely unjustified. Issuers must examine such factual basis as far as possible before using it for their own value judgments, statements of opinion, assessments or forecasts. Failing to do so may result in statements being made which are completely unfounded and which are also deemed to constitute market manipulation.

Information is also deemed to be false when it is incomplete, i.e. leaves out key aspects and thus gives rise to a false overall impression.

Example:

An issuer publishes new revenue and earnings forecasts after acquiring a new cooperation partner, but does not mention that the only legal basis for the cooperation so far consists in declarations of intent, and that its actual implementation still carries significant risks.

VI.3.2.1.4 Misleading

Information is deemed to be misleading where such information, despite being true in terms of their content, is presented in a way to create a wrong impression of the facts for those persons receiving such information. Once again, the overall context in which the information is supplied is decisive. Information is deemed to be misleading where it is not untrue in the explicit sense but, by reason of accompanying actions, is nevertheless considered to be so based on generally accepted standards of the relevant market.

Example:

In a prospectus regarding a capital increase an issuer explains that demand for a certain product group will increase more sharply in future as a result of state subsidies under newly introduced legislation. This statement is true. The issuer moreover manufactures a product that clearly might fall within this product group. However, the criteria for such
state subsidies are not (yet) met by such product. The company does not make any mention of this.

It follows that the statements made with regard to state subsidies and the resulting rising demand for a certain product group are misleading. Although the statements are true per se, investors are led to believe by the way in which such statements are presented in the prospectus that the expected increase in demand resulting from state subsidies applies in particular to the product manufactured by the issuer. Otherwise the statements would not make any sense in context in which they are made. By failing to provide any information in the prospectus on the question of whether or not its product meets the subsidy criteria, the company thus implicitly states, by reason of generally accepted standards of the relevant market, that its product meets such criteria.

VI.3.2.2 Correction duties

Where authorised persons (or any persons having adopted information as their own) recognise that information is false or misleading, they have an obligation to rectify such information. The information thus recognised as being false or misleading must then be corrected, completed or, where applicable, updated.

Where the false or misleading information has been supplied in an ad hoc disclosure, a separate ad hoc disclosure correcting such information must be published (section 15 (2) sentence 2 of the WpHG in conjunction with section 4 (3) of the WpAIV). In other cases, ad hoc disclosures may be used for the purpose of updating information (section 15 (1) of the WpHG in conjunction with section 4 (2) of the WpAIV). For details, please refer to IV.4.4., IV.4.5., IV.5.2.1.

VI.3.2.3 Circumstances of crucial importance for the valuation of financial instruments

The element assumed as the basis of prohibition of market manipulation is false or misleading information supplied concerning circumstances that are of crucial importance for the valuation of financial instruments. Circumstances of crucial importance for the valuation of financial instruments are defined in section 2 (1) sentence 1 of the MaKonV as facts and value judgments which a reasonable investor would take into consideration in making an investment decision. Future circumstances may also be of relevance for the valuation where such circumstances can reasonably be expected to occur in the future (section 2 (1) sentence 2 of the MaKonV). As a rule, inside information subject to the publication obligation pursuant to section 15 (1) sentence 1 of the WpHG as well as decisions and the acquisition of controlling interests subject to the publication obligation pursuant to section 10 or section 35 of the WpÜG are deemed to be circumstances that are of crucial importance for the valuation of financial instruments (section 2 (2) of the MaKonV). In addition, section 2 (3) of the MaKonV contains a (non-exhaustive) list of circumstances which are always deemed to be of crucial importance for the valuation of financial instruments. Lastly, section 2 (4) of the MaKonV also provides a list of examples (which, once again, is not exhaustive) which may, but do not necessarily have to, constitute circumstance of crucial importance for the valuation of financial instruments.
Whether or not a circumstance is of crucial importance for valuation will depend on whether it would change the valuation of a financial instrument from a reasonable investor’s perspective. Since such valuation refers to the financial instrument and the related assessment is effected from the perspective of an investor acting according to economically rational principles, this represents an objective criterion that can be established by the authorities and the courts. Consequently, the views of the persons acting or of individual investors are not decisive.

VI.3.2.4 Withholding information concerning circumstances of crucial importance for the valuation in contravention of a statutory obligation

Withholding circumstances that are of crucial importance for the valuation of financial instruments in contravention of a legal obligation is deemed equivalent to supplying false or misleading information.

VI.3.2.4.1 Withholding

Circumstances that are of crucial importance for the valuation of financial instruments and subject to disclosure are deemed to be withheld if such circumstances are not disclosed at all, i.e. to nobody. However, circumstances that are of crucial importance for the valuation of financial instruments may also be deemed to be withheld if such circumstance are not disclosed to all persons vis-à-vis whom a disclosure obligation applies. This is the case, for example, where the form of disclosure provided for in the disclosure obligation is not observed, with the result that the information thus disclosed is not published to the required extent.

Example:

An issuer fails to comply with its publication obligation pursuant to section 15 of the WpHG in the form as provided for in section 15 (1) sentence 1 of the WpHG in conjunction with section 5 of the WpAIV, but instead discloses the information only to the local press at the company’s registered office.

Circumstances of crucial importance for the valuation of financial instruments may also be deemed to have been withheld where such circumstances whose disclosure is required at (or by) a certain date are disclosed too late.

Lastly, claiming an exemption with regard to the disclosure obligation despite the fact that the prerequisites for such exemption are not met may also constitute a contravention of statutory provisions.

Example:

An issuer avails itself of the exemption option under section 15 (3) of the WpHG in respect of information whose publication is required by section 15 of the WpHG, even though such issuer has no legitimate interests that would justify postponing publication of such information.
VI.3.2.4.2  Circumstances of crucial importance for the valuation of financial instruments

For a definition of circumstances of crucial importance for the valuation of financial instruments, please refer to VI.3.2.3.

VI.3.2.4.3  Disclosure obligation

The obligation to disclose information must be an applicable statutory obligation (i.e. it must be established by a law or regulation). Besides German laws and regulations, the disclosure obligation may also be established under European regulations, and in some cases also under foreign laws and regulations (e.g. where an issuer’s securities are also traded on a foreign exchange and are subject to the capital market legislation of such foreign jurisdiction). By contrast, no disclosure obligation is established by non-binding codes of conduct or similar voluntary agreements.

For example, such disclosure obligation may arise from ad hoc disclosure requirements (section 15 of the WpHG), from the provisions on disclosures required under commercial and accounting legislation, or from other provisions of capital market legislation. The latter may result from regulations adopted for specific events, such as company takeovers (sections 10, 27, 35 of the WpÜG) or insolvencies (section 92 (2) of the AktG), from provisions on standard disclosures, such as duties to publish interim reports (section 40 of the BörsG in conjunction with sections 53 et seq. of the BörsenZulVO, or from the duty to prepare and disclose annual financial statements (sections 325 et seq. in conjunction with sections 264 et seq. of the HGB).

Where the withholding of information concerning circumstances of crucial importance for the valuation of financial instruments is concerned, only those persons may commit a violation who themselves are subject to the disclosure obligation or who are responsible within the company for the statutory disclosure obligation incumbent on the issuer. In the event that other persons are involved, they may be accessory to the violation (see VI.3.1.).

VI.3.2.5  Potential to influence prices (note: not “significant effect” on prices)

The prohibition of market manipulation is further restricted by the requirement that, in addition to the fact that the supplied or withheld information must be of crucial importance for the valuation of financial instruments, the information must also have the potential to influence the stock exchange or market price of a financial instrument.

Even if the different terms “influence” and “effect” used by the legislature mean the same thing, the threshold for the potential to influence the stock exchange or market price is lower as compared with the criterion for inside information as defined in section 13 of the WpHG of having a “significant effect” on the stock exchange or market price (see III.2.1.4.). Consequently, the definition of market manipulation does not require the influence on prices to be “significant”. To satisfy the elements of market manipulation by reason of an influence on prices, it suffices for the provision or withholding of the information concerned to be generally capable of influencing prices in the context of the specific circumstances and market situation. That also means that no incentive to buy or sell is required for determining that the potential to influence prices exists.
In practice, BaFin applies an objective, *ex post* assessment in determining whether or not the provision or withholding of the information has the potential to influence prices. For this purpose it is examined from the perspective of a reasonable investor (objective view) – based on empirical values from the capital markets and giving due regard to the market situation prevailing when the act was committed – whether there was a serious possibility of the act in question having an impact on the price determination process. In this regard, the direction of a potential influence on prices (i.e. whether the provision or withholding of information was capable of resulting in an upward or downward movement of prices, or of keeping the price unchanged) is irrelevant; it is not necessary for the price of the financial instrument to have actually changed (see VI.3.2.9.1.).

An objective price influencing potential does not require any statement to have been disclosed to or concealed from the protected capital markets or capital market participants.

*Example:*

*In an interview with a popular, widely circulated magazine, the member of an issuer’s board of management makes false statements about the company.*

*Example:*

*The member of an issuer’s board of management makes false statements to a private investor who holds a large stake in the issuer. The private investor is induced by the false statements not to sell his stake in the issuer via the stock exchange as planned, but otherwise does not engage in any stock exchange activities.*

On the whole, the elements constituting the offence of prohibited market manipulation are defined more broadly as compared with the provisions on the prohibition of insider dealing and the ad hoc disclosure obligation. The threshold of having “the potential to influence prices” is easily crossed, particularly where issuers supply or withhold information. Consequently, in order to avoid market manipulation offences, issuers must focus their efforts already at a level where they can ensure that the information provided in corporate communication is accurate and that their disclosure obligations are fulfilled.

### VI.3.2.6 Rumours and recommendations

Although completely fabricated statements in respect of financial instruments such as rumours, recommendations or warnings made without any objective basis do not represent false statements since they lack any factual basis, such statements are nevertheless deemed to constitute “other deceptive acts” and as such are prohibited under section 20a (1) sentence 1 no. 3 of the WpHG.

Spreading rumours or opinions – and in particular recommendations – with regard to financial instruments or their issuers is also prohibited where a conflict of interests (resulting, e.g., from trading activities or already existing positions) has not been adequately disclosed at the same time (cf. section 4 (3) no. 2 of the MaKonV). In this regard it is irrelevant whether the rumour is true or the opinion is objectively justified.
VI.3.2.7 Sanctions under the WpHG

Violations of the prohibition of market manipulation may constitute an administrative offence or a criminal offence. Both cases require that the elements of the offence as defined in section 20a of the WpHG be satisfied. Whether such violation constitutes an administrative or a criminal offence will depend on whether the stock exchange or market price was actually influenced by the offence, or whether the offender is found to have acted by wilful intent or only by gross negligence.

VI.3.2.8 Sanctions in the case of market manipulation punishable as a criminal offence

Violating the prohibition of market manipulation (section 20a of the WpHG) is deemed to be a criminal offence pursuant to section 38 (2) of the WpHG if the offence actually has influenced the stock exchange or market price and the person responsible acted by wilful intent. A violation of the prohibition of market manipulation is punishable by up to five years of imprisonment or a fine (section 38 (1) and (2) in conjunction with section 39 (1) no. 1 and no. 2 and section 39 (2) no. 11, section 20a (1) sentence 1 of the WpHG).

VI.3.2.9 Prerequisites for market manipulation to be punishable as a criminal offence

VI.3.2.9.1 Actual influence on stock exchange or market price

An actual influence is deemed to take place if the stock exchange or market price of a financial instrument moves upwards or downwards or is kept unchanged (artificially) as a result of false or misleading information having been supplied concerning circumstances of crucial importance for the valuation of financial instruments or as a result of the withholding of such information. For this purpose, the supply or withholding of such information must at least be partly responsible for the price change or price stabilisation. In a landmark decision, the Federal Court of Justice (Bundesgerichtshof – BGH) ruled that the requirements in criminal proceedings for determining whether an act has had an influence on prices need not be excessive. For example, comparisons of past price trends and turnovers with the price and turnover trend of the financial instrument concerned on the day when the offence was committed are deemed to constitute sufficient evidence for a causal influence on prices.37

VI.3.2.9.2 Offence committed by wilful intent

A criminal offence is deemed to have been committed only if the responsible person acted by wilful intent. Wilful intent means that the offender was aware of the action in question and willingly committed it. For the definition of market manipulation pursuant to section 38 (2) of the WpHG, contingent intent (dolus eventualis) suffices. Contingent intent is already deemed to exist where the responsible person thinks that it would be possible for him to commit the prohibited act and the resulting offence and condones the same. A “condoning” is deemed to occur where the person acting has accepted the possibility of the offence being committed, even if he may not want it to be committed. Accordingly, for the criterion of wilful intent to

37 cf. BGH judgment of 6 November 2003, reference: 1 StR 24/03
be fulfilled in order for market manipulation to constitute a criminal offence, it is sufficient if the responsible person recognises the possibility of supplying false or misleading information concerning circumstances that are of crucial importance for the valuation of financial instruments or of withholding such information, and moreover recognises the possibility of this having an influence on prices, but still accepts such consequence and commits the offence nonetheless.

**VI.3.2.10 Sanctions in the case of market manipulation constituting an administrative offence**

Violating the prohibition of market manipulation (section 20a of the WpHG) is deemed to be an administrative offence if such offence did not influence the stock exchange or market price (as required by section 38 (2) of the WpHG for a criminal offence), or if the person responsible acted in gross negligence pursuant to section 39 (2) no. 11 of the WpHG. Administrative offences in violation of the prohibition of market manipulation thus fall into these two cases. The administrative offence is punishable by a fine of up to €1m (section 39 (4) in conjunction with section 39 (1) no. 1 and no. 2 and (2) no. 11, section 20a (1) sentence 1 of the WpHG).

**VI.3.2.11 Market manipulation by wilful acts without prices actually being influenced**

If the responsible person acts by wilful intent, but no actual influence on prices (as required by section 38 (2) of the WpHG) can be identified, this constitutes an administrative offence. Consequently, even the abstract risk posed to the price determination process by wilful false or misleading information concerning circumstances of crucial importance for the valuation of financial instruments or the withholding of such information is subject to a fine.

**VI.3.2.12 Market manipulation by gross negligence**

If the responsible person is found to have acted with gross negligence, this act also constitutes an administrative offence. Although the threshold of gross negligence is deemed to be reached only in the case of an objectively and subjectively high degree of negligence, it suffices for a person to be found to have acted in a very careless manner, disregarding what should have been obvious given such person’s skills and knowledge. In this regard it is irrelevant whether or not the merely grossly negligent violation resulted in an influence on prices. Defining the elements of a grossly negligent violation as an administrative offence serves a catch-all function, i.e. in cases where it is not possible to determine conclusively whether the individual in question acted by wilful intent or gross negligence, the offence in any case may be punished as an administrative offence.
VII Insider lists

VII.1 Preliminary remarks

Section 15b of the WpHG establishes the obligation to maintain insider lists. Under this obligation, issuers within the meaning of section 15 (1) sentence 1 of the WpHG and persons acting on behalf or for the account of the issuer are required to maintain lists of persons who work for them and have access to inside information as part of their function. The lists must be updated without undue delay and submitted to BaFin on request. Issuers are obliged to inform the persons included in the list regarding the legal obligations associated with access to inside information and the legal consequences of violations. The introduction of section 15b WpHG transposed Article 6(3)(3) of the Market Abuse Directive as well as Article 5 of the Implementing Directive 2004/72/EC into national law.

The measure is first of all preventive: the persons named in the list must be specifically cautioned, beyond the general duties of corporate confidentiality, and informed of the consequences of any violations so as to raise their awareness of the need to exercise care in handling inside information. Secondly, the lists enable issuers and other persons or entities under an obligation to maintain such lists to monitor the flow of inside information and thus comply with their confidentiality duties. Where a specific suspicious case has already arisen, the lists make it easier for BaFin to quickly ascertain the potential group of insiders concerned.

VII.2 Persons and entities obliged to maintain insider lists

Section 15b of the WpHG requires two groups of persons or entities to maintain insider lists (hereinafter: "persons or entities obliged to maintain insider lists"): firstly, issuers pursuant to section 15 (1) sentence 1 and sentence 2 of the WpHG, and secondly, persons acting on their behalf or for their account.

VII.2.1 Issuers

For the purpose of defining issuers, section 15b (1) sentence 1 of the WpHG refers to the definition of domestic issuers in section 15 (1) sentence 1 and sentence 2 of the WpHG (see IV.2.1.1.). In other words, domestic issuers of financial instruments (even where admission to trading in such instruments has merely been applied for but not yet granted) are obliged to maintain insider lists.
VII.2.2 Persons acting on their behalf or for their account

The group of persons and entities concerned also includes persons acting on behalf or for the account of issuers. Since the concepts of “acting on behalf” and “acting for the account of” were adopted verbatim from Directives 2003/6/EC and 2004/72/EC, they do not correspond to the legal concepts used under German law (namely “im Auftrag” within the meaning of section 675 BGB, for instance, or “für Rechnung”), since these terms are exclusively intended to describe contractual relationships or agency transactions under German law. Rather, these concepts must be interpreted not in the foregoing sense but generally and thus more broadly against the background of European law (as shown by a comparison of different versions of Article 6(3) of the Market Abuse Directive in different languages). The spirit and purpose of the European provision is to ensure that members of certain professions who act in the interests of an issuer and by reason of such work typically gain access to inside information are named in a list and are informed about their duties in handling inside information.

Consequently, it is also necessary to define the group of persons and entities who are obliged to maintain such lists. The group of persons and entities concerned thus includes persons acting in the interests of the issuer, or in advisory professions, or whose activities for the issuer fall within an area in which they typically otherwise have access to inside information. These include lawyers, corporate consultants, tax advisers, investor relations agencies, or external accountants.

Such persons acting on behalf of or for the account of issuers are referred to hereinafter in short as “service providers”.

In their insider list, issuers must provide a reference to the involvement of such service provider, or the disclosure of inside information to such service provider, stating when the service provider was involved or when the information was forwarded. For this purpose it suffices to state the company name of the service provider along with its contact person and telephone number.

Where the service provider retains another service provider to perform its assignment (e.g. if the bank instructed by the issuer to execute a capital adjustment measure in turn retains a lawyer who prepares a legal opinion on behalf of the bank or for the latter’s account), such additional service provider is not obliged to maintain a separate insider list for such matter. Here, too, it suffices for the service provider contracted by the issuer to state the company name of its contractor as well as the name of the additional service provider’s contact person.

VII.2.3 Examples

VII.2.3.1 Typical service providers of issuers

**Investor relations agencies** advise issuers on maintaining relations to investors and typically gain access to inside information. They thus have an obligation to maintain an insider list.

**Translation providers** which translate ad hoc disclosures, draft contracts, etc. typically have access to inside information and therefore must maintain an insider list.
Rating agencies preparing a rating commissioned by an issuer act in the interest of the issuer and thus frequently have access to inside information as part of their function. In such cases they are obliged to maintain their own insider list. However, this may not be understood to mean that the rating agency is under instructions in preparing its rating, or that its independence is compromised. Where a rating agency prepares a rating on its own initiative or that of a third party (e.g. a bank), it is not deemed to act on behalf or for the account of the issuer and, consequently, does not have an obligation to maintain an insider list.

Credit institutions are deemed service providers within the meaning of this provision if they provide services beyond the scope of general banking services (such as maintaining account relationships, or lending) and thus act in the interest of the issuer or within its sphere. Such services establishing an obligation to maintain an insider list include providing advice on initial public offerings, capital adjustment measures or acquisitions (involving the bank’s corporate finance or mergers & acquisitions units).

VII.2.3.2 Not service providers within the meaning of section 15b of the WpHG

Public authorities, the courts, public prosecutors and the police do not act on behalf of or for the account of the issuer. They therefore do not belong to the group of persons or entities obliged to maintain insider lists as specified in section 15b of the WpHG. Where a notary performs statutory duties, he is not deemed to act on behalf or for the account of the issuer.

Suppliers are not deemed to act in the interest of an issuer, and are therefore not obliged to maintain their own insider lists.

In principle, subsidiaries or parent companies of an issuer are not obliged to maintain an insider list. They are not deemed to act for, on behalf, or for the account of the issuer since neither section 15b of the WpHG nor its legislative intent give any indication that the Act was intended to cover affiliated companies. Even where a holding structure exists, the non-listed holding company does not have any obligation to maintain an insider list. This also applies where a control and profit-and-loss transfer agreement has been entered into between the parent and subsidiary. However, if individual employees of the parent or subsidiary are still in a contractual relationship to the exchange-listed issuer, such persons act on behalf of the issuer. As a result, they must be included in the issuer’s insider list if they have access to inside information as part of their function. An obligation to maintain an insider list arises only if the affiliated enterprise is one of the service providers as described above.

Likewise, major or majority shareholders have no obligation to maintain an insider list.

VII.2.4 Exemption from the obligation to maintain an insider list

Pursuant to section 15b (1) sentence 4 of the WpHG, the persons or entities as specified in section 323 (1) sentence 1 of the HGB, i.e. external auditors and their agents, and an auditing firm’s legal representatives involved in performing an audit, are exempt from the obligation to maintain an insider list. However, such exemption applies only if this group of persons has been instructed to perform an audit required by law.
In the event that external auditors or staff members of auditing firms gain access to inside information within the scope of their audit, the auditor or the auditing firm, including a contact person, must be included in the insider list maintained by the issuer.

Where auditors or staff members of auditing firms act on behalf of the issuer in another capacity (e.g. as consultants) and have access to inside information as part of their function, they must maintain their own insider list. In such cases, the exemption of section 15b (1) sentence 4 of the WpHG does not apply.

VII.2.5 Persons and entities concerned which are domiciled in another EU or EEA country

Persons or entities domiciled in another EU member state or another signatory to the EEA are permitted to maintain their insider list in accordance with the legal provisions in force in such country. In such cases, BaFin recognises an insider list created in accordance with the requirements of such country, even if such list departs from the requirements of German legislation, for example in terms of the type, structure and content of the insider list.

VII.3 Persons to be included

The insider list must include persons who act on behalf of or for the account of an issuer and have access to inside information as part of their function. However, this does not mean that the persons in question are required to actually have had access to certain inside information. Rather, for the purposes of inclusion it suffices for the job description of the persons in question to provide for a potential exposure to inside information.

VII.3.1 Acting

In keeping with the very broad interpretation of European provisions, the concept of “acting” is not restricted to persons who have an employment relationship with the persons or entities subject to the obligation to maintain an insider list, but also includes persons who act on their behalf under other contractual relationships or otherwise.

VII.3.2 Access to inside information as part of their function

The concept of “access to inside information as part of their function” means that the person to be included in the list does not come into the possession of the information in a merely accidental or coincidental manner. For example, IT employees whose administration rights give them access to the internal e-mail traffic or the databases of the person or entity under the obligation to maintain an insider list do not have to be included in the insider list because such
persons do not have access to the content of e-mails or databases as part of their function. This is because examining the content of such files, e-mails, documents, etc. does not fall within the scope of duties to be performed by this group of employees.

Moreover, any employees or third parties obtaining access to information illegally (notably by infringing their authorisation limits for access to information) are not deemed to have access to such information as part of their function.

VII.3.3 Examples

Members of the corporate bodies of persons or entities under the obligation to maintain an insider list are deemed to act on behalf of the issuer. In the capacity as members of a corporate body, they generally have access to inside information as part of their function and therefore must be included in the issuer’s insider list. However, the corporate body members themselves are not obliged to maintain their own insider list.

VII.4 Structure and content of the list

VII.4.1 Structure

Various models are conceivable for the structure of insider lists. Persons or entities obliged to maintain an insider list may decide on a particular form for such list, or may combine several forms.

VII.4.1.1 Insider lists structured by inside information item/project

Persons or entities obliged to maintain an insider list may subdivide their list by inside information item/project and may name those persons who have access to such specific items of information/to the specific project.

It may be necessary and sensible to create an insider list by item of information or project even in advance of inside information arising. This applies in particular for information taking a long time to materialise and involving numerous persons holding such information, as in the case of takeover negotiations. Persons already involved in the matter concerned when the inside information arises must be included in the insider list.

Where persons or entities obliged to maintain insider lists maintain an insider list structured by item of information or project, it should be noted for the purpose of clarification that BaFin, by reason of the mere inclusion of an item of information or a project in such list, will not conclude that the persons or entities obliged to maintain an insider list, at that time such item of information or project was included, had assumed that inside information establishing a requirement for ad hoc disclosure existed in principle. In such cases BaFin duly considers the
fact that the person or entity obliged to maintain an insider list will generally create such list at a time when the information had not yet become sufficiently specific to qualify as inside information.

**VII.4.1.2 Insider lists structured by function/area of confidentiality**

The list may also be structured by function or area of confidentiality in which inside information typically arises. When structuring a list based on various functions or areas of confidentiality, it is not necessary to specify the inside information. However, the functions or areas should be sufficiently specified so that information can be assigned to them without difficulty and persons having access to such information can be identified at all times.

Such functions or areas may include the board of management, supervisory board, legal department, controlling and finance department, public or investor relations department, and the compliance department itself. However, this does not mean that the persons in question actually have access to certain inside information. Rather, for the purposes of inclusion it suffices for the job description of the persons in question to provide for a potential exposure to inside information.

The specific scope of such confidentiality areas (whether they include entire departments, or only individual teams or persons) will very largely depend on the organisation and business area of the person or entity obliged to maintain an insider list. For this reason, only the persons or entities obliged to maintain an insider list may assess in which areas inside information typically occurs and which persons have access to such information.

In the case of large organisation units it may be sensible to include only certain teams or persons in the insider list. For example, employees working in the accounting department frequently have access only to information on individual figures and facts which in themselves do not constitute inside information but which may consolidate into inside information when seen in conjunction with other facts and figures.

As a general rule, simply listing all persons acting on behalf of the person or entity obliged to maintain an insider list constitutes a breach of the duty to correctly maintain insider lists. However, exceptions are possible where persons or entities obliged to maintain an insider list employ very few persons, e.g. providers of ad hoc disclosure services, or exchange-listed holding companies.

For the persons included in an insider list structured by function or area of confidentiality, the fact of their being included in the list does not mean that BaFin concludes that the persons named therein have had uninterrupted access to inside information during the entire period in which they were assigned to a function or an area. Otherwise, such persons listed would be prohibited from entering into any personal account dealings or directors’ dealings at all. This is not the objective pursued by the provision in section 15b of the WpHG.
VII.4.2 Information to be included

The information to be included in the list is specified in section 14 of the WpAIV.

VII.4.2.1 Details regarding the persons or entities obliged to maintain an insider list, and regarding the persons commissioned by them

Firstly, the insider list must bear the clearly-highlighted title "Insider list pursuant to section 15b WpHG". In addition, the name of the person or entity obliged to maintain the insider list and the names of the persons commissioned by such person or entity to maintain the insider list must be included in the list.

VII.4.2.2 Details on persons having access to inside information

With regard to persons to be included in the insider list due to their having access to inside information as part of their function, the list must include their full name, their date and place of birth as well as their private and business addresses. Except for their names, all other details may be replaced by a reference to another database (such as the personnel information system) provided that such details can be subsequently transferred into the insider list at any time without undue delay for the entire retention period.

VII.4.2.3 Reason for inclusion of such person in the list

Pursuant to section 14 no. 4 of the WpAIV, the reason for including a person in the list must also be assigned to the name of such person. Depending on how the list is structured, it must include the person’s assignment to a certain function or to a certain area, or that person’s exposure to certain inside information or assignment to a certain project.

VII.4.2.4 Commencement and end of access

Pursuant to section 14 sentence 1 no. 5 of the WpAIV, the insider list must also contain the date as of which the respective person has had access to inside information and, where applicable, the date as of which such access ceased.

These details vary depending on the way in which the insider list is maintained. When maintaining a list by function or area of confidentiality, the date to be referred to will be the date as of which the respective person has been assigned to the area in question, or has exercised the function in question. If this date was prior to entry into force of the AnSVG on 30 October 2004, 30 October 2004 may be recorded as the commencement date.

In the case of an insider list structured by inside information item or by project, what is decisive is the date since which the relevant person has had access to the respective information or has been involved in the project.

Absence times due to holiday and short-term sick leave need not be included.
For lists structured by function or area, the point in time from which access no longer exists depends on the date on which the employee left permanently or for a longer period of time. For lists structured by inside information item or project, the date when the information was published or, if applicable, the date when the inside information ceased being sensitive, or the date when the project ended must be stated.

**VII.4.2.5 Details on creation and updating of insider list**

The date when the list was created and the date of its last update must be stated.

**VII.5 Updates**

The insider list must be updated without undue delay if it contains information that is no longer true. This is particularly the case if the reason for inclusion of a person in the list has changed, new persons are to be added to the insider list, or persons appearing on the list no longer have access to inside information.

As already explained above, times of absence due to holiday or short-term sick leave of persons included in the list are not deemed a reason to update the list.

**VII.6 Obligations to inform**

Pursuant to section 15 b (1) sentence 3 of the WpHG, issuers are obliged to inform the persons included in the list regarding the legal obligations associated with access to inside information, and the legal consequences of violations.

In this regard, the Act provides for an express obligation only for issuers. However, since issuers are hardly able to comply with this obligation in respect of persons working for a service provider, the obligation to inform may be delegated to such service provider. On behalf of the issuer, such service provider shall then inform the persons included on the insider list about their legal obligations.

An example of the specific information to be communicated for this purpose is available for download from BaFin’s website at http://www.bafin.de/dok/2677782. To comply with this obligation, it is not necessary to re-inform employees every time new inside information arises. Instead, it is sufficient to inform them once, e.g. when they join the company.

No written confirmation that the person to be informed has acknowledged the information is required. However, from the perspective of the issuer, or any person commissioned by the issuer to perform the obligation to inform, this may be useful for documentation purposes.
VII.7  Form, retention and destruction of the insider list

It is up to the discretion of the persons or entities obliged to maintain an insider list to decide whether to retain the information on paper or on electronic data media as long as it is ensured that the information is available at all times and can be made available in readable form within a reasonable period.

Where BaFin requests a list to be submitted, it prefers submission in electronic form.

The lists must be stored so as to be accessible only to those persons who are responsible within the company for maintaining the list (e.g. members of the board of management) and those persons who have been instructed to maintain the list (e.g. compliance employees).

Once the data have been created, they must be retained for a period of six years so as to be able to ascertain at all times who had access to inside information at any time during the past six years. This period commences anew each time the list is updated. At the end of the retention period, the information must be destroyed.

VII.8  Penalties

Pursuant to section 39 (2) nos. 8 and 9 of the WpHG, a person or entity obliged to keep a list commits an administrative offence if such person or entity fails to keep a list or keeps such a list incorrectly or incompletely, or fails to submit this list or fails to submit it within the prescribed period. Pursuant to section 39 (4) of the WpHG, this administrative offence is punishable by a fine of up to €50,000.

Pursuant to section 15b (1) sentence 2 of the WpHG, BaFin may request submission of the insider list at any time without any specific grounds of suspicions being required.
VIII  Information on major holdings of voting rights

The transparency of the capital market is enhanced when market participants are aware of an exchange-listed company’s shareholder structure and learn of any major changes in voting rights. At the same time, this provides important indications of any company takeovers that may be impending. Lastly, information on changes in voting rights helps prevent inside information from being abused.

For this reason, natural persons and legal entities are obliged to disclose to BaFin and to the exchange-listed company the proportion of their voting rights as soon as such voting rights (as a result of an acquisition, sale or in any other way) reach, exceed or fall below one of the relevant thresholds. The exchange-listed company is then required to forward the notification without undue delay to a pool of different media for dissemination across Europe, and to the company register which stores the data. This two-tier procedure is attributable to European legislation which formed the basis for the provisions of major holdings.

VIII.1  Basic principles

Part 5 of the WpHG (information on major holdings of voting rights) has been changed significantly by the Transparency Directive Implementation Act (Transparenzrichtlinie-Umsetzungsgesetz – TUG). The TUG, which entered into force on 20 January 2007, transposes the Transparency Directive into German law. The Directive is designed to improve transparency on the European capital markets and to harmonise the corresponding rules throughout Europe. Its objective is to ensure that important company information is disclosed and kept available in databases on a pan-European basis. Thus, the Transparency Directive is intended not only to promote the development of an efficient, transparent and integrated securities market as part of the European Single Market but also to enhance investor protection. It establishes a new, two-tier regime for disclosure of capital market information under which information on major holdings of voting rights and other capital market information must be forwarded to media to ensure their publication, and thus their active dissemination, within the entire EU and the other EEA countries, and to an officially established electronic system for centralised storage so that the information is kept available as historical data over a protracted period.

39 Federal Law Gazette I 2007, p. 10
At the European level, Directive 2007/14/EC (Implementing Directive)\(^{41}\) clarifies the requirements of the Transparency Directive \textit{inter alia} with regard to the disclosure by investors of major holdings, the minimum standards for the dissemination of regulated information across Europe, and minimum requirements for the recognition of the equivalence of provisions of third countries (countries that are neither members of the EU nor members of the EEA.)

As far as possible, the TUG was drafted already giving regard to the Implementing Directive that was in the draft stage during the legislative process. Additional implementing measures, to the extent these required changes in legislation, were made within the framework of the Act Amending the Investment Act (\textit{Investmentänderungsgesetz} – InvÄndG) which entered into force on 28 December 2007\(^{42}\). With the Regulation Implementing the Transparency Directive (\textit{Transparenzrichtlinie-Durchführungsverordnung} – TranspRLDV)\(^{43}\), which entered into force on 21 March 2008, the remaining requirements of Directive 2007/14/EC have now been transposed into national law.

Additional amendments result from the Risk Limitation Act (\textit{Risikobegrenzungsgesetz} – RBG)\(^{44}\). The Act is designed, among other things, to enhance transparency on the financial markets so as to limit risks arising from financial investments.

The following measures are of key importance with regard to the disclosure obligations:

- Expansion and clarification of the provisions in the WpHG as well as in the WpÜG on the coordinated behaviour of investors (referred to as “acting in concert”). This provision entered into force on 19 August 2008.

- Aggregation of voting rights attached to shares and to similar positions in other financial instruments for the purposes of notifications under securities law provisions. This provision entered into force on 1 March 2009.

- In future, holders of qualifying holdings (10% of voting rights or more) are required to state to the issuer the purpose they are pursuing with the holding as well as the origin of the relevant financial resources. This provision entered into force on 31 May 2009.

- Prohibition of exercise of voting rights for a period of six months in the event of violation of notification obligations under securities trading law. This provision entered into force on 19 August 2008.

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42 Federal Law Gazette I 2007, p. 3089

43 Federal Law Gazette 2008 I, p. 408

44 Federal Law Gazette I 2008, p. 1666
VIII.2 Notification obligations

VIII.2.1 Overview

The prerequisites, deadline, contents, nature, language, scope and form of voting rights notifications are governed by section 21 of the WpHG in conjunction with sections 17 and 18 of the WpAIV. In addition, section 21 (1) of the WpHG defines the term “notifying party” (i.e. persons or entities subject to the notification obligation) and section 21 (2) of the WpHG explains in respect of which issuers the submission of voting rights notifications may be required. Section 22 of the WpHG determines in which cases voting rights attached to shares owned by a third party are attributed to the person or entity subject to the notification obligation, and thus broadens the material scope of their notification obligation. Section 23 of the WpHG provides for exemptions from inclusion of voting rights in calculating the percentage of voting rights. Section 24 of the WpHG, in the case of group companies, allows the notification obligation of the subsidiary or subsidiaries to be performed by the parent company. Section 25 of the WpHG provides for a separate notification obligation relating to holdings in other financial instruments. Sections 27, 29 and 30 of the WpHG contain procedural rules and section 28 of the WpHG contains provisions on the civil-law consequences of violations of the notification obligation.

VIII.2.2 Issuer whose home country is the Federal Republic of Germany

Pursuant to section 21 (1) sentence 1 of the WpHG, the notification obligations relate to issuers whose home country pursuant to section 2 (6) of the WpHG is the Federal Republic of Germany (see IV.2.1.1.2. and IV.2.1.3.).

Pursuant to section 21 (2) of the WpHG, however, not all issuers whose home country may be Germany are covered by this definition; rather, where the provisions on changes in voting rights are concerned, the term “issuer” is limited to those issuers whose shares are admitted to trading on an organised market within the meaning of section 2 (5) of the WpHG.

Consequently, only section 2 (6) no. 1 of the WpHG is relevant for determining the issuers for which notification obligations apply under the WpHG. According to this provision, an issuer’s home country is thus the Federal Republic of Germany only if the issuer

- is domiciled in Germany and its shares are admitted to trading on an organised market in Germany, or in another EU or EEA country, or;
- is domiciled in a third country and its shares are admitted to trading on an organised market in Germany or in another EU or EEA country, and is required to file the annual document within the meaning of section 10 of the WpPG with BaFin.
VIII.2.3 Notification obligation for voting rights attached to shares in the case of already exchange-listed issuers (section 21 (1) of the WpHG)

If a person, whether natural or legal, reaches, exceeds or falls below certain thresholds of voting rights in an issuer whose home country is the Federal Republic of Germany, it must notify both the issuer and BaFin of such fact without undue delay, however, no later than four trading days (section 21 (1) of the WpHG).

VIII.2.3.1 Thresholds

Pursuant to section 21 (1) sentence 1 of the WpHG, the relevant thresholds are 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%.

The thresholds relate to voting rights – and not to shares, for instance – in issuers whose home country is the Federal Republic of Germany. Such voting rights will generally correspond to the capital interests held in a company, since each share confers the same voting right (section 12 (1) of the AktG). However, companies may also issue preference shares, which as a rule do not confer voting rights. In certain circumstances (sections 140 (2), section 141 (4) of the AktG), however, the voting right of these shares may revive, with the result that the preference shares must be treated in the same way as ordinary shares with voting rights.

Where a person is entitled to voting rights attached to shares held directly, and such person is attributed further voting rights pursuant to section 22 of the WpHG, the aggregate of the voting rights is decisive for the question of whether or not a threshold was reached, exceeded or fallen below, which requires notification. For example, if the person or entity subject to the notification obligation exceeds a threshold only in respect of its voting rights attached to directly held shares, but not in respect of its entire voting rights (aggregate of voting rights attached to directly held shares and attributed voting rights), this does not establish an obligation to submit a further notification.

Example:

A person holds 2% of his shares directly, and 4% of his voting rights are attributed to him by reason of a proxy. The person’s entire voting interest is 6%, for which he submitted a proper voting rights notification. If such person now purchases an additional shareholding of 2.5%, his entire voting interest increases from 6% to 8.5%. Since this person does not exceed any further threshold, the transaction does not trigger any additional notification obligation.

Neither does a change from voting rights attached to directly held shares to attributed voting rights (or vice versa) give rise to a notification obligation (see VIII.2.5.).

VIII.2.3.2 Calculation of voting interest

The voting interest is calculated according to the ratio of the number of own shares (numerator) to the total number of voting rights (denominator).
For the number of voting rights attributed to the person or entity subject to the notification obligation (numerator), it is irrelevant whether or not the voting rights can be exercised (abstract view). For this reason, section 28 of the WpHG also requires the person or entity subject to the notification obligation to also count non-exercisable voting rights.

Own shares must be included in the total number of voting rights (denominator). For this reason, the total number of voting rights is reduced only when own shares are redeemed and the capital is reduced.

However, own shares are not included in the calculation of the number of own voting rights (numerator). For example, where an issuer itself acquires own shares, no notification obligation pursuant to section 21 (1) of the WpHG arises. However, for such cases the WpHG does provide for a disclosure obligation under section 26 (1) sentence 2 of the WpHG (see VIII.3.2.).

Pursuant to section 17 (4) of the WpAIV, the person or entity subject to the notification obligation may calculate the voting interest on the basis of the last publication pursuant to section 26a of the WpHG. However, if an issuer, having made such publication, then launches a capital increase, for example, before a new publication pursuant to section 26a of the WpHG with regard to the increase in the total number of voting rights has been submitted, this may result in notifications whose notified voting interest is not equal to the actual interest.

Example:

An issuer has published the total number of voting rights pursuant to section 26a of the WpHG. This is followed by a capital increase resulting in an increase in the total number of voting rights. After the total number of voting rights has increased as a result of the capital increase not yet published pursuant to section 26a of the WpHG, a shareholder who is just under the threshold of 30% acquires further shares. Based on the figure last published pursuant to section 26a of the WpHG, the threshold of 30% would be exceeded. However, based on the current number of voting rights which is actually higher, the threshold of 30% has not been exceeded. A notification would therefore be confusing since the threshold for control provided for in the WpÜG in fact has not yet been reached.

Pursuant to section 17 (4) of the WpAIV, the last publication pursuant to section 26a of the WpHG may serve as a basis for the total number of voting rights. However, where the person or entity subject to the notification obligation knows that the total number last published is not correct, the actual registered share capital existing in accordance with stock corporation law is to be used as a basis for calculating the voting interest. The same applies if the person or entity subject to the notification obligation should have been aware of the same. Holders of major holdings have to meet more stringent duties of care in this regard. It is always possible and legally permissible for the person or entity subject to the notification obligation to take the correct, actual number of voting rights as a basis.
VIII.2.3.3 Threshold being crossed or reached as a result of acquisition or disposal

Acquisition or disposal of shares includes the voting rights attached to such shares. Based on the prohibition of split-off under corporate law regulations, voting rights and the shares to which they are attached may not be acquired or disposed of separately.

Acquisition takes place only when the acquiring party obtains title in the shares. As a general rule, this takes place on the date when the shares are credited to the securities account.

A disposal thus takes place only when the disposing party loses title in the shares. As a general rule, this happens when the shares are withdrawn from the disposing party’s securities account. Since in the vast majority of cases shares are not temporarily acquired by credit institutions involved, the dates of the delivery and withdrawal should be identical.

For acquisition and disposal, the legal act altering the right in question (Verfügungsgeschäft) is therefore decisive. However, acts and agreements performed or entered into in advance may, depending on their specific form, meet the elements for attribution pursuant to section 22 of the WpHG or fall under section 25 of the WpHG.

VIII.2.3.4 Threshold being crossed or reached “otherwise”

Thresholds may also be crossed or reached otherwise without the shareholder’s involvement. This applies, for example, to capital increases or capital reductions, measures designed to restructure the registered share capital, universal succession in the case of inheritance, or revival of voting rights in the case of preference shares. In addition, thresholds may also be crossed or reached otherwise, i.e. without an own acquisition or disposal, where attributions of voting rights are established or such attributions cease to exist pursuant to section 22 of the WpHG (e.g. in the case of granted proxy/expiry of such proxy authorisation, establishment/cessation of capacity as parent entity, etc.).

VIII.2.3.4.1 Measures for procuring and reducing capital

VIII.2.3.4.1.1 Capital increases against contributions, authorised capital, capital increases from company funds, and capital reductions

Capital increases made against contributions from company funds as well as capital reductions take effect only upon execution (in the case of capital increases) or registration of the capital reduction resolution in the commercial register (for capital reductions). The registration is constitutive. It is only when such registration is effected that the voting rights come into existence (sections 189 and 211 of the AktG) or cease to exist (section 224 of the AktG), resulting in a change in the total number of voting rights. The same applies to authorised capital since section 203 (1) sentence 1 of the AktG refers to section 189 of the AktG. In other words, rights of membership and voting rights come into existence when the capital increase is registered in the commercial register; the securitisation of the share is not relevant. At the same time, the voting rights vest directly with the initial subscriber of the shares, i.e. they do not vest in the issuer first. If the capital increase is carried out with the involvement of a credit institution as part of a syndicate of banks, such credit institution will frequently subscribe all shares of the capital increase as initial subscriber, and in the event of a threshold being
exceeded must submit a notification in this regard when the capital increase is registered in
the commercial register. After the shares have been transferred to the secondary subscribers
(the actual shareholders), the credit institution then notifies that it has fallen below the
notification thresholds. For details regarding exemptions, please refer to the explanations with
regard to section 23 of the WpHG under VIII.2.6.

In the event of a capital reduction resulting from the redemption of shares, the
registered share capital is reduced upon registration of the resolution or, in the case where
redemption of shares takes place subsequently, upon redemption (section 238 of the AktG).

At the point in time when the capital increase is registered, shareholdings may also fall
below the thresholds as a result of dilution. By contrast, in the case of capital reductions the
thresholds may be exceeded at the time of registration due to a reduction in the total number
of voting rights.

VIII.2.3.4.1.2 Contingent capital increases

In the case of a contingent capital increase, the registered share capital increases upon
issuance of the new shares (section 200 of the AktG). Subsequent registration in the
commercial register (section 201 of the AktG) merely has declaratory significance. The
registered share capital and thus the total number of voting rights changes with each
additional issuance of shares. For issuance, delivery to the subscriber is required in addition to
an issuance agreement which must be entered into. Such delivery normally takes place at the
same time as the shares are credited to the securities account.

In some cases the person or entity subject to the notification obligation may be required to
inquire with the issuer about when the shares (and what number of shares) are issued so that
the exact date on which the threshold was crossed or reached can be determined (see VIII.
3.3.2.).

VIII.2.3.4.2 Notification obligations in the event of corporate restructurings

VIII.2.3.4.2.1 Mergers pursuant to sections 2 et seq. of the Transformation Act
(Uwandlungsgesetz – UmwG)

VIII.2.3.4.2.1.1 Merger by absorption (section 2 no. 1 of the UmwG)

Example:

Company A, whose shares are admitted to trading on an organised market, is merged
into company B (whose shares are likewise admitted to trading on an organised market),
whereby company A transfers all its assets to company B by way of absorption. As a
result, A ceases to exist.

Since company A has ceased to exist, it can no longer be an addressee of voting rights
notifications. Consequently, company A itself (i.e. for notifications to other issuers) and
A’s former shareholders (in respect of the dissolved company A) are no longer subject
to notification obligations with respect to A. However, the existing shareholders of the
transferor company A as a general rule become shareholders of the transferee company B. For this reason, obligations to submit notifications in respect of company B may arise because of the relevant thresholds being exceeded.

Notification obligations on the part of the transferee company B are also conceivable, for example if the transferor company A held shares in another issuer which were transferred to company B as a result of the merger. If a change in the total number of voting rights takes place at the transferee company B, this may also give rise to notification obligations on the part of B’s existing shareholders.

VIII.2.3.4.2.1.2 Merger by formation of a new company (section 2 no. 2 of the UmwG)

Example:

Companies A and B, whose shares are admitted to trading on an organised market, are merged, whereby A and B transfer all their assets to company C, a new company they formed.

In respect of the notification obligations, a merger by formation of a new company generally takes place along the same lines as a merger by absorption. No obligations apply with respect to A and B which have ceased to exist. However, the following special rules apply where former shareholders of A or B become shareholders of the newly formed company C: shareholders of the new company C, where shares of company C are admitted to trading on an organised market, are required to submit notifications pursuant to section 21 (1a) of the WpHG. In the event that the shares of company C were already admitted to trading on an organised market when the company was formed, the notification obligation pursuant to section 21 (1) of the WpHG may apply.

If legal entities subject to the notification obligation are merged, the following applies:

Notification obligations can no longer apply to the legal entity which ceased to exist as a result of the merger. The transferee company therefore does not have to submit any notifications on behalf of the legal entity that ceased to exist if the voting interest falls below a threshold. However, a notification obligation is conceivable in a scenario where the merger results in the transferee company exceeding the thresholds of section 21 (1) sentence 1 of the WpHG.

VIII.2.3.4.2.2 Change in legal form pursuant to sections 190 et seq. of the UmwG

In the event of a change in legal form pursuant to sections 190 et seq. of the UmwG, the legal entity merely assumes a new legal form but otherwise remains the same.
Given the legal entity’s continued existence, the legal regulations governing the voting rights do not change. For this reason, no thresholds are being crossed or reached and no notification obligations arise. Since the legal entity does not change if its company name is changed, this alone cannot result in voting rights exceeding, falling below or reaching a threshold. Consequently, no notification obligation applies in such cases.  

**VIII.2.3.5 Notification obligation in the case of several threshold being crossed or reached within one day, and in the event of voting interest exceeding and falling below a threshold on the same day**

If within the same day, the percentage of voting rights exceeds or falls below thresholds several times in one direction, it is sufficient to make one voting rights notification at the end of the day.

*Example:*

If a person or entity subject to the notification obligation e.g. exceeds the threshold of 5% in the morning, the threshold of 10% at noon, and the threshold of 15% in the afternoon, it is sufficient to make only one notification in which the exceeding of the thresholds of 5%, 10% and 15% is stated.

If a person or entity subject to the notification obligation first exceeds and then falls below (or first falls below and then exceeds) the same thresholds within one day, BaFin (provided that the voting rights are not exercised on such day) permits a netting to be performed so that no notification is required.

*Example:*

If a person or entity subject to the notification obligation exceeds the threshold of 10% in the morning and falls below such threshold in the afternoon, without crossing or reaching any other threshold, such person or entity is not required to submit any notification.

If the threshold is exceeded on one day and the voting interest falls below the threshold only on the next day or later, two notifications must be submitted.

A general netting of long and short positions (such as call and put options) is not permitted.

**VIII.2.3.6 Date on which the threshold was crossed or reached**

The legal situation *in rem* is decisive when it comes to determining the date on which a threshold was crossed or reached as a result of an acquisition or disposal. As the date on which it *exceeds a threshold*, the acquiring party must give the date on which it acquires title in the shares.

Accordingly, the disposing party, as the date on which it *falls below a threshold*, must state the date on which it loses title to the shares.

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45 Higher Regional Court of Düsseldorf (OLG Düsseldorf), decision of 10 September 2008, case ref. 1-6 W 30/08; Krefeld District Court (LG), judgment of 20 August 2008, case ref. 11 O 14/08. For a different view, see Cologne District Court, judgment of 5 October 2007, case ref. 82 O 114/06 – not res judicata.
Thresholds that are not crossed or reached as a result of an acquisition or disposal but are crossed or reached otherwise are governed by different rules, for example where the voting interest falls below a threshold after being diluted by a capital increase (see VIII.2.3.4.).

For the attribution elements pursuant to section 22 (1) and (2) of the WpHG to be satisfied (in this regard, see VIII.2.3.4. et seq.), other dates may also apply. For example, where a proxy has been validly appointed, thresholds may be exceeded by way of attribution pursuant to section 22 (1) sentence 1 no. 6 of the WpHG.

VIII.2.3.7 Person or entity subject to the notification obligation

Anybody, i.e. any natural person or any legal entity regardless of its legal form, may be subject to the notification obligation. A natural person’s nationality and place of residence, or registered office in the case of legal entities, is of no relevance in this regard. Accordingly, the group of persons and entities normally concerned may also include foreign private shareholders having their place of residence abroad, general partnerships (Offene Handelsgesellschaft), limited partnerships (Kommanditgesellschaft), partnership companies (Partnerschaftsgesellschaft), civil-law partnerships engaging in outward dealings with third parties (BGB-Außengesellschaft) as well as legal entities organised under foreign law. The same applies to corporations organised under public law such as the federal government, the federal states, and other countries.

VIII.2.3.8 Depositary receipts

Section 21 (1) sentence 2 of the WpHG provides that, for certificates representing shares (such as depositary receipts), exclusively the certificate holder and not the issuer of the certificate (depositary bank) is deemed to be the shareholder and is thus deemed to be subject to the original notification obligation pursuant to section 21 (1) of the WpHG. By this provision, BaFin’s past administrative practice in this regard was enshrined in law.

VIII.2.3.9 Notification

VIII.2.3.9.1 Addressees of the notification

The notification must be submitted both to issuers whose home country is the Federal Republic of Germany and in which the voting rights exist, and to BaFin (by fax: +49 228 4108 3119 or by mail: Postfach 50 01 54, 60391 Frankfurt am Main).

VIII.2.3.9.2 Content of the notification

Pursuant to section 17 (1) of the WpAIV, the notification must contain the following details:

- the clearly-highlighted title “Voting rights notification” (section 17 (1) no. 1);

- the name and address of the person or entity subject to the notification obligation (section 17 (1) no. 2);

- the name and address of the issuer (section 17 (1) no. 3);
• the threshold that was crossed or reached and the information whether the voting rights have exceeded, fallen below or reached this threshold (section 17 (1) no. 4);

• the voting rights held (expressed as both a percentage and the number of voting rights (section 17 (1) no. 5) – the date on which the threshold was crossed or reached is decisive;

• the date the voting rights have exceeded, fallen below or reached a threshold (section 17 (1) no. 6); and

• the information whether and how many voting rights were obtained by exercising the right conferred by financial instruments within the meaning of section 25 (1) sentence 1 of the WpHG to acquire shares in an issuer whose home country is the Federal Republic of Germany (section 17 (1) no. 7).

When stating the details pursuant to section 17 (1) no. 4 of the WpAIV, the person or entity subject to the notification obligation must consider that a threshold, in the strictly correct sense, is reached only if the share of voting rights exactly matches the threshold value.

Example:

An issuer’s total number of voting rights is 1,000,000.

The number of voting rights held is 100,000.

In this example, the voting interest is exactly 10%, which requires the following notification: "... has reached the threshold of 10% and now amounts to 10.00% (100,000 voting rights)." If the person or entity subject to the notification obligation now acquires one additional voting right, such person or entity then must notify that it has exceeded the 10% threshold.

If in the above example the number of voting rights held is now, e.g., 100,010 voting rights, the notification must read as follows: "... has exceeded the threshold of 10% and now amounts to 10.001% (100,010 voting rights)." In such cases, figures should not be rounded to the nearest hundredth.

When stating the voting interest currently held pursuant to section 17 (1) no. 5 of the WpAIV, the person or entity subject to the notification obligation must state both the absolute number of voting rights and a percentage rounded to the nearest hundredth.

The statement pursuant to section 17 (1) no. 7 of the WpAIV is required only if the acquisition of shares to which voting rights are attached arising from the exercise of financial instruments results in a threshold pursuant to section 21 (1) sentence 1 of the WpHG being crossed or reached. A further requirement for the statement pursuant to section 17 (1) no. 7 of the WpAIV is that the person or entity subject to the notification obligation has already notified or should already have notified the holding of financial instruments pursuant to section 25 (1) sentence 1 of the WpHG.
In complex scenarios such as group structures, it is advisable to provide BaFin, in addition to the voting rights notifications, with overviews of the group structures concerned (in the form of organisation charts) and with background information, unless such information is already known to BaFin from previous notifications.

Where a correction to a past notification is required, the person or entity subject to the notification obligation must state that this is a “Correction to the notification dated [insert date]”.

BaFin does not permit submission of pre-emptive notifications. Should any questions of doubt arise, these should be clarified with BaFin.

As a general rule, voluntary notifications (where no relevant thresholds have been crossed or reached) should generally not be made. Voluntary notifications may be submitted only in justified exceptional cases and after advance consultation with BaFin.

For details on further information to be stated in the event of attribution elements, please refer to VIII.2.5.11.

**VIII.2.3.9.3 Nature, form and language of the notification**

Notifications must be sent in writing, by mail or fax to the issuer and to BaFin. The notification must be signed (electronic or scanned signatures are not sufficient). The person or entity subject to the notification obligation may choose between the German and the English language (section 18 of the WpAIV).

**VIII.2.3.9.4 Time limit**

The person or entity subject to the notification obligation must make the notification without undue delay. Accordingly, the notification must take place after four trading days at the latest. Pursuant to section 21 (1) sentence 3 of the WpHG, such notification period begins when the person or entity subject to the notification obligation learns or in consideration of the circumstances must have learned that its percentage of voting rights has reached, exceeded or fallen below the relevant thresholds. It is assumed that the person or entity subject to the notification obligation learns of this two trading days after reaching, exceeding or falling below the thresholds mentioned (section 21 (1) sentence 4 of the WpHG). However, this assumption can only be of relevance in exceptional cases since the person or entity subject to the notification obligation as a general rule is deemed to have knowledge of the circumstances on the same day the threshold was crossed or reached.

Notification to BaFin must take place simultaneously with the notification to the issuer. The requirements of such simultaneous notification are still deemed to be satisfied if notifications are sent one immediately after the other.

For the purposes of calculating the time limit, the day on which the person or entity learns of, or must have learned of the threshold being crossed or reached is not included. Trading days are all calendar days other than Saturdays, Sundays or public holidays that are legally recognised in at least one Federal State (section 30 (1) of the WpHG). A public holiday recognised in a Federal State is one that is recognised as such in that Federal State, and not just in certain municipalities or districts of the same.
For the purpose of calculating the time limit, BaFin has posted on its website a calendar of trading days pursuant to section 30 of the WpHG (http://www.bafin.de/dok/2675916).

BaFin will not grant an extension to the time limit.

### VIII.2.3.9.5 Standard form of BaFin (section 21 (1) of the WpHG)

For notifications, BaFin recommends using the standard form available on the BaFin website at www.bafin.de >> English >> Companies >> Listed companies >> Major holdings of voting rights >> Standard Form for notifications of voting rights and Sample text for notifications and publications. In the event that it should not be possible to use the standard form, BaFin recommends issuing the notification based on the samples texts drafted by BaFin.⁴⁶

### VIII.2.4 Notification obligation upon first-time admission to exchange trading (section 21 (1a) of the WpHG)

#### VIII.2.4.1 Prerequisites

Where a company is listed on a stock exchange for the first time, section 21 (1a) of the WpHG establishes a notification obligation for shareholders holding an interest of 3% or more of the voting rights in an issuer whose home country is the Federal Republic of Germany. This notification obligation arises on the point in time when the shares of such issuer are admitted to trading on an organised market for the first time. In this regard it should be noted that it is not the time when the shares are listed for the first time that is decisive, but instead the time of their first-time admission. The time of first-time admission is stated in the decision approving the admission.

#### VIII.2.4.2 Notification

With regard to the addressee(s), content, nature, form and language of and time limit for the notification, there are in principle no differences versus the notification pursuant to section 21 (1) of the WpHG (see VIII.2.3.), except that in a notification pursuant to section 21 (1a) of the WpHG no thresholds must be stated.

#### VIII.2.4.3 Standard form of BaFin (section 21 (1a) of the WpHG)

For notifications, BaFin recommends using the standard form available on the BaFin website at http://www.bafin.de/dok/2784890. In the event that it should not be possible to use the standard form, BaFin recommends issuing the notification based on the samples texts drafted by BaFin.⁴⁷

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⁴⁶ http://www.bafin.de/dok/2784908
⁴⁷ http://www.bafin.de/dok/2784908
VIII.2.5 Attribution of voting rights pursuant to section 22 of the WpHG

Section 22 (1) of the WpHG takes an abstract approach to the attribution of voting rights. Where the required criteria for the relevant attribution are satisfied, an attribution of voting rights takes place even where the person or entity to whom the voting rights are attributed (based on the provision agreed in the individual case) does not have any legal claim to compliance with its instructions, or where such person or entity declares that it will not exert any influence (or does not exert any actual influence). The purpose of this provision is to create transparency with regard to the legal and actual voting power and control structure of the company concerned.

Likewise, where a person or entity changes from holding the voting rights attached to shares directly to being attributed such voting rights pursuant to section 22 of the WpHG, this does not establish any notification obligation. The same applies to changes from one attribution criterion to another.

Example:

A, as shareholder, holds 5% of the voting rights attached to shares in issuer B. If A sells all its shares to its subsidiary C, it loses its title in the shares and in principle is subject to the notification obligation pursuant to section 21 (1) of the WpHG. However, since the 5% of the voting rights is attributed to A pursuant to section 22 (1) sentence 1 no. 1 of the WpHG, and A’s interest has merely changed from being held “directly” to being held “indirectly”, it is not required to make any notification.

The attribution criteria defined by statute are exhaustive.

VIII.2.5.1 Shares owned by a subsidiary of the person or entity subject to the notification obligation (section 22 (1) sentence 1 no. 1 and sentence 3 of the WpHG)

Voting rights attached to shares in the issuer owned by a subsidiary of the person or entity subject to the notification obligation are fully attributed to such person or entity pursuant to section 22 (1) sentence 1 no. 1 of the WpHG. For details on exemptions to this rule in connection with asset management companies (Kapitalanlagegesellschaften) and management companies (Verwaltungsgesellschaften) (section 32 (2) to (4) of the Investment Act (Investmentgesetz – InvG)) as well as investment services enterprises (section 22 (3a) and section 29a (3) of the WpHG), please refer to VIII.2.5.10. et seq.

The shares are deemed to “belong to” the subsidiary where such subsidiary holds civil-law title in the shares.
Section 22 (3) of the WpHG defines subsidiaries as companies which are deemed subsidiaries within the meaning of section 290 of the HGB or upon which a controlling influence can be exerted, irrespective of their legal form and domicile. According to this definition, subsidiaries are thus companies

- which are part of a group under the uniform control of a corporation (parent) and whose parent company holds an equity interest in them pursuant to section 271 (1) of the HGB (section 290 (1) of the HGB), in which another company holds a majority of voting rights, for which another company has the right to appoint or remove the majority of the members of the administrative, managing or supervisory body; or on which the other company is able to exert a controlling influence by reason of a controlling agreement or a provision contained in the articles of association (section 290 (2) of the HGB; "control concept");

- which are controlled indirectly pursuant to section 290 (3) of the HGB (sub-subsidiary, i.e. the subsidiary of a subsidiary company).

Moreover, subsidiaries are companies on which the person or entity subject to the notification obligation is able to exert a controlling influence. The assessment of whether or not a controlling influence exists is governed by the principles of section 17 of the AktG. Since this is irrespective of their legal form and domicile (section 22 (3) of the WpHG) natural persons, too, may be deemed parent companies.

**VIII.2.5.1.2 Attribution of voting rights in the case of a GmbH & Co. KG**

In the case of a GmbH & Co. KG (which is a special form of limited partnership) in which a corporation participates as general partner) organised subject to the standard rules of statute (i.e. powers to manage and represent the company as defined by statute vest with the general partner), the general partner GmbH is generally deemed to be the parent of the GmbH & Co. KG pursuant to section 22 (3) of the WpHG in conjunction with section 290 (1) of the HGB, as well as pursuant to section 22 (3) of the WpHG in conjunction with section 290 (2) no. 2 of the HGB. Pursuant to section 22 (1) sentence 1 no. 1 in conjunction with section 22 (3) of the WpHG, voting rights are therefore generally attributed to the general partner GmbH in a GmbH & Co. KG organised under the standard rules of statute.

For other forms of GmbH & Co. KG organised under individual contractual agreements, the potential status of the GmbH as parent company will depend on the relevant provisions contained in the articles of association. What is decisive in each case is the extent to which the GmbH, as general partner, actually exercises uniform control according to the provisions of the articles of association, or whether these provisions satisfy the elements of one of the cases of section 290 (2) of the HGB. This has to be assessed giving due regard to the circumstances of each individual case on the basis of the articles of association. However, a limited partnership company (Kommanditgesellschaft – KG) may not be considered a subsidiary of the general partner GmbH where the latter is excluded from managing the company.
Where management powers of the general partner GmbH are not completely excluded but are subject to restrictions, it must be clarified in the individual case whether this situation still constitutes a case of uniform control (section 290 (1) of the HGB) or of control pursuant to section 290 (2) of the HGB.

It is therefore not possible to make a general statement that applies to all forms of GmbH & Co. KG.

The statement above that, in a GmbH & Co. KG organised under the standard rules of statute, the limited partnership company is the subsidiary of the GmbH, can also be applied to a limited partnership company which is not a GmbH & Co. KG. From this it follows that a limited partnership company is always the subsidiary of the general partner if the company is organised under the standard rules of statute.

A special provision applies to the case of a consolidated unit company (Einheitsgesellschaft), in which the limited partnership company holds all shares in the GmbH, ultimately creating a single company. In such cases the GmbH never acts as parent of the limited partnership company; rather, the limited partnership company in such cases is deemed to be the parent of the GmbH. As a result, an attribution to the GmbH is excluded.

VIII.2.5.1.3 Attribution of voting rights in the case of foundations (Stiftungen)

In a foundation (Stiftung), no rights of membership exist. As a general rule, therefore, a foundation is not a dependent company because no participating interests are held in it. That in turn means that no attribution takes place beyond the foundation itself.

However, constructive control of a foundation is possible. Such constructive control arises when one person is granted a right of appointment and removal in respect of the foundation’s managing bodies by virtue of the foundation’s articles. In such cases, attribution is deemed to be made to such controlling person.

Whether or not such person is a founder is of no relevance in this connection. It is also irrelevant whether the person holding the right of appointment and removal is a member of one of the foundation’s bodies.

VIII.2.5.1.4 Special features in the case of trusts

The concept of a trust is commonly found in Anglo-American jurisdictions, it being necessary to distinguish between trusts having their own legal personality and those without their own legal personality.

In the case of trusts not having their own legal personality, the trust assets constitute a kind of a fund. The legal owner of the trust assets is generally the trustee, which means that there is an original notification obligation on the part of the trustee but not on the part of the trust.

By contrast, trusts having their own legal personality are themselves subject to the notification obligation because they can be owners. Such trusts are similar in their form to foundations, since here also it is not possible for participating interests to be held. Nonetheless, these trusts
may also be controlled, for example if one person has a right of appointment and removal in respect of the trust's managing bodies. This right may be established by the articles of the trust, but also under the legal provisions governing the trust.

VIII.2.5.1.5 Multi-parent control

A subsidiary may also be controlled jointly by several companies acting at the same corporate level. Where such controlling influence pursuant to section 22 (3) of the WpHG in conjunction with section 17 of the AktG is exerted, the principles of multi-parent control are applicable.

Multi-parent control may exist in the case of a horizontal group of parent companies pursuant to section 18 (2) of the AktG. Multi-parent control may be brought about as a result of contractual agreements on uniform voting, but may also arise from the actual circumstances as in the case of overlapping membership on corporate bodies. When assessing such cases, the viewpoint of the controlled company is decisive.

It should also be noted that participation on a parity basis (50:50) does not automatically lead to multi-parent control. In this case, a constructive compulsion to agree does not necessarily exist since in a stalemate situation it might happen that company resolutions are not adopted (which in turns means that, from the company's viewpoint, it is not controlled by both entities jointly). For multi-parent control, additional circumstances are therefore required, also in the case of 50:50 participating interests.

Given the numerous possible scenarios and the difficulties of making an assessment in the individual case, persons or entities potentially subject to the notification obligation should contact BaFin at an early stage in order to clarify in advance whether or not multi-parent control actually exists in the specific case.

VIII.2.5.2 Held for the account of persons or entities subject to the notification obligation (section 22 (2) sentence 1 no. 2 of the WpHG)

Pursuant to section 22 (1) sentence 1 no. 2 of the WpHG, voting rights attached to shares in the issuer owned by a third party are fully attributed to the person or entity subject to the notification obligation if such third party holds the shares for the account of the person or entity subject to the notification obligation. In this case also, an abstract view is to be taken. In other words, it does not matter whether the way in which the voting rights are exercised is actually influenced.

The shares are deemed to be owned by a third party where such third party holds civil-law title in the shares.

By defining the two concepts of being “owned by” and “held on behalf of” the person or entity, the WpHG describes scenarios which are classified differently depending on whether they are assessed from a legal or economic perspective. For the purposes of establishing that shares are held for the account of the person or entity subject to the notification obligation, the point of reference is therefore the fact that the risks and rewards attached to the shares are borne not by the owner of the shares (the third party) but the person to whom those shares must be attributed (the person or entity subject to the notification obligation). What is decisive is the risks borne with respect to the change in the exchange price and in dividend entitlement, including subscription rights and any compensation payments.
VIII.2.5.2.1 Administrative trusts (Verwaltungstreuhand)

A third party is deemed to hold shares for the account of the person or entity subject to the notification obligation particularly when it holds them in trust. This is a typical fiduciary trust (Vollrechtstreuhand) in which the trustee (the third party) holds title to the shares in the external relationship. For the purposes of the definition of section 22 (1) sentence 1 no. 2 of the WpHG, it is sufficient for the trustee to be required by reason of an internal legal relationship (usually an order or an agency contract) to exercise the voting right in the interest of the trustor, or (in the absence of such agreement) for such requirement to be clear from the nature of the interests involved (trust for the benefit of others).

VIII.2.5.2.2 Securities lending

From a legal perspective, a securities lending transaction is classified as a non-financial loan within the meaning of section 607 of the BGB.

Under this transaction, the lender transfers to the borrower title in securities from its securities portfolio for a certain period in return for payment of a user fee. On maturity of the transaction, the borrower is obliged to deliver to the lender securities of the same type and quantity. Dividends on the securities must be forwarded to the lender.

Simple securities loan

A simple securities loan, which is very rare in practice, is a transaction in which re-sale of the shares by the borrower is not intended or permitted. From the viewpoint of civil law, title in the shares is transferred to the borrower. However, beneficial ownership in the shares remains with the lender, since it is generally the one that holds the risks and rewards (for example, dividends go to the lender who is also granted the subscription rights). Since the shares are not re-sold by the borrower, the possibility of the lender exerting an influence over how the voting rights are exercised cannot be ruled out. The borrower is thus deemed to hold the shares “for the account of” the lender, and for this reason the voting rights attached to the “loaned” shares continue to be attributed to the lender.

The following notification obligations apply:

Where applicable, the borrower must notify a threshold being exceeded pursuant to section 21 (1) of the WpHG due to acquisition of title. The lender, however, is not required to make any notification. Although the lender has lost title in the shares, the voting rights attached to the shares continue to be attributed to the lender pursuant to section 22 (1) sentence 1 no. 2 of the WpHG because the borrower holds the shares for the lender’s account. A change from holding shares directly to holding shares indirectly is not subject to the notification requirement.

If the loan is returned, the borrower in certain cases may have to notify that its interest has fallen below a relevant threshold due to loss of title. In this case also, the lender has no notification obligation.
Chain securities lending (*Ketten-Wertpapierleihe*)

The most common form of such transactions is chain securities lending under which the shares loaned are re-sold by the borrower for example to fulfil delivery obligations as a result of short-selling transactions, or under another securities lending transaction.

Since the borrower’s re-sale of the shares might result in the lender’s percentage of voting rights falling below a relevant threshold, the lender would, in principle, be obliged to notify this at the time of such re-sale. This is because as soon as title is lost, the borrower no longer holds the shares for the lender’s account, and the elements of attribution pursuant to section 22 (1) no. 2 of the WpHG are no longer satisfied. However, this is impracticable: the lender would constantly have to be inquiring with the borrower as to whether the latter has already re-sold the shares.

By reason of the intended re-sale of the shares by the borrower that normally must be assumed, BaFin therefore considers that attribution to the lender already ends when the shares are transferred to the borrower. Already from this point in time, the lender must comply with any arising notification obligations. In this regard, it does not matter whether the shares have actually been re-sold by the borrower: as soon as the lender loses title in the shares, it is subject to the notification obligation if its voting rights fall below a relevant threshold. If it recovers title in the shares, it must notify having exceeded a relevant threshold.

The same applies to securities lending transactions performed in the context of a greenshoe option for an initial public offering.

However, where securities lending is performed in connection with a capital increase, the point in time when attribution to the lender ends depends on when the new shares are placed. In transactions structured in this way, the existing shareholders usually make shares available to the syndicated banks by means of securities lending. The syndicated banks can then use these shares to fulfil subscription orders placed by subscribers already before the capital increase is registered. When transfer of the shares subscribed commences, however, the syndicated banks must inform the existing shareholders granting the securities loan with regard to the use of the securities loaned so as to enable them to comply with any notification obligations arising for them due to the change in their voting rights.

Based on BaFin’s existing administrative practice, the lender’s recovery claim as such does not give rise to any notification obligation pursuant to section 25 of the WpHG (see V.3.7.12. and VIII.2.8.3.2. and the statements made with regard to section 25 of the WpHG).

**VIII.2.5.3 Assigned as collateral to a third party (section 22 (1) sentence 1 no. 3 of the WpHG)**

Pursuant to section 22 (1) sentence 1 no. 3 of the WpHG, the person or entity subject to the notification obligation is attributed voting rights attached to shares in an issuer which such person or entity subject to the notification obligation has assigned as collateral to a third party, unless such third party is authorised to exercise the voting rights attached to the shares and declares its intention to do so independently of the instructions of the person or entity subject to the notification obligation.
In contrast to the remaining elements of attribution in section 22 of the WpHG, section 22 (1) sentence 1 no. 3 of the WpHG applies the principle of **alternative attribution**, i.e. voting rights are only recognised exclusively for either the secured party or the securing party.

**VIII.2.5.3.1 Transfer of title as collateral**

As a general rule, voting rights attached to shares assigned by the securing party to the secured party ("third party") as collateral continue to be attributed to the securing party, even though the secured party, as owner, is entitled to the voting rights in the external relationship. The primary reason for this is that the secured party is required to exercise the voting rights in accordance with the securing party's instructions except where such instructions are contrary to the secured party's interests pursued with the collateral. Given the principle of alternative attribution, voting rights attributed to the securing party pursuant to section 22 (1) sentence 1 no. 3 are not recognised for the secured party even though the latter is the owner of the shares.

Pursuant to section 22 (1) sentence 1 no. 3 half-sentence 2, attribution to the securing party ends when the secured party (the "third party") is authorised to exercise the voting rights attached to such shares and has stated its intention to exercise the voting rights independent of the instructions of the person or entity subject to the notification obligation. In this case, the voting rights are recognised only for the secured party.

**VIII.2.5.3.2 Pledge**

Section 22 (1) sentence 1 no. 3 of the WpHG is not applicable to pledges of shares because title in the shares to which voting rights are attached remains with the pledgor. If the pledgee, by way of exception, is authorised to exercise the voting rights, attribution pursuant to section 22 (1) sentence 1 no. 6 of the WpHG is possible.

**VIII.2.5.4 Usufruct created in favour of the person or entity subject to the notification obligation (section 22 (1) sentence 1 no. 4 of the WpHG)**

Section 22 (1) sentence 1 no. 4 of the WpHG provides that voting rights are attributed to a person for whose benefit usufruct has been created. For the WpHG it is therefore irrelevant who is entitled to the voting right when usufruct on shares has been created.

For the owner of shares to which voting rights are attached, a notification obligation is established from section 21 (1) sentence 1 of the WpHG; the holder of the usufruct is subject to the notification obligation pursuant to section 21 (1) sentence 1 in conjunction with section 22 (1) sentence 1 no. 4 of the WpHG where thresholds have been crossed or reached.

**VIII.2.5.5 Capable of being acquired by way of declaration of intent (section 22 (1) sentence 1 no. 5 of the WpHG)**

Pursuant to section 22 (1) sentence 1 no. 5 of the WpHG, voting rights attached to shares in an issuer are attributed to the person or entity subject to the notification obligation if such person or entity can acquire the shares by way of declaration of intent.
In section 22 (1) sentence 1 no. 5 of the WpHG, the concept of acquisition must be understood in the narrower sense, i.e. in the sense of obtaining title. Consequently, the concept covers only those scenarios in which only the declaration of intent of the person or entity subject to the notification obligation is needed for such person or entity to acquire title in the shares. Shares are likewise attributed in accordance with no. 5 if, instead of a declaration of intent, the payment of a purchase price directly results in acquisition of title. Contractual agreements which involve a delivery claim or by which such claim is created, and matters requiring the participation of a third party therefore do not require an attribution pursuant to no. 5. This is clear from the purpose of no. 5, according to which an attribution of voting rights is required only if the person or entity subject to the notification obligation holds a position which does not make the exercise of voting rights conditional on imponderables that are beyond the control of such person or entity. No. 5 primarily applies to the case of options conferring rights in rem.

Examples:

(Contractual) call option

A person which is entitled to purchase a certain underlying within a certain period or at a certain point in time at a price defined in advance and in a quantity defined in advance holds what is referred to as a call option. In such case, exercise of the call option does not bring about transfer of title in the shares but merely the conclusion of the purchase agreement giving the acquirer a contractual claim to be transferred title in the shares. The option in this case is a contractual option that does not fall under the scope of section 22 (1) sentence 1 no. 5 of the WpHG. However, a notification obligation pursuant to section 25 of the WpHG may arise (in this regard and in general, please refer to the distinction between section 22 (1) sentence 1 no. 5 of the WpHG and section 25 of the WpHG in VIII.2.8.1.).

Option in rem

A person entitled, e.g., to acquire title in shares by acceptance of a prior, irrevocable offer to transfer title therein is the holder of an option in rem. In this case, the acquisition of title may no longer be prevented by the seller or third party provided that the other conditions for valid transfer of title have already been satisfied. It takes place directly by way of the purchaser’s declaration of intent. In this case, an attribution takes place in accordance with section 22 (1) sentence 1 no. 5 of the WpHG. However, no attribution takes place in cases where the shares have yet to be transferred by the seller to the acquirer.

Typical clause of a purchase agreement in the case of off-exchange acquisition (payment of purchase price)

The following or similar clauses generally result in an attribution pursuant to section 22 (1) sentence 1 no. 5 of the WpHG: “The seller hereby transfers title in the sold shares, including all rights incidental thereto, subject to the condition precedent of payment in full of the purchase price to the buyer, who accepts the same, wherein delivery of the shares pursuant to sections 929, 931 of the German Civil Code (Bürgerliches Gesetzbuch – BGB) is replaced by seller’s assignment to the buyer (who accepts such assignment) of all rights held by seller in the shares as against the custodian bank under the relationship of constructive possession with the custodian bank; the seller moreover shall procure that the co-ownership interest in the buyer’s global certificates which corresponds to
the sold shares is credited at such time by the custodian bank to the seller’s account and that the sold shares are removed by the custodian bank from the securities account of the seller and delivered by the custodian bank to the securities account of the buyer (transfer of constructive possession). “In this case, attribution takes place in accordance with section 22 (1) sentence 1 no. 5 of the WpHG, since acquisition in rem takes place by reason of the assignment of the recovery claims directly upon payment of the purchase price.

VIII.2.5.6 Entrusting or proxy (section 22 (1) sentence 1 no. 6 of the WpHG)

Pursuant to section 22 (1) sentence 1 no. 6 of the WpHG, voting rights are attributed to a person or entity subject to the notification obligation which have been entrusted to such person or entity or which such person or entity may exercise by means of proxy voting, provided that it can exercise the voting rights attached to the shares at its own discretion where no particular instructions have been issued by the shareholder.

The element of “being entrusted” in no. 6 assumes an obligation to safeguard the shareholder’s asset interests with respect to the shares. Attribution takes place only if, within the limits set by such obligation, the person or entity subject to the notification obligation still enjoys some discretionary scope in exercising the voting rights. For the purposes of such attribution it is irrelevant whether such person or entity actually exercises its discretion.

Even where power of representation exists by statute, voting rights are deemed to be entrusted to the person or entity subject to the notification obligation. For example, parents, as legal representatives, are attributed the full voting rights attached to the shares of their minor children in each case in accordance with no. 6.

The TUG has now introduced a provision specifically dealing with the case where the person or entity subject to the notification obligation is authorised by the shareholder to exercise voting rights independently, i.e. without being bound by instructions. Although for proxies an attribution by virtue of the element of “being entrusted” is already possible in many cases, such authorisation falls under a separate scope of application since the concepts of being authorised (as proxy) and being entrusted (with voting rights) are not completely identical. In this regard it should be noted that even where a grantor of authority issues instructions on a regular basis, this does end the attribution applicable to the person thus authorised. It is only if the authorised person is not permitted to act in the absence of instructions that the element of attribution pursuant to no. 6 is not fulfilled.

Where the person authorised validly delegates authority, the voting rights are also attributed to the holder of such delegated authority pursuant to no. 6 provided that the prerequisites described above have been satisfied. Likewise, delegating authority does not result in attribution to the person originally authorised being ended.
Notification obligations of asset management companies (Kapitalanlagegesellschaften – KAGs) and management companies (Verwaltungsgesellschaften)

Section 22 (1) sentence 1 no. 6 may therefore be of relevance particularly in the case of a trust by agency (Vollmachtstreuehand) as well as asset and fund management companies.

In a trust by agency, the fiduciary relationship is established by the trustor’s granting to the trustee authority to exercise the voting rights and obliging the trustee to safeguard the trustor’s asset interests. However, the trustor reserves title in the shares and thus continues to be the shareholder.

Asset and fund management companies may be attributed voting rights attached to shares which the company manages for its clients provided they can exercise such voting rights at their free discretion.

For further details in this regard, please refer to VIII.2.5.10.

VIII.2.5.6.1 Voting rights attached to shares held in custody accounts

Proxy voting rights of credit institutions (section 135 of the AktG) are not covered by section 22 (1) sentence 1 no. 6 of the WpHG. Although credit institutions must be regarded as authorised entities in respect of the voting rights attached to shares held by them in custody, the voting rights are not attributed because such credit institutions are not entitled to use their own discretion in exercising such voting rights pursuant to section 135 (5) of the AktG. A credit institution which has not been issued any instruction for exercising the voting right concerned as a rule may exercise such voting right only in accordance with its own proposals. Pursuant to section 128 (2) of the AktG, only such proposals may be submitted which exclusively serve the interests of the proxy issuer, without giving any regard to the interests of the credit institution. If, following such proposals, the shareholder has not issued any other instructions, the shareholder is assumed to adopt such proposals as its own.

VIII.2.5.6.2 Proxy to attend the shareholders’ meeting (section 22 (4) of the WpHG)

If the holder of proxy is only authorised for a shareholders’ meeting to exercise voting rights at his own discretion without special instructions of the shareholder, the proxy holder would be required to make a notification twice: once upon being granted proxy power prior to the shareholders’ meeting in the case of thresholds being crossed or reached as a result of attribution; and once after the shareholders’ meeting when the proxy or the exercise discretion expires and thresholds are once again crossed or reached as a result. The provision restricts the requirement of the second notification, since only one notification has to be made (when the proxy power is granted). However, this notification must contain the additional information required by section 22 (4) sentence 2 of the WpHG. The person or entity subject to the notification obligation must state when the shareholders’ meeting will take place and how high its voting interest will be after the proxy or the discretion granted thereby has expired.
However, if the voting interest changes after this notification in such a way that after expiry of the proxy power or the discretion granted thereby the voting interest is different from that stated in the notification, this must be disclosed in a second notification; in that case it is no longer possible to use the convenience of this provision.

VIII.2.5.7 Equivalence of subsidiaries (section 22 (1) sentence 2 of the WpHG)

Pursuant to section 22 (1) sentence 2 of the WpHG, persons or entities subject to the notification obligation are also fully attributed all voting rights which are attributed to the subsidiary itself pursuant to sentence 1 nos. 2 to 6.

VIII.2.5.8 Coordinated conduct (section 22 (2) sentences 1 and 2 of the WpHG)

Pursuant to section 22 (2) of the WpHG, any voting rights attached to shares in the issuer whose home country is the Federal Republic of Germany which belong to a third party are also attributed in full to the person or entity subject to the notification obligation if such person or entity, or its subsidiary, coordinates with such third party, on the basis of an agreement or in another manner, its conduct in respect of the issuer; agreements in individual cases shall be excluded. In this regard, coordinated conduct requires that the person or entity subject to the notification obligation or its subsidiary and the third party reach a consensus on the exercise of voting rights or collaborate in another manner with the aim of bringing about a permanent and material change in the issuer’s business strategy.

The first condition to be satisfied pursuant to section 22 (2) of the WpHG is that there has to be a communicative process between at least two persons culminating in an agreement being reached or in conduct being otherwise coordinated. Voting and pooling agreements definitely fall under this definition, but as a general rule it also encompasses all civil-law forms of contract. Conduct which is coordinated in another manner, however, is designed to cover those instances where a “meeting of minds” is reached without any agreement being concluded in the formal sense (such as a gentlemen’s agreement).

Exercising voting rights at the issuer’s shareholders’ meeting remains the purpose of such coordinated conduct. However, it is irrelevant whether the voting rights are actually exercised. Instead, the intention on the part of the persons coordinating their conduct to do so suffices.

Under the amendment introduced by the RBG, attribution pursuant to section 22 (2) of the WpHG is also to be possible based on other agreements, and in particular also in cases outside the exercise of voting rights at the shareholders’ meeting.

Given that section 22 (2) sentence 1 of the WpHG describes the conduct alternatives, section 22 (2) sentence 2 of the WpHG defines the concept of coordinated conduct as

- reaching a consensus on the exercise of voting rights; or
- collaborating in another manner with the aim of bringing about a permanent and material change in the issuer’s business strategy.
The consequence of section 22 (2) of the WpHG is a full mutual attribution of voting rights, i.e. each person or entity subject to the notification obligation involved in such coordinated conduct by reason of an agreement or in any other way is attributed all voting rights of the other persons or entities involved. It is not decisive in this regard whether such person or entity subject to the notification obligation itself holds shares to which voting rights are attached or whether voting rights are attributable to it by reason of other elements for attribution (i.e. section 22 (1) sentence 1 nos. 1 to 6 of the WpHG). As a result, attribution pursuant to section 22 (2) of the WpHG alone may give rise to notification obligations pursuant to section 21 (1) sentence 1 of the WpHG.

In the Act there is no basis for a view, sometimes held in the literature, according to which voting rights are to be attributed (unilaterally) only to the person or entity controlling a pool of voting rights. Attribution must take place reciprocally since it follows from the word (“in full”) that all voting rights of the other parties involved must be attributed.

Example:

A, B, C and D enter into a voting agreement. A holds 9.0%, B 4.0% and C is attributed 0.5% via a subsidiary. D does not hold any voting rights. All four persons are subject to the notification obligation each for a total interest of 13.5%. Pursuant to section 22 (2) of the WpHG, the interests are attributed as follows: 4.5% to A, 9.5% to B, 13.0% to C, and 13.5% to D.

The number of voting rights to be attributed as a general rule must be determined on the basis of the underlying agreement or other coordinated conduct: if the parties involved hold a great number of shares and voting rights and commit only some of them for coordinated conduct, only such committed voting rights will be attributed. If, however, no such quantifiable restriction has been agreed between the persons or entities, all shares and voting rights of the respective person or entity will be assumed to have been committed for such coordinated conduct.

Example:

A and B enter into a voting agreement. A holds 4.0% and B 12%. Under the voting agreement, B expressly undertakes to coordinate its conduct with A only in respect of 3.0%.

A and B are subject to the notification obligation: A notifies 7.0%, of which it is attributed 3.0% pursuant to section 22 (2) of the WpHG. B notifies 16.0%, of which it is attributed 4.0% pursuant to section 22 (2) of the WpHG.

Special case: notification obligations of the parent company, where a subsidiary is party to a voting agreement or both companies are parties to a voting agreement.

Pursuant to section 22 (2) sentence 1 of the WpHG, voting rights of a third party with which the person or entity subject to the notification obligation or its subsidiary co-ordinates its voting behaviour are attributed to such person or entity subject to the notification obligation. From this it follows that the parent company is attributed the voting rights of the third party with which its subsidiary coordinates its voting behaviour likewise pursuant to section 22 (2) of the WpHG, while the voting rights of the subsidiary are attributed to the parent company pursuant to section 22 (1) sentence 1 no. 1 of the WpHG.
If the parent company itself is also party to a voting agreement in addition to its subsidiary, not only the voting rights of the third party but also the voting rights of the subsidiary are attributed to the parent company pursuant to section 22 (2) of the WpHG. In addition, the voting rights of the subsidiary are attributable to the parent company also pursuant to section 22 (1) sentence 1 no. 1 of the WpHG.

Examples:

A (4.0%) enters into a voting agreement with B (7.0%). Both notify a total of 11.0%, with 7.0% being attributed to A and 4.0% to B pursuant to section 22 (2) of the WpHG. The parent company of A likewise notifies a total of 11.0%, of which it is attributed 7.0% pursuant to section 22 (2) of the WpHG and 4.0% pursuant to section 22 (1) sentence 1 no. 1 of the WpHG.

A (4.0%) and its parent company C (1.0%) enter into a voting agreement with B (7.0%). All three notify a total of 12.0%, with 8.0% being attributed to A and 5.0% to B pursuant to section 22 (2) of the WpHG. C likewise notifies 12.0%, of which it is attributed, however, 11.0% pursuant to section 22 (2) of the WpHG and of that 4.0% also according to section 22 (1) sentence 1 no. 1 of the WpHG.

In cases of voting agreements to be entered into exclusively between a parent and a subsidiary, BaFin should be contacted beforehand.

VIII.2.5.9 Subsidiaries (section 22 (3) of the WpHG)

Section 22 (3) of the WpHG defines subsidiaries as companies which are deemed subsidiaries within the meaning of section 290 of the HGB, or companies upon which a controlling influence can be exerted, in both cases irrespective of their legal form and domicile (for more details on section 22 (1) no. 1 see VIII.2.5.1. et seq.).

VIII.2.5.10 Notification obligations in connection with asset management companies (Kapitalanlagegesellschaften) and management companies (Verwaltungsgesellschaften) as well as the termination of capacity as subsidiary (section 32 of the InvG and section 22 (3a), section 29a (3) of the WpHG)

VIII.2.5.10.1 Notification obligations for asset management companies and management companies

An asset management company (Kapitalanlagegesellschaft – KAG) pursuant to the InvG manages funds (Sondervermögen). Such funds also comprise the voting rights attached to shares whose voting interest may reach a threshold subject to the notification obligation. For the person or entity subject to the notification obligation, a distinction generally has to be made between what are referred to as the co-ownership and trust scheme. In the case of the co-ownership scheme, investors of the investment scheme are co-owners of the voting rights within the investment scheme, whereas under the trust scheme the asset management company is the owner of the shares and holds these in trust on behalf of the investors (section 2 (2) of the InvG). The particular form in question depends on the fund rules of the asset management company (section 30 (1) sentence 1 of the InvG).
As a result, the following notification obligations apply in the case of **common funds**: 

An asset management company is required to make a notification under both the co-ownership and trust scheme in the case of a threshold being crossed or reached pursuant to section 21 of the WpHG since the voting rights under the co-ownership scheme are considered to be those of the asset management company, and under the trust scheme the asset management company is the owner of the voting rights; the investors are generally not subject to the notification obligation (section 32 (2) sentence 3 of the InvG).

*Example:*

*An asset management company manages several common funds, some under the co-ownership scheme, and some under the trust scheme. If the asset investment company exceeds a threshold with all its funds, it is required to submit a notification only pursuant to section 21 (1) of the WpHG.*

In the case of **special funds** (*Spezialfonds*), the following notification obligations apply:

Under the co-ownership scheme the asset management company, where a threshold is crossed or reached, has the obligation to make a notification pursuant to sections 21 and 22 (1) sentence 1 no. 6 of the WpHG. Under the trust scheme, the asset management company submits a notification pursuant to section 21 WpHG. Under the co-ownership scheme the investors make a notification pursuant to section 21 WpHG if their proportionate share in the shares comprised within the fund crosses or reaches a threshold. In the case of the trust scheme, the investors must submit a notification pursuant to sections 21 and 22 (1) sentence 1 no. 2 of the WpHG to the extent their proportionate share in the shares comprised within the fund crosses or reaches a threshold. The most frequent case of a notification obligation for investors is a special fund in which there is only one investor.

*Example:*

*An asset management company manages in fund A 2.0% of the shares (co-ownership scheme) and in fund B 5.0% of the shares of the same stock (trust scheme). Investor X is the sole investor of fund A and holds 50% of the units in fund B.*

*The asset management company notifies a total of 7.0%, of which 2.0% is attributable to it pursuant to section 22 (1) sentence 1 no. 6 of the WpHG. Investor X notifies a total of 4.5%, of which 2.5% is attributable to him pursuant to section 22 (1) sentence 1 no. 2 of the WpHG.*

The statements made with regard to common and special funds managed by asset management companies (section 32 (2) sentence 3 of the InvG) also apply analogously for **management companies domiciled in an EU or EEA country** provided that the investors normally cannot issue any instructions on the exercise of voting rights (section 32 (3) sentence 2 of the InvG; see VIII.2.5.11.2.2.). For management companies domiciled in a third country, the statements pursuant to section 32 (4) sentence 2 of the InvG apply analogously.

The statements made with regard to common and special funds (section 32 (2) sentence 3 of the InvG) apply analogously to the holding of financial instruments pursuant to section 25 of the WpHG (see VIII.2.8.) by asset management companies and foreign management companies (section 32 (2) sentence 4, (3) sentence 1, (4) sentence 2 of the InvG).
Special form in Germany: investment stock corporation (Investmentaktiengesellschaft)

In the case of an investment stock corporation, there is no fund as with an asset management company. The investment stock corporation (i.e. its company assets) at the same time serves as the investment assets. There are two forms of investment stock corporation. The first form is that of an investment stock corporation in which the entire company assets are issued to investors as company shares with voting rights (section 96 (1b) of the InvG). Investors do not acquire units in a fund, but instead shares in the investment stock corporation itself. The investment stock corporation becomes the owner of the shares and voting rights. Its notification obligations are determined by section 21 of the WpHG. In all other respects, the general statements apply. There is also a form of investment stock corporation that issues what are referred to as “investment shares”. Investment shares do not confer any voting rights with reference to the investment stock corporation (section 96 (1c) of the InvG). As a result, an attribution pursuant to section 22 (1) sentence 1 no. 1 of the WpHG to an investor holding more than 50% of “investment shares” is excluded. Such attribution can only be made to the holder of the shares to which voting rights are attached. Moreover, a distinction must be made between an investment stock corporation managed by third parties and one which is self-managed. In the case of an investment stock corporation managed by a third party, the voting rights are exercised by an asset management company, which is then subject to the notification obligation pursuant to section 21 in conjunction with section 22 (1) sentence 1 no. 6 of the WpHG. In addition, attribution to investors pursuant to section 22 (1) sentence 1 no. 2 of the WpHG may occur because the (special) investment stock corporation normally holds the shares for the account of the investors. The shares in the investment stock corporation then represent the company’s shares, with the result that, in the event of a share in the investment stock corporation of more than 50%, attribution pursuant to section 22 (1) sentence 1 no. 1 of the WpHG is also conceivable.

For investment stock corporations taking the form of umbrella schemes, see statement below on investment compartments (Teilfonds).

Typical foreign fund structures:

- **SICAV**

A SICAV (Société d’Investissement à Capital Variable) is comparable to an investment stock corporation (Investmentaktiengesellschaft) under German law. Here, too, a fund takes the form of a company which may either manage itself or appoint an external management company. Investors do not acquire units in a fund, but instead shares in the SICAV itself. The SICAV becomes the owner of the shares and voting rights. Its notification obligations are determined by section 21 of the WpHG. Frequently, the voting rights in such cases are exercised by so-called investment managers. Since they normally may exercise the voting rights according to their own discretion, attribution in this case is effected pursuant to section 22 (1) sentence 1 no. 6 of the WpHG (cf. investment stock corporation managed by a third party). In addition, attribution to investors pursuant to section 22 (1) sentence 1 no. 2 of the WpHG may occur because the (special) SICAV normally holds the shares for the account of the investors. The shares in the SICAV at the same time represent the company’s shares, with the result that, in the event of a share in the SICAV of more than 50%, attribution pursuant to section 22 (1) sentence 1 no. 1 of the WpHG is also conceivable.
• Legally independent funds

In Anglo-American jurisdictions funds have often their own legal personality (e.g. in the legal form of a limited company) and are therefore themselves subject to the notification obligation pursuant to section 21 of the WpHG if they cross or reach a threshold. With these funds, management as a rule is performed by management companies which *inter alia* also exercise the voting rights. Since they normally may exercise the voting rights according to their own discretion, attribution in this case also is effected to these companies pursuant to section 22 (1) sentence 1 no. 6 of the WpHG. Likewise, attribution to investors pursuant to section 22 (1) sentence 1 no. 2 of the WpHG may occur because the legally independent funds normally hold the shares for the account of the investors. The units in the fund at the same time represent the company shares, with the result that, in the event of a share in the fund of more than 50%, attribution pursuant to section 22 (1) sentence 1 no. 1 of the WpHG is also conceivable.

*Examples:*

*Fund A Limited holds 2.0% shares in its assets, fund B Limited holds 4.0% of the same stock in its assets. The common management company is C Management Limited.* Investor X holds 40% of the shares in each of fund A and B. *Of the two funds, only fund B Limited is subject to the notification obligation because it holds 4.0% of the voting rights. C Management Limited notifies a total of 6.0%, of which it is attributed all voting rights pursuant to section 22 (1) sentence 1 no. 6 of the WpHG. Investor X is not subject to the notification obligation because he is attributed a proportionate share of only 2.4% pursuant to section 22 (1) sentence 1 no. 2 of the WpHG.*

*Fund A Limited holds 4.0% shares in its assets. The management company is C Management Limited. Investor X holds 80% of the shares in fund A Limited. In this case, fund A Limited and C Management Limited each notify 4.0%. The voting interests are attributable to C Management Limited in full pursuant to section 22 (1) sentence 1 no. 6 of the WpHG. Investor X likewise notifies 4.0%, of which this is attributable to him in full pursuant to section 22 (1) sentence 1 no. 1 of the WpHG (because it accounts for more than 50% of the shares in the fund); of this, however, 3.2% is also attributable to him pursuant to section 22 (1) sentence 1 no. 2 of the WpHG because the fund holds shares for investor X in the amount of 80%.*

• Special case: investment compartments (*Teilfonds*)

Foreign, legally independent funds are sometimes subdivided into investment compartments. Since these investment compartments as a general rule do not have any legal personality of their own, they cannot be subject to notification obligation. This is only possible for their legal entities owning the legally independent (umbrella) funds. In such cases, the sum of the shares of all investment compartments corresponds to the company shares in the (umbrella) funds, which means that there are no differences for investors in investment compartments as compared with investors of legally independent funds without investment compartments. These statements apply *mutatis mutandis* for umbrella investment stock corporations.
Example:

Fund A Limited has two legally dependent investment compartments B and C. Both investment compartments each hold 2.0% of an issuer. D Management Limited is the management company. Investor X holds 25% of investment compartment B and 50% of investment compartment C. Only fund A Limited, as owner of the two investment compartments B and C as well as D Management Limited, which is attributed the voting rights (4%) pursuant to section 22 (1) sentence 1 no. 6 of the WpHG, are subject to the notification obligation. Investor X is not subject to the notification obligation since his proportionate share in the issuer’s voting rights totals only 1.5% (0.5% through investment compartment B and 1.0% through investment compartment C), whereas he holds 37.5% of the shares in fund A Limited.

VIII.2.5.10.2 Termination of capacity as subsidiary (section 32 of the InvG and section 22 (3a), section 29a (3) of the WpHG)

VIII.2.5.10.2.1 Section 32 (2) of the InvG

Section 32 (2) of the InvG provides for an exception with regard to the capacity of asset management companies as subsidiaries. Provided that the conditions specified in section 32 (2) sentences 1 and 2 of the InvG are satisfied, the asset management company is not deemed a subsidiary pursuant to section 22 (3) of the WpHG. With regard to the question of notification obligations pursuant to sections 21 et seq. of the WpHG, that means that voting rights of the asset management company are not attributed to their parent companies.

For this scenario, the following conditions of section 32 (2) sentence 1 must be satisfied:

- The asset management company must exercise its voting rights independently of its parent undertaking.
- The fund of the asset management company must be managed in accordance with Directive 85/611/ECC (UCITS Directive).
- The parent undertaking must notify BaFin of the name of the asset management company and the competent authority responsible for its supervision, or the lack of any such competent authority.
- The parent undertaking must declare to BaFin that the requirements set forth in section 32 (2) sentence 1 no. 1 of the InvG have been satisfied.

Subject to the provisions of the UCITS Directive, not only funds complying with the Directive (common funds) are managed but also those that, in analogous application of the UCITS rules (in particular Article 10(2) of the UCITS Directive, transposed in section 9 (2) no. 1 of the InvG), are managed in compliance with the Directive.
In addition, section 20 (1) of the TranspRLDV defines when an asset management company exercises voting rights independently of the parent undertaking. This is the case if:

- the parent undertaking or other undertakings controlled by the parent undertaking may not exert an influence on the exercise of the voting rights attached to shares owned by a fund managed by an asset management company or to an investment stock corporation managed by the latter by issuing direct or indirect instructions or in any other way; and

- the asset management company exercises such voting rights freely and independently of its parent undertakings and any other undertakings controlled by the parent undertakings.

Section 20 (2) of the TranspRLDV defines the direct and indirect instructions mentioned in section 20 (1) no. 1.

Accordingly, the parent undertakings must submit a **written declaration** to BaFin stating the name of the asset management company and the authority responsible for its supervision according to which:

- they or other undertakings controlled by them may not exert an influence on the exercise of the voting rights held by the management company through direct or indirect instructions or in any other way, and the asset management company exercises the voting rights freely and independently of the parent undertakings and any other undertakings controlled by them;

- the organisational structures of the parent undertakings and the asset management company are such that the voting rights are exercised independently of the parent undertakings;

- the persons who decide on how the voting rights are to be exercised act independently; and

- in the event that one of the parent undertakings or any other undertaking controlled by the parent undertakings is a client of the asset management company or holds an interest in the assets managed by the asset management company, a clear written mandate exists for an independent client relationship between the parent undertaking or the other undertaking controlled by one of the parent undertakings and the asset management company, or will exist for any such case in future.

The parent undertakings must update the list with the names of the asset management companies and the authority or authorities supervising them on an ongoing basis (i.e. in the event of changes) and must notify such list to BaFin.

In the case of consolidated or group structures, the above declaration must be submitted by each individual parent undertaking of the asset management company, attaching an organisation chart. However, it is possible for the declarations to be made by one parent undertaking on its own behalf and on behalf of the other parent undertakings (in which case these must be specified individually).
Where the conditions as described above are satisfied only at a later point in time (i.e. after the parent undertaking had become subject to the notification obligation and notifications had already been submitted), it is no longer to be attributed the voting rights of the asset management company. If in this case it falls below relevant thresholds, the parent undertaking is subject to the notification obligation pursuant to section 21 of the WpHG.

If one of the above conditions is no longer satisfied, section 32 (2) of the InvG no longer applies. The asset management company is then deemed a subsidiary, thus reviving the notification obligation for parent undertakings of the asset management company.

Reverse exception:

Even despite the conditions of section 32 (2) sentence 1 of the InvG being satisfied, an asset management company is still deemed a subsidiary pursuant to section 32 (2) sentence 2 of the InvG if the parent undertaking or another undertaking controlled by it in turn holds units of the fund managed by the asset management company and the asset management company may not exercise the voting rights attached to such units in its discretion but only on the basis of instructions. In such cases the asset management company remains a subsidiary with reference to this fund. That in turn requires an attribution of these shares of the asset management company to the parent undertaking.

Example:

An asset management company manages four funds each of which comprises 1.0% of an issuer’s shares. It is managed under the trust scheme (VIII.2.5.10.1.). The parent undertaking of the asset management company holds an interest of 50% in one of the four funds.

For the question of attribution to the parent undertaking, the following rule applies:

If the parent undertaking may issue instructions to the asset management company on the exercise of voting rights, the asset management company is deemed a subsidiary with reference to the voting rights held in this investment scheme (i.e. equal to 1.0%).

If, however, a clear written mandate exists between the asset management company and the parent undertaking for an independent client relationship, the asset management company is not deemed to be a subsidiary, with the result that also the voting rights under this fund are not attributed pursuant to section 22 (1) sentence 1 no. 1 of the WpHG.

However, it must be noted that the parent undertaking, where applicable, may be attributed 0.5% as investor pursuant to section 22 (1) sentence 1 no. 2 of the WpHG, which in combination with other shares may result in thresholds being crossed or reached.
VIII.2.5.10.2.2 Section 32 (3) of the InvG

Section 32 (3) sentence 1 of the InvG contains a provision, similar to section 32 (2) of the InvG, for management companies within the meaning of the UCITS Directive domiciled in another EU or EEA country. A management company within the meaning of the UCITS Directive is any company whose regular business consists in managing an investment fund, an investment company or an investment stock corporation. Section 32 (2) sentences 1, 2 and 4 of the InvG applies mutatis mutandis to these companies. Likewise, section 32 (2) sentence 3 applies mutatis mutandis if the investor normally may not issue any instructions on the exercise of the voting rights.

For section 32 (3) of the InvG, the above-described requirements for independence of section 20 (1) of the TranspRLDV also apply.

In this case also, the parent undertakings of the management company must submit a declaration to BaFin which satisfies the above-described requirements.

Section 32 (3) sentence 1 of the InvG lays down that, inter alia, section 32 (2) sentence 2 of the InvG (reverse exception; see VIII.2.5.10.2.1.) is applicable by analogy.

VIII.2.5.10.2.3 Section 32 (4) of the InvG

Section 32 (4) sentence 1 of the InvG provides that undertakings domiciled in a third country, which would require authorisation pursuant to section 7 or section 97 of the InvG if they were domiciled in Germany, are also not deemed subsidiaries pursuant to section 22 (3) of the WpHG and section 2 (6) of the WpÜG where the following requirements are met:

- The undertaking satisfies requirements with regard to its independence that are equivalent to those applicable to the asset management companies referred to in section 32 (2) sentence 1 of the InvG.
- The parent undertakings notify to BaFin the name of the company and of the competent authority responsible for its supervision, or the lack of any such competent authority.
- The parent undertakings declare to BaFin that the requirements for independence specified under no. 1 have been satisfied.

Companies which would require authorisation pursuant to section 7 or section 97 of the InvG are all companies engaging in activities of a management or investment company.

With regard to the equivalence of the requirements for independence described under no. 1, section 22 of the TranspRLDV contains further-reaching provisions. Pursuant to section 22 (1) of the TranspRLDV, the rules of a third country are deemed equivalent if its legal provisions prescribe that a company within the meaning of section 32 (4) of the InvG

- always exercises the voting rights attached to assets managed by it freely and independently of its parent undertakings or other undertakings controlled by them; and
- must not give regard to the interests of the parent undertakings or of other undertakings controlled by them in the event of conflicts of interests.
Accordingly, the parent undertakings must submit a written declaration to BaFin stating the name of the management company and the authority responsible for its supervision according to which

- the management company, in accordance with the legal regulations in force in the management company’s home country, in all cases of the exercise of voting rights attached to the assets managed by it, is free and independent from the parent undertakings or other undertakings controlled by them;

- the management company, in accordance with the legal regulations in force in the management company’s home country, must not give regard to the interests of the parent undertakings or of other undertakings controlled by them in the event of conflicts of interest;

- the organisational structures of the parent undertakings and the management company are such that the voting rights are exercised independently of the parent undertakings;

- the persons who decide on how the voting rights are to be exercised act independently;

and

- in the event that one of the parent undertakings or any other undertaking controlled by the parent undertakings is a client of the management company or holds an interest in the assets managed by the management company, a clear written mandate exists for an independent client relationship between the parent undertaking or the other undertaking controlled by one of the parent undertakings and the management company, or will exist for any such case in future.

In this case also, the parent undertakings must update the list with the names of the management companies and the authority or authorities supervising them on an ongoing basis (i.e. in the event of changes). The above statements also apply to consolidated or group structures.

Section 32 (4) sentence 2 of the InvG lays down that, inter alia, section 32 (2) sentence 2 of the InvG (reverse exception; see VIII.2.5.10.2.1.) is applicable by analogy.

### VIII.2.5.10.2.4 Section 22 (3a) of the WpHG

Section 22 (3a) of the WpHG in conjunction with section 2 of the TranspRLDV provides that an investment services enterprise is not deemed a subsidiary in respect of the holdings which are managed as part of portfolio management pursuant to section 2 (3) sentence 1 no. 7 of the WpHG, provided that the requirements as described in section 22 (3a) of the WpHG in conjunction with section 2 of the TranspRLDV are satisfied. These requirements are largely equivalent to those of section 32 (2) of the InvG in conjunction with section 20 of the TranspRLDV. Accordingly, reference is made to the statements regarding section 32 (2) of the InvG (see VIII.2.5.10.2.1.).

Making a distinction between portfolio management and fund management may prove difficult in the specific case. In cases of doubt, any persons and entities potentially subject to the notification obligation should therefore contact BaFin early on.
VIII.2.5.10.2.5 Exemptions for companies from third countries (section 29a (3) of the WpHG)

Section 29a (3) of the WpHG in conjunction with section 8 of the TranspRLDV contains a corresponding provision for companies domiciled in a third country that would require authorisation for portfolio management if they were domiciled in Germany. This provision is largely equivalent to section 32 (4) of the InvG in conjunction with section 22 of the TranspRLDV. Accordingly, reference is made to the statements regarding section 32 (4) of the InvG.

VIII.2.5.11 Content of the notification in the case of attribution of voting rights (section 17 (2) of the WpAIV)

In the case of voting rights being attributed pursuant to section 22 (1) and (2) of the WpHG, the notification must contain the following information in addition to the information pursuant to section 17 (1) of the WpAIV (see VIII.2.3.9.2.):

- the name of the third party whose voting rights attached to its shares are attributed if the attributed percentage of voting rights amounts to 3% or more (section 17 (2) sentence 1 no. 1 of the WpAIV);

- if applicable, the name of the controlled undertakings through which the voting rights are actually held if their attributed percentage of voting rights amounts to 3% or more (section 17 (2) sentence 1 no. 2 of the WpAIV); and

- the voting rights to be attributed (expressed as both a percentage and the number of voting rights) specified separately for each of the numbers in section 22 (1) of the WpHG and for section 22 (2) sentence 1 of the WpHG (section 17 (2) sentence 2 of the WpAIV).

Pursuant to section 17 (2) sentence 1 no. 1 of the WpAIV, each person or entity subject to the notification obligation to which voting rights are attributed must state the name of the shareholder from whose shares such person or entity is attributed 3% or more voting rights. The obligation to state the name thus not only applies to those persons and entities subject to the notification obligation that are attributed 3% or more of shares to which voting rights are attached directly by the legal owner, but also to the other persons or entities subject to the notification obligation (e.g. parent undertakings of an entity subject to the notification obligation which is attributed voting rights by a shareholder by reason of a proxy pursuant to section 22 (1) sentence 1 no. 6 of the WpHG.) The restriction whereby the shareholder must be named only if 3% or more of the voting rights are attributed by such shareholder is based on the notion that only those persons must be stated who themselves are subject to the notification obligation.

By contrast, section 17 (2) no. 2 of the WpAIV relates only to the attribution case of section 22 (1) no. 1 of the WpHG (subsidiary company holding title to shares to which voting rights are attached). The names of all subsidiaries must be stated through which the voting rights are held if the voting interest attributed to them represents 3% each or more.

The specification of third parties pursuant to section 17 (2) of the WpAIV does not have any influence on the obligation of such third parties to submit such voting rights notifications in the case of thresholds being crossed or reached.
VIII.2.6  Non-consideration of voting rights (section 23 of the WpHG)

VIII.2.6.1  General information

The non-consideration of voting rights not only applies to the group of persons directly targeted by the elements of section 23 of the WpHG but also triggers a blocking effect with regard to its parent undertakings (which means that there is no attribution to the parent undertakings).

Example:

A parent undertaking has two investment services enterprises as subsidiaries each holding in their trading portfolio 4% of the same shares to which voting rights are attached. In this case no attribution to the parent undertaking takes place, even if the parent undertaking itself is an investment services enterprise and holds in its trading portfolio the same shares to which voting rights are attached.

Provided that the requirements of the individual elements are satisfied, these exist alongside one another, i.e. an institution which acts as a market maker and besides this also holds voting rights in its trading portfolio may claim the maximum limits associated with the two elements to the full extent in each case.

Example (column 1 of the table below):

A company holds 2.9% of the voting rights of an issuer’s shares in its investment portfolio, 4.9% in its trading portfolio and a further 1.0% of the voting rights of the same issuer’s shares in its market maker portfolio. In this case there is no notification obligation on the part of the company because it does not exceed the permissible maximum limits in its trading and market maker portfolio and remains under the 3% threshold with its share in the investment portfolio. No attribution to its parent undertaking takes place either.

Further examples:

<table>
<thead>
<tr>
<th>Example</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investment portfolio</td>
<td>2.9%</td>
<td>2.9%</td>
<td>4.0%</td>
<td>2.9%</td>
<td>2.9%</td>
<td>2.9%</td>
<td>9.0%</td>
<td>2.9%</td>
</tr>
<tr>
<td>Trading portfolio</td>
<td>4.9%</td>
<td>5.0%</td>
<td>5.0%</td>
<td>5.1%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>5.0%</td>
</tr>
<tr>
<td>MM portfolio</td>
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<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>6.0%</td>
<td>10.0%</td>
<td>2.0%</td>
<td>9.9%</td>
</tr>
<tr>
<td>Total</td>
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<td>7.9%</td>
<td>9.0%</td>
<td>8.0%</td>
<td>8.9%</td>
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<td>17.8%</td>
</tr>
<tr>
<td>Thresholds triggering notification obligations</td>
<td>–</td>
<td>–</td>
<td>3%</td>
<td>3%</td>
<td>5%</td>
<td>–</td>
<td>3%</td>
<td>5%</td>
</tr>
<tr>
<td>Exercisable voting rights</td>
<td>2.9%</td>
<td>2.9%</td>
<td>4.0%</td>
<td>8.0%</td>
<td>2.9%</td>
<td>12.9%</td>
<td>9.0%</td>
<td>2.9%</td>
</tr>
</tbody>
</table>

The voting rights held subject to the requirements of the specific elements cannot be exercised. Exception: voting rights attached to shares held by a custodian (see VIII.2.6.4.).
VIII.2.6.2 Trading portfolio (section 23 (1) of the WpHG)

The trading portfolio exemption applies only to those companies

- which provide investment services within the meaning of section 2 (3) of the WpHG and are domiciled in an EU or EEA country;

- which hold or intend to hold the shares in question in their trading portfolio and this holding does not exceed 5% of the voting rights; and

- which ensure that the voting rights attached to such shares are not exercised or otherwise used to exert influence over the management of the issuer.

No exemption application is required, nor any confirmation by the auditor that the shares were held in the trading portfolio in accordance with the applicable legal provisions.

Voting rights attached to shares held in the trading portfolio are deemed fully exempt up to and including 5.0%; from 5% plus 1 voting right onwards, however, the voting rights must be fully considered.

Example:

*An investment services enterprise holds 1.5% of the voting rights attached to shares in its investment portfolio and 3% of the same stock in its trading portfolio. There is no notification obligation because the share in the trading portfolio is not to be considered. If the investment services enterprise acquires an additional 3% for the trading portfolio, this triggers the notification obligation as a result of the 3% and 5% threshold being exceeded to 7.5%.*

*If an additional 2% are added to the investment portfolio, the enterprise reaches 3.5% in its investment portfolio but still holds 9.5% in total; as a result, no new notification obligation is triggered because the 10% threshold is not reached or exceeded.*

Non-consideration in full of voting rights attached to shares in the trading portfolio once again applies as soon as the trading portfolio reaches 5% or less.

Example:

*An investment services enterprise holds 3.5% of the voting rights attached to shares in its investment portfolio and 7% of the voting rights attached to shares in its trading portfolio; it had already made a corresponding notification for 10.5%. If the investment services enterprise sells 3% from the trading portfolio, a notification obligation for falling below the 10% and 5% threshold to 3.5% is triggered because of the non-consideration in full of the 4% in the trading portfolio.*
VIII.2.6.3 Clearing and settlement (section 23 (2) no. 1 of the WpHG)

The exemption applies only for clearing and settlement in the narrow sense, i.e. it is required for the shares in question to have been acquired on- or off-exchange exclusively for the purpose of clearing and settlement. An additional requirement is that the shares are not held for longer than three trading days.

Clearing and settlement transactions need not be the sole service of the company, but the share purchase must exclusively represent a clearing and settlement transaction. For this reason, the exemption does not apply to shares acquired by (syndicated) institutions within the scope of planning and executing capital increases. In such cases, the purchase of shares does not exclusively serve the purpose of clearing and settlement, but is part of a comprehensive service of placing the new shares for the issuer.

At the most, the shares underwritten may be eligible for non-consideration as part of the trading portfolio exemption (see VIII.2.6.2.) provided that the voting rights do not exceed the 5% threshold.

VIII.2.6.4 Custodian (section 23 (2) no. 2 of the WpHG)

Only “institutions” may invoke this exemption. This refers to those (legal) persons which, if they were subject to German law, would require authorisation for the safe custody and administration of securities for the account of others (safe custody business) within the meaning of section 1 (1) no. 5 of the KWG. The provision moreover extends to only those custodians which are the legal owner of the shares held in safe custody but exercise the voting rights attached to the shares held in safe custody only on the basis of instructions given in writing or by electronic means.

Under German law, the custodian bank as a general rule will not be the owner of the shares held in safe custody, in which case non-consideration pursuant to section 23 (2) no. 2 of the WpHG is excluded; but this is not required either because generally the voting rights are not exercised by the custodian banks (or if so, then only in accordance with instructions), with the result that the voting rights are not attributable to them pursuant to section 22 (1) sentence 1 no. 6 of the WpHG.

This rule therefore primarily applies to the case of depositaries of fund companies abroad, since there the depositaries may acquire ownership in the shares held in safe custody. The voting rights are attributable to the economic beneficiaries (section 22 (1) sentence 1 no. 2 of the WpHG; see VIII.2.5.2.). In such cases, the requirement to name the depositary in the notifications (section 17 (2) no. 1 of the WpAIV; see VIII.2.5.11.) does not apply.

Example:

Depositary X (Luxembourg) is the owner of a total of 6.5% of shares of which it holds 4% of the shares for fund A Limited (UK) and 2.5% for fund B Limited (UK). Both funds have the same management company: C Management Limited (UK). Depositary X and fund B Limited are not subject to the notification obligation because Depositary X, pursuant to section 23 (2) no. 2 of the WpHG, does not have to consider the voting rights attached to the shares and fund B Limited holds less than 3%. 
However, fund A Limited and C Management Limited are subject to the notification obligation: fund A Limited is attributed 4% pursuant to section 22 (1) sentence 1 no. 2 of the WpHG as beneficiary, C Management Limited is attributed a total of 6.5% pursuant to section 22 (1) sentence 1 no. 6 of the WpHG. However, in derogation from section 17 (2) sentence 1 no. 1 of the WpAIV, neither is required to name Depositary X in their notifications.

VIII.2.6.5 Market makers (section 23 (4) of the WpHG)

A market maker is defined as any person who holds himself out on a market on a continuous basis as being willing to buy or sell, by way of proprietary trading, financial instruments at prices defined by him.

In this regard, the designation as market maker is not decisive for being classified as a marker maker; instead, what is decisive is whether the participant (e.g. as designated sponsor) satisfies the definition of a market maker and thus has to be considered a market maker.

The portfolio of a market maker is deemed exempt if

- such person acts in his capacity as market maker;
- such person holds a licence pursuant to section 32 (1) sentence 1 in conjunction with section 1 (1a) sentence 2 no. 4 of the KWG;
- such person neither intervenes in the management of the issuer nor exerts any influence on the issuer to buy such shares or back the share price; and
- such person notifies to BaFin without undue delay, at the latest within four trading days stating the shares concerned, that it acts as market maker.

Market makers also have a notification obligation towards BaFin if they no longer offer shares or other financial instruments on a continuous basis (section 4 (1) of the TranspRLDV). Both notifications may be submitted to BaFin by mail or fax.

Voting rights attached to shares held in the market maker portfolio are deemed exempt in full up to 10% minus 1 voting right; as of 10% of voting rights attached to shares, the voting rights must be considered in full.

Example:

A market maker holds 4% of the voting rights of an issuer’s shares in its investment portfolio and 9% of the voting rights of the same issuer’s shares in its market maker portfolio. The market maker has notified that the 3% threshold was exceeded to 4%; it was not required for the share in the market maker portfolio to be considered. If the market maker acquires an additional 3% of voting rights attached to shares for its market maker portfolio, this triggers the notification obligation as a result of the 5%, 10% and 15% threshold being exceeded to 16%.

Non-consideration in full of voting rights attached to shares in the market maker portfolio once again applies as soon as the market maker portfolio falls below 10%.
Example:

If, in the above example (16% in total, of which 12% in the market maker portfolio), the market maker again sells 5% from its market maker portfolio, this triggers the notification obligation as a result of the portfolio falling below the 15% and 10% threshold to 4% because of the non-consideration in full of the 7% in the market maker portfolio.

At the request of BaFin, the market maker must be able to furnish proof of which shares or other financial instruments it holds in its capacity as market maker and in what amount. If it is not able to do so, BaFin may order it to hold the shares or other financial instruments on a separate account (section 4 (2) of the TranspRLDV).

VIII.2.7 Notification by group companies (section 24 of the WpHG)

Notifications may generally also be submitted in the name and by power of attorney of other persons or companies. In the case of companies forming part of a group, the parent undertaking may fulfil the notification obligations for the subsidiary or subsidiaries by law, i.e. the notifications for the subsidiaries are made in the parent undertaking’s own name by reference to section 24 of the WpHG. The parent undertaking’s own notification in no case replaces those of its subsidiaries. Moreover, notifications for subsidiaries must contain all information required by law.

In summary this means that

- the parent undertaking may submit notifications of subsidiaries subject to the notification obligation by reference to section 24 of the WpHG in its own name without needing any express authorisation by the subsidiaries;
- the notifications in question are separate notifications on the respective voting interests of the subsidiaries which are made independent of the parent company’s own notification on its position;
- the notifications of parent undertakings and subsidiaries may be made in one communication of the parent undertaking provided that the notifications are stated in such a way that they can be distinguished from one another;
- the subsidiaries are exempt from their notification obligation only by a proper notification of the parent undertaking.

According to its administrative practice, BaFin will, by analogous application of section 24 of the WpHG, generally also accept notifications of foreign group parents that submit notifications in their own name on behalf of group subsidiaries. However, in view of section 28 of the WpHG, it appears advisable for the parent undertaking to have a power of attorney for this purpose.
VIII.2.8 Notification obligations relating to holdings in other financial instruments (section 25 of the WpHG)

VIII.2.8.1 Prerequisites

Notification obligations also exist in relation to directly or indirectly held financial instruments that result in an entitlement to acquire, unilaterally and under a legally binding agreement, shares in an issuer whose home country is the Federal Republic of Germany that carry voting rights and have already been issued.

Financial instruments are deemed to be held directly if the financial instrument is owned by one person. By contrast, financial instruments are deemed to be held indirectly where they are held by subsidiaries or in administrative trust (Verwaltungstreuhand).

Fungibility is not decisive for classifying an instrument as a financial instrument. For example, a claim to delivery under a share purchase agreement is also a financial instrument within the meaning of section 25 of the WpHG if the delivery is to take place later than two days after the agreement is concluded.

Call options (provided that they grant entitlement not only to cash settlement but also to delivery of the shares) are typical financial instruments within the meaning of section 25 of the WpHG. By contrast, it is irrelevant for classification as a financial instrument whether or not the option may be exercised during the entire term (American style option) or only during a certain time or at a certain point in time (European style option). As soon as the person or entity subject to the notification obligation either directly or indirectly holds financial instruments in an amount relevant for a threshold, a threshold may be crossed or reached even if the exercise period has not yet been reached.

Put options, by contrast, do not fall under the definition of section 25 of the WpHG since these do not grant the holder the right to demand delivery of the shares.

Convertible bonds as a rule do not fall under the scope of the provision because financial instruments as defined in section 25 of the WpHG must refer to shares that have already been issued.

The notification obligation applies when the position concerned hypothetically reaches, exceeds or falls below the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75%, i.e. whenever the holder of the financial instrument is entitled or, as the case may be, ceases to be entitled to purchase a corresponding quantity of shares to which voting rights are attached.

Sections 23 and 24 of the WpHG apply mutatis mutandis to financial instruments held.

Previously, the notification obligation pursuant to sections 21 and 22 of the WpHG for held and attributed voting rights attached to shares existed in addition to the notification obligation pursuant to section 25 WpHG for other financial instruments introduced by the TUG. With the RBG, both portfolios are now aggregated. If both shares and other financial instruments are held, the voting rights attached to these portfolios are aggregated. As a result of the aggregation, the entry notification threshold is reached earlier and the ambit of notifications is increased.
Financial instruments pursuant to section 25 of the WpHG which at the same time fall under section 22 (1) sentence 1 no. 5 of the WpHG (e.g. call options conferring rights in rem) are included in the calculation of the aggregated voting interest only once. Generally, each case of section 22 (1) sentence 1 no. 5 of the WpHG is also a financial instrument pursuant to section 25 of the WpHG. However, this is not necessarily the case the other way around: rights in rem must be conferred for attribution in accordance with section 22 (1) sentence 1 no. 5 of the WpHG, which is exactly not something that is required by section 25 of the WpHG.

Where a notification pursuant to section 21 of the WpHG, also in conjunction with section 22 of the WpHG, is being or has been submitted, an additional notification in respect of an aggregation within the meaning of sentence 3 is only necessary if, as a consequence, the position in question reaches, exceeds or falls below further thresholds mentioned under section 21 (1) sentence 1 of the WpHG (section 25 (1) sentence 4 of the WpHG). The purpose of section 25 (1) sentence 4 of the WpHG is to counter a duplication of notification obligations. The notification obligation of section 25 of the WpHG is restricted to cases in which the aggregation results in a position once again reaching, exceeding or falling below the statutory thresholds. Besides preserving a consistency across Europe as well as consistency with the WpÜG, the provision at the same time upholds the principle of proportionality because the capital market is informed only in the event of changes in which the person or entity subject to the notification obligation – in addition to any voting rights already notified pursuant to sections 21 and 22 of the WpHG – holds financial instruments which in their aggregation cross or reach a new threshold.

If different financial instruments refer to shares of the same issuer, the holder of the financial instruments must aggregate the voting rights attached to these shares (section 25 (2) sentence 1 of the WpHG).

A notification pursuant to section 25 of the WpHG is required if voting rights and financial instruments held amount to 5% in the aggregate – irrespective of whether or not the separate notification threshold of voting rights of 3% was also reached or exceeded: a portfolio consisting of 1% voting rights and 4.5% financial instruments is thus subject to the notification obligation.

Examples of aggregation:

**Base case**
A company acquires voting rights of 6% and notifies this pursuant to section 21 of the WpHG. At the same time (or following this):

**Example 1**
- the company acquires financial instruments by means of which it can purchase voting rights of 3%.

Notification obligation pursuant to section 25 of the WpHG: no

On a cumulative basis, the company reaches voting rights of 9% and thus only exceeds the 5% threshold, which already has or will be notified pursuant to sections 21 and 22 of the WpHG.
Example 2
- the company acquires financial instruments equal to 5% of the voting rights.

Notification obligation pursuant to section 25 of the WpHG: yes

On a cumulative basis, the company reaches 11% and thus exceeds the 10% threshold, which has not yet been notified pursuant to sections 21 and 22 of the WpHG.

Example 3
- the company acquires financial instruments equal to 5% of the voting rights (notification of 11% pursuant to section 25 of the WpHG) and later exercises

a) all financial instruments equal to voting rights of 5%; and

b) financial instruments equal to 2%.

a) Notification obligation pursuant to section 25 of the WpHG: yes
   The company no longer holds any financial instruments and therefore falls to 0%.
   In addition, the notification obligation applies pursuant to section 21 of the WpHG because the company now holds voting rights of 11% and therefore exceeds the 10% threshold pursuant to section 21 of the WpHG.

b) Notification obligation pursuant to section 25 of the WpHG: no
   On a cumulative basis, the company still reaches 11% (3% via financial instruments + 8% of voting rights pursuant to sections 21 and 22 of the WpHG). There is no notification obligation pursuant to section 21 of the WpHG because no threshold is exceeded pursuant to section 21 of the WpHG.

Example 4
- the company acquires financial instruments equal to voting rights of 5% (notification of 11% pursuant to section 25 of the WpHG); the company then exercises financial instruments equal to voting rights of 2%, while financial instruments equal to voting rights of a further 2% expire or are sold.

Notification obligation pursuant to section 25 of the WpHG: yes

On a cumulative basis, the company now only reaches 9% (1% via financial instruments + 8% voting rights pursuant to sections 21 and 22 of the WpHG) and therefore falls below the 10% threshold. There is no notification obligation pursuant to sections 21 of the WpHG because no threshold is exceeded.

Variation of base case
A company holds voting rights of 2% pursuant to section 21 of the WpHG and financial instruments equal to voting rights of 2%.

Notification obligation pursuant to section 25 of the WpHG: no

The entry threshold as defined in section 25 of the WpHG is 5%; on a cumulative basis, the company holds only 4%. There is no notification obligation pursuant to section 21 and 22 of the WpHG either.
Additional example:
The company is then attributed voting rights of a further 2% pursuant to sections 21 and 22 of the WpHG.

Notification obligation pursuant to section 25 of the WpHG: yes

Even though the company does not acquire any additional financial instruments, it now reaches 6% on a cumulative basis (2% via financial instruments + 4% of voting rights pursuant to sections 21 and 22 of the WpHG) and thus exceeds the 5% threshold which has not already been notified pursuant to sections 21 and 22 of the WpHG. At the same time there is also a notification obligation pursuant to sections 21 and 22 of the WpHG as a result of the 3% threshold being exceeded.

VIII.2.8.2 Notification

VIII.2.8.2.1 Addressees of the notification

Like the notification pursuant to section 21 of the WpHG, the notification pursuant to section 25 of the WpHG must also be submitted both to issuers whose home country is the Federal Republic of Germany and in which the voting rights exist, and to BaFin (by fax: +49 228 4108 3119 or by mail: Postfach 50 01 54, 60391 Frankfurt am Main).

VIII.2.8.2.2 Content of the notification

Pursuant to section 17 (3) and (1) of the WpAIV, the notification must contain the following details:

- the clearly-highlighted title “Voting rights notification” (section 17 (1) no. 1 of the WpAIV);

- the name and address of the person or entity subject to the notification obligation (section 17 (1) no. 2 of the WpAIV);

- the name and the address of the issuer of the shares which may be acquired with the financial instruments (section 17 (3) no. 1 of the WpAIV);

- all thresholds that would be crossed or reached and the voting interest (expressed as both a percentage and the number of voting rights) that would exist if the person or entity subject to the notification obligation held the shares instead of the financial instruments, as well as information whether the position would exceed, fall below or reach the thresholds (section 17 (3) no. 2 of the WpAIV);

- if applicable, the chain of controlled undertakings through which the financial instruments are held (section 17 (3) no. 3 of the WpAIV);

- the date of the position hypothetically reaching, exceeding or falling below the thresholds (section 17 (3) no. 4 of the WpAIV);
in respect of financial instruments with a specific exercise period, a reference to the point in time the shares shall or may be acquired (section 17 (3) no. 5 of the WpAIV); and

the date of maturity or expiration of the financial instruments (section 17 (3) no. 6 of the WpAIV).

VIII.2.8.2.3 Nature, form and language of the notification

Here, the same applies as in the case of notifications pursuant to section 21 of the WpHG (see VIII.2.3.9.).

For notifications pursuant to section 25 of the WpHG, BaFin recommends using the sample texts available on the BaFin website.\(^4\)

VIII.2.8.2.4 Time limit

Pursuant to section 25 (1) sentence 1 of the WpHG, the person or entity subject to the notification obligation must make the notification without undue delay. Pursuant to section 21 (1) sentence 1 of the WpHG, the notification must be submitted after four trading days at the latest. Accordingly, such notification period begins when the person or entity subject to the notification obligation learns or, in consideration of the circumstances, must have learned that its voting interest hypothetically has reached, exceeded or fallen below the relevant thresholds. The threshold is deemed to hypothetically have been crossed or reached at the point in time when the financial instruments are held, it being irrelevant whether the financial instruments can already be exercised. In all other respects, the same applies as in the case of notifications pursuant to section 21 of the WpHG (see VIII.2.3.9.4.).

VIII.2.8.3 Special cases

VIII.2.8.3.1 Purchases via stock exchange

In the case of shares purchased via the stock exchange with a delay in delivery, i.e. transfer to the purchaser’s securities account, this does not give rise to any notification obligation pursuant to section 25 of the WpHG on the part of the purchaser.

VIII.2.8.3.2 Securities lending

The recovery claim of a securities lender does not trigger any separate notification obligation pursuant to section 25 of the WpHG.

VIII.2.8.3.3 Repo transactions

The repurchase agreement in a repo transaction (under which a security is sold with a date for its repurchase being agreed at the same time) does not trigger a separate notification obligation pursuant to section 25 of the WpHG.

\(^4\) [http://www.bafin.de/dok/2784908; please find the corresponding form under http://www.bafin.de/dok/2784892](http://www.bafin.de/dok/2784908)
VIII.2.8.3.4 Off-exchange acquisition

If shares are acquired off-exchange and a separate period is agreed for delivery (longer than \( T+2 \)) a notification – in the case of a threshold being crossed or reached – is required pursuant to section 25 of the WpHG. However, if delivery is to take place within two days following the transaction, the conclusion of the contract does not trigger any notification obligation pursuant to section 25 of the WpHG.

VIII.2.8.3.5 Cases in which persons or entities subject to the notification obligation exceed (or fall below) notification thresholds

Cases in which persons or entities subject to the notification obligation even briefly exceed (or fall below) thresholds generally trigger a notification obligation pursuant to section 25 of the WpHG. However, BaFin permits same-day netting in cases of persons or entities exceeding or falling below thresholds, although a general netting of long and short positions (such as call and put options) is not permitted.

VIII.2.9 Notification obligations for holders of qualifying holdings (section 27a of the WpHG)

Pursuant to the new provision introduced by the RBG, any person or entity subject to the notification obligation within the meaning of sections 21 and 22 of the WpHG that reaches or exceeds the threshold of 10\%, or a higher threshold, of voting rights attached to shares must, within 20 trading days of reaching or exceeding such thresholds, inform the issuers whose home country is the Federal Republic of Germany of the aims and of the origin of the funds.

If the aims within the meaning of sentence 1 change, this must also be notified within 20 trading days.

In respect of the aims underlying the purchase of the voting rights, the person or entity subject to the notification obligation must state, pursuant to section 27a (1) sentence 3 of the WpHG, whether

- a long-term strategic investment in the issuer is being pursued, or whether it is primarily seeking to generate short-term trading profits with the investment;
- it plans to acquire further voting rights within the next twelve months by means of a purchase or by any other means;
- it intends to exert influence on the appointment or removal of members of the issuer’s administrative, managing and supervisory bodies; and
- it intends to achieve a material change in the company’s capital structure, in particular as regards the ratio between own funds and external funds and the dividend policy.

The above list of aims pursuant to sentence 3 is exhaustive.
With regard to the origin of the funds used, the person of entity subject to the notification obligation must state, pursuant to sentence 4, whether the funds raised by the person or entity to finance the purchase of the voting rights are own funds or external funds. In the case of mixed financing, the respective share of financing forms in the total financing must be stated.

Pursuant to section 27a (1) sentence 5 of the WpHG, no notification obligation pursuant to sentence 1 exists if the threshold has been reached or exceeded as a result of an offer within the meaning of section 2 (1) of the WpÜG.

Moreover, pursuant to section 27a (1) sentence 6 of the WpHG, no notification obligation applies to asset management companies (Kapitalanlagegesellschaften), investment stock corporations (Investmentaktiengesellschaften) as well as foreign management companies and investment companies within the meaning of the UCITS Directive which are subject to a prohibition pursuant to Article 25(1) sentence 1 of the UCITS Directive, to the extent that an investment threshold of 10% or less had been determined; in addition, no notification obligation applies in the event of a permissible exception for exceeding investment thresholds in accordance with Article 26(1) sentence 1 and (2) of the UCITS Directive. Article 25(1) sentence 1 of the UCITS Directive is transposed by section 64 (2) of the InvG. Asset management companies, investment stock corporations as well as EC investment undertakings subject to the requirements of the UCITS Directive, and their management companies are therefore exempt from the notification obligation pursuant to sentence 6 because these undertakings are generally not permitted to hold any interest in the relevant amount here of at least 10% of voting rights. By the reference to Article 26(1) sentence 1 and (2) of the UCITS Directive, which was transposed by section 65 sentences 1 and 2 of the InvG, the undertakings are also exempt from the notification obligation in cases where the investment limit is briefly exceeded.

Section 27a (3) of the WpHG makes it possible for issuers domiciled in Germany to exempt themselves from the notification obligation with regard to the aims and origin of funds in subsection (1), and the disclosure according to subsection (2), by including a provision to this effect in their articles of association. The exemption may only be provided for the entirety of the disclosures pursuant to subsection (1). The inclusion of a corresponding provision in the articles of association and its revocation are governed, for issuers domiciled in Germany, by the general provisions of the AktG. The same applies mutatis mutandis to issuers domiciled abroad.

After the entry into force of section 27a of the WpHG, no notification of existing shareholdings is required. This is clear in particular from the way in which the rule is worded, requiring a threshold to be reached or exceeded and thus an active involvement on the part of the person or entity subject to the notification obligation. Provided that already prior to 31 May 2009 a voting interest of 10% or more exists, the change in legislation does not result in a threshold being further reached or exceeded. For this reason, a notification pursuant to section 27a of the WpHG is only required when the next threshold as specified in section 21 (1) of the WpHG has been reached or exceeded.
VIII.2.10 Legal consequences in the event of violations of the notification obligation

VIII.2.10.1 Administrative offence proceedings

Breaches of obligations pursuant to section 21 (1), section 21 (1a) and section 25 of the WpHG are punishable by a fine pursuant to section 39 of the WpHG. The relevant fines may be as much as €200,000 for single offences.

VIII.2.10.2 Loss of rights pursuant to section 28 of the WpHG

Pursuant to section 28 sentence 1 of the WpHG, rights attached to shares held by a person or entity subject to the notification obligation, or by reason of which voting rights are attributed to such person or entity pursuant to section 22 (1) sentence 1 no. 1 or 2 of the WpHG shall not exist for the period during which the notification obligations are not satisfied. This does not apply to claims under section 58 (4) of the AktG (claim to net distributable profit) and section 271 of the AktG (claim to liquidation surplus) if the notification was omitted unintentionally and this has subsequently been remedied.

For cases in which the breach of the notification obligation relates to the amount of shareholding, the RBG provides for more stringent sanctions. In such cases, the loss of rights previously provided will not be limited to the period up to fulfilment of the notification obligation but instead, in the case of intentional or grossly negligent breach of notification obligations, will be extended pursuant to the new sentence 3 to a period of six months thereafter where the breach relates to the voting interest. Under the previous legislation, a shareholder failing to comply with the notification obligation was able to build up a shareholding that would go unnoticed at least between two shareholders’ meetings without thereby suffering the sanction of loss of voting rights. The purpose of this change is to prevent the situation where persons or entities subject to the notification obligation are able to subsequently submit the notification just before resolutions are adopted by the shareholders’ meeting.

Pursuant to sentence 4, the new sentence 3 does not apply if the actual percentage of voting rights is less than 10% higher or lower than the percentage of voting rights indicated in the previously submitted incorrect notification and if no notification is omitted regarding such person or entity reaching, exceeding or falling below any threshold mentioned under section 21.

Sentence 4 excludes petty offences from the newly introduced sanction of the loss of legal rights continuing in effect for six months in the case of failure to notify the actual voting interests. In addition to the scope of the sanction being limited to intent and gross negligence, reasons of proportionality require the loss of rights continuing for the six-month period to be limited to cases in which a past notification represented a serious deviation from the actual voting interest of the person or entity subject to the notification obligation, or cases in which the notification on one of the thresholds of section 21 of the WpHG being crossed or reached was omitted. In the case of minor deviations of less than 10% of the correct voting interest, persons or entities subject to the notification obligation are permitted to publish a correction without triggering the more stringent sanction of sentence 3.
VIII.3 Publication and transmission obligations

VIII.3.1 Persons and entities subject to publication and transmission obligations

Any domestic issuer of shares within the meaning of section 2 (7) of the WpHG in conjunction with section 21 (2) of the WpHG has an obligation to publish notifications and transmit them to the company register. These include:

- issuers domiciled in Germany whose shares are admitted to trading on an organised market in Germany or in another EU or EEA country (exception: issuers whose shares are admitted to trading not in Germany but only in another EU or EEA country are not deemed domestic issuers);

- issuers domiciled in a third country which are required to deposit the annual document with BaFin in accordance with section 10 of the WpPG; and

- issuers domiciled in another EU or EEA country whose shares are admitted to trading on an organised market only in Germany.

With regard to the concept of "domestic issuer", please refer to the detailed explanation under IV.2.1.1.

VIII.3.2 Publication obligation of issuer and transmission to the company register (section 26 of the WpHG)

VIII.3.2.1 Publication

A person or entity subject to the publication obligation pursuant to section 26 (1) sentence 1 of the WpHG is required to publish voting rights notifications pursuant to sections 21 and 25 of the WpHG by forwarding the notifications to media for dissemination across Europe. The issuer is not required to ensure that the publication is effected.

The person or entity subject to the publication obligation may instruct a third party to make the publication (service provider). Also when a service provider is used, the person or entity subject to the publication obligation remains responsible for fulfilling the publication obligation (section 3a (4) of the WpAIV).

For issuers that are domiciled in another EU or EEA country and whose shares are admitted to trading on an organised market only in Germany there is no notification obligation pursuant to section 21 or section 25 of the WpHG. In this case, however, the publication obligation extends to those notifications received by such issuer in accordance with the legal regulations of the home country concerned.
In addition to notifications of voting rights, a domestic issuer is also required to make a publication whenever it reaches, exceeds or falls below the 3%, 5% and 10% thresholds in respect of its own shares. For issuers that are domiciled in another EU or EEA country and whose shares are admitted to trading on an organised market only in Germany, this applies only to the 5% and 10% thresholds.

Unlike the previous situation of legislation, there are no longer any exemptions from the publication obligation since January 2007.

Special case: issuers undergoing insolvency proceedings

Section 11 of the WpHG provides for an obligation on the part of the insolvency administrator to assist the issuer inter alia in the performance of its obligations pursuant to section 26 of the WpHG, in particular by providing the necessary funds from the assets involved in the insolvency proceedings. In practice this includes forwarding to the board of management the voting rights notifications addressed to the domestic issuer unless the insolvency administrator itself makes the publication to the domestic issuer.

VIII.3.2.1.1 Time limit

The issuer is required to fulfil the publication obligation without undue delay. Pursuant to section 26 (1) sentence 1 half-sentence 1 of the WpHG, however, the publication must take place at the latest three trading days following receipt of the notification. The time limit commences on the next trading day following the date of receipt, i.e. the date of receipt is not included.

For the purpose of calculating the publication time limits, trading days are all calendar days other than Saturdays, Sundays or public holidays that are legally recognised in at least one Federal State (section 30 (1) of the WpHG).

For the purpose of calculating the time limit, a calendar of trading days pursuant to section 30 of the WpHG has been posted on the BaFin website.50

VIII.3.2.1.2 Content of publication (section 19 of the WpAIV)

Pursuant to section 19 of the WpAIV, the publication as a general rule must contain all information of the notification. However, the publication must only state the name of the person subject to the notification obligation and the country in which that person has his place of residence, or in the case of legal entities the name, domicile and country in which the legal entity is domiciled.

Example:

"We have been notified by Mr [insert name], Germany, ...” or “We have been notified by [insert company name], Germany, ...”.

50 http://www.bafin.de/dok/2675916
The full address must **not** be stated in the publication. This serves the legitimate interests of the person or entity subject to the notification obligation of being protected from criminal acts.

Apart from this, the notification text of the domestic issuer and the information from the standard notification page must be adopted. Deviations from this (e.g. if the notification is manifestly flawed) should be made only after consultation with BaFin due to the risk of the notification’s content being changed or distorted and having to be rectified by a correction notification. Irrespective of this, publication of several notifications in one publication is possible in principle and even preferable in specific cases, e.g. where several notifications of several companies from one group are made. However, the requirement for this is that there is at least a factual connection between the individual notifications.

**Further examples:**

* A **domestic issuer is aware that an existing shareholder has transferred his shareholding to a new shareholder. If this transfer establishes a notification obligation for both persons (thresholds are crossed or reached on identical date), the domestic issuer may publish both notifications together.**

* Several notifications are triggered by a capital adjustment measure of a domestic issuer.*

Some service providers offer the possibility for issuers to “compile” the publication text using pre-worded input masks. Particularly in the case of complicated notifications (e.g. several different attribution cases) or when several notifications are published, the publication text then still has to be adjusted to the correct notification text. In such cases the alternative is to enter the text “manually”, i.e. without using the pre-worded input masks.

The domestic issuer is generally not permitted to include explanatory comments or additional information in the publication text. However, a domestic issuer is free to make such comments or information known to the market (for example on its website or through a press release) provided that this does not result in investors or market participants being misled.

When transmitting notifications to the media, the domestic issuer must state the following general information:

- name and address of the issuer subject to the publication obligation;
- date and time of transmission; and
- aim to disseminate the information as prescribed information on a Europe-wide level;

The domestic issuer must also state a keyword summarising the essential content of the publication (section 3a (2) no. 3 of the WpAIV) and additionally use one of the following headers:

- “Publication of a notification pursuant to section 26 (1) sentence 1 of the WpHG”
- “Publication pursuant to section 26 (1) sentence 2 of the WpHG (own shares)“.

Frequent sources of error:
Particularly as a result of the input masks of service providers being used incorrectly, mistakes are frequently made in the heading: notifications pursuant to section 21 (1) of the WpHG are frequently published under the heading “Publication of a statement pursuant to section 26 (1) sentence 2 of the WpHG (own shares)”, or vice versa, publications of a statement pursuant to section 26 (1) sentence 2 of the WpHG under “Publication of a notification pursuant to section 21 (1) of the WpHG (share)”. It is also incorrect to publish a notification made subject to the laws of a foreign jurisdiction (see VIII.3.2.1.) under “Publication of a notification pursuant to section 21 (1) of the WpHG (share)”, for the simple reason that such notification is not a notification pursuant to section 21 (1) of the WpHG.

When publishing several notifications, the use of the input mask “Person or entity subject to the notification obligation” frequently leads to further mistakes: here it often occurs that only one person or entity subject to the notification obligation is entered, although there are actually several. Where entry of all persons and entities subject to the notification obligation is not desired, it is possible to make the entry “See text of notification” so as to avoid creating the impression that there is only one person or entity subject to the notification obligation.

VIII.3.2.1.3 Nature of the publication (section 20 in conjunction with section 3a of the WpAIV)

VIII.3.2.1.3.1 Choice of media

The objective of the publication is to ensure active dissemination of the notification across Europe (section 3a (1) of the WpAIV). According to the intent of the German legislature, the issuer is required to use a pool of different types of media.

Pursuant to section 3a (2) sentence 1 no. 1 of the WpAIV, media which are able to actively disseminate the publication as rapidly and as promptly as possible across the entire EU and the other EEA countries must also be considered for the publication. In all other respects, the choice of the types of media and the number of media of the respective media type are determined by the circumstances of the individual case. Circumstances that the issuer must consider when selecting the type and number of media notably include the number and location of stock exchanges in Germany and other European countries to which the issuer’s securities are admitted to trading, as well as its shareholding structure.

According to the grounds stated for the Act, the types of media to be considered by the issuer include:

- electronic information systems;
- news agencies;
- news providers;
- print media; and
- websites for the financial market.
In this context, BaFin sees a need for a minimum standard to be observed. Accordingly, a reasonable pool of media must at least comprise:

- all five types of media specified in the grounds stated for the Act;
- one medium per media type.

Of these, at least one medium must be capable of providing active dissemination across Europe. Moreover, the individual media must also be capable of disseminating the information at least in the country in which the issuer’s shares are admitted to trading.

Depending on the individual case, the issuer may be required to exceed this mandatory minimum standard regarding the number of media of one media type used, or the number of additional media capable of providing active dissemination abroad.

For instance, where an issuer’s shares are admitted to trading in a further EU or EEA country, such issuer must also transmit the information to those news agencies, news providers, print media and financial market websites that are able to disseminate the information in the country of such further admission to trading.

**VIII.3.2.1.3.2 Requirements for transmitting publications to the media pool**

When forwarding the notifications destined for publication to the various media, the issuer must give due regard to technical and content-related requirements.

In technical terms, it must ensure, pursuant to section 3a (2) sentence 1 no. 2 of the WpAIV, that

- the sender can be clearly identified;
- the data are sufficiently protected against unauthorised access or modification;
- the transmission remains confidential and secure; and
- errors or interruptions occurring during the transmission can be remedied without undue delay.

For this purpose, BaFin considers transmission by fax to the media to be generally suited to meeting the above criteria. By contrast, a transmission simply by e-mail (in unencrypted form or via an unsecure connection) does not satisfy the requirements, since ensuring clear identification of the sender as well as a safe connection and transmission of data would require further suitable measures.


**VIII.3.2.1.3.3 Content-related requirements**

For the purpose of classifying the notification, the issuer must provide the following information (required content) when transmitting a notification:

- the name and address of the issuer subject to the publication obligation;
- the phrase “Publication of a notification pursuant to section 26 (1) of the WpHG” in the subject line;
- the date and time of transmission;
- the aim to disseminate the information as prescribed information across Europe.

**VIII.3.2.1.3.4 Service providers**

Pursuant to section 3a (4) of the WpAIV, an issuer may avail itself of the help of a third party, for example a service provider. In this case, however, it must duly consider that it remains responsible for fulfilling its publication obligation.

**VIII.3.2.1.3.5 Retention of information**

Lastly, pursuant to section 3a (3) of the WpAIV, an issuer must be able, for a period of six years, to specify to BaFin on request:

- the person who sent the notification to the media;
- the security measures used for sending the notification to the media;
- the date and time of transmission to the media;
- the medium used for the transmission of the notification to the media; and
- where applicable, all data pertaining to any delay in the publication.

**VIII.3.2.1.4 Language of the publication**

The language of the publication is determined by section 3b in conjunction with section 20 of the WpAIV.

Language of publication:

- home country is the Federal Republic of Germany and admission only in Germany: German;
- home country is the Federal Republic of Germany and admission also in the EU/EEA: German or English and (depending on the choice of the issuer) a language accepted by the other EU/EEA country or English (section 3b (2) of the WpAIV), i.e. the publication may be made in two languages or only in English;
• domicile in the EU/EEA and admission only in Germany (section 2 (7) no. 2 of the WpHG): German or English (section 3b (3) sentence 1 of the WpAIV);

• domicile in Germany and admission only in several EU/EEA countries: depending on the choice of the issuer, in a language accepted by the other EU/EEA country or English; in addition, German is also possible (section 3b (3) sentence 2 of the WpAIV);

• domicile abroad: English or, on a voluntary basis, German (section 3b (1) of the WpAIV).

In derogation of the general provision on language in section 3b of the WpAIV, the domestic issuer may also publish a notification made in English exclusively in English (section 20 of the WpAIV).

VIII.3.2.1.5 Correction publications

Generally, domestic issuers are required to make correction publications if the notification was incorrect and a correction notification has been submitted, or if a domestic issuer has incorrectly published a correct notification.

Correction publications are required in the event of deviations from notification-relevant information (e.g. date the threshold was crossed or reached, percentage and number of voting rights, name of person or entity subject to the notification obligation, specification of the attribution case). Given the risk of resolutions taken at shareholders' meetings being contested on the basis of section 28 of the WpHG, such corrections are also in the interest of the person or entity subject to the notification obligation and the domestic issuer.

Correction publications must already be designated as such in the heading (“Correction of a publication pursuant to section 26 (1)”). The heading or the text of the publication must also set out the date of the publication that is being corrected since the incorrect publication is not deleted from the company register.

The correction publication must contain the complete and correct text of the publication; it is not sufficient to publish only the information that is being corrected. It need not be highlighted in the text of the publication which specific information is being corrected.

VIII.3.2.1.6 Special case: publication with reference to own shares (section 26 (1) sentence 2 of the WpHG)

Own shares are defined not only as those shares which an issuer holds directly, but also those held by a person or entity acting in its own name but for the account of the domestic issuer. In all cases, no prior notifications to BaFin are required.

No publication obligation applies (as in section 21 (1a) of the WpHG) for the first-time admission of the shares to an organised market.

Pursuant to section 71d of the AktG, shares held by a company controlled by the issuer or in which such issuer holds a majority interest are also deemed own shares. However, this case is not covered by the wording of section 26 (1) sentence 2 of the WpHG, with the result that no publication obligation applies for the domestic issuer in respect of these shares. However,
The voluntary inclusion of these shares and subsequent publication is desirable. It must be noted that, in such case, the issuer is then required to include these shares in the following publications also.

If shares are held through third parties or subsidiaries, such interests must be stated in the publication as interests which are not attributable to the domestic issuer pursuant to section 22 (1) sentence 1 no. 1 2 of the WpHG. Nonetheless, the holding of own shares through third parties or subsidiaries may be disclosed in the publication.

Example:

"We hereby notify that on DD.MM.YYYY we exceeded the threshold of 3% in own shares and as at this date hold 4.50% in own shares, including 0.51% held through our subsidiary xy."

VIII.3.2.2 Transmission of notifications to the company register

Pursuant to section 26 (1) sentence 1 half-sentence 2 of the WpHG, the issuer must transmit the information subject to the publication requirement to the company register without undue delay to be stored there. However, such transmission for storage purposes may not take place prior to publication. The obligation to transmit the information to the company register as the centralised storage medium within the meaning of the Transparency Directive already follows from section 8b (2) no. 9 in conjunction with (3) sentence 1 no. 2 of the HGB. However, the WpHG determines when the transmission must be made to the company register to ensure that all investors are informed quickly and uniformly.

The company register is maintained by Bundesanzeiger Verlagsgesellschaft mbH on behalf of the Federal Ministry of Justice (www.unternehmensregister.de).

VIII.3.2.3 Issuer’s obligation to furnish BaFin with proof of publication (section 26 (2) of the WpHG)

In addition to making the publication, the issuer is also required to submit a notification to BaFin that the publication has been made. The domestic issuer must notify BaFin of the publication directly following such publication ("simultaneously"). The notification must contain the text of the publication, the media to which the publication text was sent, as well as the exact time and date the information was sent to the media (section 21 in conjunction with section 3c of the WpAIV).

The notification by the domestic issuer to BaFin with regard to the publication may also be sent by e-mail (WA12@bafin.de), in contrast to the publication of the person or entity subject to the notification obligation (only by mail or fax).
VIII.3.3 Obligation to publish the total number of voting rights and transmission to the company register (section 26a of the WpHG)

Changes in the total number of voting rights must be published at the end of each calendar month in which voting rights increase or decrease (capital increases, redemption of own shares, preference shares for which voting rights revive, etc.). The manner as well as the language in which the publication is to be made is determined by general rules (see IV.6. and VIII.3.2.1.3.). In addition to making the publication, the information must also be transmitted to the company register to be stored there, and BaFin must be notified of the publication (IV.6.4.; VII.3.2.3.).

Where a publication obligation applies pursuant to section 26a of the WpHG, it should always be kept in mind that a publication may also be required pursuant to section 30b (1) no. 1 of the WpHG (issuance of shares: publication as a rule without undue delay after publication in the electronic Federal Gazette) (see IX.3.).

VIII.3.3.1 Contents

Publications pursuant to section 26a of the WpHG must contain the following information:

- the total number of voting rights; and

- statement “as at the end of [insert month]”.

When stating the total number of shares, the shares held by the domestic issuer ("own shares") must not be deducted. This is already clear from the fact that any change in the portfolio of own shares would entail a publication obligation pursuant to section 26a of the WpHG. However, that would make a separate publication obligation for own shares (section 26 (1) sentence 2 of the WpHG) superfluous.

The effective date of the change may be stated voluntarily (in the case of several changes during one month, see section “Contingent capital increases” below). However, a strict distinction must be observed between the point in time when the publication is made and the point in time when the change takes effect: the publication must always be made at the end of the month in which changes have occurred, whereas the effective date is governed by the provisions of stock corporation law.

Example:

"We hereby notify that the total number of voting rights at the end of [insert month] 2008 is xy. The change in the total number has been in effect since DD.MM.YYYY (e.g. date when execution of capital increase was registered pursuant to section 189 of the AktG)."
VIII.3.3.2 Date of publication

End of the calendar month

The end of the calendar month is generally considered to be the last calendar day of the month. A publication made only on the first or second of the following month is late and thus not permissible. If the publication is made too early, it must be made once again at the end of the calendar month. If the last calendar day of the month is a Saturday, Sunday or public holiday throughout Germany, BaFin allows a publication to be made on the preceding last trading day within the meaning of section 30 of the WpHG as sufficient for meeting the publication obligation.

Contingent capital increases (e.g. employee stock-option programmes)

The new shares (and the related increase in registered share capital) are generally deemed to be issued from a legal viewpoint only after they have been transferred to the beneficiary’s securities account. As a rule, this takes place within T+2, but the exact date is generally not known to the issuer. For the purposes of section 26a of the WpHG, the issuer may assume for all intents and purposes that the registered share capital has increased already when its instructed institution has been ordered to transfer the (new) shares to the securities account of the beneficiary. Where applicable, it may be necessary for the issuer to have its instructed institution notify the current stage of the issuance on the last day of the month in each case.

Where the change in the total number of voting rights resulting from the issuance of new shares takes place on several days in a month and the domestic issuer would like to state the effective date of the changes (voluntary disclosure, see VIII.3.3.1.), it must state all days on which the total number of voting rights changed. It is not sufficient – and thus incorrect – to state only the last day on which new shares were issued.

Regardless of whether or not the domestic issuer includes this information in the publication, it must keep the data available in the event that shareholders who cross or reach one or more thresholds as a result of the issuance of new shares are able to determine the exact date the threshold was crossed or reached. Where required, the domestic issuer must take corresponding precautions together with the institution issuing the (new) shares.

Special case: first-time admission of domestic issuer’s shares

The first-time admission of an issuer’s shares (IPO) on an organised market as a rule is preceded by a capital increase.

Example:

Domestic issuer A is planning an IPO, and prior thereto launches a capital increase against contributions. Execution of the capital increase is registered (section 189 of the AktG) on 5 October, and the shares are admitted on 6 October. No further change in the registered share capital takes place during that month.

Here, the change in the total number of voting rights took place prior to the first-time admission of the shares, and thus prior to the point in time when the obligations of sections 21 et seq. of the WpHG arose. For this reason, there is no publication obligation pursuant to section 26a of the WpHG at the end of the month of first-time admission.
VIII.3.4 Exemptions from the obligations pursuant to section 26 (1) and section 26a of the WpHG for third-country issuers (section 29a (1) and (2) of the WpHG)

Section 29a of the WpHG provides for exemptions for issuers from third countries from the publication obligations pursuant to section 26 (1) of the WpHG and section 26a of the WpHG.

Under section 29a (1) of the WpHG, BaFin may exempt issuers domiciled in a third country and whose home country is Germany pursuant to section 2 (6) no. 1 (b), no. 2 or no. 3 (c), from the obligations set forth in section 26 (1) and section 26a of the WpHG provided that such issuers are subject to equivalent rules of a third country or submit to such rules. Such rules may be those of the third country in which the issuer is domiciled, or those of another country to which the issuer has submitted. The purpose of this provision is to prevent a situation in which such issuers are burdened by two equivalent sets of rules. The concept of third country is defined in section 2 (6) no. 1 (b) of the WpHG.

The requirements of equivalence of third-country rules are clarified in the TranspRLDV.

The criteria for determining whether a third country’s rules are equivalent to the time limits to be observed for the issuer’s publication obligations pursuant to section 26 (1) sentence 1 of the WpHG are set forth in section 5 of the TranspRLDV. For the criteria of equivalence to be met, the time limit within which the issuer domiciled in the third country must be informed about changes in the voting interest and within which such issuer must publish such changes may not be more than seven trading days.

Section 6 of the TranspRLDV sets out the criteria for determining whether a third country’s rules are equivalent regarding the issuer’s publication obligations to be met with regard to own shares. These requirements depend on the permissible proportion of own shares. If an issuer is permitted to hold no more than 5% of its own shares to which voting rights are attached, the criteria of equivalence are satisfied if the issuer is required to notify that such threshold has been reached or exceeded. If an issuer is permitted to hold between 5% and 10% of its own voting shares, it is required to notify that it has reached or exceeded the 5% threshold or the applicable maximum threshold. An issuer permitted to hold more than 10% of its own voting shares must notify that it has reached or exceeded the 5% threshold as well as the 10% threshold. For the purposes of equivalence, a notification above the 10% threshold is not required.

Section 7 of the TranspRLDV sets out the criteria for determining whether a third country’s rules are equivalent regarding the issuer’s publication obligations to be met with regard to the total number of voting rights. The rules of a third country are deemed equivalent to the requirements of section 26a of the WpHG if they require a domestic issuer to publish the total number of voting rights and the capital within 30 calendar days of an increase or decrease in the total number of voting rights or the capital.

Pursuant to section 29a (2) of the WpHG, issuers which by reason of an exemption by BaFin pursuant to section 29a (1) of the WpHG are not required to comply with the obligations pursuant to section 26 (1) of the WpHG and section 26a of the WpHG must nonetheless ensure that the general public within the EU and the EEA is informed about the matters set out therein. For this purpose they are required to publish any information they are obliged to provide to the general public pursuant to the foreign provisions – corresponding to section 26.
(1) of the WpHG and section 26a of the WpHG – in the third country concerned also within the EU and the EEA in the manner prescribed by section 26 (1) of the WpHG, and to submit the notification to BaFin as set forth in section 26 (2) of the WpHG. The obligation to transmit the information to the company register is set forth in section 8b (2) no. 9 in conjunction with (3) sentence 1 no. 2 of the HGB.

VIII.3.5 Publication obligation pursuant to section 27a (2) of the WpHG

An issuer whose home country is the Federal Republic of Germany must publish the information received pursuant to section 27a of the WpHG, or the fact that the notification pursuant to section 27a (1) of the WpHG was not fulfilled, in accordance with section 26 (1) sentence 1 of the WpHG in conjunction with the Regulation pursuant to section 26 (3) no. 1 of the WpHG.

VIII.3.6 Legal consequences in the event of violations of the notification obligation

Breaches of the obligations pursuant to sections 26, 26a and 29a of the WpHG are subject to a fine pursuant to section 39 of the WpHG. The relevant fines may be as much as €200,000 for single offences.

VIII.4 Obligations for notifying the voting interests held pursuant to section 41 (4a) of the WpHG

VIII.4.1 Prerequisites

Pursuant to section 41 (4a) of the WpHG, holders of voting interests in certain cases are subject to the obligation to notify the voting interests held by them as per 20 January 2007. This obligation to notify the voting interests held does not apply generally to all shareholdings held. Moreover, such notification of voting interests held as per 20 January 2007 – in contrast to the obligation under section 41 (2) of the WpHG – must be sent only to the issuer, not also to BaFin.

A notification to the issuer is required only if either

- a threshold newly introduced by the Transparency Directive (i.e. the 15%, 20% and 30% thresholds) is crossed or reached by reason of purchase, sale or otherwise;

- the voting interest changes as a result of a change in substantive law (such as a change in the attribution condition of section 22 (1) sentence 1 no. 6 of the WpHG) and this results in a threshold being crossed or reached; or
- financial instruments are held in an amount relevant for a threshold.

However, the obligation to notify the voting interests held as per 20 January 2007 does not apply in the three cases mentioned above if the person or entity subject to the notification obligation already submitted a notification to the issuer containing equivalent information prior to 20 January 2007.

If only the 3% threshold is crossed or reached, no notification of the voting interests held as per 20 January 2007 is required. This rule was introduced by the German legislature to keep the burden on all parties involved to the necessary minimum. Experience shows that companies frequently increase or reduce their shareholdings especially in the range of the lower thresholds. According to the new rules, they more frequently trigger voting rights notifications: this ensures transparency for shareholdings around the 3% and 5% thresholds.

In the case of an obligation to notify the voting interests held as per 20 January 2007, the notification was required to be submitted no later than 20 March 2007.

A domestic issuer was required to publish such notification no later than 20 April 2007, and to transmit the information without undue delay, but not before its publication, to the company register (section 41 (4a) sentence 7 and 8 of the WpHG). The publication was governed by section 26 (1) sentence 1 of the WpHG (see VIII.3.).

Where a notification of the voting interests held as per 20 January 2007 is submitted to a domestic issuer after 20 April 2007, no publication obligation applies for such domestic issuer. However, a voluntary publication by the issuer in such cases is welcomed by BaFin.

VIII.4.2 Legal consequences in the event of breaches of the obligation to notify the voting interests held as per 20 January 2007

Breaches of obligations pursuant to section 41 (4a) of the WpHG are subject to a fine pursuant to section 41 (5) of the WpHG. The relevant fines may be as much as €200,000 for single offences.
IX  Information necessary for exercising rights attached to securities (sections 30a - 30e of the WpHG)

IX.1  Introduction

Since transposition of the Transparency Directive by the TUG as at 20 January 2007, Part 5a of the WpHG sets out various publication obligations for issuers of admitted securities. The purpose of these publications is to ensure that investors and the capital markets have all necessary information to exercise their rights attached to admitted securities. To facilitate such exercise in practice, this Part of the WpHG also requires issuers to create a certain basis and observe certain conditions for this purpose locally.

Prior to 20 January 2007, some of the information obligations established for issuers under sections 30a to 30g of the WpHG were provided under the BörsZulV and the BörsG, and for this reason had been supervised by the Admissions Offices (Börsenzulassungsstellen). Up to incorporation of the obligations in the WpHG, they had been part of the obligations subsequent to stock exchange admission. The remaining part of obligations subsequent to stock exchange admission, which for the most part concerns financial reporting obligations, were also incorporated in the WpHG and are found in Part 11 Sub-part 2 of the Act (see XIV.).

Upon transposition of the Transparency Directive, sections 63, 64, 66, 67 and 70 of the BörsZulV as well as (part of) section 39 of the BörsG were absorbed into sections 30a to 30g of the WpHG and were supplemented by further information obligations established under the Transparency Directive and adapted to the obligations arising from the Directive. By way of subsequent amendment, sections 63, 64, 66, 67 and 70 of the BörsZulV were repealed. In Article 24, the Transparency Directive assigns the task of monitoring compliance with the obligations to the centralised supervisory authorities, i.e. as far as the obligations incorporated into the WpHG are concerned, to BaFin.

Previously, the point of reference for the obligations was exchange admission and in particular the place of exchange admission. This territorial connection between the issuer and the obligation was replaced by incorporation of the obligations into the WpHG. The obligations of sections 30a to 30g of the WpHG are now based on the definitions of issuers as set forth in section 2 (6) and (7) of the WpHG. Sections 30a to 30c of the WpHG establish publication and notification obligations for issuers whose home country is the Federal Republic of Germany (see IV.2.1.1.2.), whereas section 30e of the WpHG is addressed to domestic issuers (see IV.2.1.1.1.).

Generally, the obligations of sections 30a to 30g of the WpHG cover all securities admitted to trading on an organised market. Some restrictions arise from specific rules, e.g. section 30b (1) of the WpHG which is intended to apply only with reference to admitted shares.
Section 30a of the WpHG sets out the obligations that issuers whose home country is the Federal Republic of Germany have vis-à-vis all holders of the securities issued by them and admitted to trading on an organised market in Germany or in another EU or EEA country.

Section 30b of the WpHG establishes the obligation of issuers within the meaning of section 2 (6) of the WpHG to publish information in the electronic Federal Gazette in order to inform specific investors; section 30b (1) of the WpHG requires information to be published on admitted shares, whereas section 30b (2) provides for nearly parallel publications to inform holders of certain admitted debt securities as defined in section 30a (1) no. 6 of the WpHG. Thus, an issuer whose home country is the Federal Republic of Germany is required, for example, to publish the convening of the shareholders’ meeting and information on the venue, time and date of the general meeting of debt securities holders in the electronic Federal Gazette. In addition, section 30b (3) of the WpHG contains provisions relating to the transmission of information by means of remote data transfer.

Section 30c of the WpHG governs the issuers’ obligation to notify BaFin in the case of intended amendments to the issuer’s legal basis. Regarding the obligation to inform the capital markets about various changes relating to domestic issuers, section 30e of the WpHG establishes publication obligations for the rights attached to admitted securities as well as for new loan issues. In addition, section 30e of the WpHG establishes a publication obligation in respect of information published in a third country. Publications pursuant to section 30e of the WpHG must be notified to BaFin.

Lastly, section 30f of the WpHG establishes the prerequisites for exemption from the obligations of sections 30a, 30b and 30e of the WpHG in the case of equivalent provisions in the respective third country. Pursuant to section 30g of the WpHG, resolutions adopted at shareholders’ meetings cannot be appealed on the grounds of a contravention of the provisions of Part 5a of the WpHG.

IX.2 Issuers’ obligations vis-à-vis security holders (section 30a of the WpHG)

IX.2.1 General

Section 30a of the WpHG establishes the obligations that an issuer within the meaning of section 2 (6) of the WpHG is required to fulfil vis-à-vis holders of securities. These obligations, some of which previously had been contained in section 39 of the BörsG, apply if the entity concerned is an issuer whose home country is the Federal Republic of Germany and the securities are admitted to trading on an organised market in Germany or in another EU or EEA country. The provision of section 30a of the WpHG generally covers all admitted securities within the meaning of section 2 (1) of the WpHG, with section 30a (3) of the WpHG providing that certificates representing shares are deemed equivalent to admitted shares in certain cases.
IX.2.2 Obligations of issuers vis-à-vis holders of admitted securities and debt securities

IX.2.2.1 Section 30a (1) no. 1 of the WpHG

Pursuant to section 30a (1) no. 1 of the WpHG, issuers must ensure that, above and beyond the information obligations, holders of securities meeting the other criteria of section 30a (1) no. 1 of the WpHG are treated equally. With regard to the holders of shares, the requirement of equal treatment also follows from section 53a of the AktG. As a result, the obligation of the WpHG will more likely apply to holders of other securities.

IX.2.2.2 Section 30a (1) no. 2 of the WpHG

Under this provision, securities holders in Germany must be provided with all facilities and information that they need to exercise their rights. Section 30a (1) no. 2 of the WpHG is merely a catch-all provision: the creation of the material basis and publication of fundamental information are covered by obligations especially established for this purpose (in this regard, please refer to the comments below on section 30a (1) no. 4 of the WpHG and section 30b (1) and (2) of the WpHG).

IX.2.2.3 Section 30a (1) no. 3 of the WpHG

This provision establishes an obligation of the issuer to ensure that the data of holders of securities are protected from access by unauthorised persons.

IX.2.2.4 Section 30a (1) no. 4 of the WpHG

During the entire period during which securities are admitted to trading, a financial institution must be appointed as paying agent in Germany (i.e. the home country) where all necessary measures in respect of the securities can be effected free of charge.

The term “financial institution” may be misleading. What is meant are credit institutions pursuant to section 1 (1) sentence 1 of the KWG. Unless the issuer is a credit institution itself, it no longer suffices for the issuer itself to be appointed as paying agent. This possibility was eliminated when section 39 (1) no. 2 of the BörsG (old version) was repealed.

IX.2.2.5 Section 30a (1) no. 5 of the WpHG

In the case of admitted shares, a form for granting a proxy for the shareholders’ meeting must be made available in writing to each person entitled to vote upon request, either together with the invitation to the shareholders’ meeting or after the date for the shareholders’ meeting has been announced. The proxy form may be provided to the shareholder in either paper or electronic form.
**IX.2.2.6 Section 30a (1) no. 6 of the WpHG**

Where admitted debt securities have been issued, section 30a (1) no. 6 of the WpHG establishes a parallel provision to section 30b (1) no. 5 of the WpHG according to which a form for granting a proxy for the general meeting of debt securities holders must be sent in writing an in a timely manner to each person entitled to vote upon request, either at the same time as the invitation to the general meeting or after the date for such meeting has been announced.

The provision of no. 6 covers only debt securities within the meaning of section 2 (1) sentence 1 no. 3 of the WpHG (e.g. profit-participation certificates, bearer bonds, order bonds or other securities pursuant to section 2 (1) sentence 1 no. 3 (b) of the WpHG) except where these already fall under section 2 (1) no. 2 of the WpHG or establish an at least contingent right to the acquisition of shares or similar interests in companies.

**IX.2.3 Section 30a (2) of the WpHG**

Pursuant to section 30a (2) of the WpHG, issuers of admitted debt securities within the meaning of section 30a (1) no. 6 of the WpHG may hold the general meeting of debt securities holders in any EU or EEA country. However, this applies only if all the facilities and information necessary to exercise rights are made available to the debt securities holders in the respective EU member state or EEA country and provided that only holders of debt securities whose denomination per unit amounts to at least €50,000, or the equivalent amount in any other currency as at the date of issue, are invited to the meeting.

**IX.3 Publication of notifications and transmission by way of remote data transfer (section 30b of the WpHG)**

**IX.3.1 General**

Section 30b (1) of the WpHG, which largely corresponds to section 63 of the BörsZulV (old version), provides for a number of publication obligations for issuers of admitted shares in respect of the shareholders’ meeting, dividends, issuance of new shares as well as any arrangements for, or exercise of, conversion, cancellation and subscription rights. Pursuant to section 30b (2) of the WpHG, issuers of admitted debt securities have largely similar obligations with regard to the general meeting of debt securities holders and notifications concerning the exercise of any conversion, subscription and cancellation rights as well as the payment of interest, repayments, drawings and units that have been cancelled or drawn but have not yet been redeemed.

Lastly, section 30b (3) of the WpHG sets out the requirements to be met for electronic transmission of information to holders of securities. However, electronic transmission cannot substitute publication pursuant to subsection (1) or (2).
Once again, the issuers subject to the obligation within the meaning of section 30b of the WpHG are those whose home country is the Federal Republic of Germany (see IV.2.1.1.2.).

Language of the publication

Generally, the publication pursuant to section 30b of the WpHG must be made in German since the issuer as a rule is domiciled in the Federal Republic of Germany and the information therefore “originates” at the company in German.

Given the member state principle, section 30b of the WpHG also applies to issuers domiciled in a third country if they are required to file their annual document (section 10 of the WpPG) in the Federal Republic of Germany. For such issuers as well as issuers which by reason of the application of section 30d of the WpHG are subject to the obligations of section 30b of the WpHG, a publication in English is permitted.

IX.3.2 Section 30b (1) sentence 1 no. 1 of the WpHG

Pursuant to section 30b (1) sentence 1 no. 1 of the WpHG, an issuer of shares is required to publish in the electronic Federal Gazette the following circumstances relating to the shareholders’ meeting:

- the convening of shareholders’ meeting, including the agenda;
- the total number of shares and voting rights at the time the shareholders’ meeting was convened; and
- the rights of shareholders with respect to participation in the shareholders’ meeting.

IX.3.2.1 Total number of shares and voting rights

The obligation to publish the total number of shares and voting rights at the time the shareholders’ meeting is convened was not laid down in the predecessor rule of section 63 (1) of the BörsZulV (old version). This obligation was introduced as a result of the transposition of Article 17(2) of the Transparency Directive.

The obligation to publish the total number of shares and voting rights means that the issuer is required to state in its publication the number of ordinary and preference shares in issue at the time the shareholders’ meeting was convened. In this connection, the respective number must be determined independent of the trading portfolio or the holding of own shares, i.e. own shares must also be included when calculating the number of voting rights. Additionally, the issuer is also permitted to state how many shares it holds itself.

Determining the total number of shares and voting rights presents a problem where new shares are issued as part of a contingent capital increase, since in this case the issuance of the new shares and the related increase in the registered share capital are generally deemed to take legal effect only when the shares are transferred to the beneficiary’s securities account. As a rule, this happens within T+2, with the exact date not being known to the issuer. For the purposes of section 30b (1) sentence 1 no. 1 of the WpHG, the issuer may assume for
all intents and purposes that the registered share capital has increased already when the institution instructed by it has ordered the (new) shares to be transferred to the securities account of the beneficiary. The issuer must have its instructed institution notify it, on the day when the text of the publication is transmitted to the electronic Federal Gazette in each case, of the current stage of issuance. A so-called “post-publication” (i.e. an additional publication following the convening of the shareholders’ meeting) of the total number of shares and voting rights on the relevant key date of the convening of the shareholders’ meeting does not satisfy the requirements of section 30b (1) no. 1 of the WpHG.

IX.3.2.2 Date of convening of the shareholders’ meeting

The date of convening of the shareholders’ meeting must be determined in accordance with the AktG. Pursuant to section 121 (2) sentence 1 of the AktG, the shareholders’ meeting is convened by the board of management. In this regard, the resolution adopted by the board of management does not constitute convening; instead the announcement of such resolution in the company’s designated journals is decisive (i.e. pursuant to section 25 sentence 1 of the AktG, the date on which the announcement was inserted in the electronic Federal Gazette). In the case of German stock corporations, it suffices (pursuant to section 30b (1) sentence 2 of the WpHG) for the publication to be made once provided that the requirements in terms of content specified in section 30b (1) no. 1 of the WpHG have been met, since the date and medium of the publication pursuant to the WpHG and the AktG are identical.

IX.3.2.3 Rights of shareholders with respect to participation

Upon convening, the issuer must publish the rights of shareholders with respect to participation in the shareholders’ meeting. Specifically, the issuer is required to point out the possibility of appointing proxies (cf. section 125 (1) sentence 2 of the AktG) and to indicate that proxy forms are available and from which contact address of the company they can be obtained. It is also necessary to specify the company’s proxies and to provide information about the submission of countermotions by shareholders. Publication of rights to which the shareholders are entitled during the shareholders’ meeting is not required.

IX.3.3 Section 30b (1) sentence 1 no. 2 of the WpHG

Pursuant to section 30b (1) sentence 1 no. 2 of the WpHG, an issuer must publish the distribution and payment of dividends, the issue of new shares and any arrangements for, or exercise of, conversion, cancellation and subscription rights. Article 17(2)(d) of the Transparency Directive extended the list of obligations of section 63 of the BörsZulV (old version) to include the concepts of “arrangement” and “cancellation rights” in section 30b (1) no. 2 of the WpHG. Pursuant to section 30b (1) no. 2 of the WpHG, not only the exercise of but already the arrangements for as well as exclusion of such rights must be published.
IX.3.3.1 Dividend payments

The concept of “dividend” only includes “genuine” dividends within the meaning of the AktG, not other payments whose amounts are oriented thereon. For example, a compensation payment (or the resolution adopted for this) pursuant to section 304 of the AktG accordingly does not constitute a dividend within the meaning of section 30b (1) no. 2 of the WpHG.

IX.3.3.2 Obligation to make a publication without undue delay upon issuance of new shares

Section 30b (1) no. 2 of the WpHG provides for the obligation to make a publication without undue delay when new shares are issued. “Without undue delay” refers to the point in time when the new shares are issued.

In the case of an ordinary capital increase, the issuance of the shares is deemed to take place when the execution of the capital increase is registered in the commercial register pursuant to section 189 of the AktG. The obligation to make a publication without undue delay set forth in section 30b (1) no. 2 of the WpHG is thus based on section 189 of the AktG.

In the case of a contingent capital increase, the shares are issued in accordance with section 199 of the AktG. This may result in a daily publication obligation in option exercise periods. The legislature did not have any interest in such daily publication obligation (cf. section 201 of the AktG and section 26a of the WpHG). In the case of contingent capital increases, the registration of the resolution on the contingent capital (section 195 of the AktG) is to be published as the “issuance of new shares” pursuant to section 30b (1) no. 2 of the WpHG. This is because, before the TUG came into force, the publication obligation now set forth in section 30b (1) no. 2 of the WpHG had been specified in section 63 (1) of the BörsZulV (old version). Section 63 of the BörsZulV (old version) also stipulated certain publication obligations with respect to shares that were already provided for in the AktG. The publication obligation with respect to the issuance of new shares at that time was then an “additional” requirement under section 190 AktG. This section was repealed because the provisions governing publication in the electronic Federal Gazette are now found in section 30b (1) no. 2 of the WpHG and as a consequence of the Act on Electronic Commercial Registers, Cooperative Society Registers and the Company Register (Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister – EHUG). Section 196 of the AktG (obligation to publish registration of the resolution on contingent capital) was directly based on section 190 of the AktG for contingent capital increases. As a result of section 30b (1) no. 2 of the WpHG, section 196 of the AktG was repealed by the EHUG since its regulatory content was previously covered by section 63 of the BörsZulV (old version) and is now covered by section 30b (1) no. 2 of the WpHG.

Pursuant to section 203 (1) sentence 1 of the AktG, authorised capital is subject to the provisions for ordinary capital increases. Accordingly, shares in the case of authorised capital, pursuant to section 189 of the AktG, are likewise deemed to be issued on being registered. The point in time to be referred to for publication is therefore only when the authorised capital is “utilised” and thus when the related execution of the capital increase is registered.
Summary:

<table>
<thead>
<tr>
<th>Type of capital increase</th>
<th>Time of publication pursuant to section 30b (1) sentence 1 no. 2 WpHG (&quot;issuance of new shares&quot;)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ordinary capital increase</td>
<td>Upon registration of the capital increase in the commercial register pursuant to section 189 AktG</td>
</tr>
<tr>
<td>Contingent capital increase</td>
<td>Upon registration of the resolution in the commercial register pursuant to section 195 AktG</td>
</tr>
<tr>
<td>Authorised capital</td>
<td>As with ordinary capital increase: upon registration of the capital increase in the commercial register pursuant to section 189 AktG</td>
</tr>
</tbody>
</table>

**IX.3.3.3 Concept of “arrangements”**

The concept of “arrangements” within the meaning of section 30b (1) no. 2 of the WpHG is synonymous with “any kind of provision”. That is because the exercise of conversion, cancellation and subscription rights is generally decided by the board of management or the shareholders’ meeting.

An arrangement for a conversion, cancellation and subscription right also includes the possibility of excluding such right. This is particularly clear from Article 17(2)(d) of the Transparency Directive which refers to “arrangements” in relation to the rights specified in section 30b (1) no. 2 of the WpHG.

No publication obligation pursuant to section 30e (1) no. 1 first half-sentence of the WpHG ("change in the rights attached to admitted securities") exists in addition to the publication obligations of section 30b (1) no. 2 of the WpHG which is designed as a catch-all provision to ensure that the general public is informed on an ongoing basis regarding changes in the rights securitised in the admitted securities. This provision does not apply if publication (as in the present case) is already prescribed elsewhere.

**IX.3.3.4 Publication obligation in respect to the exercise of conversion, cancellation and subscription rights**

As explained above, the issuance of share options and the exercise thereof (i.e. issuance of new shares) is not subject to any ongoing obligation to be published (without undue delay) pursuant to section 30b (1) no. 2 of the WpHG regarding the exercise of said rights by the shareholders. Neither does such ongoing publication obligation pursuant to section 30b (1) no. 2 of the WpHG follow from the concept of the “exercise” of subscription rights either. Instead what this term covers, as already under the previous provision of section 63 (1) of the BörsZulV (old version), is only the notification regarding the exercise of conversion, cancellation and subscription rights by the issuer. The information about these rights must be published, but ongoing notification on the scope in which they have been exercised is not required.

In this regard, section 30b (1) no. 2 of the WpHG must be interpreted in line with the Transparency Directive. According to the wording of Article 17(2)(d) of the Transparency Directive, only agreements relating to allotment, subscription, cancellation or conversion must be published. In other words, the information in question must be information originating from
the issuer’s (own) sphere of influence. Accordingly, the phrase “arrangement for or exercise of” in section 30b (1) no. 2 of the WpHG is to be understood as one criterion, i.e. in the sense of (an arrangement for) the “manner” in which subscription rights are exercised.

Example of “conversion right“:

A compensatory payment within the meaning of section 305 of the AktG does not generally establish a publication obligation pursuant to section 30b (1) no. 2 of the WpHG. Only in the cases of section 305 (2) no. 1 and no. 2, first alternative of the AktG does a conversion right exist. Pursuant to section 294 (2) of the AktG, the publication obligation arises only when the control and profit-and-loss transfer agreement is registered in the commercial register.

**IX.3.3.5 Time of publication**

With regard to the time of publication of the notifications on the arrangements for, or exercise of, conversion, cancellation and subscription rights, the statements above apply. Accordingly, pursuant to section 30b (1) no. 2 of the WpHG the content of the resolution adopted to exercise the respective rights must be published.

**IX.3.4 Examples of standard resolutions subject to the publication requirement**

**IX.3.4.1 Resolution pursuant to section 71 (1) no. 8 of the AktG**

Resolutions pursuant to section 71 (1) no. 8 of the AktG relating to the purchase of own shares (with the authorisation of the board of management to cancel the shares) must be published pursuant to section 30b (1) no. 2 of the WpHG because they constitute an arrangement for a cancellation right. If the board of management then exercises the authorisation for cancellation, this must also be published pursuant to section 30b (1) no. 2 of the WpHG because it constitutes the exercise of the cancellation right.

**IX.3.4.2 Contingent capital/authorised capital**

With regard to the obligation to publish the issuance of new shares in these cases, please refer to IX.3.3.2. A resolution on contingent capital or authorised capital requires a decision to be taken regarding the persons or entities in whose favour a subscription right is to be created, which normally entails an exclusion of subscription rights for existing shareholders. This exclusion of subscription rights constitutes an arrangement for the subscription rights. Pursuant to section 30b (1) no. 2 of the WpHG, such arrangement for subscription rights must be published without undue delay. Since the validity of such exclusion of subscription rights will generally depend on valid registration of the respective resolution in the commercial register, publication without undue delay after registration pursuant to section 195 of the AktG will be required in the case of contingent capital, and publication likewise after registration of the resolution in the case of authorised capital. If the board of management exercises the authorisation to exclude subscription rights, section 30b (1) no. 2 requires publication of this fact as “exercise“.
IX.3.5 Section 30b (1) sentence 2 of the WpHG

“Such publication” within the meaning of section 30b (1) sentence 2 of the WpHG as required under other provisions is a publication which likewise must be made without undue delay pursuant to these provisions. Accordingly, a publication made once in the electronic Federal Gazette suffices only if at the same time it fully satisfies the requirements of section 30b of the WpHG. Section 30b (1) sentence 2 of the WpHG was introduced to avoid the potential for double publication obligations since, as already explained above, section 30b (1) of the WpHG “repeats” numerous publication obligations already existing under the AktG.

IX.3.6 Section 30b (2) no. 1 of the WpHG

Section 30b (2) no. 1 of the WpHG establishes a publication obligation for issuers of admitted debt securities within the meaning of section 30a (1) no. 6 of the WpHG in respect of the place, time and agenda of the meeting of debt securities holders as well as the notices concerning the right of those securities holders to participate in such meetings. It is thus an obligation corresponding to section 30b (1) no. 1 for admitted debt securities.

IX.3.7 Section 30b (2) no. 2 of the WpHG

For issuers of admitted debt securities within the meaning of section 30a (1) no. 6 of the WpHG, section 30b (2) no. 2 of the WpHG defines publication obligations similar to the ones set forth in section 30b (1) sentence 1 no. 2 of the WpHG for issuers of admitted shares. Publication is required concerning the exercise of any conversion, subscription and cancellation rights as well as the payment of interest, repayments, drawings and units that have been cancelled or drawn but have not yet been redeemed.

Payments of interest

The term “payment of interest” covers all monetary payments made on the value date. Accordingly, the announcement of interest payments for variable-interest debt securities (such as floaters) also triggers the publication obligation, in which case the interest rate defined or effective at that time must also be published.

Exception: in the case of admitted debt securities, a publication pursuant to section 30b (2) no. 2 of the WpHG is not required only if, in the case of a fixed interest rate and predetermined payment dates, the required information has already been provided in the prospectus. Since in this regard section 30b (2) no. 2 of the WpHG has adopted the wording used by the previous provision of the BörsZulV, this interpretation must be maintained.

IX.3.8 Section 46 (4) of the WpHG

Under the transitional provision of section 46 (4) of the WpHG, the issuer is required to effect publications pursuant to section 30b (1) and (2) of the WpHG in the electronic Federal Gazette and in parallel also in a national newspaper for statutory stock exchange announcements.
(überregionales Börsenpflichtblatt) up until 31 December 2010. Since section 46 (4) of the WpHG is a transitional provision, it does not entail any enlargement of the group of entities subject to the publication obligation. Accordingly, section 46 (4) of the WpHG extends to issuers whose home country is the Federal Republic of Germany and who were already covered by the provisions of the BörsZulV.

Moreover, BaFin considers publication of a short version of the agenda for the shareholders’ meeting as sufficient within the scope of section 46 (4) of the WpHG even if it does not include the proposals for resolutions. However, the following minimum requirements must be met (i.e. the following information must be included in the publication):

- venue, time and date of the shareholders’ meeting;
- the items of the agenda;
- all other information required under section 30b (1) no. 1 of the WpHG;
- reference to the fact that the full text of the publication has been published in the electronic Federal Gazette;
- specification of the (paying) agent from which the complete agenda including annexes is available free of charge.

There is no obligation to make a separate application with BaFin (or to obtain its approval) for this as had previously been the case with the BörsZulV.

**IX.3.9 Section 30b (3) of the WpHG**

Section 30b (3) of the WpHG sets out under what conditions electronic transmission of information to shareholders is permitted. Specifically, it is provided that the publication obligations pursuant to section 30b (1) and (2) remain unaffected thereby, which means that the publication obligations must be satisfied in full irrespective of any transmission by way of remote data transfer.

**Concept of information**

Information within the meaning of section 30b (3) of the WpHG may be any notification (both mandatory and voluntary) made by an issuer to a shareholder. In fact, section 30b (3) of the WpHG does not only cover the information specified in section 30b (1) and (2) of the WpHG. Information within the meaning of section 30b (3) of the WpHG may thus be any information originating from an issuer’s sphere and disclosed by such issuer to any or all of its shareholders. Given this definition, the concept of information may not be limited to obligations under the AktG.
IX.4 Amendments to the issuer’s legal basis
(Section 30c of the WpHG)

Section 30c of the WpHG provides for a notification obligation for an issuer whose home country is the Federal Republic of Germany vis-à-vis BaFin and the admission offices of the domestic and foreign organised markets on which the securities are admitted to trading. Such notification obligation pursuant to section 30c of the WpHG concerns any proposed amendment to the issuer’s articles of association. Where amendments to the issuer’s other legal bases are intended, the obligations pursuant to section 30c of the WpHG cover only those amendments affecting the rights of securities holders.

IX.4.1 Decision-making body

The decision-making body within the meaning of section 30c of the WpHG is the shareholders’ meeting or, as the case may be, the meeting of debt securities holders. Accordingly, those amendments to the articles of association which another body (such as the supervisory board) is entitled to make (referred to as adjustments to the articles) are not subject to the notification obligation pursuant to section 30c of the WpHG. This follows both from Article 19(1)(2) of the Transparency Directive and the grounds stated for the TUG.

IX.4.2 Concept of other legal bases

The concept is to be understood in such a way that “other legal bases” are only those which are deemed equivalent to the provisions contained in the articles of association. The concept of other legal bases within the meaning of section 30c of the WpHG had previously been set forth in section 64 (2) of the BörsZulV (old version) that was applicable only in the area of other securities. After subsections (1) and (2) of section 64 of the BörsZulV (old version) were consolidated into section 30c of the WpHG, amendments to other legal bases affecting the rights of securities holders are now, according to the wording of section 30c of the WpHG, generally also subject to the notification requirement for stock corporations. However, this does not mean that an issuer of shares is required to notify every planned resolution of a shareholders’ meeting (particularly also not the authorisation resolutions for purchasing own shares pursuant to section 71 of the AktG). In keeping with the original intention of the BörsZulV, the term “other legal bases” generally does not entail any separate significance for issuers of admitted shares.

Accordingly, the term “other legal bases” can apply as a rule only to issuers of other admitted securities. To ensure consistency with the shares mentioned in the first alternative, an amendment to the same may affect the rights of the securities holders only when the securities provide for profit-linked remuneration. Accordingly, an event such as a merger may be subject to the notification requirement pursuant to section 30c of the WpHG for issuers of other admitted securities. However, changes in the issuer’s registered office and company name generally are not subject to the notification requirement.
Conversely, the obligation to notify proposed amendments to the articles of association generally is likewise of significance only for issuers of admitted shares. Stock corporations which only have admitted other securities are not required by section 30c of the WpHG to notify proposed amendments to the articles of association.

IX.4.3 Specific questions relating to notifications pursuant to section 30c of the WpHG

<table>
<thead>
<tr>
<th>Time of notification</th>
<th>Without undue delay (section 121 (1) of the BGB), after the decision by the issuer (e.g. board of management and supervisory board) to present the amendment to the articles of association to the decision-making body (shareholders’ meeting, meeting of debt securities holders)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Addressee of the notification</td>
<td>BaFin and the Admissions Offices of the domestic or foreign organised markets on which securities are admitted to trading</td>
</tr>
</tbody>
</table>
| Content of notification | Specification of existing content of articles of association (in respect of the article(s) to be amended) and the proposed new provision  
Alternatively: description of amendment |
| Form of notification | Any form of notification (i.e. by letter, fax, e-mail), with a notification by e-mail stating in the subject line a reference to section 30c and the name of the issuer. |
| Contact data of BaFin for notification | Bundesanstalt für Finanzdienstleistungsaufsicht  
Referat WA 12  
Marie-Curie-Str. 24-28  
60439 Frankfurt  
Fax: +49 228-4108-3119  
E-mail: WA12@bafin.de |

IX.5 Applicability of sections 30a to 30c of the WpHG to issuers from the EU and the EEA (section 30d of the WpHG)

The transitional provision of section 30d of the WpHG has become largely obsolete as a result of the Transparency Directive’s transposition in the EU and EEA countries. It sets out the applicability of sections 30a to 30c of the WpHG to issuers whose home country is not the Federal Republic of Germany but one of the EU and EEA countries, provided that their securities are admitted to trading on an organised market in Germany and their home country does not prescribe any provisions equivalent to those specified in sections 30a to 30c of the WpHG.
IX.6 Publication of additional information and transmission to the company register (section 30e of the WpHG)

IX.6.1 General

Section 30e of the WpHG replaces the previous provisions of section 66 of the BörsZulV and transposes Article 16 of the Transparency Directive.

The provision sets out the publication obligations of domestic issuers (see IV.2.1.1.1.) in the case of changes in rights attached to the respective securities as well as for the issuance of bonds. In addition, a publication obligation is established in respect of information published in a third country. The manner as well as the language in which the publication is made is governed by the general rules to which section 26 of the WpAIV refers (see IV.6.1. and IV.6.2.). For the language in which the information pursuant to section 30e (1) no. 3 of the WpHG is published, section 26 of the WpAIV provides the possibility of publishing such information only in English. In addition to making the publication, the information must also be transmitted to the company register to be stored there, and BaFin must be notified of the publication (see IV.6.4. and IV.6.5.).

IX.6.2 Section 30e (1) sentence 1 no. 1 of the WpHG

IX.6.2.1 Overview

Pursuant to section 30e (1) sentence 1 no. 1 of the WpHG (at the beginning), domestic issuers are required to publish without undue delay any amendment in the rights attached to admitted securities and to notify such publication to BaFin. Special provisions are provided in accordance with no. 1 (a) in the case of admitted shares for those rights attached to derivative securities issued by the issuer itself provided that they grant conversion or acquisition rights in respect of the issuer’s admitted shares, and in accordance with no. 1 (b) in the case of admitted securities other than shares, for changes in the terms of these securities, provided that the rights attached to such securities are indirectly affected thereby. Pursuant to no. 1 (c), there is moreover a publication obligation for domestic issuers of admitted securities which grant conversion or subscription rights to the creditors in respect of all alterations of rights attached to the shares to which the conversion or subscription rights relate.

IX.6.2.2 Section 30e (1) sentence 1 no. 1 of the WpHG (at the beginning) – catch-all provision

Section 30e (1) no. 1 of the WpHG (at the beginning) corresponds to the wording of section 66 of the BörsZulV (old version), which was a catch-all provision for information relating to securities whose publication is not prescribed by other provisions. The publication obligations were not expanded by transposition of the Transparency Directive. As a result, where a
The conclusion of a control and profit-and-loss transfer agreement does not constitute a change in the rights attached to admitted securities which is subject to the publication obligation pursuant to section 30e of the WpHG. Here, there is no direct effect since notably the entitlement to dividends continues to exist in a formal sense.

Legal consequences that may be established under the AktG generally do not lead to a publication obligation pursuant to section 30e (1) no. 1 of the WpHG (at the beginning), with the result that, as a general rule, neither “splitting” nor “squeeze-out” resolutions are subject to the publication obligation.

A publication obligation likewise does not exist in respect of a resolution within the meaning of section 30b (3) no. 1 (a) of the WpHG since there is no direct change in the rights attached to the securities.

Changes in the remuneration of the supervisory board/board of management likewise do not lead to a publication obligation pursuant to section 30e (1) no. 1 of the WpHG (at the beginning) since here, too, there is no direct link to the rights of the securities holders. Such link might exist only if the change in remuneration were of major significance for the issuer’s economic position. However, in such cases there would be an obligation to publish an ad hoc disclosure, thus excluding any obligation for a publication pursuant to section 30e (1) no. 1 of the WpHG.

**IX.6.2.3 Section 30e (1) sentence 1 no. 1 (a) of the WpHG**

This provision contains a publication obligation for domestic issuers of admitted shares in respect of a change in those rights attached to derivative securities issued by the issuer itself provided that they grant conversion or acquisition rights in respect of the issuer’s admitted shares.

**IX.6.2.4 Section 30e (1) sentence 1 no. 1 (b) of the WpHG**

The publication obligation of section 30e (1) sentence 1 no. 1 (b) of the WpHG only covers changes in the features of the securities admitted or the conditions attached thereto. In this regard, interest rates are listed as one example. Since section 30e (1) no. 1 (b) of the WpHG requires publication in respect of changes in features, section 30e (1) sentence 1 no. 1 (b) of the WpHG only prescribes publication of interest rates if these have been amended subsequently, for example at a general meeting of debt securities holders. In the other cases, the publication obligation pursuant to section 30b (2) no. 2 of the WpHG applies (see IX.3.7.).
The “securities” specified in the provision must be admitted securities. This follows from the wording of Article 16(2) of the Transparency Directive.

**IX.6.2.5 Section 30e (1) sentence 1 no. 1 c) of the WpHG**

The scope of this provision is confined to admitted securities. The provision corresponds to section 66 (2) no. 2 of the BörsZulV (old version) and was based on Article 81(4) of the Consolidated Admissions and Reporting Directive 2001/34/EC (now repealed) which provided for a limitation to admitted convertible bonds and bonds with warrants.

**IX.6.3 Section 30e (1) sentence 1 no. 2 of the WpHG**

**IX.6.3.1 General**

Pursuant to section 30e (1) sentence 1 no. 2 of the WpHG, a domestic issuer as a general rule is subject to the publication obligation where the admission of bonds is concerned. This provision is based on Article 16(3) of the Transparency Directive as well as section 66 (3) of the BörsZulV (old version). The purpose of this publication obligation is to put investors in a position in which they can inform themselves of circumstances capable of impairing the issuer’s ability to meet its payment obligations arising from securities (including other securities). The end of the tap issuer privilege (Daueremittentenprivileg) means that these issuers are also subject to section 30e (1) no. 2 of the WpHG provided that the other prerequisites are met.

**IX.6.3.2 Admission of bonds and granting of guarantees**

In principle, section 30e (1) sentence 1 no. 2 of the WpHG is not limited to bonds admitted to trading on an organised market. The spirit and purpose of section 30e (1) sentence 1 no. 2 of the WpHG and of Article 16(3) of the Transparency Directive on which it is based does not result in any other interpretation either. According to its scope as described above, the purpose of section 30e (1) sentence 1 no. 2 of the WpHG is also to ensure that the domestic issuer informs the general public about circumstances relating to its capital resources. To ensure consistency with other EU and EEA countries, the publication obligation pursuant to section 30e (1) no. 2 of the WpHG is limited to admitted bonds. Moreover, the gain in transparency that would be achieved if the issuance of all bonds were subject to the publication obligation would not likely be very significant given the volume involved, since in that case the admission of short-term bonds would also have to be published.

Where guarantees are given, these must be guarantees that are granted for the bonds issued. This is clear from the wording which refers to “guarantees assumed for such loan issues”. Security granted for bonds is of significance for creditors given that bonds are usually issued with a long term (such security particularly including collateral in rem such as land charges, mortgages, etc.) The entity subject to the publication obligation is still the domestic issuer issuing the bond, i.e. a domestic issuer which merely gives a guarantee for a bond is not subject to the publication obligation pursuant section 30e (1) no. 2 of the WpHG.
IX.6.3.3 Pfandbriefe

Section 30e (1) sentence 1 no. 2 of the WpHG does not prescribe any publication obligation for Pfandbriefe (bonds issued by German mortgage banks) since they are based on the cover pool (cf. section 4 of the Pfandbrief Act (Pfandbriefgesetz – PfandBG)).

IX.6.3.4 Bonds issued by the German government and federal states (Länder) as well as by other public institutions from EU/EEA countries

The publication obligation does not extend to bonds issued by the German government and the federal states (Länder) (cf. section 36 of the BörsG) as well as, in principle, public international bodies with EU/EEA countries as members and issuers which issue only securities that are guaranteed by the German government.

IX.6.3.5 Minimum content of a publication pursuant to section 30e (1) sentence 1 no. 2 of the WpHG

A publication pursuant to section 30e (1) sentence 1 no. 2 of the WpHG must show which bonds have been issued by what issuers and in what volume, i.e. the following information must be stated:

- issuer’s name and address;
- issuance volume as well as ISIN/WKN;
- interest payment period;
- maturity.

This minimum content follows from the spirit and purpose of the publication pursuant to section 30e (1) sentence 1 no. 2 of the WpHG.
IX.6.4 Summary of the requirements to be met by a publication or notification pursuant to section 30e (1) sentence 1 nos. 1 and 2 of the WpHG

<table>
<thead>
<tr>
<th>Publications</th>
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</thead>
<tbody>
<tr>
<td>Time of publication</td>
</tr>
<tr>
<td>Addressees of the publication</td>
</tr>
<tr>
<td>Language of the publication</td>
</tr>
<tr>
<td>Content of the publication</td>
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</table>

<table>
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<tr>
<th>Notification concerning the publication</th>
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<tbody>
<tr>
<td>Time of the notification</td>
</tr>
<tr>
<td>Addressees of the notification</td>
</tr>
<tr>
<td>Content of the notification</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Submission to the company register</th>
</tr>
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<tbody>
<tr>
<td>Time of transmission</td>
</tr>
<tr>
<td>Content of transmission</td>
</tr>
</tbody>
</table>

IX.6.5 Section 30e (1) sentence 1 no. 3 of the WpHG

IX.6.5.1 General

Section 30e (1) sentence 1 no. 3 of the WpHG is based on Article 23(3) of the Transparency Directive. The background to this provision is Recital 27 of the Directive according to which disparities of information should be prevented and that for this reason any relevant information should be made available to all investors.

IX.6.5.2 No general obligation for publication in full-text version

Information within the meaning of section 30e (1) sentence 1 no. 3 of the WpHG must generally be published in the full-text version irrespective of length. This follows from the wording of section 30e (1) sentence 1 no. 3 of the WpHG.

In cases where the volume of such publications is substantial, they may place considerable burdens on issuers while being of little benefit to investors who may be flooded with information. Instead of this, an announcement can be used so that interested investors may retrieve the document in question in its full-text version, thus ensuring that there is no loss of transparency. For a publication pursuant to section 30e (1) sentence 1 no. 3 of the WpHG,
it is not sufficient to provide a reference to a website which requires a further search for the document. Instead, the exact path must be indicated, with a publication on the company’s website being preferable given the greater proximity to the relevant context.

**IX.6.5.3 Publication in a third country**

A publication in another EU/EEA country in addition to the publication in a third country is excluded by the publication obligation pursuant to section 30e (1) sentence 1 no. 3 of the WpHG. Section 30e (1) sentence 1 no. 3 of the WpHG is based on Article 23(3) and Recital 27 of the Transparency Directive. The background to this is the avoidance of information disparities between third countries and the EU/EEA. Section 30e (1) sentence 1 no. 3 of the WpHG should be read as follows: “... information which he publishes “only” in a third country ...

**IX.7 Exemption (section 30f of the WpHG)**

Pursuant to section 30f of the WpHG, BaFin may exempt domestic issuers domiciled in a third country (see IV.2.1.1.) from the duties set forth in sections 30a, 30b and 30e (1) sentence 1 nos. 1 and 2 if such issuers are subject to equivalent rules of a third country or if they submit to such rules.

Equivalence in respect of the requirements pursuant to section 30b (1) sentence 1 nos. 1 and 2 of the WpHG exists pursuant to section 9 of the TranspRLDV with reference to meetings if the rules of the third country prescribe that an issuer domiciled in such country is required to state at least the venue, time and date and the agenda.

Even in the event of an exemption, section 30f (2) of the WpHG requires information on circumstances within the meaning of section 30e (1) sentence 1 nos. 1 and 2 of the WpHG, where such information must be made available to the general public in accordance with equivalent rules of the third country, to be published pursuant to section 30e (1) in conjunction with the WpAIV and the publication to be notified simultaneously to BaFin. Moreover, the information must be transmitted to the commercial register without undue delay, but not before its publication.

**IX.8 Administrative offences**

Breaches of the obligations pursuant to sections 30a to 30f of the WpHG are subject to a fine pursuant to section 39 of the WpHG. The relevant fines may be as much as €200,000 for single offences.
X Monitoring of company financial statements pursuant to sections 37n et seq. of the WpHG

X.1 Introduction

Since the introduction of the financial reporting enforcement procedure (Bilanzkontrollverfahren) on 1 July 2005, Germany has a new instrument for monitoring the financial statements of publicly traded companies (enforcement procedure). In the wake of international accounting scandals (Enron and Parmalat), the German legislature acted to strengthen investor confidence in the correctness of company financial statements by introducing an additional procedure for enforcing accounting rules. This two-tier procedure provides for a division of responsibilities in accounts monitoring between a private-law entity – the German Financial Reporting Enforcement Panel (hereinafter referred to as “Enforcement Panel” or “FREP”) – and BaFin vested with public powers. The Financial Reporting Enforcement Act (Bilanzkontrollgesetz – BilKoG), unlike most recent legislation relating to the capital markets, is not based on the transposition of a European directive. Nonetheless, certain standards of CESR\textsuperscript{51}, the relevant European body, and of the international organisation IOSCO are reflected in the supervisory practice and the continued development of financial reporting enforcement without being binding in character.

This new section of the Issuer Guideline is designed to provide the companies concerned with an overview of the key issues involved in interpreting and applying the relevant enforcement provisions. Here the Issuer Guideline for the most part confines itself to the provisions of the WpHG, since it is by these that the procedures at BaFin are governed. Over the past few years, BaFin has been able to gather practical experience in this field and clarify questions of doubt whose publication will hopefully be very helpful for the companies concerned.

X.2 Companies and financial reports concerned (section 37n of the WpHG)

X.2.1 Scope of application

Pursuant to section 37n of the WpHG, the enforcement procedure applies to companies whose securities within the meaning of section 2 (1) sentence 1 of the WpHG are admitted to trading on a regulated market of a stock exchange in Germany. “Companies” are deemed

\textsuperscript{51} CESR proposal: Standard No. 1 on Financial Information: Enforcement of standards on financial information in Europe, CESR document no. 03-073 of 1 March 2003

Last amended: 28 April 2009
to be enterprises from the private economy which are subject to accounting regulations. By contrast, financial reporting enforcement does not cover public-law entities such as the German government and the federal states (Länder), or international organisations such as the World Bank and the European Investment Bank, at least to the extent they do not engage in competition similar to private companies. Moreover, the companies must be issuers of securities within the meaning of section 2 (1) sentence 1 of the WpHG. The list provided there includes shares (as the most important category in the practice of financial reporting enforcement) as well as certain debt securities such as bonds and certificates. By contrast, the definition of securities for the purposes of financial reporting enforcement does not include units in investment funds (Investmentvermögen) issued by an asset management company (Kapitalanlagegesellschaft) or a foreign investment company (Investmentgesellschaft).

The company’s registered office is of no relevance for the financial reporting enforcement procedure. Foreign companies are also subject to the enforcement procedure if their securities are admitted to trading on a regulated market of a stock exchange in Germany.

As a prerequisite for financial reporting enforcement pursuant to sections 37n et seq. of the WpHG, the securities must be admitted to trading on a regulated market of a stock exchange in Germany. In contradistinction to the regulated unofficial market (Freiverkehr), the regulated market is the stock exchange segment subject to more stringent regulation and was created from the merging of the previous official (amtlich) and regulated (geregelt) market segments with effect on 1 November 2007. Only companies whose securities are admitted to the regulated market (but not companies which are merely included in exchange trading on this market pursuant to section 33 of the BörsG) are subject to financial reporting enforcement. Whereas the issuer of the securities is required itself to apply for admission, inclusion pursuant to section 33 of the BörsG only requires a trading participant to apply for the same or the management to arrange for inclusion ex officio. An issue of relevance here is whether the admission pursuant to section 32 of the BörsG exists at the time and date of the financial reporting enforcement procedure being initiated. If admission is revoked during the procedure pursuant to section 39 of the BörsG, the procedure as a rule must be discontinued since its purpose usually becomes obsolete when the company’s capacity as a publicly traded company ends.

X.2.2 Material scope of audit

The audit covers the most recently approved annual financial statements or the most recently approved consolidated financial statements and the corresponding (group) management report. Following transposition of the Transparency Directive, the most recently published condensed set of financial statements and interim financial statements – which form part of a company’s half-yearly financial report pursuant to section 37w of the WpHG – are subject to financial reporting enforcement. This applies to financial reports of financial years commencing after 31 December 2006. Outdated financial statements from previous years generally are not subject to the audit. However, an audit procedure, once commenced, will be continued even if during such audit new financial statements are approved. This continuity in the scope of the audit also applies pursuant to section 37o (1) sentence 4 of the WpHG also in cases where, initially, the audit is conducted by the Enforcement Panel and joined by BaFin at the second-tier level.
Financial statements prepared or approved at a time when the securities had not yet been admitted to trading on the regulated market may also fall under the scope of the audit provided that the other prerequisites have been met. This is because there is no statutory element requiring the financial statements and exchange listing to coincide. Moreover, it must be ensured that no time gap arises during which it would not be possible to submit an exchange-listed company to a financial reporting enforcement procedure even where the indications of irregularities are compelling.

X.2.3 Audit criteria

Pursuant to section 37n of the WpHG, the financial reporting enforcement procedure examines whether the financial statements comply with the legal requirements including the German Generally Accepted Accounting Principles or other accounting standards permitted by law. For companies domiciled in Germany, the decisive accounting rules in this regard are the accounting regulations of the Third Book of the HGB, the regulations of the AktG and (for consolidated financial statements) the International Financial Reporting Standards (IFRS). The term “legal requirements” in this context is not limited to legislation in the formal sense but also includes, for example, directly applicable EU regulations.

Companies domiciled abroad, in addition to IFRS and US GAAP, may also be subject to the accounting standards prescribed by the respective national laws.

X.3 Two-tier financial reporting enforcement procedure

X.3.1 Basic principles

In Germany, a two-tier enforcement procedure was established which provides for both an audit by the Enforcement Panel organised under private law and in certain cases also by BaFin which is vested with public powers. The relationship between these two auditing bodies is as follows:

As a rule, audits are initiated by the Enforcement Panel, the active body of the “Deutsche Prüfstelle für Rechnungslegung e.V.” recognised by the German Ministry of Justice pursuant to section 342b of the HGB. The “Deutsche Prüfstelle für Rechnungslegung e.V.” is an institution organised under private law whose active organ, i.e. the Enforcement Panel, conducts audits of company financial statements in accordance with a defined Code of Procedures and without being subject to instructions from the “Deutsche Prüfstelle für Rechnungslegung e.V.”. Further information on the composition of the Enforcement Panel and its legal basis is available at www.frep.info.

Pursuant to section 342b (2) sentence 3 of the HGB, the Enforcement Panel may initiate an audit in the following three cases:
where there are specific grounds to assume a violation of accounting regulations (audit with cause)

- on request by BaFin; or

- without any particular reason as an audit conducted on a random sampling basis.

In an audit with cause, the Enforcement Panel has specific indications suggesting that accounting regulations are likely to have been violated. For this purpose, the Enforcement Panel may consult all conceivable sources, and may gather information from its own research, from media reports as well as public authorities, legal entities and natural persons.

An audit conducted on request by BaFin is initiated if BaFin has specific indications that accounting regulations have been violated and BaFin requests the Enforcement Panel to conduct an audit of a company’s accounting practices pursuant to section 37p (2) of the WpHG.

By contrast, the decision on which companies are examined without any particular reason is taken by the Enforcement Panel at its own discretion. For this purpose the Enforcement Panel takes its decision in accordance with the “Principles for Random Sampling pursuant to section 342b (2) sentence 3 no. 3 of the HGB” adopted by it pursuant to section 342b (2) sentence 5 of the HGB. These principles combine aspects of risk-based selection and randomised statistical selection, and ensure that a representative selection of all companies subject to the enforcement procedure are audited in certain periods. Condensed set of financial statements and their related interim management reports are not subjected to such random sampling audits.

Given that the Enforcement Panel is recognised pursuant to section 342b (1) of the HGB, BaFin conducts financial reporting enforcement procedures itself only if:

- it is informed by the Enforcement Panel that a company refuses to cooperate in an audit or does not agree with the result of the audit (section 37p (1) sentence 2 no. 1 of the WpHG); or

- there are substantial doubts with regard to the accuracy of the Enforcement Panel’s audit result or with regard to the proper conduct of the audit by the Enforcement Panel (section 37p (1) sentence 2 no. 2 of the WpHG).

Without prejudice to this, BaFin may take over the audit at any time if it itself is also conducting or has conducted an audit pursuant to section 44 (1) sentence 2 of the KWG or section 83 (1) no. 2 of the Insurance Supervision Act (Versicherungsaufsichtsgesetz – VAG) and the audits concern the same subject.

**X.3.1.1 Refusal to cooperate**

Since it is not vested with public powers, the Enforcement Panel depends on the cooperation of the company to be audited. If such company is not willing to cooperate, the Enforcement Panel informs BaFin of this fact. BaFin will then conduct the audit itself and may enforce the investigations required for the audit also using the means provided to it under German administrative law. Consequently, not only will a refusal only lead to the procedure being
delayed without changing anything in the enforcement of the audit as such, but may also result in the costs of the procedure being directly imposed on the company concerned pursuant to section 17c of the Act Establishing the Federal Financial Supervisory Authority (Finanzdienstleistungsaufsichtsgesetz –FinDAG).

X.3.1.2 Public interest

In the case of an audit with cause, the prerequisite for the audit by BaFin as well as by the Enforcement Panel is for there to be a public interest in the audit. That means that even in cases of clear indications of accounting errors, no audit will be performed if the impact of the errors is recognised to be without relevance, for example because even on the assumption that the indications are correct, the error is very obviously of immaterial importance.

X.3.1.3 Hindrances to audits

Pursuant to section 37o (2) of the WpHG and section 342b (3) of the HGB, no audit is conducted by BaFin or, as the case may be, by the Enforcement Panel, as long as an action to declare the financial statements void is pending pursuant to the provisions of the AktG specified therein or if a special auditor has been appointed for the subject of the audit at the same time pursuant to section 37o (2) sentence 2 of the WpHG. The motivation behind this is to avoid redundant audits and divergent decisions.

X.3.2 Error identification procedure

X.3.2.1 Error identification procedure at the Enforcement Panel

X.3.2.1.1 Initiation and conduct of audit

Prior to the audit, the Enforcement Panel ascertains that the legal requirements for an audit have been satisfied, i.e. in particular that none of the grounds for exclusion exists as described in III.3.1.3. In accordance with its Code of Procedures, the Enforcement Panel decides through its committees on the initiation of an enforcement procedure and notifies BaFin of its intention to conduct an audit pursuant to section 342b (6) sentence 1 no. 1 of the HGB. In accordance with the Code of Procedures, the company is asked before the audit is commenced to state whether it will cooperate in the audit pursuant to section 342b (4) of the HGB. Provided that the company declares its willingness to cooperate to the Enforcement Panel, the company’s representatives and other persons of key importance have the obligation to submit accurate and complete documents and to provide accurate and complete information. Failure of the company as a whole to submit documents and provide information constitutes a refusal to cooperate unless a person subject to the obligation to provide information duly avails himself of his right of refusal pursuant to section 342b (4) sentence 2 of the HGB.
X.3.2.1.2 Conclusion of audit and error identification

The Enforcement Panel notifies the company of the audit result. In the event that accounting is found to be erroneous, grounds will be stated for the audit result; at the same time, the Enforcement Panel, stating a reasonable period for reply, will request the company to submit a declaration as to whether it agrees with the audit result. The President of the Enforcement Panel will then inform BaFin of the audit result and, where applicable, whether the company has declared that it agrees with the result. This ends the audit procedure for the Enforcement Panel.

In this connection the question arises as to whether the company may restrict its agreement to only part of the Enforcement Panel’s findings and whether the procedure is then continued by BaFin only with respect to a contested part of the findings. BaFin takes the view that such splitting is not permitted, since according to the wording of section 37p (1) sentence 2 no. 2 of the WpHG, the decisive matter is whether the company agrees with the result of the audit, such result comprising the Enforcement Panel’s entire findings. Where the company does not agree with certain error findings, it does not agree with the result of the audit as such. Otherwise, a partial agreement with the findings followed by publication of part of the audit’s findings, and with the procedure being continued by BaFin, might give rise to the impression of a conclusive publication having been made and thus result in the capital market being misled. Moreover, there may also be an interaction between specific parts of the Enforcement Panel’s result which, by dividing up the procedure, can no longer be adequately considered. The company may therefore only declare or refuse its agreement with the overall result; partial agreement is not possible.

X.3.2.2 Error identification procedure at BaFin

X.3.2.2.1 Initiation of audit

BaFin initiates its audits by formally ordering an audit pursuant to section 37o (1) sentences 1 to 3 of the WpHG. This constitutes an inculpatory administrative act (belastender Verwaltungsakt) for which an objection (Widerspruch) is admissible as a formal legal remedy. Pursuant to section 37o (1) sentence 3 of the WpHG, the scope of each individual audit must also be defined in the audit order. In practice, however, BaFin’s audit like the one conducted by the Enforcement Panel will always cover (for capacity reasons) only selected parts of the financial statements to be audited. Normally, these are the areas in which indications of errors in accounting have been found or in which the Enforcement Panel in any case has already found errors in accounting at the first-tier level of the enforcement procedure.

At around the same time as the audit is ordered, BaFin also decides on a possible publication of the audit order and the grounds pursuant to section 37o (1) sentence 5 of the WpHG. This may be done in cases where the company has refused to cooperate with the Enforcement Panel or did not agree with the result of the audit. Since such facts in and of themselves may represent an important warning signal for the capital market, a publication may be justified already at this point. However, in such cases the interest of the capital market in information must also be weighed up against the interest of the company in not being discredited prematurely by a result of the audit which may prove to have been rightly contested by the company.
X.3.2.2.2 Conduct of the audit

BaFin commences its audit at the second-tier level by making an initial analysis of the documents from the audit procedure of the Enforcement Panel, which transmits these to BaFin pursuant to section 342b (6) sentence 1 no. 3 of the HGB and, where applicable, pursuant to section 37p (1) sentence 3 of the WpHG.

After BaFin, building on the findings of the Enforcement Panel, has gained an overview of the previous audit procedure, it will, to the extent necessary, focus its efforts on further clarifying the case by issuing requests for information. Section 37o (4) of the WpHG requires not only the company itself, the members of its bodies and its employees, but also its auditors to furnish information and documentation to the extent required for the audit. This obligation of the auditors also includes submission of working documents to the extent these are needed for further clarifying the matter\textsuperscript{52}. In addition, the company’s arguments are analysed in further detail in discussions with representatives or through written correspondence. Where required, additional expert opinions on accounting issues may also be obtained at this stage of the audit procedure.

X.3.2.2.3 Conclusion of audit and error identification

BaFin ends the audit either by notifying the company that the audit did not give rise to any objections (section 37q (3) of the WpHG) or by determining that accounting is erroneous. This latter case constitutes a declaratory administrative act (feststellender Verwaltungsakt) which, together with the statement of grounds, is required to be made known to the company.

Even if several violations against accounting regulations have been determined, they are deemed to be a single error in financial reporting within the meaning of section 37q of the WpHG. The legislature accordingly also sometimes refers in the grounds for the legislation to errors in the plural. After all, more than one single violation of accounting regulations are typically found in practice. Artificially splitting up an error into several independent ones or even several administrative acts would, if applicable, also lead to several publication orders. This would result in the capital market being provided with incoherent and little transparent information, and would not reflect the spirit and purpose of the financial reporting enforcement procedure.

Within the meaning of this provision, an error exists if an accounting practice violates the legal provisions including the relevant generally accepted accounting principles or other accounting standards permitted by law. In order to determine that accounting is erroneous the violations need to be significant either on their own or on an aggregate view. This is the case when investors and institutions participating in the capital market consider such errors to be of relevance to them, i.e. are notably capable of influencing the company’s performance as well as assessments of future performance that can be derived therefrom\textsuperscript{53}. This case-by-case assessment must be based on both qualitative and quantitative aspects. It is therefore not possible to define generally applicable limits; neither the identification of the error nor the

\textsuperscript{52} Decision of the Higher Regional Court of Frankfurt am Main (OLG Frankfurt am Main) of 29 November 2007, case ref.: WpÜG 2/07
\textsuperscript{53} Decision of the Higher Regional Court of Frankfurt am Main (OLG Frankfurt am Main) of 22 January 2009, case ref. WpÜG 1/08 and 3/08
order to publish the error is confined to violations which have an effect on income or loss. Even several minor cases of non-compliance may produce an accounting practice which is deemed to be deficient if the overall picture of accounting is impaired thereby.\textsuperscript{54}

X.3.3 Section 37q (2) of the WpHG – publication of an error

X.3.3.1 Basic principles

In practice, the order to publish an error pursuant to section 37q (2) of the WpHG is one of the central issues of the financial reporting enforcement procedure, and is also increasingly a subject of discussion with persons or entities subject to the publication obligation. This stems from the great significance of such error publication for the audited company: it is usually only at this point in time that the audit procedure conducted comes under the gaze of the relevant capital market public. Many audited companies then try to avoid publication of an error as such or to have it worded more favourably – often by including explanatory comments.

X.3.3.2 Order to publish an error

As an inculpatory administrative act, the order to publish an error is reserved to BaFin; this applies without exception also in cases where the company agreed with the findings of the Enforcement Panel, and BaFin for this reason did not join the procedure at the second-tier level.

The legal basis for ordering publication of an error is provided by section 37q (2) sentence 1 of the WpHG, according to which BaFin orders the company to publish the error identified by BaFin or the Enforcement Panel in agreement with the company, together with the primary grounds for identifying the error. The wording “orders” shows that BaFin is not permitted to exercise any discretion in this area; it is required to issue an order unless one of the elements of exemption described below applies.

X.3.3.3 Public interest

BaFin must examine \textit{ex officio}, i.e. without being requested by the company, whether there is a public interest in the error being published, since otherwise it will waive such order pursuant to section 37q (2) sentence 2 of the WpHG. As is already clear from the wording of the Act and the purpose of the enforcement procedure to inform the capital market about identified errors, publication of the error is the rule.\textsuperscript{55} According to the grounds stated for the Act with reference to section 37q (2) of the WpHG, there are cases where no public interest may exist, for example where trivial matters are concerned which obviously represent insignificant violations of accounting rules.\textsuperscript{56}

\textsuperscript{54} Higher Regional Court of Frankfurt am Main (OLG Frankfurt am Main) \textit{op. cit.}

\textsuperscript{55} Decision of the Higher Regional Court of Frankfurt am Main (OLG Frankfurt am Main) of 14 June 2007, case ref. WpÜG 1/07; decision of the Higher Regional Court of Frankfurt am Main (OLG Frankfurt am Main) of 22 January 2009, case ref. WpÜG 1/08 und 3/08

\textsuperscript{56} Reasons stated for BilKoG draft bill, BT-Drucksache 15/3421, p. 18
However, public interest cannot be excluded merely because an extended period of time has passed since the year of the financial statements audited, since it is usual for an audit procedure to be lengthy already because of the two-tier procedure provided for it. Section 37o (1) sentence 4 second half-sentence of the WpHG shows that the continuity of the audit procedure has priority, despite the new financial statements having a much more recent date compared with the ones audited. This fundamental notion also applies to the publication of an error as the last act of the enforcement procedure.

As a rule, public interest in an error being published can also not be excluded if the capital market is informed by means other than the statutory procedure set forth in section 37q (2) of the WpHG. In particular, it is not sufficient for the identified error to have been considered and corrected in subsequent financial statements, even if such financial statements have already been published. This is because the spirit and purpose of the financial reporting enforcement procedure require that the capital market be expressly informed of the identified accounting error, including all material grounds, which is something that cannot be achieved by a reference “hidden” in another publication. The Higher Regional Court of Frankfurt am Main (OLG Frankfurt am Main) has also decided that a correction of objectionable accounting violations and the subsequent provision of omitted disclosures in the next financial statements under no circumstances constitute sufficient grounds for an order to publish an error to be waived. Lastly, an ad hoc disclosure pursuant to section 15 of the WpHG does not make a publication pursuant to section 37q (2) of the WpHG dispensable. Generally, an ad hoc disclosure and a financial reporting enforcement procedure are two separate and independent procedures. It is, however, conceivable that the initiation of an audit with cause or the identification of a significant error in a financial reporting enforcement procedure may constitute information subject to the publication requirement pursuant to section 15 of the WpHG.

X.3.3.4 Application for waiver of publication

In addition to the requirements to be examined ex officio, BaFin may waive issuing an order for publication on the company’s application pursuant to section 37q (2) sentence 3 of the WpHG if such publication is likely to damage the legitimate interests of the company. This is a discretionary decision in which BaFin is required to weigh up the interest of the capital market in publication against the legitimate interests submitted by the company. Generally, priority must be given to informing the capital market as the chief objective of the enforcement procedure. Consequences which typically result from publication of an error and which are unavoidable can never be successfully asserted as legitimate interests: a loss of confidence in the company’s accounting practices and the related adverse effects this entails for the reputation and valuation of the company’s securities are typical consequences of financial reporting enforcement which the German legislature has deemed to be acceptable and which are therefore not unreasonable for the company. Neither do objections based on the argument that similar errors have been committed by other companies (or on the company’s small size) qualify as legitimate interests constituting a reason for waiving a publication order. Also irrelevant are subjective factors falling under the company’s responsibility, such as tight deadlines for preparing the financial report, or the company’s particularly active assistance in the audit procedure.

57 Decision of the Higher Regional Court of Frankfurt am Main (OLG Frankfurt am Main) of 22 January 2009, case ref. WpÜG 1/08 and 3/08
X.3.3.5  Content of error publication and of the order by BaFin

Pursuant to section 37q (2) sentence 1 of the WpHG, the error publication must contain the error together with the primary grounds for identifying the error. Accordingly, in the operative part of its publication order BaFin gives a description of the error including the material grounds which the company is also required to publish. This applies regardless of whether the Enforcement Panel or BaFin itself has determined that accounting is erroneous. In the actual grounds of the notice, this is followed by a description of the factual basis and a legal assessment.

As a rule, a merely partial publication of accounting violations may not be considered because of the requirement to inform the capital market also about the violations that have been identified if a company’s accounting has proven to be erroneous.

Although section 37q (2) does not require BaFin to dictate the exact wording of the error publication to the company, BaFin’s requirements regarding the content of the publication are nevertheless binding. The wording of the publication must reflect the objective of the financial reporting enforcement procedure and enable the capital market to be informed about the identified error in an objective and truthful manner. The language used in the publication must not conflict with this purpose or undermine the publication’s sanctioning character (which is intended by the German legislature in the first place). Neither must any additional information be included which gives the impression of having been reviewed by the Enforcement Panel or BaFin. Specifically, that means that the company may not include any qualifying or otherwise mitigating comments or statements that detract from or conceal the content of the error identified. In particular, this includes additions which dispute the existence of an error or play down its significance.

Consequently, language which the company adds on its own initiative, such as the statement that the error identified would have “almost no impact given the company’s outstanding business performance over the past year”, are not permitted. The publication of an error pursuant to section 37q (2) of the WpHG must not be used to make advertising statements. Also not permitted in the publication are comments to the effect, for example, that the error in question in the company’s view is not even an error and that the Enforcement Panel or BaFin were mistaken in this regard. Such doubts may be asserted by the company through the procedures provided for this purpose: by declaring that it disagrees with the error as identified by the Enforcement Panel or appealing against the error identified by BaFin – but not in the publication itself.

X.3.3.6  Publication in the intended media without undue delay

Pursuant to section 37q (2) sentence 4 of the WpHG, the company is required to make the publication cumulatively in two media: in the electronic Federal Gazette and additionally either in a national newspaper for statutory stock exchange announcements or in an electronic information system which is broadly used in the financial industry. The publication moreover must be made without undue delay.
X.3.3.7 Enforcement of publication orders

Where a company fails to comply with a publication order, or where a publication does not comply with the publication order (for example because of impermissible additions to the publication), BaFin may enforce the same using the administrative means available to it. These include imposing a coercive fine of up to €250,000 or performing the publication itself at the company’s expense. Such non-compliance also constitutes an administrative offence which is punishable by a fine of up to €50,000.
XI Cooperation of BaFin with other authorities in Germany as part of the enforcement procedure (sections 6, 8, 37r of the WpHG)

Within the scope of the financial reporting enforcement procedure, BaFin is authorised and obliged to cooperate with other authorities and public entities. This cooperation primarily consists in exchanging information needed by BaFin or the other authorities and entities to perform their duties. The objective pursued by such cooperation is to make the enforcement supervision of BaFin and the work of the other authorities and entities more effective than would be the case if they acted in isolation from one another. The cooperation, in particular the exchange of information, is advantageous not least for issuers as it allows them, for example, to prevent inefficient duplication of procedures. However, such cooperation is limited where the confidentiality of information and the protection of personal data take priority. For the parties involved in a financial reporting enforcement procedure it is important to know to what extent and with what authorities and entities BaFin exchanges data about enforcement-related matters and what further consequences this may have for the companies.

XI.1 Cooperation with prosecuting authorities – section 37r (1), section 8 (1) sentence 3 no. 1 of the WpHG

If in the course of its financial reporting enforcement activities BaFin becomes aware of facts giving reason to suspect a criminal offence in relation to the company’s accounting, it must inform the competent prosecuting authority so that the latter may initiate a proceeding to investigate and sanction such criminal offence where applicable. Such criminal offences are defined in section 331 of the HGB and section 400 of the AktG and include misrepresentation of a corporation’s or group’s situation and similar offences. Falsification of documents, fraud or insolvency-related criminal offences are also covered if such offences are committed to enable, or are a consequence of, false accounting.

BaFin will suspect a criminal offence whenever it deems a specific violation against a criminally sanctioned prohibition to be possible on the basis of its factual findings and experience. Although it need not yet have an eye on any specific offender, mere speculations without any factual evidence are not sufficient to give rise to an obligation to report to the public prosecutor’s office pursuant to section 37r (1) of the WpHG.

In addition to the reporting obligation in cases where there is specific suspicion, the Act provides for the possibility of authorised disclosure of information to the public prosecutors’ offices: section 8 (1) sentence 3 no. 1 of the WpHG defines that BaFin does not violate the confidentiality obligation it is required to observe by informing the public prosecutors’ offices or courts having jurisdiction in criminal cases and administrative offence cases of facts of which
it gained knowledge in the course of its supervisory activity and which such authorities need to perform their duties. When to make such disclosure is subject to BaFin’s duly exercised discretion.

In the case of both mandatory notifications and other authorised disclosures of information, the Act expressly permits personal data to be transmitted as well.

BaFin will not further investigate suspected or alleged criminal offences, since this is the task of the prosecuting authorities. BaFin’s role thus solely consists in making the knowledge it gains in the performance of its duties available for use by the public prosecutors’ offices, not in doing investigative work for the prosecuting authorities.

Incidentally, the initiation of investigations by the public prosecutor does not in any way influence the continuation of an enforcement procedure. Both procedures pursue different objectives: capital market transparency on the one hand, sanctioning of personal misconduct on the other.

XI.2 Cooperation with the Chamber of Public Accountants – section 37r (2) sentence 1, section 8 (1) of the WpHG

BaFin’s obligation to inform the Chamber of Public Accountants (Wirtschaftsprüfкамmer – WPK) about facts “indicating the violation of professional obligations by the auditor” is expressly set forth in section 37r (2) sentence 1 of the WpHG. For this purpose, personal data of the persons suspected of the offence, or persons who may be required to act as witnesses, may also be transmitted. Whether such facts exist depends on the view taken by BaFin. According to the grounds stated by the government, this primarily applies to the case where an error has been identified in audited financial statements for which an auditor issued an unqualified auditors’ report.

However, BaFin may also have a notification obligation already before a financial reporting enforcement procedure has been concluded. The point is that the disclosure obligation is intended to enable the most effective supervision of auditors possible by making the information gathered by the Enforcement Panel and BaFin available for use in indirect government supervision of auditors. On the other hand, a notification by BaFin can be used effectively only if it actually provides a basis for further investigations by the WPK. Moreover, an exaggerated notification obligation would put an undue strain on the resources of BaFin and possibly also on wrongly suspected auditors beyond what may be deemed justified given the spirit and purpose of the provision.

The confidentiality obligation pursuant to section 8 of the WpHG is not opposed to other notifications to the WPK provided that the information transmitted does not need to be kept secret or is disclosed with authorisation. The material proximity that the WPK’s public mandate has to matters relating to financial reporting enforcement by BaFin justifies WPK’s qualification as an authorised recipient of information.
XI.3 Cooperation with the exchange supervisory authorities and trading surveillance units – section 37r (2) sentence 2, section 6 (2), section 8 (1) sentence 3 no. 2 of the WpHG

In the course of a financial reporting enforcement procedure, BaFin sometimes discovers facts supporting the likelihood that the company audited has violated regulations under stock exchange law. BaFin is not permitted to further pursue such suspicion because supervision of the exchanges and the execution of exchange trading in accordance with the provisions of the AktG and the BörsZulV is the responsibility of the exchange supervisory authorities, which in turn fall under the administration of the federal states (Länder). The exchange supervisory authorities are vested with the necessary powers to investigate stock exchange law matters and to issue to stock exchanges and trading participants the orders required to enforce proper exchange trading and proper execution of exchange transactions.

With the transposing of the Transparency Directive, most of issuers’ obligations to be fulfilled following stock exchange admission set forth in the BörsZulV were replaced by similar provisions in the WpHG which are monitored by BaFin. This concerns, for example, the former provisions on interim reports, annual financial statements and management reports as well as the obligations of issuers vis-à-vis securities holders which have now been absorbed into sections 30a et seq. and sections 37v et seq. of the WpHG and whose supervision falls under the duties of BaFin. As a result, violations of stock exchange regulations by companies audited under financial reporting enforcement law are less common.

BaFin’s notification regarding cases of suspicion that may have implications under stock exchange law helps the exchange supervisory authorities to ensure orderly exchange trading and to better supervise those companies which are required to meet requirements under stock exchange law in their capacity as issuers or market participants. For this purpose, BaFin may also transmit personal data of suspects or of potential witnesses.

Apart from its obligation to make notifications of suspicion, BaFin is required by section 6 (2) of the WpHG to inform the exchange supervisory authorities and the trading surveillance units of the stock exchanges of any and all observations and findings needed by the latter for their supervisory activity. This comprehensive duty to cooperate also extends to personal data. On inquiry by the exchange supervisory authority, BaFin must (and may) transmit information it has gained, for example, in a financial reporting enforcement procedure. Conversely, the exchange supervisory authorities and the trading surveillance units are obliged and authorised to make available to BaFin any information and data to which they have gained access if BaFin needs such information and data for a financial reporting enforcement procedure or performance of one of its other duties. Despite its confidentiality obligation with regard to business and trade secrets as well as personal data, BaFin is not prohibited, pursuant to section 8 (1) sentence 3 no. 2 of the WpHG, from exchanging such information with all entities which by law or by order of public authorities are entrusted with the supervision of stock exchanges or other markets on which financial instruments are traded.
XI.4 Cooperation with Bundesbank, Federal Cartel Office, the labour inspection offices and other entities – section 6 (2), section 8 of the WpHG

As in all areas of its supervisory activity, BaFin is also required within the scope of financial reporting enforcement to exchange information with the Bundesbank, the Federal Cartel Office (Bundeskartellamt) and the labour inspection offices (Gewerbeaufsichtsämter) supervising brokers of insurance and investment shares, all information which the other respective entity needs to perform its duties. This represents a comprehensive duty to cooperate and provide mutual assistance, and is in the interest of ensuring effective state control of the financial markets as also prescribed by European Community law.

BaFin’s confidentiality obligation with respect to information which normally must be kept secret in the interest of a third party no longer applies if data – including data from financial reporting enforcement procedures – are disclosed to other capital market supervisory authorities, to the European Central Bank or other central banks, or to entities entrusted with the liquidation or with conducting the insolvency proceedings on the assets of an investment services enterprise or of an organised market, provided that such institutions need the data for the performance of their duties.
XII Cooperation of BaFin with foreign entities as part of the enforcement procedure (sections 37s, 7 of the WpHG)

In the areas of supervision incumbent on it pursuant to the WpHG, BaFin extensively complies with its duty of international cooperation with supervisory authorities from other EU member states and third countries as well as with international organisations. Where securities trading law is harmonised by European Community law, such cooperation is closely regulated and requires the supervisory authorities to cooperate intensively and to provide one another with mutual assistance in the cross-border investigation of matters as well as to prosecute violations. This cooperation obligation is designed to ensure effective supervision of the European Single Market for financial services through a network of supervisory authorities of individual member states.

By contrast, financial reporting enforcement law is not based on the requirements of Community law. Accordingly, in the enforcement procedure, section 37s of the WpHG gives BaFin further-reaching discretion in deciding whether to cooperate with foreign entities than, for example, in the case of supervision of the publication of financial reports as harmonised by the Transparency Directive.

Information gained by it as part of the financial reporting enforcement procedure may be disclosed by BaFin to foreign entities only for the purpose of financial reporting enforcement. Pursuant to section 7 (2) of the WpHG, information as a general rule may be used for all areas of supervision of stock exchanges, banks, financial services providers, investment companies and insurers.

For the purpose of procuring information for foreign authorities, BaFin may request information only from companies admitted to trading on an organised market and the companies included in their consolidated financial statements, in each case including their corporate bodies and employees as well as their auditors, whereas in the other areas of securities supervision BaFin may request information and submission of documents from anyone. In all cases, however, it may conduct investigations on behalf of foreign authorities even if no legal violation has been committed in Germany. These investigative powers also include the right to enter the business premises of companies subject to the obligation to provide information. In turn, BaFin may also direct requests to foreign authorities for the purpose of transmitting information needed by BaFin for its supervisory activity or for initiating an investigation against a foreign company.

In addition to providing mutual assistance in clarifying individual matters and for prosecuting violations of accounting standards on a cross-border basis, BaFin maintains and promotes international cooperation at the abstract level. In this area the objective is to develop international standards and a common administrative practice for the application of accounting standards and their enforcement within the scope of bilateral contact or international organisations. Part of this harmonisation work is the further development and use of a European database of sample enforcement decisions from various countries. Such database is run by CESR.

BaFin performs its duty of international cooperation in financial reporting enforcement in consultation with the Enforcement Panel.
XIII Judicial relief from measures taken by BaFin in financial reporting enforcement procedures

XIII.1 Measures taken by the Enforcement Panel

The German procedure for monitoring company financial statements is designed as a two-tier procedure. At the first-tier level, the Enforcement Panel examines company financial statements on a random sampling basis, at BaFin’s request or where there are specific indications that accounting rules have been violated. As a private-law entity, the Enforcement Panel in this connection depends on the willingness of companies to cooperate in this audit, since otherwise it cannot take any legally binding decisions. If the company initially cooperates and the Enforcement Panel then establishes the result of its audit, the company is once again free to decide whether to agree with this result or to refuse to do so. By not cooperating in an audit by the Enforcement Panel from the outset or simply refusing to agree with the result, it may prevent the enforcement procedure at the first-tier level or end it without adverse consequences, and without having to seek judicial relief by way of a formal proceeding. Legislation therefore does not provide for any appeal against measures taken by the Enforcement Panel.

XIII.2 Measures taken by BaFin

A statutory examination procedure can only be instituted at the second-tier level of the enforcement procedure by BaFin. That is because BaFin is vested with the necessary powers for this only if a company refuses to cooperate in an audit by the Enforcement Panel or does not agree with the result of such audit, or if BaFin has substantial doubts with regard to the audit result or the way in which the audit was conducted at the first-tier level of the enforcement procedure (section 37p (1) sentence 2 of the WpHG). It is vested with statutory powers to order an accounting audit (section 37o (1) sentences 1 and 2 of the WpHG), publish the audit order (section 37o (1) sentence 5 of the WpHG), seek information from companies or submission of documents (section 37o (4) of the WpHG), enter property and business premises (section 37o (5) of the WpHG), require the Enforcement Panel to explain its audit and to submit an audit report or to initiate an audit (section 37p (1) sentences 3 and 4; (2) of the WpHG), establish that company financial statements are erroneous (section 37q (1) of the WpHG) and order publication of an identified error (section 37q (2) sentence 1 of the WpHG); the latter is also the task of BaFin in the event that no enforcement procedure at the second-tier level takes place. Moreover, it may enforce any administrative acts it has taken by availing itself of the means provided for this purpose under administrative enforcement law by
imposing a coercive fine, or ordering substitute performance at the expense of the company not having complied with its obligations, or by performing a publication pursuant to section 4 (6) of the WpHG at the company’s expense.

XIII.2.1 Objections

The company concerned or the Enforcement Panel may defend itself against administrative acts of BaFin pursuant to sections 37o, 37p and 37q of the WpHG by way of objection pursuant to section 37t of the WpHG. Unless otherwise provided for in the WpHG, such objections are governed by the general rules for preliminary proceedings pursuant to sections 68-73 and 80 (1) of the Rules of the VwGO.

By contrast, simple statutory administrative activities of BaFin which do not carry any binding provisions for orders or prohibitions may not be challenged by way of objection. For example, the notification by BaFin to the company pursuant to section 37q of the WpHG that the audit did not result in any findings of fault is not a statutory provision against which an objection would be admissible.

Also inadmissible are objections filed with the aim of challenging an (expected) administrative act pre-emptively even though such act has not yet been issued at all, for example because it has not yet been made known to the addressee in the manner prescribed by law. A preliminary proceeding is excluded where an administrative act issued in the meantime has lapsed because such act no longer gives rise to any inculpatory effects for the person or entity concerned. Where the addressee is able to assert a particular interest in the subsequent declaration being issued that the administrative act was unlawful, it may directly lodge a judicial complaint for a declaratory ruling on the unlawfulness of such administrative act (Fortsetzungsfeststellungsbeschwerde).

Section 37t (1) sentence 2 of the WpHG moreover clarifies that no additional preliminary proceeding is allowed where the original administrative act was already once examined in an objection proceeding and the remedial decision or the ruling on the objection contains a gravamen for the first time against which the complainant would like to take action.

XIII.2.1.1 Objections authority

An objection pursuing the aim of setting aside an administrative act must be lodged with BaFin as the competent objections authority. That is because section 73 (1) no. 2 of the VwGO provides that the authority having issued the administrative act is also required to rule on the objections if the next higher authority is a supreme federal authority (oberste Bundesbehörde). The Federal Ministry of Finance, which performs legal and technical supervision of BaFin, is thus not responsible for processing objections against orders issued by BaFin. Within BaFin, objections are processed in an organisational unit other than the one in which the order originated.
XIII.2.1.2 Right of objection

Objections may be lodged only by the person or entity to which the BaFin order is addressed. As a rule, that will be the company subject to the enforcement audit. But also members of its corporate bodies, employees of the company or its auditors have the right to object if BaFin requests them to provide information or submit documents.

Third parties other than the person or entity to whom the administrative act is addressed do not have any right of objection even if they are indirectly affected by the act (for example as shareholders). Since the establishment of an error has binding effect only for the parties to the procedure (i.e. BaFin and the audited company), third parties – such as the auditor – cannot claim any infringement of their own rights. Neither may third parties assert claims against BaFin by way of action for issuance of an administrative act (Verpflichtungsklage) with the aim of establishing an error. That is because financial reporting enforcement, like BaFin’s entire supervisory activity, is performed exclusively in the public interest.

XIII.2.1.3 Time limit

An objection must reach BaFin within a period of one month starting from when the administrative act has been made known to the person or entity to which it has been addressed. Pursuant to section 70 (1) sentence 2 in conjunction with section 58 (2) of the VwGO, the time limit is extended by one year only in the event of deficient instructions in the original notice with regard to the correct filing of an appeal. The calculation of the time limit must take account of the provisions on public holidays at BaFin’s offices in Bonn and Frankfurt; in all other respects, the time limit is calculated in accordance with the provisions set forth in sections 187 et seq. of the BGB. In the event of culpable failure to observe the time limit, the order of BaFin becomes non-appealable.

XIII.2.1.4 Form

The objection may be submitted in writing by mail, fax or computer fax, or declared for recording with BaFin. German is the mandatory language for this purpose.

An e-mail does not satisfy the form requirements because BaFin, for technical reasons, is unable to receive and process any qualifying electronic signatures within the meaning of section 3a (2) of the VwVfG and the SigG by means of which written form could be replaced by electronic form. Lodging an objection orally or by phone is also excluded.

XIII.2.1.5 Review by BaFin

BaFin in each case reviews only the individual order whose lawfulness has been called into question by the complainant. If the complainant objects, for example, to BaFin’s request to provide certain information or submit documents, only the lawfulness and expediency of these fact finding measures will be subject to an additional review. The question of whether or not it was permissible to order the financial reporting enforcement audit in the first place is not re-examined. If the establishment of an error has become res judicata, the company concerned may later lodge an objection against the order for publication but may not invoke in such objection that the underlying establishment of the error had not been correct.
Subject to this restriction to the subject-matter in dispute, BaFin reviews the lawfulness of the challenged order in its entirety. In this context it considers any new arguments brought in by the complainant, but is also required to set aside the original administrative act if it acknowledges such act to be unlawful on grounds other than those submitted by the complainant. To the extent that the original order is based on a discretionary decision by BaFin (i.e. the issuance of such order was not prescribed by mandatory law), the exercise of such discretion will be re-examined in the objection proceeding.

The lawfulness and expediency of the administrative act is to be examined on the basis of the facts of the case and the legislation in force at the time when BaFin decides on the objection. In the event that the legal requirements or factual circumstances on which the administrative act was based change, this may work in favour of or against the complainant.

If BaFin finds that the original notice was unlawful, or that at the time of the decision on the objection the original order can no longer be upheld, this will remedy the objection. If, on the other hand, it holds the objection to be unfounded, it will dismiss the same in the form of an objection notice (with costs).

### XIII.2.1.6 No suspensive effect

Pursuant to section 37t (2) of the WpHG, BaFin’s orders as described above under XIII.2. are immediately executable as part of financial reporting enforcement. The suspensive effect normally associated with the lodging of an appeal does not apply here. That means that the order must already be observed when it is made known to the person or entity addressed by the same, and may be executed by BaFin by means of administrative compulsion even if the time limit for objections has not yet expired or an objection has been lodged within such time limit. This provision ensures that the interest of the capital market in being provided with transparency as quickly as possible is not restricted by an appeal proceeding. However, the persons or entities subject to a financial reporting enforcement order may apply to the Higher Regional Court of Frankfurt am Main for an order granting their objection suspensive effect (see XIII.2.3.).

### XIII.2.2 Complaints

Persons or entities to whom administrative acts of BaFin are addressed as part of financial reporting enforcement may lodge a judicial complaint proceeding if BaFin has not (fully) remedied their objection or the ruling on the objection contains a first-time cause for complaint (see XIII.2.1.).

In principle, a complaint is also possible if the dispute has been settled in the meantime but the complainant is able to assert a legitimate interest in a declaration that the order issued by BaFin had been unlawful. Such complaints for a declaratory ruling on the unlawfulness of a previous administrative act (Fortsetzungsfeststellungsbeschwerde) pursuant to section 37u (2) of the WpHG in conjunction with section 56 (2) sentence 2 of the WpÜG may be lodged, for example, where a request for information by BaFin directed to a company or its auditor has lapsed because the information has already been provided but the person or entity in question is concerned that further similar measures may be taken in future.
XIII.2.2.1 Court having jurisdiction

Pursuant to section 37u (2) of the WpHG in conjunction with section 48 (4) of the WpÜG, the Higher Regional Court of Frankfurt am Main has exclusive jurisdiction for deciding on financial reporting enforcement complaints. Specifically, the Division for Securities Acquisition and Takeover Matters at the Higher Regional Court decides on the matters subject to the analogous application of the procedural rules as set forth in the WpÜG. No further appeal is possible against rulings of the Higher Regional Court of Frankfurt am Main; however, if the Higher Regional Court of Frankfurt am Main wishes to depart from the case law of another Higher Regional Court or of the Federal Court of Justice (Bundesgerichtshof – BGH), it must refer the matter to the BGH for a decision (divergence referral in accordance with section 56 (6) of the WpÜG).

XIII.2.2.2 Right of complaint

Persons or entities whose rights are directly affected by orders issued by BaFin within the scope of financial reporting enforcement (which generally take the form of objection notices; see XIII.2.) may lodge a complaint against such orders. As a general rule, this will be the company subject to the financial reporting enforcement procedure. However, complaints may also be lodged by persons whom BaFin has requested to provide information, or by the Enforcement Panel as the entity to which an order to initiate an audit was addressed. By contrast, indirectly affected third parties – in accordance with the objections procedure – are not entitled to lodge appeals (see XIII.2.1.2.).

XIII.2.2.3 Time limits and formal requirements

The complaint must be received by the court within one month from service of the objection notice; this time limit cannot be extended. This is followed by a further time limit of one month within which grounds must be stated for the complaint. This time limit may be extended by the court on request. In the grounds it must be stated in what way and to what extent the court should amend or set aside the administrative act. In this case the complainant may restrict the subject-matter in dispute to parts of the BaFin order, for example by contesting a request for information by BaFin only with respect to specific questions from a longer list, or by making only certain errors established by BaFin the subject-matter of the proceedings. Moreover, the factual circumstances on which the complaint is based must be explained and substantiated by evidence.

XIII.2.2.4 Proceeding

The complainant must be represented at court by either a German lawyer or a teacher of law at a university or other higher education institution. The court may waive an oral hearing provided the parties have given their consent to this procedure. A decision may be issued even if the parties, despite having been duly notified, do not appear with their respective lawyers at the oral hearing. Pursuant to section 58 no. 1 of the WpÜG in conjunction with section 172 of the GVG, the general public may be excluded from the oral hearing.

The appellate court has an obligation to investigate the matter ex officio. For this purpose, it may appoint experts to provide clarification of particularly complex questions relating to the facts of the case. It decides by way of court order pursuant to section 56 (1) sentence 1
of the WpÜG. However, in issuing its court order it may not go beyond the relief sought by
the complainant. That means that the court order may not contain any inculpatory effects
exceeding the scope of the contested administrative act.

If the appellate court comes to the conclusion that the order was unlawful, it sets the same
aside. Pursuant to section 56 (4) of the WpÜG, unlawfulness of the order may be established on
the ground that BaFin did not properly exercise its decision-making discretion, for example by
overstepping the bounds of its discretion or violating the spirit and purpose of financial reporting
enforcement. In the case of a complaint for a declaratory ruling on the unlawfulness of a previous
administrative act (see XIII.2.2.), the court establishes in its court order whether or not such act
is unlawful. If the order is lawful, the Higher Regional Court dismisses the complaint.

Only the parties to the proceeding are bound by the court order. It has no binding effect for
indirectly affected third parties.

XIII.2.3 Summary proceedings

Pursuant to section 37u (1) sentence 2 of the WpHG, no suspensive effect is associated with
complaints against administrative acts of BaFin in financial reporting enforcement matters.
Given the interest the capital market has in being provided with transparency as quickly
as possible, the orders (including those issued in the form of objection notices) may be
executed immediately without the need to await the outcome of a complaint proceeding (see
XIII.2.1.6.). This means that BaFin may also enforce its order before res judicata conclusion
of an appeal proceeding by threatening imposition on the person or entity to whom the order
is addressed (in the event of their failure to comply with the order) of a coercive fine in the
amount of up to €250,000, or by performing the requested act (such as the publication of an
error) itself at the costs of the person or entity concerned.

To protect themselves against immediate execution, the persons whose rights are directly
affected by the BaFin order may initiate a judicial summary proceeding. Neither the WpHG
nor the WpÜG (whose procedural rules apply to the complaint proceeding) provides that BaFin
itself might lift the immediate executability of its orders.

On application, the appellate court (see III.2.2.1.) may grant suspensive effect to an objection
or a complaint pursuant to section 37u (2) of the WpHG in conjunction with section 50 (3) of
the WpÜG. In this case, however, the applicant must submit prima facie evidence of facts on
the basis of which the court recognises serious doubts as to the lawfulness of the contested
administrative act of BaFin or reaches the conclusion that the execution of such administrative
act would result in an undue hardship not justified by overriding public interests.

The first alternative (serious doubts as to the lawfulness of the administrative act) may apply if
the court, based on a summary review of the prospects of success, reaches the conclusion that
the administrative act in all likelihood will be set aside in the subsequent main proceeding. The
second alternative (undue hardship) will then apply in the main proceeding if disadvantages
that are more than just typical consequences of such administrative acts for the person or
entity affected thereby (such as a drop in the company’s share price upon publication of an
error) may be expected. Rather, there would have to be the likelihood of a person or entity to
whom an administrative act is addressed being threatened in its very existence, without this
being compensated by an overriding public interest in the BaFin order.
XIV Financial reporting requirements (sections 37v-37z of the WpHG)

XIV.1 Introduction

Sections 37v to 37z of the WpHG define the content of financial reports pursuant to the WpHG, the publication and storage obligations in connection therewith, and the exemption options available in this regard. Within the meaning of these provisions, financial reports are the annual financial reports (section 37v of the WpHG), the half-yearly financial reports (section 37w of the WpHG) and the interim management statements (section 37x of the WpHG).

If a quarterly financial report satisfying the requirements of section 37w (2) no. 1 and 2, (3) and (4) of the WpHG (referred to as exempting quarterly financial report) is prepared, the obligation to publish an interim management statement does not apply.

If a parent company has the obligation to prepare consolidated financial statements and a group management report, the requirements of sections 37v to 37x of the WpHG on financial reporting are modified subject to the provisions of section 37y of the WpHG.

Lastly, section 37z of the WpHG provides for exemptions to the financial reporting obligation pursuant to the WpHG.

Legal basis and legislative history

The essential legal basis of sections 37v et seq. of the WpHG is provided by the requirements of the Transparency Directive. The relevant provisions are mainly found in Articles 4 to 8 of the Transparency Directive. These are further clarified by the provisions of the accompanying implementing directive, particularly with regard to the disclosure of financial data in half-yearly financial reports and the minimum requirements for recognition of the equivalence of financial reporting rules of third countries.

In Germany, these requirements were transposed by the TUG which implemented the requirements of the Transparency Directive in the WpHG and the WpAIV. The relevant powers to adopt legal regulations created by the TUG were also used by the TranspRLDV. With the adoption of the TUG, sections 53 et seq. of the BörsZulV, which had contained provisions on interim reporting obligations (i.e. obligations to be fulfilled following admission to the stock exchange), were repealed.

XIV.2 Scope

The obligations of sections 37v et seq. of the WpHG apply only to domestic issuers pursuant to section 2 (7) of the WpHG (see IV.2.1.1.). An additional restriction in the group of entities subject to these obligations is that such obligations only apply to companies. That means that they do not extend, for example, to the German government and to the federal states (Länder) as issuers. Further restrictions in the personal scope of application are defined directly in sections 37w and 37x of the WpHG.

In determining whether a company has the capacity of a domestic issuer, the point in time when the securities are or were admitted to trading on an organised market in Germany is to be referred to as a basis it being noted in this regard that the point in time when the securities are actually admitted is decisive, and not when admission is or was applied for. From the time of admission, a reporting obligation exists for the current and all following reporting periods. A reporting obligation further applies for a preceding reporting period where admission takes place during the respective decisive publication period. The reporting obligation ends on the date when the revocation of admission takes effect. No report is required for the period within which a revocation of admission takes effect (which, however, is not the case for the report on the immediately preceding reporting period).

Example:

An issuer’s securities are admitted to trading on 1 August (financial year = calendar year). Since said admission has taken place within the relevant publication period, the issuer also has an obligation to prepare and publish a half-yearly financial report.

If, however, exchange admission is validly revoked on 1 August the issuer is still required to prepare and publish the half-yearly financial report (because this reporting period has been concluded), but is no longer required to prepare and publish an interim management statement (for the third quarter) and an annual financial report.

In the case of an abridged financial year, sections 37v et seq. of the WpHG apply as follows: at the end of an abridged financial year, the obligations in respect of an annual report pursuant to section 37v of the WpHG must be satisfied. Moreover, no peculiarities generally apply for interim financial reporting in the case of an abridged financial year, except that there is no requirement for additional interim reporting if the end of the reporting period coincides with the end of the abridged financial year.

Example:

A financial year commencing on 1 July is adapted to the calendar year with effect from 1 January of the following year. For the close of the abridged financial year as at 31 December, an annual report must be prepared and made available to the public no later than on 30 April of the following year, but there is no obligation to prepare and publish a half-yearly financial report for the period from 1 July to 31 December. By contrast, if the financial year is changed with effect from 1 February of the following year, both an annual financial report for the conclusion of the abridged financial year as at 31 January of the following year and a half-yearly financial report for the period from 1 July to 31 December must be prepared and published.
XIV.2.1 Applicability of sections 37v et seq. of the WpHG for insolvent companies

The obligations pursuant to sections 37v et seq. of the WpHG must also be observed by issuers for which a request for the opening of insolvency proceedings has been made or in respect of whose assets insolvency proceedings have already been opened. The (provisional) insolvency administrator is required to assist such issuers in fulfilling their obligations under capital market legislation, particularly with regard to the funds requirement for this (section 11 of the WpHG).

XIV.2.2 Exemptions from scope of application pursuant to section 37z of the WpHG

In section 37z, the WpHG provides for a number of exemptions from the scope of application of sections 37v et seq. of the WpHG by which issuers are exempt from obligations or from the entire scope of application of the rules.

XIV.2.2.1 Exemptions pursuant to section 37z (1) to (3) of the WpHG

Pursuant to section 37z (1) of the WpHG, sections 37v to 37y of the WpHG do not apply to companies that exclusively issue admitted debt securities pursuant to section 2 (1) sentence 1 no. 3 of the WpHG with a minimum denomination per unit of €50,000 or the equivalent value of such denomination per unit in any other currency as at the date of issue.

Section 37z (2), on the other hand, exempts credit institutions issuing securities as domestic issuers (see IV.2.1.) from the obligation to fulfil the provisions governing the half-yearly financial report (section 37w of the WpHG), provided that their shares are not admitted to trading on an organised market and they have (either in a continuous or repeated manner) exclusively issued debt securities whose total nominal amount remains below €1m and for which a prospectus under the WpPG has not been published.

Also exempt from the obligations of section 37w of the WpHG are companies that issue securities as domestic issuers and already existed before 31 December 2003, provided that they exclusively issue debt securities which are admitted to trading on an organised market and are unconditionally and irrevocably guaranteed by the German government or one of the federal states or by one of the regional or local authorities (e.g. the Sparkassen and Volksbanken).
### Prerequisites

1. Exclusive issue of debt securities admitted to trading on an organised market (section 2 (1) sentence 1 no. 3 of the WpHG),
2. with a minimum denomination per unit of €50,000 or equivalent value of such denomination per unit in another currency on the date of issue.

### Exemption

Obligations pursuant to sections 37v to 37y of the WpHG (section 37z (1) of the WpHG)

### Prerequisites

1. Credit institution,
2. no issue of shares admitted to trading on an organised market,
3. issuance, in a continuous or repeated manner, of debt securities whose total nominal amount remains below €1m and for which
4. no prospectus was published pursuant to the WpPG.

### Exemption

Obligations pursuant to section 37w of the WpHG – half-yearly financial report – (section 37z (2) of the WpHG)

### Prerequisites

1. Company already existed before 31 December 2003,
2. exclusive issuance of debt securities admitted to trading on an organised market, and
3. unconditionally and irrevocably guaranteed by the German government or one of the federal states (Länder) or one of the regional or local authorities.

### Exemption

Obligations pursuant to section 37w of the WpHG – half-yearly financial report – (section 37w (3) of the WpHG)

### XIV.2.2.2 Exemption pursuant to section 37z (4) of the WpHG in the case of equivalent rules of a third country

Pursuant to section 37z (4) of the WpHG, BaFin may, on request, exempt companies which are domiciled in a third country and which issue securities as domestic issuers from the requirements of sections 37v to 37y. A prerequisite for this is that the company is subject (or submits) to equivalent rules in such third country.

Equivalence is determined in accordance with sections 12 to 17 of the TranspRLDV which sets out specific criteria for determining whether requirements relating to financial reports (but not to such third country’s accounting principles) are equivalent. BaFin examines the question of equivalence based on the rules of the third country in question. By contrast, the company’s individual reporting is not relevant in this regard. If BaFin comes to the conclusion that the criteria of equivalence are satisfied, it may exempt the company from the requirements of sections 37v to 37y of the WpHG. The wording of the rule thus affords BaFin a certain degree of discretion. Prior to a decision being taken, a further consultation on such conclusion is effected at the European level.

Even where the exemption has been granted, that does not mean that the issuer does not have any financial reporting obligations in Germany. Rather, such issuer is required by section 37z (4) sentences 2 and 3 of the WpHG to disseminate the information prepared in accordance with the rules of the third country and to publish an announcement pursuant to the relevant provisions of the WpHG and the WpAIV. In addition, the announcement and the information prepared in accordance with the rules of the third country must be transmitted to the company register to be stored there.
XIV.3 Section 37v of the WpHG – annual financial report

Section 37v of the WpHG requires companies that issue securities as domestic issuers to prepare an annual financial report as per the end of each financial year and to make such report available to the public no later than four months after the end of the respective financial year unless the company is already required by provisions under commercial law to disclose the accounting documents as specified in section 37v (2) of the WpHG. In addition, prior to making such documents publicly available, the issuer must also publish an announcement as to when and on what website these will be publicly available. Simultaneously with its publication, such announcement must be notified to BaFin and transmitted without undue delay, but not before its publication, to the company register to be stored there. The documents themselves specified in section 37v (2) of the WpHG must also be transmitted without undue delay, but not before publication of the announcement, to the company register to be stored there unless they have already been transmitted by the operator of the electronic Federal Gazette in accordance with the provisions under commercial law.

XIV.3.1 Section 37v (2) of the WpHG – content of the annual financial report

Pursuant to section 37v (2) of the WpHG, the annual financial report must at least contain the following information:

- the audited annual financial statements (no. 1);
- the management report (no. 2);
- a statement made in accordance with the provisions of sections 264 (2) sentence 3, section 289 (1) sentence 5 of the HGB (no. 3); and
- a certificate of registration of the auditor issued by the Chamber of German Public Auditors (Wirtschaftsprüferkammer) pursuant to section 134 (2a) of the WPO or a certification of exemption from the registration obligation issued by the Chamber of German Public Auditors pursuant to section 134 (4) sentence 8 of the WPO (no. 4).

Further content may be added to the scope of the report, provided that the report contains the minimum components as specified in section 37v (2) nos. 1 to 4 of the WpHG.

XIV.3.1.1 Audited annual financial statements

Firstly, the annual financial report must contain the audited annual financial statements. In the case of companies domiciled in Germany, this is the financial statements as set forth in sections 242 and 264 (1) sentence 1 of the HGB.
XIV.3.1.2 Management report

The content of the management report is not further specified in section 37v of the WpHG. However, the relevant requirements are set forth in section 289 of the HGB for issuers domiciled in Germany. Although auditing of the management report – in addition to the annual financial statements – is not required under the WpHG, such auditing obligation is established under section 316 (1) sentence 1 of the HGB for issuers domiciled in Germany.

XIV.3.1.3 Statement made in accordance with the provisions of sections 264 (2) sentence 3 and 289 (1) sentence 5 of the HGB (responsibility statement)

By means of the responsibility statement, the statutory representatives of the company assure that the annual financial statements give a true and fair view of the company’s assets, liabilities, financial position and profit or loss, and that the management report includes a fair review of the development and performance of the business and the position of the company, together with a description of the principal opportunities and risks associated with the expected development of the company. The statement is given subject to the qualification that the statutory representatives give such assurance to the best of their knowledge.

The responsibility statement may be worded to conform to the German Accounting Standard (DRS) No. 16 for Consolidated Financial Statements (announcement of German Accounting Standard No. 16 (DRS 16) – Interim Reporting – of the German Accounting Standards Committee, Berlin, pursuant to section 342 (2) of the German Commercial Code dated 8 July 2008; published as an annex to the Federal Gazette on 24 July 2008).

XIV.3.1.4 Certificate or certification of the Chamber of German Public Auditors pursuant to section 134 of the WPO

Annual financial reports must contain a certificate of registration of the auditor issued by the Chamber of German Public Auditors pursuant to section 134 (2a) of the WPO or a certification of exemption from the registration obligation issued by the Chamber of German Public Auditors pursuant to section 134 (4) sentence 8 of the WPO, particularly if an auditor from a third country has issued the auditors’ report for the financial statements of a company domiciled in such country. This is never the case for publicly appointed auditors in Germany.

XIV.3.2 Group

Where a parent company is required to prepare consolidated financial statements and a group management report, section 37v of the WpHG is modified by section 37y of the WpHG in such a way that the annual financial report must also contain the audited consolidated financial statements prepared in accordance with Regulation (EC) No 1606/2002, the group management report, a statement made in accordance with the provisions set forth in section 297 (2) sentence 3, section 315 (1) sentence 6 of the HGB and a certificate of registration of the auditor issued by the Chamber of German Public Auditors pursuant to section 134 (2a) of the WPO or a certification of exemption from the registration obligation issued by the Chamber of German Public Auditors pursuant to section 134 (4) sentence 8 of the WPO. These
components must be stated in addition to the parts of the annual financial report already mentioned, and together they form the annual financial report within the meaning of section 37v of the WpHG. Thus, there is only one single financial report.

The consolidated financial statements must be prepared in accordance with Regulation (EC) No 1606/2002, i.e. in accordance with the IASs/IFRSs adopted by the EU. Pursuant to the WpHG, however, an auditing obligation exists for the consolidated financial statements but not for the group management report. Such obligation is established in section 316 (2) sentence 1 of the HGB for issuers domiciled in Germany. Section 315 HGB moreover also establishes requirements for the content of the group management report.

**XIV.3.3 Dissemination and announcement**

**XIV.3.3.1 Making the annual financial report available to the public**

The annual financial report itself must be made available to the public on a website no later than four months after the end of each financial year. Additional publication by other means is permissible but not necessary. It is also not necessary for the report to be posted on the respective company’s website. Instead, the report may also be posted on another website, although publication on the company’s website is preferable given the greater proximity to the relevant context.

**XIV.3.3.2 Announcement**

Section 37v (1) sentence 2 of the WpHG requires the issuer to publish an announcement. This announcement must state from when the annual financial report is publicly available and on what website.

The path of the website on which the announcement is published must be stated. A reference to a website (specifically a link to the company’s investor relations page from which a further search is necessary) does not satisfy the requirements of section 37v (1) sentence 2 of the WpHG. However, it is still acceptable if the path leads to a page from which investors are able to select or find such report by means of one additional click.

Pursuant to section 3a of the WpAIV (to which section 22 of the WpAIV refers), the publication is required to be made via a media pool (see IV.6.1.1.).

The announcement must be published before the annual financial report is made available to the public for the first time. An advance period of one week is recommended to enable as many market participants as possible to be apprised of the impending making-available of the annual financial report.

Group notifications satisfy the requirements of the Act provided that such notifications already state the correct point in time when, and the correct website under which the financial reports are made available to the public. A correction notification is required if the dates or path stated change. It is recommended that group notifications be submitted twelve months in advance at the most so as to maintain the temporal reference and avoid numerous subsequent changes.
XIV.3.3.3  Notification to BaFin and transmission to the company register

Section 37v (1) sentence 3 of the WpHG requires the announcement to be notified to BaFin simultaneously with its publication. For this purpose, the announcement is deemed to be notified simultaneously with publication if sent in immediate succession.

The obligation to transmit the notification to the company register is established in section 8b (2) no. 9, (3) sentence 1 no. 2 of the HGB. Section 37v (1) sentence 3 of the WpHG provides that such transmission must take place without undue delay, but not before the announcement is published. In this regard, the requirement to transmit the notification immediately is determined by section 121 (1) sentence 1 of the BGB, i.e. transmission must take place without undue delay.

XIV.3.3.4  Language of the annual financial report and the announcement as well as duration of the publication

The language of the annual financial report and the announcement (see IV.6.2.) is determined by section 3b of the WpAIV to which section 22 of the WpAIV refers.

Pursuant to section 24 of the WpAIV, the financial report must be accessible to the public in the company register for a period of at least five years.

XIV.3.4  Transmission of accounting documents to the company register

The company is required to transmit the accounting documents specified in section 37v (2) of the WpHG without undue delay, but not before publication of the announcement, to the company register to be stored there.

As a general rule, the domestic issuer is required to transmit the documents pursuant to section 37v (1) sentence 4 of the WpHG to the company register either itself or through a service provider (section 8b (3) sentence 1 no. 2 of the HGB). Only in the event of disclosure of the accounting documents pursuant to section 37v (2) of the WpHG by way of disclosure pursuant to the rules of commercial law does the operator of the electronic Federal Gazette forward these to the company register to be included therein (section 8b (2) no. 4, (3) sentence 1 no. 1 of the HGB). However, in such cases also it is required to post the documents on the Internet.

Details regarding transmission to the company register are set forth in the URV. Performance of the obligations set forth in this regulation is not subject to the supervision of BaFin.

Transmission takes place pursuant to section 4 sentence 1 of the URV by way of remote data transfer and only in exceptional cases by fax (section 4 sentence 2 of the URV). Pursuant to section 11 sentence 1 of the URV, data within the meaning of section 8b (2) no. 9 of the HGB must be transmitted to the company register without undue delay after publication, and data within the meaning of section 8b (2) no. 10 of the HGB without undue delay after the

notification. Pursuant to section 11 sentence 2 of the URV, section 10 sentence 2 of the URV applies analogously. Accordingly, data are required to be transmitted in a structured format defined by the operator and widely used in business, for example in the form of Extensible Markup Language (XML).

XIV.4 Section 37w of the WpHG – half-yearly financial report

Section 37w of the WpHG requires companies which, as domestic issuers, issue shares or debt securities within the meaning of section 2 (1) sentence 1 of the WpHG to prepare and publish a half-yearly financial report covering the first six months of each financial year. However, issuers of certificates representing shares or similar interests in companies (section 2 (1) sentence 1 no. 2 of the WpHG) as well as those issuing debt securities which grant at least a contingent right to acquire securities pursuant to section 2 (1) sentence 1 no. 1 and 2 of the WpHG are exempt from such requirement. The group of entities subject to the reporting obligation is thus narrower than for the obligation to submit an annual financial report.

The rules for publishing the report and the announcement are defined in section 37w (1) of the WpHG, whereas section 37w (2) of the WpHG specifies the components making up the report. Subsections (3) and (4) describe in more detail the components of the condensed set of financial statements and the interim management report. Pursuant to section 37w (5) of the WpHG, these components may be reviewed by an auditor or audited in accordance with section 317 of the HGB. A guide to the requirements to be met by the half-yearly financial report is provided by German Accounting Standard 16 (DRS 16).

XIV.4.1 Section 37w (2) of the WpHG – content of the half-yearly financial report

Pursuant to section 37w (2) of the WpHG, the half-yearly financial report must at least contain:

- a condensed set of financial statements (no. 1);
- an interim management report (no. 2); and
- a statement made in accordance with the provisions of sections 264 (2) sentence 3, 289 (1) sentence 5 of the HGB (no. 3).

XIV.4.1.1 Condensed set of financial statements

Pursuant to section 37w (3) sentence 1 of the WpHG, the condensed set of financial statements must at least contain a condensed balance sheet, a condensed profit and loss account and notes.
The condensed set of financial statements must be prepared in accordance with the accounting standards applicable to the annual financial statements. This does not apply if, in the case of publication, the annual financial statements are replaced by separate financial statements within the meaning of section 325 (2a) of the HGB. In this case, the IASs/IFRSs adopted by the EU are applicable to the condensed set of financial statements pursuant to section 37w (3) sentence 3 of the WpHG. However, where the condensed set of financial statements are not to be prepared in accordance with such standards, the requirements of section 37w (3) sentence 3 of the WpHG are further clarified by section 10 of the TranspRLDV.

XIV.4.1.2 Interim management report

The minimum content of an interim management report is defined in section 37w (4) sentence 1 of the WpHG, according to which the interim management report must include at least the important events that have occurred during the reporting period in the issuer's company and their impact on the condensed set of financial statements as well as a description of the principal opportunities and risks during the six months of the financial year following the reporting period. Accordingly, both past and future events must be reported.

In addition, issuers of shares are required to disclose the major transactions performed with their related parties, such disclosure also being possible in the notes. Which transactions are required to be disclosed in this regard is clarified by section 11 of the TranspRLDV. The decision on which information is included in the interim management report is taken by the issuer's statutory representatives. However, DRS 16 provides an aid on the content of interim reports.

XIV.4.1.3 Responsibility statement

With reference to the responsibility statement, the remarks made with regard to the annual financial report apply analogously. Its wording may also be adapted to conform to the sample of DRS 16 for the consolidated financial statements.

XIV.4.1.4 Review by an auditor (section 37w (5) of the WpHG)

Section 37w (5) sentence 1 of the WpHG does not prescribe a review of the condensed set of financial statements and interim management report as mandatory. However, if a review is undertaken, it must be effected in such a way that, upon conscientious exercise of the profession, the possibility of the condensed set of financial statements and the interim management report being inconsistent with the applicable accounting standards in material aspects can be excluded. Accordingly, the auditor is only required to make a negatively formulated statement which is to be published in the form of a certification together with the half-yearly financial report.

The issuer may also instruct the auditor to perform an audit. If this is the case, the auditor's report or the non-affirmative auditor's report must be reproduced in full and published together with the half-yearly financial report (section 37w (5) sentence 5 of the WpHG).

Where the company chooses to perform neither an auditor's review nor a full audit, this fact must be stated in the half-yearly financial report (section 37w (5) sentence 6 of the WpHG).
XIV.4.2 Group

Where a company is required as a parent company to prepare consolidated financial statements and a group management report, section 37w of the WpHG is modified by section 37y no. 2 sentence 1 of the WpHG in such a way that the half-yearly financial report must be prepared and published for the parent company and the entirety of the subsidiaries to be included. No separate half-yearly financial report is required for the parent company.

XIV.4.3 Dissemination and announcement

The statements made under XIV.3.3. regarding dissemination and announcement for the annual financial report apply analogously to the half-yearly financial report. However, the half-yearly financial report must be made available to the public without undue delay, however no later than two months after the end of the reporting period.

XIV.4.4 Transmission of the half-yearly financial report to the company register

Also with regard to transmission to the company register, the statements made under XIV.3.4. apply analogously. The company must at all times ensure that the half-yearly financial report is transmitted without undue delay, but not before publication of the announcement, to the company register to be stored there.

XIV.5 Section 37x of the WpHG – interim management statement

Section 37x of the WpHG requires companies to make publicly available an interim statement by its management in a period between ten weeks after the beginning and six weeks before the end of the first half of the financial year, and another statement in a period between ten weeks after the beginning and six weeks before the end of the second half of the financial year. The group of entities subject to this obligation includes only those companies which issue shares as domestic issuers, and is thus once again narrower as compared with the scope of section 37w of the WpHG.

Before the TUG entered into force, there were no statutory provisions in this regard. At most, regulations in this regard existed at the non-statutory level, e.g. in the rules and regulations of the stock exchanges or in the German Corporate Governance Code.

Section 37x (1) of the WpHG sets out the rules for making the report available to the public and for publication of the announcement, whereas section 37x (2) sets forth the content of the reports. Section 37x (3) contains an exemption provision for cases where a quarterly financial report is prepared pursuant to the requirements of section 37w (2) nos. 1 and 2 and section
37w (3) and (4) of the WpHG. In this case, provided that such requirements are satisfied, the obligations applying in section 37x (1) of the WpHG in respect of the interim management statement do not apply.

DRS 16 provides a guide with regard to the requirements to be met by the interim management statement.

**XIV.5.1 Section 37x (2) of the WpHG – content of the interim management statement**

Pursuant to section 37x (2) of the WpHG, the interim management statement must contain information on how the issuer’s business has performed during the period covered by the interim management statement. Unlike the other cases of financial reporting, therefore, the interim management statement relates exclusively to the past. For this purpose, it must provide an explanation of the material events and transactions that have taken place at the issuer’s company during the period covered by the interim statement and their impact on the issuer’s financial position, as well as a description of the issuer’s financial position and performance during the period covered by the interim statement (section 37x (2) sentence 2 of the WpHG). The reportable period covered by the interim management statement ends when the interim management statement is made publicly available. For this reason, the interim management statement, unlike quarterly financial reports (see XIV.5.5.), is not always required to cover a three-month period. For example, an interim management statement covering a period of only 10 weeks is thus also possible.

Section 37x of the WpHG does not prescribe observance of any particular form. In particular, no responsibility statement pursuant to section 264 (2) sentence 3, section 289 (1) sentence 5 of the HGB is required since section 37x (1) and (3) of the WpHG does not refer to section 37w (2) no. 3 of the WpHG. Neither is any audit or auditor’s review of the interim management statement required.

**XIV.5.2 Group**

If a company is required as a parent company to prepare an interim management statement, the disclosures pursuant to section 37x (2) of the WpHG must refer, pursuant to section 37y no. 3 of the WpHG, to the parent company and all the subsidiaries to be included. No separate interim management statement of the management is thus required for the parent company.

**XIV.5.3 Dissemination and announcement**

The statements made under XIV.3.3. regarding dissemination and announcement for the annual financial report apply analogously. However, the interim management statement must be made publicly available within a period between ten weeks after the beginning and six weeks before the end of the first half of the financial year, and another statement in a period between ten weeks after the beginning and six weeks before the end of the second half of the financial year.
Example:

The interim management statement in the second half of financial year 2007 (financial year = calendar year) was allowed to be published in the period from 10 September to 19 November 2007 because the date decisive for the commencement of the period (9 September 2007) was a Sunday and the period therefore commenced on the following workday.

XIV.5.4 Transmission of interim management statement to the company register

Also with regard to transmission to the company register, the statements made under XIV.3.4. apply analogously. The company must always transmit the interim management statement (either itself or through a service provider) without undue delay, but not before publication of the announcement, to the company register to be stored there.

XIV.5.5 Quarterly financial report (section 37x (3) of the WpHG)

Pursuant to section 37x (3) sentence 1 of the WpHG, the obligation pursuant to section 37x (1) of the WpHG does not apply in cases where a quarterly financial report satisfying the requirements of section 37w (2) nos. 1 and 2, section 37w (3) and (4) of the WpHG is prepared and published. For this purpose it does not matter whether an obligation to publish an exempting quarterly report exists, for example, pursuant to the relevant rules and regulations of a stock exchange, or whether such quarterly report is published voluntarily.

XIV.5.5.1 Content

Exempting quarterly reports must meet more extensive requirements as compared with interim management statements. It must at least contain a condensed set of financial statements and an interim management statement pursuant to section 37w (3) and 4 of the WpHG. Unlike an interim management statement, the quarterly report always covers a three-month reporting period.

XIV.5.5.2 Group

Section 37y of the WpHG does not contain any provisions on the content of an exempting quarterly financial report of a parent company required to prepare consolidated financial statements and a group management report. However, given the content-related link to half-yearly reporting, it is sufficient in this regard for a quarterly report to be prepared exclusively for the parent company and all its subsidiaries to be included.
XIV.5.5.3 Exemption from all obligations specified in section 37x (1) of the WpHG

Pursuant to section 37x (3) of the WpHG, the preparation of an exempting quarterly financial report grants exemption from all obligations specified in section 37x (1) of the WpHG (preparation of an interim management statement, publication of an announcement, notification to BaFin as well as transmission to the company register) provided that the quarterly financial report is prepared in accordance with the requirements of section 37w (2) nos. 1 and 2, section 37w (3) and (4) of the WpHG.

XIV.5.5.4 Publication of the quarterly financial report and transmission to the company register

The WpHG does not contain any provisions on the manner in which quarterly financial reports are published. The obligation to publish, notify and transmit an announcement as established in section 37x (1) of the WpHG does not apply either.

However, the issuer may be subject to the publication requirements pursuant to the relevant rules and regulations of certain stock exchanges. If the relevant rules and regulations of the stock exchanges do not define such provisions – i.e. a quarterly financial report is prepared and published voluntarily – it is sufficient for the quarterly financial report to be disseminated in a suitable electronic medium. In such cases it is also sufficient for an announcement to be published in a national newspaper for statutory stock exchange announcements which refers to a publicly accessible place where the report can be immediately found or retrieved.

The time limit of section 37x (1) sentence 1 of the WpHG is not applicable to the publication of a quarterly financial report within the meaning of section 37x (3) of the WpHG. It is therefore unobjectionable if a quarterly financial report is prepared in accordance with the provisions laid down in section 37w (2) nos. 1 and 2, and section 37w (3) and (4) and published subject to the time limits as provided for in the rules and regulations of the respective stock exchange. Overall, it should be noted that the quarterly financial report is to be published prior to the following half-yearly or annual financial report so as to ensure that the information is presented in a sensible manner as well as separate from the other reports.

Without prejudice thereto, quarterly financial reports must be transmitted without undue delay, but not before their publication, to the company register to be stored there (section 37x (3) sentence 2 of the WpHG).

XIV.6 Administrative offences

Violations of the obligations pursuant to sections 37v et seq. of the WpHG are subject to a fine pursuant to section 39 (2) of the WpHG. They are punishable in each case by a fine of up to €200,000 (section 39 (4) of the WpHG).
XIV.7 **Summary of general requirements for financial reporting pursuant to sections 37v et seq. of the WpHG**

The requirements for financial reporting pursuant to sections 37v et seq. of the WpHG comprise the following steps in the sequence and chronological order as shown in the diagram below:

<table>
<thead>
<tr>
<th>Obligation</th>
<th>Entity subject to obligation</th>
<th>Time</th>
<th>Exemption</th>
<th>Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Annual financial report</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Publication of an announcement</td>
<td>Company that issues securities as a domestic issuer</td>
<td>Before the report itself is made available to the public</td>
<td></td>
<td>Section 37v (1) sentence 2 of the WpHG</td>
</tr>
<tr>
<td>Notification to BaFin that announcement has been published</td>
<td>As above</td>
<td>Simultaneously with publication</td>
<td></td>
<td>Section 37v (1) sentence 3 half-sentence 1 of the WpHG</td>
</tr>
<tr>
<td>Transmission of notification for storage in company register</td>
<td>As above</td>
<td>Without undue delay after publication</td>
<td></td>
<td>Section 37w (1) sentence 2 of the WpHG</td>
</tr>
<tr>
<td>Making an annual financial report publicly available</td>
<td>As above</td>
<td>Four months after end of financial year at the latest</td>
<td>Disclosure obligation pursuant to section 325 of the HGB, but: report must be additionally made available by issuer on the Internet, and a corresponding announcement must be made additionally</td>
<td>Section 37v (1) sentence 1 of the WpHG</td>
</tr>
<tr>
<td>Transmission of accounting documents pursuant to section 37v (2) of the WpHG to company register for storage</td>
<td>As above</td>
<td>Without undue delay after publication of the announcement</td>
<td>Transmission pursuant to section 8b (2) no. 4 in conj. with (3) sentence 1 no. 1 of the HGB</td>
<td>Section 37w (1) sentence 2 of the WpHG</td>
</tr>
<tr>
<td><strong>Half-yearly financial report</strong></td>
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<td></td>
</tr>
<tr>
<td>Publication of an announcement</td>
<td>Company that issues shares or debt securities as a domestic issuer within the meaning of section 2 (1) sentence 1 of the WpHG</td>
<td>Before the report itself is made available to the public</td>
<td>Company that issues as a domestic issuer either only debt securities pursuant to section 2 (1) sentence 1 no. 2 or debt securities which grant at least a contingent right to acquire securities pursuant to section 2 (1) sentence 1 no. 1 or 2 of the WpHG</td>
<td>Section 37w (1) sentence 2 of the WpHG</td>
</tr>
</tbody>
</table>
### Interim management statement

<table>
<thead>
<tr>
<th>Notification to BaFin that announcement has been published</th>
<th>As above</th>
<th>Simultaneously with publication</th>
<th>As above</th>
<th>Section 37w (1) sentence 3 half-sentence 1 of the WpHG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transmission of notification for storage in company register</td>
<td>As above</td>
<td>Without undue delay after publication</td>
<td>As above</td>
<td>Section 8b (2) no. 9, (3) sentence 1 no. 2 of the HGB in conj. with section 37w (1) sentence 3 half-sentence 2 of the WpHG</td>
</tr>
<tr>
<td>Making a half-yearly financial report publicly available</td>
<td>As above</td>
<td>Two months after end of reporting period at the latest</td>
<td>As above</td>
<td>Section 37w (1) sentence 1 of the WpHG</td>
</tr>
<tr>
<td>Transmission of accounting documents pursuant to section 37w (2) of the WpHG to company register for storage</td>
<td>As above</td>
<td>Without undue delay after publication of the announcement</td>
<td>As above</td>
<td>Section 8b (2) no. 9, (3) sentence 1 no. 2 of the HGB in conj. with section 37w (1) sentence 4 of the WpHG</td>
</tr>
</tbody>
</table>

**Publication of an announcement**

<table>
<thead>
<tr>
<th>Company that issues shares as a domestic issuer</th>
<th>Before the report itself is made available to the public</th>
<th>Quarterly financial report pursuant to the requirements of section 37w (2) nos. 1 and 2, (3) and (4) of the WpHG (section 37x (3) sentence 1 of the WpHG)</th>
<th>Section 37x (1) sentence 2 of the WpHG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notification to BaFin that announcement has been published</td>
<td>Simultaneously with publication</td>
<td>As above</td>
<td>Section 37x (1) sentence 3 half-sentence 1 of the WpHG</td>
</tr>
<tr>
<td>Transmission of notification for storage in company register</td>
<td>Without undue delay after publication</td>
<td>As above</td>
<td>Section 8b (2) no. 9, (3) sentence 1 no. 2 of the HGB in conj. with section 37x (1) sentence 3 half-sentence 2 of the WpHG</td>
</tr>
<tr>
<td>Making an interim statement publicly available</td>
<td>Period of 10 weeks after the beginning and six weeks before the end of the first half of the financial year, and another statement 10 weeks after the beginning and six weeks before the end of the second half of the financial year</td>
<td>As above</td>
<td>Section 37x (1) sentence 1 of the WpHG</td>
</tr>
<tr>
<td>Transmission of interim statement to company register for storage</td>
<td>Without undue delay after publication of the announcement</td>
<td>As above</td>
<td>Section 8b (2) no. 9, (3) sentence 1 no. 2 of the HGB in conj. with section 37x (1) sentence 4 of the WpHG</td>
</tr>
</tbody>
</table>
# Abbreviations

<p>| A | AktG | Aktiengesetz (Stock Corporation Act) |
| A | AnsVG | Anlegerschutzverbesserungsgesetz (Act Improving Investor Protection) |
| B | BaFin | Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority) |
| B | BAW | Bundesanstalt für den Wertpapierhandel (Federal Securities Supervisory Office) |
| B | BGB | Bürgerliches Gesetzbuch (Civil Code) |
| B | BGH | Bundesgerichtshof (Federal Court of Justice) |
| B | BilKoG | Bilanzkontrollgesetz (Financial Reporting Enforcement Act) |
| B | BilMoG | Bilanzrechtsmodernisierungsgesetz (Act to Modernise Accounting Law) |
| B | BörsG | Börsengesetz (Stock Exchange Act) |
| B | BörsZulV | Börsenzulassungsverordnung (Stock Exchange Admission Regulation) |
| C | CESR | Committee of European Securities Regulators |
| C | cf. | confer |
| D | DRS | Deutscher Rechnungslegungsstandard (German Accounting Standard) |
| E | e.g. | exempli gratia |
| E | EBIT | earnings before interest and taxes |
| E | EBITDA | earnings before interest, taxes, depreciation and amortization |
| E | EEA | European Economic Area |
| E | EEX | European Energy Exchange |</p>
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>EHUG</td>
<td>Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (Act on Electronic Commercial Registers, Cooperative Society Registers and the Company Register)</td>
</tr>
<tr>
<td>EPS</td>
<td>earnings per share</td>
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<td>ESOP</td>
<td>Employee stock option programme</td>
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<td>et seq.</td>
<td>et sequens</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>F</td>
<td>FinDAG Finanzdienstleistungsaufsichtsgesetz (Act Establishing the Federal Financial Supervisory Authority)</td>
</tr>
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<td>FREP</td>
<td>Deutsche Prüfstelle für Rechnungslegung (Financial Reporting Enforcement Panel)</td>
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<tr>
<td>FRUG</td>
<td>Finanzmarktrichtlinie-Umsetzungsgesetz (Act Implementing the Markets in Financial Instruments Directive)</td>
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<tr>
<td>G</td>
<td>GbR Gesellschaft bürgerlichen Rechts (non-trading partnership under the German Civil Code)</td>
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<td></td>
<td>GVG Gerichtsverfassungsgesetz (Judiciary Act)</td>
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<td>H</td>
<td>HGB Handelsgesetzbuch (Commercial Code)</td>
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<tr>
<td>I</td>
<td>IAS International Accounting Standards</td>
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<td></td>
<td>IFRS International Financial Reporting Standards</td>
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<td></td>
<td>in conj. with in conjunction with</td>
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<td></td>
<td>InvÄndG Investmentänderungsgesetz (Act Amending the Investment Act)</td>
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<td></td>
<td>InvG Investmentgesetz (Investment Act)</td>
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<td></td>
<td>IPO initial public offering</td>
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<td></td>
<td>ISIN International Securities Identification Number</td>
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<td>KuMaKV</td>
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<tr>
<td>KWG</td>
<td>Kreditwesengesetz (Banking Act)</td>
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<td>M</td>
<td>MaKonV</td>
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<tr>
<td>MiFID</td>
<td>Markets in Financial Instruments Directive</td>
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<td>O</td>
<td>OLG</td>
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<td>OwiG</td>
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