Modul B
Information on major holdings of voting rights / Information necessary for exercising rights attached to securities

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I Information on major holdings of voting rights (sections 33 – 47 of the WpHG)

One of the primary regulatory goals of the transparency of equity interests under securities trading law is to ensure information efficiency through the disclosure of changes in major holdings of voting rights in listed issuers. At the same time, this gives important indications of any pending company takeovers. Lastly, information on changes in voting rights helps preventing insider information from being abused. For this reason, natural persons and legal entities are obliged to disclose to BaFin and to the listed issuer the holdings of their voting rights as soon as such holdings reach, exceed or fall below one of the relevant thresholds as a result of an acquisition or sale or for other reasons. The listed issuer is then required to forward the notification without undue delay to a pool of different media for dissemination across Europe, as well as to the company register that stores the data.

I.1 Basic principles

I.1.1 Requirements of European law

The transparency requirements governing changes in major holdings of voting rights are based on the provisions of the Transparency Directive and the related secondary European legislative acts:

The Implementing Directive on the Transparency Directive expands on the requirements, among other things with regard to the disclosure of major holdings by investors, the minimum standards for the dissemination of regulated information across Europe and minimum requirements for recognising the equivalence of provisions of third countries (countries that are neither members of the EU nor members of the EEA).

Delegated Regulation (EU) 2015/761, which came into force in 2015 and was effective immediately in all Member States, contains regulatory technical standards governing, among other things, calculating the amount of voting rights in connection with the market making and trading book exemptions, as well as with regard to groups of companies. The European Securities and Markets Authority (ESMA) also issues Level 3 measures that expand on the requirements of the Transparency Directive, such as “Questions and answers” (ESMA Q&A).

I.1.2 National legislation

Since the Second Financial Market Promotion Act (Zweites Finanzmarktförderungsgesetz — 2. FFG) became effective as of 1 January 1995, the Securities Trading Act (Wertpapierhandelsgesetz – WpHG) governs notification and publication requirements applicable to major holdings of voting rights in listed issuers. The notification and publication requirements of the WpHG were most recently amended by the Second Act Amending Financial Markets Regulations (Zweites Finanzmarktnovellierungsgesetz – 2. FiMaNoG) effective as of 3 January 2018. However, the amendments related solely to changes in the numbering of the provisions. The same applies to the more far-reaching requirements that have been governed since 3 January 2018 by the Regulation Specifying Reporting, Notification and Publication Requirements under the Securities Trading Act (Verordnung zur Konkretisierung von Anzeige-, Mitteilungs- und Veröffentlichungspflichten nach dem Wertpapierhandelsgesetz – WpAV) (previously: Securities Trading Reporting and Insider List Regulation [Wertpapierhandelsanzeige- und Insiderverzeichnisverordnung – WpAV]). Other legislative amendments prior to 3 January 2018 were:

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6 Second Financial Market Promotion Act (Zweites Finanzmarktförderungsgesetz — 2. FFG) of 26 July 1994, Federal Law Gazette I 1994, page 1749; in accordance with Article 20 sentence 2 in conjunction with sentence 1 of the 2. FFG, the requirements of the then Part 4, sections 21 et seq., relating to notification and publication requirements in the case of changes in proportions of voting rights in listed companies, did not take effect until 1 January 1995.
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Transparency Directive Implementation Act (Transparenzrichtlinie-Umsetzungsgesetz – TUG)\(^7\), effective as of 20 January 2007

Since that date, there has been a two-pillar regime for publishing capital market information: firstly, information on major holdings of voting rights (based on notifications by parties subject to the notification obligation) and other capital market information is forwarded by the addressees (issuers) to the media in order to publish and hence actively disseminate the information throughout the EU and the other EEA countries. Secondly, the information is forwarded to an officially appointed central electronic storage system so that it is available as historical data over a prolonged period (in Germany: the Company Register (Unternehmensregister))\(^8\). This ensures that company information important for investors is disclosed throughout Europe and made available in databases.

Regulation Implementing the Transparency Directive (Transparenzrichtlinie-Durchführungsverordnung – TranspRLDVO)\(^9\), effective as of 21 March 2008, which transposed the requirements of the aforementioned Implementing Directive into national law

In the following years, the disclosure requirements of the Securities Trading Act were significantly enhanced, both quantitatively and qualitatively, by the Risk Limitation Act (Risikobegrenzungsgesetz) and the Investor Protection and Capital Markets Improvement Act (Anlegerschutz- und Funktionsverbesserungsgesetz) in order to improve investor protection and increase transparency.

Risk Limitation Act (Risikobegrenzungsgesetz)\(^10\), effective as of 22 August 2008

Among other things, the Risk Limitation Act

\begin{itemize}
  \item introduced the aggregation of holdings of voting rights attached to shares with holdings of voting rights relating to instruments subject to the notification obligation (from 1 March 2009),
  \item increased the loss of rights in the case of violations of the notification obligations and
  \item introduced a supplementary notification and publication requirement for the objectives and intentions associated with an interest of 10 per cent or more (from 31 May 2009).
\end{itemize}

Investor Protection and Capital Markets Improvement Act (Anlegerschutz- und Funktionsverbesserungsgesetz)\(^11\), effective as of 1 February 2012

Its primary provisions were:

\begin{itemize}
  \item the extension of the previous notification obligation for instruments by “other” instruments, in particular a right to recall lent shares;
  \item the introduction of a separate notification obligation for instruments that, for the first time, also includes cash-settled derivatives for which an acquisition of shares by the holder can be inferred purely on the basis of economic considerations.
  \item general aggregation of holdings of voting rights attached to shares with holdings of voting rights relating to instruments.
\end{itemize}


This legislation aligned the investment transparency requirements with the (amended) Transparency Directive. The core provisions were:

\begin{itemize}
  \item the standardisation of the notification for all three notification provisions (“baskets”) if thresholds are triggered by virtue of directly held or attributed holdings of voting rights attached to shares (sections 33 and 34 of the WpHG), by virtue of holdings of voting rights relating to instruments (section 38 of the WpHG) and by virtue of the aggregation of holdings of voting rights attached to shares with holdings of voting rights relating to instruments (section 39 of the WpHG), by the introduction of a mandatory standard form for filing voting rights notifications under sections 33 et seq. of the WpHG;
  \item a switch with regard to the motive for the notification obligation under section 33 (1) of the WpHG to the
\end{itemize}


\(^{8}\) The Company Register was established as a meta-register on the basis of the Act on Electronic Commercial Registers, Cooperative Society Registers and the Company Register (Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister) of 10 November 2006 (EHUG), Federal Law Gazette I 2006, page 2553., in order to meet the requirements of Transparency Directive II.


legal transaction underlying the acquisition/disposal of voting shares;
- the introduction of “group notifications” (section 37 of the WpHG);
- the alignment of the attribution criteria (section 34 of the WpHG) and notification obligation for instruments (section 38 of the WpHG) to the requirements of the Transparency Directive; and
- the expansion and tightening of penalties in the event of violations of the notification obligations, including the loss or rights (section 44 of the WpHG).

First Act Amending Financial Markets Regulations (Erstes Finanzmarktnovellierungsgesetz – 1. FiMaNoG)13, effective as of 2 July 2016, which created an exemption for units in and shares of open-ended investment funds, to the extent that they are not specialised investment funds (section 1 (3) of the WpHG).

I.2 Notification obligations

I.2.1 Overview

The baskets, which the notification provisions refer to, are as follows:
1. sections 33 and 34 of the WpHG: notification obligation for direct and indirect holdings of voting rights attached to shares;
2. section 38 of the WpHG: notification obligation for direct and indirect holdings of instruments (financial instruments and other financial instruments) that allow the holder to acquire voting rights attached to shares;
3. section 39 of the WpHG: notification obligation for the aggregation of holdings of voting rights under sections 33, 34 and 38 of the WpHG.

In addition, the three baskets are no longer deemed to trigger separate notification obligation. In fact, if there is a notification obligation under sections 33, 38 or 39 of the WpHG, a disclosure is required for all positions if a threshold is triggered for one of the three baskets.14 Ultimately, this results in greater transparency of equity interests, because all the holdings of a party subject to the notification obligation are revealed in a single notification, and at the same time the number of notifications is reduced.

In conjunction with sections 17 and 14 of the WpAV and the Annex to the WpAV, sections 33, 38 and 39 of the WpHG govern the conditions, deadline, contents and language of a voting rights notification. The nature and format of a voting rights notification are stipulated in conjunction with BaFin’s Voting Rights Notification Regulation (Stimmrechtsmitteilungsverordnung – StimmRMV). Electronic form has also been permitted for voting rights notifications since 30 October 2018. Section 34 of the WpHG determines the cases in which voting rights attached to shares and owned by a third party are attributed to the party subject to the notification obligation, whereas section 36 of the WpHG provides exemptions from including voting rights when calculating holdings of voting rights.

Under section 37 of the WpHG, in the case of parent undertakings within the meaning of section 35 (1) of the WpHG, the ultimate parent undertaking can meet the notification obligations under sections 33, 38 and 39 of the WpHG by filing a single notification that has exemptive effect for all subsidiaries that are also subject to the notification obligation (group notification). Sections 42, 45 and 47 of the WpHG contain procedural requirements and section 44 of the WpHG contains provisions on the civil law consequences of violations of the notification obligation.

Section 127 (10) and (11) of the WpHG stipulate certain notification obligations for voting rights held as a result of changes in the law due to the TRL-ÄndRL-UmsG and the 1. FiMaNoG.

I.2.2 General principles for filing notifications under sections 33, 38 and 39 of the WpHG in conjunction with sections 12 and 14 of the WpAV and the Annex to the WpAV

I.2.2.1 Issuer whose home country is the Federal Republic of Germany (sections 2 (13), 33 (4) of the WpHG)

Under section 33 (1) sentence 1 of the WpHG, the notification obligations under sections 33, 38 and 39 of the WpHG apply to issuers whose home country, as defined in section 2 (13) of the WpHG, is the Federal Republic of Germany.

Under section 2 (13) of the WpHG, the home country of an issuer is determined either by law or by a corresponding election made by the issuer. Under section 33 (4) of the WpHG, however, not all issuers whose home country may be the Federal Republic of Germany are covered by this definition; rather, where the provisions on changes in holdings of voting rights

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14 See also ESMA Q&A, ESMA/2015/1595, op. cit., no. 20.
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 (11) of the WpHG.

Under section 2 (13) no. 1 of the WpHG, the Federal Republic of Germany is the home country of an issuer of shares if the issuer
1. has its registered office in Germany and its shares are admitted to trading on an organised market in Germany or in another EU or EEA country (section 2 (13) no. 1 a) of the WpHG), or
2. has its registered office in a third country (see section 2 (12) of the WpHG) and its shares are admitted to trading on an organised market in Germany or in another EU or EEA country, and if it has elected the Federal Republic of Germany as its home country under section 4 (1) of the WpHG (section 2 (13) no. 1 b) of the WpHG) or it fails to elect a home country (section 2 (13) no. 3 of the WpHG).

The election of a home country becomes effective when it is published under section 5 of the WpHG (section 4 (3) of the WpHG). In the event that no home country is elected, the catch-all clause (section 2 (13) no. 3 of the WpHG) immediately applies if the issuer has a choice regarding its home country but does not exercise it.

I.2.2.2 Party subject to the notification obligation

The term "party subject to the notification obligation" is legally defined in section 33 (1) sentence 1 of the WpHG. This states that a party subject to the notification obligation is any person who triggers a threshold that is relevant under sections 33, 38 or 39 of the WpHG. "Any person" means all natural persons and legal entities, regardless of their age and their legal form. A natural person's nationality and place of residence, or the registered office in the case of legal entities, is not relevant in this regard. Accordingly, the persons addressed by the legislation may also be a foreign private shareholder resident outside Germany, a general (commercial) partnership (offene Handelsgesellschaft – oHG), a limited partnership (Kommanditgesellschaft – KG), a partnership for the professions (Partnerschaftsgesellschaft), a civil law partnership whose members may act in relation to third parties in the name of the partnership (BGB- Außenmitgliedschaft) 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 (Bundesländer), and other countries. In the case of entities without legal capacity, it must be clarified in detail whether the entity is itself subject to a notification obligation. The decisive question is if and to what extent the entity itself carries rights and obligations or can sue or be sued in its own name, which is acknowledged, for example, for associations without legal capacity.

The decisive factor for the basic notification obligation under section 33 (1) of the WpHG is the holding of voting rights attached to shares owned by the party subject to the reporting requirement. If a party is only authorised or empowered to exercise voting rights, it can only be subject to the notification obligation due to the attribution of voting rights under section 34 of the WpHG, but not directly under section 33 of the WpHG, as the voting rights are owned by the party.16

I.2.2.3 Mandatory standard form

Voting rights notifications under sections 33, 38 and 39 of the WpHG must be filed by using the standard form prescribed in the Annex to the WpAV. The mandatory standard form can be downloaded from BaFin’s website.17 The standard form covers all reportable holdings under sections 33, 38 and 39 of the WpHG and must be completed if the party subject to the notification obligation is affected by a notification obligation under sections 33, 38 and/or 39 of the WpHG. The form must always be completed in full, i.e. disclosures must also be made about holdings for which no notifiable threshold was triggered.

I.2.2.4 General contents of the standard form

The standard form has a specific structure: page 1 contains all information needed to capture the essential content of the notification, such as disclosures on the issuer and the party subject to the notification obligation, the reason for the notification and a comparison of the current and most recently notified holdings of voting rights, instruments and aggregated positions. There is no (longer any) need to disclose

15 For further details, see section I.2.3.3.
16 The addition “from shares being owned by it” in section 33 (1) sentence 1 of the WpHG by the Retail Investor Protection Act (Kleinanlegerschutzgesetz) of 3 July 2015 was a reaction to and clarification of the decision by the Higher Regional Court in Cologne of 6 June 2012 (ref. 18 U 240/11), which had assumed that an additional notification requirement applied to the shareholder of record entered as the nominee in the share register under section 33 (1) of the WpHG alongside the owner.
17 Standard form downloadable at: www.bafin.de > Undertakings > Stock exchanges & markets > Transparency requirements > Major holdings of voting rights.
the triggered thresholds. Pages 2 and 3 contain more
detailed information, such as the details of the individual
holdings and disclosures of any group structures.
Finally, the standard form includes an Annex for
BaFin in which the details of the party subject to the
notification obligation must be disclosed. Additional
guidance on using the standard form can be found in
the form available on BaFin's website. Further support
is contained in the online form and the explanatory
FAQs.

I.2.2.5 Nature, form and language of the
notification

The nature and form of a notification are governed by
the StimmRMV, while the language of a notification is
defined in section 14 of the WpAV.
As before, the party subject to the notification obligation
must send the voting rights notification to both the
issuer and to BaFin using the mandatory standard form.
The requirement for simultaneous notification is satisfied
if notifications are sent immediately one after the other.
Whereas in the past, notifications had to be sent to both
BaFin and the issuer in writing or by fax, BaFin launched
an electronic procedure on 30 October 2018 under
which the party subject to the notification obligation
can send its notification to BaFin electronically by using
BaFin's Reporting and Publishing Platform ("MVP"). If the
party subject to the notification obligation does not wish
to send its notification to BaFin through the MVP portal,
it continues to be obliged to send it to BaFin either in
writing or by fax (fax number: 0049 0228 4108 3119;
address: Federal Financial Supervisory Authority, Division
WA 13, Marie-Curie-Str. 24-28, 60439 Frankfurt am
Main). Sending the notification by email with a (simple)
electronic signature or a scanned signature is not
sufficient.18
Regardless of the channel used to send the notification
to BaFin, the party subject to the notification obligation
is allowed to send its notification electronically to
the issuer by email, provided that the issuer has not
designated a specific procedure for this. A condition
in all cases, however, is that the issuer receives also
an XML dataset of the notification together with the
notification.19 The aim of this requirement is to facilitate
the publication of the notification and the transmission
to the Company Register by the issuer.

The party subject to the notification obligation may elect
to prepare the notification in German or English. The
withdrawal of a notification must be made in the same
manner.
In the case of complex scenarios such as group
structures, overviews of the parent undertaking and its
subsidiaries (group charts) and background information
must be sent to BaFin together with the voting rights
notifications, unless this information is already known to
BaFin from previous notifications. If there are any doubts
about the notification obligation, the party potentially
subject to the notification obligation should contact
BaFin in good time so that the matter can be clarified
definitively. BaFin does not permit the submission of
precautionary notifications.

I.2.2.6 Voluntary notifications

In principle, voluntary notifications are permitted
provided that they add informational value for the
market (e.g. in the case of a change of name that
preserves the identity of the company or a change in
legal form). However, "precautionary" voting rights
notifications are not permitted.
"Voluntary group notifications" are not voluntary
notifications in the sense described above; in these
cases, the ultimate parent undertaking has not itself
triggered a threshold and is therefore not itself a
party subject to the reporting requirement but, under
section 37 of the WpHG, its notification replaces
mandatory disclosures by one or more of its subsidiaries
that has or have in turn triggered a notification
threshold. Such voluntary group notifications are not
only permitted, but are expressly encouraged, because
the safeguard continuity of the notifying party
and provide an overview of the equity interests throughout
the group, behind which the interest in changes in part
of the group is secondary.

I.2.2.7 Time Limit for filing notifications

I.2.2.7.1 Without undue delay, at the latest
within four trading days after a
threshold has been triggered

Under section 33 (1) sentence 1 of the WpHG, the
party subject to the notification obligation must send
the notification without undue delay, i.e. without
culpable delay (section 121 (1) of the German Civil Code
(Bürgerliches Gesetzbuch – BGB); the notification must
be filed at the latest within four trading days. Under
section 33 (1) sentence 3 of the WpHG, the notification
time limit begins when the party subject to the
notification obligation learns or, in consideration of the
circumstances, must have learned, that its percentage of

18 This does not affect the requirements of section 3a of the VwVfG.
19 Such a dataset is made available by BaFin if the corresponding BaFin
procedure is used; however, it can also be generated separately in
accordance with the requirements for an electronic notification that
are described in the mapping document that can be downloaded
from BaFin’s homepage.
voting rights has reached, exceeded or fallen below the relevant thresholds.

I.2.2.7.2 Threshold triggered due to acquisition/disposal: irrefutable presumption of knowledge on the second trading day after a threshold is triggered

There is an irrefutable presumption that the party subject to the notification obligation learns of this two trading days after reaching, exceeding or falling below the thresholds referred to (section 33 (1) sentence 4 of the WpHG).

However, this does not effectively prolong the notification deadline to six trading days. Rather, the deadlines referred to are maximum deadlines and, in the case of a regular acquisition or disposal transaction, BaFin assumes in practice that a notification is reasonable and possible within four trading days of triggering a threshold.

I.2.2.7.3 Threshold is triggered due to a change in the total number of the issuer’s voting rights: publication under section 41 of the WpHG is decisive

If a threshold is triggered by a party subject to the notification obligation because of a change in the total number of the issuer’s voting rights (e.g. dilution and a holding falls below the threshold), section 33 (1) sentence 5 of the WpHG applies. By way of derogation from sentence 3, the period begins as soon as the party subject to the notification obligation has (positive) knowledge that the threshold has been triggered, at the latest on publication by the issuer of the change in the total number of voting rights (section 41 (1) of the WpHG). Under section 41 (1) of the WpHG, the issuer must generally notify the change in the total number voting rights at the latest after two trading days; by contrast, if new shares out of a contingent capital increase are issued, the publication is normally made at the end of the month in which the new shares were issued (section 41 (2) of the WpHG).

I.2.2.7.4 Calculation of the time limit

To calculate the time limit, the day on which the event triggers the deadline (party learns or must have learned) is disregarded. Trading days are all calendar days other than Saturdays, Sundays or public holidays that are legally recognised in at least one Federal State (Bundesland) (section 47 (1) of the WpHG). A public holiday recognised in a Federal State is one that is recognised as such throughout that Federal State, and not just in certain municipalities or districts. To calculate the time limit, BaFin has posted on its website a calendar of trading days under section 47 of the WpHG.20 BaFin will not grant an extension to the deadline.

I.2.3 Notification obligation for voting rights attached to shares in the case of already listed issuers (section 33 (1) of the WpHG)

If the voting rights held by a natural person or legal entity in an issuer whose home country is the Federal Republic of Germany reach, exceed or fall below certain thresholds, that natural person or legal entity must notify both the issuer and BaFin of that fact without undue delay, and at the latest within four trading days (section 33 (1) of the WpHG).

I.2.3.1 Thresholds

Under section 33 (1) of the WpHG, the relevant thresholds are 3 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent and 75 per cent.

The thresholds relate to voting rights, and not to shares, for instance, in issuers whose home country is the Federal Republic of Germany. Typically, holdings of voting rights correspond to the interests held in the capital of a company, as each share confers the same voting right (section 12 (1) of the Stock Corporation Act (Aktiengesetz – AktG). However, companies may also issue preferred shares, which do not confer voting rights, unless, under certain circumstances (sections 140 (2) and section 141 (4) of the AktG), the voting right attached to these shares may revive, with the result that the preferred shares must then be treated in the same way as ordinary shares with voting rights. If a person holds directly voting rights and further voting rights are attributed to that person under section 34 of the WpHG (see. I.2.5), only the total number of voting rights held directly and indirectly is decisive for the question of whether a threshold has been triggered. For example, if the direct holding of voting rights exceeds a threshold, but the total positions of voting rights held (total number of voting rights attached to shares held directly plus attributed voting rights) does not exceed a threshold, this does not result in a requirement to file a further notification.

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20 Available at: www.bafin.de > Undertakings > Stock exchanges and markets > Transparency requirements > Major holdings of voting rights.
Nor does a change from voting rights held directly to voting rights held indirectly trigger any notification obligation. The same applies in the opposite case.

### 1.2.3.2 Calculating holdings of voting rights

The holding of voting rights is calculated as the ratio of the number of own (treasury) shares (numerator) to the total number of voting rights issued by the issuer (denominator).

For the number of voting rights attributed to the party subject to the notification obligation (numerator), it is irrelevant whether or not the voting rights can be exercised (abstract perspective). For this reason, the party subject to the notification obligation must include voting rights that cannot be exercised, for example because of section 44 of the WpHG.

#### 1.2.3.2.1 Total number of issuer’s voting rights

Under section 12 (3) of the WpAV, the party subject to the notification obligation must base the calculation of the holding of voting rights on the most recent publication under section 41 of the WpHG. Under section 41 (1) of the WpHG, the issuer must publish the change in the total number of voting rights without undue delay, and at the latest within two trading days, including stating the specific date when the change happened, so that the party subject to the notification obligation is able to use the new total number of voting rights. An exception applies when new shares out of a contingent capital increase are issued under section 41 (2) of the WpHG. In this case, the issuer may publish the change in the total number of voting rights only at the end of the calendar month without stating the date of the relevant changes.\(^2\)

Under section 12 (3) of the WpAV, the most recent publication under section 41 of the WpHG may thus serve as a basis for the total number of voting rights. However, where the party subject to the notification obligation knows that the total number most recently published is not correct, the actual share capital recognised in accordance with stock corporation law must be used as the basis for calculating the holding of voting rights. The same applies if the party subject to the notification obligation should have been aware of this. It is always possible and legally permissible for the party subject to the notification obligation to take the correct, actual number of voting rights as a basis.

#### 1.2.3.2.2 Issuer’s own (treasury) shares

The following special arrangements apply to treasury shares of the issuer for which the issuer may not exercise any voting rights (section 71b of the AktG): the treasury shares must be included in the total number of issued voting rights (denominator). The total number of voting rights is only reduced when treasury shares are redeemed and the capital is reduced.

If the issuer itself or its subsidiary or a third party acting for the account of the issuer acquires treasury shares, no notification obligation under section 33 (1) of the WpHG arises. Instead, for such cases the WpHG stipulates a disclosure requirement under section 40 (1) sentence 2 of the WpHG.

Additionally, treasury shares are disregarded for the parent undertaking’s holdings of voting rights (i.e. when attributing voting rights under section 34 (1) sentence 1 no. 1 of the WpHG).\(^2\)

#### 1.2.3.3 Threshold triggered due to acquisition or disposal; “own” in the sense used in section 33 (3) of the WpHG

### 1.2.3.3.1 Legal situation until 26 November 2015

Before the TRL-AndRL-UmsG took effect on 26 November 2015, the transfer of legal title (Verfügungsgeschäft) was decisive for identifying when the threshold was triggered in the case of acquisitions and disposals. In this legal perspective, an acquisition only happened when legal ownership was acquired, which was generally deemed to be the date when the securities were credited to the securities account. Conversely, a disposal only happened when the seller had lost legal ownership of the shares, which was generally the case when the shares were

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\(2\) See explanatory memorandum to the government draft, Bundestag printed matter 18/5010, page 47 et seq.

\(2\) See interpretative decision on treasury shares, BaFin-Journal December 2014, page 5.
removed from the seller’s securities account. Since in the vast majority of cases shares were not temporarily acquired by credit institutions involved, the dates when the shares were credited and removed were in principle identical.

I.2.3.3.2 The term "own" in the sense used in section 33 (3) of the WpHG
Due to the addition of section 33 (3) of the WpHG the trade date is now generally decisive for identifying when a threshold is triggered, provided that the terms of the transaction provides for an unconditional claim to be satisfied without delay or a corresponding unconditional obligation to transfer shares to which voting rights are attached. As a consequence, at the date on which the transaction is entered into (trade date), a notification obligation arises either initially under section 38 of the WpHG (as before) or already under section 33 of the WpHG (new), depending on the terms of the transaction. The legislator’s intention in changing the law was to align it with a consistent Europe-wide understanding of the timing of acquisitions and disposals of shares to which voting rights are attached. In addition, section 33 (3) of the WpHG serves to simplify notification practice and to cut the time available for any insider trading.\(^{23}\)

As a result, in principle all – exchange and OTC – acquisition and disposal transactions that must be settled immediately within the commonly accepted periods in the market in question are covered by section 33 (3) of the WpHG. In these cases, triggering thresholds in the course of share acquisitions or disposals thus no longer depends on closing of the acquisition or disposal, because the change in ownership has already been initiated and is imminent. In practice, the notification will not therefore be published before the transaction has closed because of the deadlines applicable to filing and publishing notifications. When applying section 33 (3) of the WpHG in practice, it may be difficult to determine initially whether there is an instrument or a case covered by section 33 (3) of the WpHG because it may not be clear to what extent satisfaction of the claim is (still) conditional or will be delayed. Phrases such as “Title passes after payment of the purchase price at the latest...after conclusion of contract” or “Delivery within...after conclusion of contract” do not, in principle, preclude the applicability of the conditions described in section 33 (3) of the WpHG. What is decisive in such cases, however, are the terms of the transaction with regard to delivery. Depending on whether the parties assume that delivery will be effected immediately or with delay (for which the agreed delivery period may be an indication), there will either be first an instrument or a case covered by section 33 (3) of the WpHG. In the past, the question whether a notification obligation under section 33 (3) of the WpHG is triggered, arose especially in the following cases:

- Acquisition agreements subject to a condition precedent
- If, in the first instance, there is an instrument under section 38 of the WpHG (for example a contingent purchase agreement for voting shares), and if shares with voting rights attached are subsequently acquired when the instrument is exercised, the question of whether a threshold is triggered under section 33 of the WpHG depends on whether or not fulfilling the final condition gives rise to a claim for delivery of the shares that must be satisfied immediately. If once the final condition has been fulfilled and the reciprocal contractual obligations must be met immediately without further delay, the buyer and seller are subject to a notification obligation under section 33 (1) in conjunction with subsection (3) of the WpHG.

**Example**

Holding company V sells its shareholding of around 8% of the voting rights in issuer E to K, a share purchase agreement is entered into, which stipulates that the purchase agreement will only become effective (condition precedent) if the shareholder meeting of V that has been convened on a particular day in the coming month approves the sale. The agreement does not contain any further conditions. Nor has any date for completion of the sale been agreed.

A notification obligation under section 38 of the WpHG arises for the seller when the purchase agreement is entered into; as soon as V’s shareholder meeting has approved the sale, notification obligations arise for V under section 33 (1) in conjunction with 3) of the WpHG (holding falls below the threshold) and for the buyer under section 38 of the WpHG (holding falls below the threshold) as well as under section 33 (1) in conjunction with subsection (3) of the WpHG (threshold is exceeded).

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\(^{23}\) See explanatory memorandum to the government draft, Bundestag printed matter 18/5010, page 44.
In practice, however, agreements on the acquisition of shares often provide for certain conditions precedent for closing of the transaction, inter alia, an agreement on a specific time for the closing after the last of the conditions precedent has been fulfilled. Such an agreed delay is made, for instance, by an agreement on the timing for closing: purchase agreements for larger blocks of shares contains often a provision that the transaction will close at a specified time after the final condition precedent has been fulfilled. In such cases, there is no claim for transfer of the shares to be satisfied immediately; rather, there is an instrument until the transaction has closed.

Example
Holding company V sells its shareholding of 29% of the voting rights in issuer E to K; K needs the approval of the competent competition authorities before the purchase agreement can close. The share purchase agreement contains further conditions precedent in addition to the approval of the competition authorities. Besides a whole range of other acts, the parties agree in the share purchase agreement that they will undertake the transfer of legal title of the block of 29% of the shares of issuer E on the 10th day after the final condition precedent has been fulfilled.

In this case, too, notification obligations under section 38 of the WpHG arise for the seller when the purchase agreement is entered into; when the final condition precedent is fulfilled, however, the seller’s contractual obligation to transfer the shares is not due immediately, but is due only at a stipulated time (section 163 of the BGB). Consequently, when the final condition precedent is fulfilled, there is not yet an unconditional claim for transfer of the shares without delay within the meaning of section 33 (3) of the WpHG. The notification obligations for V under section 33 (1) of the WpHG (holding falls below the threshold) and for the buyer under section 38 of the WpHG (holding falls below the threshold) on the one hand and under section 33 (1) of the WpHG (threshold is exceeded) on the other hand only arise on the day when the share transfer is closed.

For settlement of takeover bids, BaFin’s administrative practice allows the buyer (= bidder) and the sellers (= shareholders accepting the offer) of the shares to rely on the date of transfer of legal title for the date on which the threshold is triggered, as it can be difficult in practice to identify the date on which a claim arises by the bidder for transfer of the shares, which may have to be satisfied immediately, and a single date on which the threshold is triggered leads to greater market transparency in such cases.

- Retention of title
An agreement on retention of title does not preclude application of section 33 (3) of the WpHG because in this case, too, there is in principle an unconditional claim for transfer that must be satisfied without delay.

- Delay in closing the transaction
If closing of the transaction is delayed unintentionally, this does not change per se the assessment of an unconditional claim for transfer without delay or of a corresponding obligation. However, in case of a further delay, it may be necessary to correct or withdraw a voting rights notification under section 33 (1) of the WpHG and to issue a voting rights notification under section 38 of the WpHG as of the date of the trade. In such cases, the parties are encouraged to contact BaFin in order to clarify the question of a correction to or withdrawal of the notification for this specific case.

- Distinction from section 34 (1) sentence 1 no. 5 of the WpHG
If the conditions described in section 33 (3) of the WpHG apply, this rules out simultaneous attribution under section 34 (1) sentence 1 no. 5 of the WpHG.

I.2.3.4 Threshold triggered “by other means”

Thresholds may also be triggered by other means, for instance by capital increases or capital reductions, restructuring of the share capital, universal succession in the case of inheritance or revival of voting rights attached to preferred shares. Thresholds may also be triggered by other means without any acquisitions or disposals by the person subject to the notification obligation if attributions under section 34 of the WpHG apply or do no longer apply (e.g. in the case of grant/revocation of proxies, aggregation/disaggregation of subsidiaries, etc.).
I.2.3.4.1 Measures for raising and reducing capital

In practice, measures for raising and reducing share capital trigger questions about notification obligations from several points of view: not only does the question arise of who is subject to the notification obligation (existing shareholders, new shareholders, initial subscribers, secondary subscribers, etc.), but also the question of what the relevant date on which the threshold is triggered and when the period for filing a notification starts running (sections 33 (1) sentences 3 and 5, (41) of the WpHG). Moreover, securities lending transactions with existing shareholders, which can also trigger notification obligations, often play a role in the context of capital increases.

To date, the following typical scenarios have emerged in practice:

I.2.3.4.1.1 Capital increases against contributions, authorised capital, capital increases from capital reserves and revenue reserves, and capital reductions

Capital increases against contributions, capital increases from capital reserves and revenue reserves, and capital reductions are only effective once their implementation has been registered with the commercial register. The registration in these cases is constitutive. Only then do the voting rights arise (sections 189 and 211 of the AktG) or cease to exist (section 224 of the AktG), changing 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 only when the capital increase is registered with the commercial register; certification of the share is not relevant. The voting rights vest directly with the initial subscriber of the shares, i.e. they do not vest in the issuer first.

I.2.3.4.1.1.1 Non-consideration of voting rights when new shares are issued with the participation of an underwriter

If the capital increase is supported by a credit institution or a banking syndicate as the underwriter, it normally subscribes for all new shares from the capital increase as the initial subscriber. From the date of entry in the commercial register, the exemption pursuant to section 36 (3) no. 1 of the WpHG, under which the voting rights attached to new shares subscribed for the purpose of clearing and settlement are disregarded until the end of the third trading day after initial subscription, generally applies to the underwriter.

For details regarding exemptions due to non-consideration of voting rights, please refer to the further explanations on section 36 of the WpHG (I.2.6).

I.2.3.4.1.1.2 Notification obligations applying to investors (new and existing shareholders) when new shares are issued

It may be difficult for investors who acquire shares as secondary subscribers to identify whether an unconditional claim arises against the underwriter at the time when the new shares are effectively issued for delivery of shares to be satisfied immediately (see section 33 (3) of the WpHG). In view of this, BaFin allows investors to make reference to the date when the new shares are credited to their securities accounts (which is when they acquire the legal title of the new shares) as the date on which the threshold is triggered. In this context, BaFin considers that there is no notification obligation under section 38 (1) of the WpHG for the investors in the period between registration of the implementation of the capital increase and crediting of the shares to the securities account.

With regard to the potential dilution following a capital increase, the previous legal situation remains unchanged to the existing shareholders: the dilutive effect already arises once the implementation of the capital increase is registered. However, if existing shareholders have already exercised their (indirect) pre-emptive rights, upon such registration BaFin considers the voting rights out of the new shares as notifiable voting rights of the respective shareholder (either under section 34 (1) sentence 1 no. 2 of the WpHG or already under section 33 (3) of the WpHG), regardless of whether the shares have already been credited to the securities account of the shareholder in question.

Example

The implementation of a capital increase against contributions is registered with the commercial register on 1 May, as a result of which existing shareholder A falls below a threshold and new shareholder B exceeds a threshold. The capital increase was implemented after all shares were placed by bank C. The new shares were transferred by bank C to the secondary subscribers on 3 May.

In this scenario, A must file a notification that its holding fell below the threshold on 1 May, whereas bank C does not have to file a notification.
because of the exemption in section 36 (3) no. 1 of the WpHG. B must also file a notification, although BaFin will accept both 1 May and 3 May as the date on which the threshold was exceeded.

**Variation**

Existing shareholder A exercises all of its pre-emptive rights and the new shares are transferred by bank C to the secondary subscribers on 10 May.

There is no notification obligation for A because bank C holds the new shares for account of A (section 34 (1) sentence 1 no. 2 of the WpHG) in the amount of the pre-emptive rights exercised by A, with the result that A’s holding of voting rights is not diluted in the aggregate. Bank C must file notifications for both 1 May and 10 May. B must file a notification that the threshold was exceeded on 10 May.

### I.2.3.4.1.2 Contingent capital increase

In the case of a contingent capital increase, the share capital is increased when the new shares are issued (section 200 of the AktG). The subsequent entry in the commercial register (section 201 of the AktG) merely has declaratory effect. Thus, the share capital and the total number of voting rights change with each additional issuance of shares. The new shares are issued once the issuer and the beneficiary have entered into an issuance agreement and the shares are delivered to the beneficiary. Delivery normally happens when the shares are credited to the securities account. When new shares are issued under section 41 (2) of the WpHG, the issuer is required to publish the changed total number of voting rights only at the end of a month, so the date on which the holding fell below the threshold is normally not known to the party subject to the notification obligation. In such cases, BaFin does not object if the last day of the month in which the new shares were issued is used in the notification as the date on which the holding fell below the threshold, provided that special circumstances do not support use of the actual date in the specific case. Under section 33 (1) sentence 5 of the WpHG, the time limit for the notification generally only starts running with publication in such cases.

### I.2.3.4.1.3 Capital reduction

In the event of a capital reduction resulting from the redemption of shares (sections 237 et seq. of the AktG), the share capital is reduced when the resolution is registered with the commercial register or, if this is followed by the redemption of the shares, when the shares are redeemed (section 238 sentence 1 of the AktG). If redemption is decisive, the management board must take action to eliminate the shares (section 238 sentence 3 of the AktG). Thresholds may be exceeded because of the reduction in the total number of voting rights.

### I.2.3.4.2 Notification obligations for transformations

#### I.2.3.4.2.1 Mergers under sections 2 et seq. of the Transformation Act (Umwandlungsrecht – UmwG)

In the case of merger transactions, the shareholders of the transferring issuer receive a defined number of shares of the transferee issuer in exchange for their shares. The transferring issuer ceases to exist when the merger becomes effective upon registration of the merger in the commercial register. At this time, the shareholders of the transferring issuer become shareholders of the transferee issuer. As a general principle, notification obligations for the shareholders of the transferring issuer under sections 33 et seq. of the WpHG only arise at this time. It may happen that the holdings of the shareholders of the transferee issuer are diluted, in which case they are subject to corresponding notification obligations at the date when the merger is entered in the register. Before a merger becomes effective, BaFin considers that the shareholders of the transferring issuer are not subject to notification obligations under section 38 of the WpHG, since the provisions of transformation law ensure adequate transparency.

### Examples

#### Merger by absorption, section 2 no. 1 of the UmwG

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), with company A transferring 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 and A’s former shareholders are no longer subject to notification obligations (in respect of the extinguished A). As a rule, however, the existing shareholders of the transferring company A...
I.2.3.4.2.2 Change in legal form under sections 190 et seq. of the UmwG
In the event of a conversion under sections 190 et seq. of the UmwG, the legal entity is merely transformed into a new legal form but remains the same entity. Due to the legal entity’s continued existence, the legal responsibility for the voting rights does not change. For this reason, no thresholds are triggered and no notification obligations arise. Since the legal entity does not change if its company name is changed, this alone cannot result in holdings of voting rights exceeding, falling below or reaching a threshold, too. Consequently, no notification obligation applies in such cases as well.

I.2.3.5 Notification obligation in the case of several thresholds being triggered within one day, and in the event of exceeding and falling below a threshold on the same day

If holdings of voting rights exceed or fall below thresholds several times within the same day, it is sufficient to file one voting rights notification at the end of the day.

Example

If, for example, the holdings of a party subject to the notification obligation exceed 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 file only a single notification disclosing that the holdings exceeded the thresholds of 5%, 10% and 15%.

If holdings of voting rights first exceed and then fall below, or first fall below and then exceed, the same thresholds within one day, BaFin permits netting the voting rights so that no notification is required (provided that the voting rights are not exercised on that day).

Example

If the holdings of a party subject to the notification obligation exceed the threshold of 10% in the morning and fall below that threshold in the afternoon, the party is not required to file any notification.

If the threshold is exceeded on one day and the holdings of voting rights do not fall below the threshold until the next day (or later), two notifications must be filed. The netting of long and short positions (such as call and put options) is not permitted in the case of instruments.

I.2.3.6 Depositary receipts
Section 33 (1) sentence 2 of the WpHG provides that, for certificates representing shares (such as depositary receipts), only 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 under section 33 (1) of the WpHG.
I.2.4 Notification obligation on first time admission of shares to trading on an organised market (section 33 (2) of the WpHG)

When a company is first admitted to trading on an organised market and the Federal Republic of Germany is its home country, a notification obligation arises under section 33 (2) of the WpHG for shareholders holding an interest of 3% or more of the voting rights at the date of initial admission of the shares of this issuer to trading on an organised market. The date of initial admission to trading of the shares is decisive, not the date of the first quotation. The date of initial admission to trading is stated in the authorisation decision of the stock exchange.

If shares are already acquired or sold on the date of initial admission to trading, for example by assigning the delivery claim, same-day netting can be performed here. Thus, it is not necessary to first file an initial voting rights notification at the “date of initial admission to trading” under section 33 (2) of the WpHG and then to file another notification under section 33 of the WpHG that a threshold has been triggered later on the date of initial admission to trading. The initial admission of shares to trading on an organised market must be disclosed as an “Other reason” in the voting rights notification.

I.2.5 Attribution of voting rights under section 34 of the WpHG

Under section 34 of the WpHG, the voting rights attached to shares of a third party may be attributed to the party subject to the notification obligation under certain circumstances. The attribution criteria in section 34 WpHG largely correspond to the requirements of EU law set out in Article 10 of the Transparency Directive. In specific cases, the rules could differ among the member states due to harmonisation with the requirements of takeover law, for which there is an explicit exemption from the EU legal principle of maximum harmonisation (point (iii) of the fourth subparagraph of Article 3(1a) of the Transparency Directive).

The WpHG takes an abstract approach to the criteria set out in section 34 (1) of the WpHG. Where the criteria required for the relevant attribution are satisfied, voting rights are attributed even when the party to which they are attributed, based on the arrangements agreed in the individual case, does not have any legal claim for its instructions to be followed, or declares that it will not exert any influence, or does not exert any actual influence. This aims to create transparency about the legal and de facto voting, influence and control structures at the company concerned. Likewise, no notification obligation is triggered when there is a change from holding the voting rights attached to shares directly to the attribution of those voting rights under section 34 of the WpHG; the same applies to a change from one attribution criterion to another.

Example

Shareholder A holds 5% of the voting rights attached to shares in issuer B. If A transfers all the shares to C in trust, A loses its title to the shares. However, since a 5% holding of the voting rights is attributed to A under section 34 (1) sentence 1 no. 2 of the WpHG and A’s interest has therefore merely changed from being held “directly” to being held “indirectly”, A is not required to file any notification.

The attribution criteria defined by law are exhaustive.

I.2.5.1 Shares owned by a subsidiary of the party subject to the notification obligation (section 34 (1) sentence 1 no. 1 and sentence 2 of the WpHG)

Voting rights attached to shares in the issuer that are owned by a subsidiary of the party subject to the notification obligation are fully attributed to such party under section 34 (1) sentence 1 no. 1 of the WpHG. See I.2.5.11 for information on exemptions to this rule in connection with investment services enterprises (Wertpapierdienstleistungsunternehmen) and investment and management companies (section 35 (2) to (6) of the WpHG).

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24 For the harmonisation between section 34 and the parallel takeover law requirement in section 30 of the Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz – WpÜG), see Bundestag printed paper 17/7034, page 70.

25 See also Frankfurt am Main Administrative Court, decision of 18 May 2006 – 1 E 3049/05, headnote 2 and juris para. 33.

26 The attribution of voting rights under section 34 (1) sentence 1 no. 1 of the WpHG is based on Article 10(e) of the Transparency Directive.
I.2.5.1.1 Subsidiaries (section 35 (1) of the WpHG)
Section 35 (1) of the WpHG defines subsidiaries as companies that are classified as subsidiaries within the meaning of section 290 of the German Commercial Code (Handelsgesetzbuch – HGB)\(^\text{27}\) (no. 1) or companies that can be controlled (no. 2), irrespective of their legal form and registered office.\(^\text{28}\) Both cases for determining whether or not a company is a subsidiary refer ultimately to the direct or indirect ability of the parent undertaking to control the subsidiary. The scenarios that appear in practice are diverse and cannot be described in any detail here. The following comments therefore constitute abstract, general guidance and are based on the legal provisions set out in section 290 of the HGB and section 17 of the AktG. It is necessary to examine in detail in individual cases, particularly by reference to relevant case law, whether a parent–subsidiary relationship satisfying the requirements for attribution of voting rights actually exists. In view of the large number of potential control scenarios and the conclusive case-by-case assessment of the attribution of voting rights under section 34 (1) sentence 1 no. 1 of the WpHG, parties potentially subject to the notification obligation are encouraged to get in touch with BaFin at an early stage.

I.2.5.1.1.1 Section 35 (1) no. 1 of the WpHG
Under section 35 (1) no. 1 of the WpHG, subsidiaries are companies defined as subsidiaries by section 290 of the HGB. Under section 290 (1) of the HGB, such a parent–subsidiary relationship exists if the parent undertaking is able, directly or indirectly, to control a subsidiary (control concept).

In the context of section 35 of the WpHG, parent undertakings within the meaning of section 290 HGB can also be natural persons or entities other than corporations, as under section 35 (1) of the WpHG the legal form is not relevant for determining the status of either the parent undertaking or the subsidiary.\(^\text{29}\) If the following typical criteria pursuant to section 290 (2) of the HGB apply, there is always an irrefutable presumption that a parent exercises control, i.e. if:

- it holds the majority of the voting rights in another company (no. 1);
- it has the right to appoint or remove the majority of the members of the administrative, managing or supervisory body determining the financial and business policies of another company, and if it is at the same time shareholder (no. 2);
- it has the right to determine the financial and business policies on the basis of a control agreement entered into with another company or by virtue of a provision of the articles of association of the other company (no. 3);
- in substance, it retains the majority of the financial risks and obtains the majority of the rewards of a company serving to accomplish a narrow and well-defined objective of the parent undertaking (special purpose vehicle).

The primary application of section 290 (2) HGB is no. 1, i.e. the situation that a parent always exercises control if it holds the majority of the voting rights attached to the shares of the subsidiary.

Under section 290 (3) of the HGB, subsidiaries are also companies that can be controlled “indirectly” via third parties. For instance, according to sentence 1 of the above subsection, rights held by a parent undertaking under section 290 (2) of the HGB also include the rights held by a subsidiary and the rights held by persons acting for the account of the parent undertaking or of subsidiaries. Additionally, under sentence 2, rights held by a parent in another company are increased by the rights that it or a subsidiary can control based on an agreement with other shareholders of that company. Section 290 (3) sentence 3 of the HGB then establishes two exceptions to these principles (in sentences 1 and 2). First, rights attached to shares that are held by the parent or by subsidiaries purely for the account of other persons have to be disregarded (section 290 (3) sentence 3 no. 1 HGB). Second, rights attached to shares that are held as collateral have to be disregarded to the extent that the rights are exercised at the instructions of the collateral provider or, if a credit institution holds the shares as collateral for a loan, in the interests of the collateral provider (section 290 (3) sentence 3 no. 2 HGB).

\(^{27}\) Substantiation of the status of a subsidiary through section 290 HGB was addressed for the first time by the introduction of the Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz – WpÜG) of 20 December 2001, Federal Law Gazette I 3822. Section 290 (1) and (2) of the WpÜG was revised by the Accounting Law Modernisation Act (Bilanzrechtsmodernisierungsgesetz – BilMoG) effective as at 29 May 2009, Federal Law Gazette I, page 1102.

\(^{28}\) The provisions of section 35 (1) of the WpHG regarding subsidiary status correspond to the definition of a “controlled undertaking” in point (f) of Article 2(1) of the Transparency Directive.

I.2.5.1.2 Attribution of voting rights in the case of a commercial partnership (Personenhandelsgesellschaft), in particular a GmbH & Co. KG

I.2.5.1.2.1 Attribution of voting rights in the case of a general commercial partnership (oHG) and a limited partnership (KG).

In a general commercial partnership (offene Handelsgesellschaft – OHG) that is organised under the regular statute (see sections 105 et seq. of the HGB), the voting rights held by the partnership are generally not attributed to any partner under section 34 (1) sentence 1 no. 1 in conjunction with section 35 (1) of the WpHG. However, this may be different in individual cases if the partnership agreement assigns comprehensive management powers to only a single partner of the OHG. In this case, the voting rights held by the partnership may be attributed to that partner. There are two types of partners in a limited partnership (Kommanditgesellschaft – KG): general partners and limited partners. In the case of a limited partnership organised under the regular statute (see sections 161 et seq. of the HGB), the partner acting as general partner is the comprehensive and sole governing body of the limited partnership. This means that the general partner is vested with the statutory powers to manage and represent the limited partnership (see sections 161 et seq. of the HGB, section 161 (2) in conjunction with sections 114 and 125 of the HGB). Therefore, in corresponding application of section 290 (2) no. 2 of the HGB the limited partnership organised under the regular statute is considered to be a subsidiary of the general partner. Particularly the intent and purpose of this provision support its application to the general partner of a limited partnership, because the general partner, although it cannot appoint the majority of the members of the partnership’s governing body, is the only partner vested with management powers and, as such, is itself a governing body. This gives it a position that is at least equally strong in the context of the self-government that applies to partnerships. The general partner’s powers as the sole manager of the limited partnership also makes a strong case for
presuming a controlling influence within the meaning of section 290 (2) no. 2 of the HGB. For this reason, the voting rights in an issuer held by the limited partnership are generally attributed to the general partner in the limited partnership under section 34 (1) sentence 1 no. 1 in conjunction with section 35 (1) of the WpHG. If there is more than one general partner, there is generally no attribution to the general partners unless comprehensive management powers have been assigned to only a single general partner.

Moreover, attribution to additional partners of a limited partnership, i.e. the limited partners, is possible if they hold – possibly jointly – a majority of the voting rights. In the case of (commercial) partnerships, majority resolutions are generally allowed (section 161 (2) in conjunction with section 119 (2) of the HGB), although in cases of doubt, a majority of the head count is meant.\(^\text{31}\)

This can result in situations in which voting rights of a limited partnership are simultaneously attributed to different persons, i.e. the general partner and the limited partner(s).

I.2.5.1.2.2 Attribution of voting rights in case of a GmbH & Co. KG

As with the limited partnership in general, it is also the case for a GmbH & Co. KG (a limited partnership in which a GmbH is the general partner) organised under the regular statute in which the statutory management and representation powers are vested in the general partner GmbH that the general partner GmbH is generally deemed to be the parent undertaking of the GmbH & Co. KG by corresponding application of section 290 (2) no. 2 of the HGB. As a result, the voting rights held by the limited partnership are generally attributed to the general partner GmbH under section 34 (1) sentence 1 no. 1 in conjunction with section 35 (1) of the WpHG. In addition, control by the limited partner(s) may be considered by virtue of the majority of voting rights. For other forms of GmbH & Co. KG organised under individual contractual arrangements, the status of the general partner GmbH as the potential parent undertaking depends on the relevant provisions of the partnership agreement. If the general partner GmbH is excluded from managing the limited partnership, the limited partnership cannot be considered to be its subsidiary. If the general partner GmbH has not been completely excluded from the management powers, but there are restrictions, it must be clarified on a case-by-case basis whether there is still control under section 290 (2) of the HGB.

I.2.5.1.3 Attribution of voting rights in the case of foundations (Stiftungen)

As an autonomous set of assets with its own legal capacity, a foundation (Stiftung) is itself subject to the notification obligation under section 33 (1) of the WpHG in the first instance if holdings of voting rights are attributed to it directly or indirectly in amounts that are relevant for thresholds. If it is possible that the foundation might be controlled, it should be considered that there are no investments in a foundation, but merely founders, beneficiaries and the foundation’s governing bodies. As a general rule, therefore, a foundation is not a dependent entity because there are no investments in it, which in turn means that no attribution takes place beyond the foundation with legal capacity.

However, de facto control of a foundation is possible. Such de facto control exists when a person has the right to appoint and remove members of the foundation’s governing bodies by virtue of the foundation’s by-laws. In such cases, voting rights are attributed to the controlling person. The question of whether that person is a founder is of no relevance in this context. It is also irrelevant whether the person holding the right of appointment and removal is a member of one of the foundation’s governing bodies.

In the case of foundations, it is also generally necessary to examine whether the assets are held for the account (section 34 (1) no. 2 of the WpHG) of a beneficiary.

I.2.5.1.4 Aspects in the case of trusts

The concept of trust is known especially in Anglo-American jurisdictions. Due to the reporting requirements applying to trusts, it is necessary to distinguish between trusts endowed with own legal capacity and those without own legal capacity.\(^\text{33}\)

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\(^{31}\) Section 119 (2) of the HGB is optional, so the partnership agreement may also stipulate a capital majority.

\(^{32}\) This does not rule out the possibility that the limited partnership (as an Einheitsgesellschaft) may itself be controlled by a majority limited partner.

\(^{33}\) Partial legal capacity of the trust is sufficient for it to be subject to the notification requirement.
In the case of trusts without own legal capacity, the trust assets constitute a kind of a pool of assets without legal capacity. The legal owner of the trust assets is generally the trustee, which means that there is an inherent notification obligation on the part of the trustee (section 33 (1) of the WpHG), but not on the part of the trust. It is also necessary to distinguish the trustee from the settlor (who is normally not the same person as the trustee). The settlor contributes the trust assets, e.g. including voting shares of a listed issuer, to the trust. There may be a reporting requirement for the settlor, for example, if the assets are held for its account. The same applies to the beneficiaries of the trust. Notification obligations of other persons should also be examined, for example of a protector (who often has the right to appoint and remove the trustee).

Trusts with own legal capacity are also established by a settlor and administered by a trustee. Such trusts with own legal capacity are themselves subject to the notification obligation because they may be owners of voting shares (section 33 (1) of the WpHG) or voting rights can be attributed to them (section 34 of the WpHG). This kind of a trust is comparable to a foundation, as in this case, too, it is not possible to invest in the trust. Nevertheless, they can also be subsidiaries (section 35 (1) of the WpHG) so that voting rights are attributed under section 34 (1) sentence 1 no. 1 of the WpHG. Control may exist, in particular, if a person (e.g. a protector) has the right to appoint and remove the members of the governing bodies of the trust.

I.2.5.1.6 Ability to control in the case of a minority interest (example of majority of voting rights present at general meetings)

Despite a minority interest (less than 50 per cent) in a company, it is still possible to exercise control if other circumstances apply. It is necessary to be able to exercise continuous, comprehensive influence under commercial law. For example, a listed stock corporation may be controlled by a shareholder who regularly holds a majority of voting rights present at general meetings of the issuer.

34 For details, see Hippeli, AG 2014, pages 147, 152 et seq. (on legally independent foundations and trusts).
35 See Federal Court of Justice, decision of 4 March 1974 – II ZR 89/72, juris para. 15, under which the critical question is whether there is a sufficiently strong basis for the exercise of joint control of a subsidiary; such a basis could consist not only of contractual or organisational links, but also legal and de facto circumstances of other kinds.
rights present may not be merely temporary. Rather, it must exist for a certain period and it must be possible to assume on the basis of past experience that the number of shareholders present will not increase significantly in the future.

I.2.5.2 Held for the account of the party subject to the notification obligation (section 34 (1) sentence 1 no. 2 of the WpHG)

Under section 34 (1) sentence 1 no. 2 of the WpHG, voting rights attached to shares of the issuer owned by a third party are fully attributed to the party subject to the notification obligation if the third party holds the shares for the account of the party subject to the notification obligation. The shares are owned by a third party if they are held by such party within the meaning of section 33 (1) of the WpHG. As described above, the decisive factor under section 33 (3) of the WpHG is the contractual legal transaction. With the two terms “to own” and “holding for the account of the party subject to the reporting requirement”, the WpHG describes scenarios in which there is a difference between the legal and beneficial attribution to the voting rights.

For the purposes of establishing that shares are held for the account of the party subject to the notification obligation, the connecting factor is that not to the formal owner of the shares (the “third party”) bears the risks and rewards attached to the shares, but the party to which those shares must be attributed (the “party subject to the notification obligation”). What is decisive is who bears the risks relating to the change in the exchange price and the dividend entitlement, as well as pre-emptive rights, any settlement and compensation payments, and the risk of insolvency of the issuer of the shares. To arrive at attribution under section 34 (1) sentence 1 no. 2 of the WpHG, however, it must also be possible to influence exercise of the voting rights. An abstract view also applies in this case, meaning that it does not matter how exercising voting rights is specifically influenced, but that the party subject to the reporting requirement exercises or has the ability to exercise influence legally or de facto.

I.2.5.2.1 Fiduciary trust (Vollrechtstreuhand)

A third party is deemed to hold voting shares for the account of the party subject to the notification obligation in particular when it holds them in trust. This refers to a fiduciary trust (Vollrechtstreuhand) in which the trustee (the third party) holds title to the shares in respect of third parties. As a rule, there is usually an internal mandate or management agreement between the trustee and the trustor (sections 662, 675 (1) of the BGB). For the purposes of the definition in section 34 (1) sentence 1 no. 2 of the WpHG, it is sufficient for the trustee to be obliged under the internal agreement to exercise the voting rights in the interest of the trustor, or (in the absence of such agreement) for such an obligation to arise from the nature of the interests involved (trust for the benefit of others). A fiduciary trust is not the same as a trust by power of attorney (Vollmachtstreuhand) or a trust by authorisation (Ermächtigungstreuhand), in which merely the voting power is transferred to the trustee on the basis of a legal authorisation.

I.2.5.2.2 Securities lending

As a general principle, retransfer claims under securities lending arrangements (legally loans in kind within the meaning of section 607 of the BGB) constitute only a notifiable instrument within the meaning of section 38 of the WpHG. Attribution under section 34 (1) sentence 1 no. 2 of the WpHG to the lender of shares can only be considered if there are additional circumstances that establish a trust or similar relationship between the lender and the borrower.

I.2.5.3 Assigned as collateral to a third party (section 34 (1) sentence 1 no. 3 of the WpHG)

Under section 34 (1) sentence 1 no. 3 of the WpHG, the party subject to the notification obligation is attributed those voting rights attached to shares in an issuer that the party subject to the notification obligation has
assigned as collateral to a third party, unless the third party is authorised to exercise the voting rights attached to these shares and declares its intention to do so independently from the instructions of the party subject to the notification obligation.48

I.2.5.3.1 Withdrawal of the concept of alternative voting rights attribution

Until the TRL-ÄndRL-UmsG came into force on 26 November 2015, the concept of “alternative voting rights application” applied with regard to section 33 (1) and section 34 (1) sentence 1 no. 3 of the WpHG, meaning that the voting shares transferred as collateral were attributed either to the collateral taker or the collateral provider. As with the other attribution criteria, the shares serving as collateral are now attributed to the collateral taker in all cases (section 33 (1) of the WpHG), and to the collateral provider (as before) only under the conditions set out in section 34 (1) sentence 1 no. 3 of the WpHG.49

This also corresponds to administrative practice regarding the parallel takeover law requirement in section 30 (1) sentence 1 no. 3 of the German Takeover Act (WpÜG).

I.2.5.3.2 Lodging of shares as collateral and condition for attribution

The attribution of voting rights under section 34 (1) sentence 1 no. 3 of the WpHG relates to the lodging as collateral of shares with voting rights attached by a collateral provider (party subject to the notification obligation) to a collateral taker (third party). As a general rule, voting rights attached to shares lodged as collateral by the collateral provider with the collateral taker continue to be attributed to the collateral provider, even though the collateral taker, as the legal owner, is entitled to the voting rights in relation to third parties. The primary reason for this is that the collateral taker is required to exercise the voting rights in accordance with the collateral provider’s instructions, except where they are contrary to the security interests of the collateral taker.

Under section 34 (1) sentence 1 no. 3 2nd half-sentence of the WpHG, the voting rights are not attributed to the collateral provider if the collateral taker is authorised to exercise the voting rights attached to the shares and has stated its intention to exercise the voting rights independently of the instructions of the collateral provider. In this case, the voting rights are only counted at the collateral taker.

I.2.5.3.3 Pledge

Section 34 (1) sentence 1 no. 3 of the WpHG is not applicable to pledges of shares because legal title to the shares with voting rights attached remains with the pledgor.

If, exceptionally, the pledgee is authorised to exercise the voting rights, attribution under section 34 (1) sentence 1 nos. 6 and 8 of the WpHG can be considered.

I.2.5.4 Life interest granted to the party subject to the notification obligation (section 34 (1) sentence 1 no. 4 of the WpHG)

Section 34 (1) sentence 1 no. 4 of the WpHG sets out that voting rights are attributed to a person to whom a life interest has been granted. For the WpHG, it is therefore irrelevant who is entitled to the voting right when a life interest has been granted for shares.50 As a result, the voting rights attached to the shares for which the life interest has been granted are also attributed to the party subject to the notification obligation if that party can only exercise the voting rights on the instructions of the shareholder or not at all.51

For the owner of shares with voting rights attached, there is a notification obligation under section 33 (1) sentence 1 of the WpHG; the beneficiary of the life interest holder is subject to the notification obligation under section 33 (1) sentence 1 in conjunction with section 34 (1) sentence 1 no. 4 of the WpHG in cases where thresholds have been triggered.

I.2.5.5 Capable of being acquired by way of declaration of intent (section 34 (1) sentence 1 no. 5 of the WpHG)

Under section 34 (1) sentence 1 no. 5 of the WpHG, voting rights attached to shares in an issuer are attributed to the party subject to the notification obligation if that party can acquire the shares though a declaration of intent.52

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48 The wording of section 34 (1) sentence 1 no. 3 of the WpHG is identical to section 30 (1) sentence 1 no. 3 of the WpÜG but does not correspond exactly to Article 10 of the Transparency Directive (point (c) of which relates to the lodging of voting shares as collateral and is implemented in section 34 (1) sentence 1 no. 8 of the WpHG).

49 See also explanatory memorandum to the government draft, Bundestag printed matter 18/5010, page 45.

50 Section 34 (1) sentence 1 no. 4 of the WpHG is based on point (d) of Article 10(1) of the Transparency Directive.

51 On the question of the distribution of voting rights in the case of life interests in shares of companies, see Wedemann, NZG 2013, 1281.

52 The wording of section 34 (1) sentence 1 no. 5 of the WpHG is identical to section 30 (1) sentence 1 no. 5 of the WpÜG, although it does not correspond exactly to Article 10 of the Transparency Directive.
In section 34 (1) sentence 1 no. 5 of the WpHG, the concept of acquisition is to be understood in the narrower sense, i.e. in the sense of obtaining legal title. Consequently, the concept exclusively covers those scenarios in which only the – unilateral – declaration of intent of the party subject to the notification obligation is needed for that party to acquire legal title in the shares without the involvement of the contractual partner or a third party. Shares are likewise attributed in accordance with no. 5 if, instead of a declaration of intent, only the payment of a purchase price directly results in the acquisition of legal title. However, if there is an unconditional claim for immediate transfer of the shares, this is the scenario covered by section 33 (3) of the WpHG, so there is no longer any scope to apply no. 5. Contractual agreements that involve a delivery claim or that actually establish such a claim, as well as situations that require the participation of a third party, therefore do not trigger any attribution under no. 5. No. 5 primarily applies to the case of “options conferring rights in rem”.

Examples

(Contractual) call option
A person who has the right 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 a case, exercising the call option does not yet lead to transfer of legal title to the shares but merely the conclusion of the purchase agreement giving the acquirer a contractual claim to transfer of legal title to the shares. The option in this case is a contractual option that does not fall under the scope of section 34 (1) sentence 1 no. 5 of the WpHG. However, a notification obligation under section 38 of the WpHG may be triggered.

Option in rem
A person who has the right, for example, to acquire title in shares through acceptance of a prior, irrevocable offer to transfer legal title to these is the holder of an option in rem. In this case, the acquisition of legal title can no longer be prevented by the seller or third party, provided that the other conditions for effective transfer of legal title have already been satisfied.

It happens directly through the purchaser’s declaration of intent. This triggers attribution under section 34 (1) sentence 1 no. 5 of the WpHG.

I.2.5.6 Entrusting or proxy (section 34 (1) sentence 1 no. 6 of the WpHG)

Under section 34 (1) sentence 1 no. 6 of the WpHG, voting rights are attributed to a party subject to the notification obligation that have been entrusted to that party or which that party may exercise as a proxyholder, provided that it can exercise the voting rights attached to the shares at its own discretion in the absence of specific instructions from the shareholder.

I.2.5.6.1 Entrusted voting rights
The criterion of “being entrusted” in no. 6 requires an obligation to safeguard the shareholder’s financial interests with respect to the shares. However, the voting rights are only attributed if, within the limits set by the obligation, the party subject to the notification obligation still has some discretion in exercising the voting rights. For the purposes of the attribution, it is irrelevant whether the party actually exercises discretion. Even where power of representation exists by statute, the voting rights are deemed to be entrusted to the party 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.

I.2.5.6.2 Authorisation as a voting proxy
Although attribution by virtue of the criterion of “being entrusted” is already possible for proxies in many cases, this 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. It should be noted in this regard that even when a principal issues instructions on a regular basis, this does not end attribution to the proxyholder. The criterion in no. 6 is not satisfied only if the proxyholder is not permitted to act in the absence of instructions. If the proxyholder validly delegates its

53 Federal Court of Justice, decision of 29 July 2014 – II ZR 353/12, headnote 4 and

54 Section 34 (1) sentence 1 no. 6 of the WpHG is based on points (f) and (h) of Article 10 of the Transparency Directive.

55 See Frankfurt am Main Administrative Court, decision of 1 October 2009 – 1 K 390/09, confirming this: Higher Administrative Court in Kassel, decision of 25 January 2010 – 6 A 2932/09.
authorisation, the voting rights are also attributable to the holder of the delegated authorisation under no. 6, provided that the conditions described above are met. Likewise, delegating authorisation does not terminate attribution to the party originally authorised.

**I.2.5.6.3 Trust by power of attorney and notification obligations of asset management companies**

Section 34 (1) sentence 1 no. 6 of the WpHG may therefore be of relevance particularly in the case of a trust by power of attorney (Vollmachtstreuhand) as well as in the investment business in the case of (asset and fund) management companies. In a trust by power of attorney, the trust relationship is established by the trustor’s granting of authorisation to exercise the voting rights to the trustee and obliging the trustee to safeguard the trustor’s financial interests. However, the trustor reserves legal title to the shares and thus continues to be the shareholder. Management companies can be attributed voting rights attached to shares that the company manages for its clients provided the management companies can exercise such voting rights at their discretion (see section 94 of the Investment Code (Kapitalanlagegesetzbuch – KAGB)). Refer to I.2.5.12 below for further details.

**I.2.5.6.4 Exemptions for proxies exercised by credit institutions (voting rights attached to shares held in safe custody accounts under section 135 of the AktG)**

Under section 135 (1) sentence 1 of the AktG, a credit institution may only exercise the voting rights attached to shares, that it does not own and for which it is not recorded as the holder in the share register, if it has been authorised to do so. Such proxy voting rights of credit institutions are not covered by section 34 (1) sentence 1 no. 6 of the WpHG.

Although credit institutions are to be regarded as proxyholders in respect of the voting rights attached to shares held by them in custody, the voting rights are not attributed because the credit institution is not entitled to use its own discretion in exercising such voting rights under section 135 (3) of the AktG. This states that, as a rule, a credit institution that has not received any instructions by the shareholder for exercising the voting right concerned may only exercise that voting right in accordance with its own proposals – which it has first made available to the shareholder in good time.

Under section 135 (2) of the AktG, only proposals that exclusively safeguard the interests of the principal may be submitted, without any consideration for the interests of the credit institution. If the shareholder has not issued any other instructions following the proposals, it is presumed that the shareholder has adopted the proposals as its own (section 135 (3) sentence 1 of the AktG).

**I.2.5.6.5 General meeting proxy (section 34 (3) of the WpHG)**

If the proxyholder is only authorised to exercise voting rights for one general meeting at its own discretion without specific instructions from the shareholder, the proxyholder would, in theory, have to file a notification twice: once when it is granted proxy prior to the general meeting if this results in one or more thresholds being exceeded due to the attribution, and again after the general meeting when the proxy or exercise discretion expires and voting rights holdings fall below one or more thresholds again. This provision sets out an exemption from the requirement to file a second voting rights notification; only one notification has to be filed when the proxy is granted. However, this notification must contain the additional disclosures required by section 34 (3) sentence 2 of the WpHG. The party subject to the notification obligation must state when the general meeting will take place and its holding of voting rights will be after the proxy or exercise discretion has expired.

However, if the holding of voting rights changes after this notification in such a way that, after expiry of the proxy or exercise discretion, the holding of voting rights is different from the holding stated in the notification, this must be disclosed in a second notification; in this case, the exemption provided for in this provision can no longer be used.

**I.2.5.7 Temporary transfer of voting rights without the related shares under an agreement for consideration (section 34 (1) sentence 1 no. 7 WpHG)**

The allocation criterion in section 34 (1) sentence 1 no. 7 of the WpHG was added due to the corresponding requirement in the Transparency Directive. It applies if the party subject to the notification obligation can exercise voting rights attached to shares under an agreement that provides for the temporary transfer of the voting rights without the related shares for

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56 Section 34 (1) sentence 1 no. 7 of the WpHG corresponds to point (b) of Article 10 of the Transparency Directive; see also explanatory memorandum to the government draft, Bundestag printed matter 18/5010, page 45.
consideration. Split-offs are prohibited under German stock corporation law (section 8 (5) of the AktG). This means that membership rights cannot be split off from the share and shareholders’ voting rights cannot be temporarily transferred without transfer of the share. In the case of shares subject to German stock corporation law, an agreement to transfer the voting rights without the underlying share is therefore not possible. At most, attribution under section 34 (1) sentence 1 no. 7 of the WpHG can be considered in the case of an agreement entered into under foreign law on the transfer of voting rights without the related shares (e.g. in the case of a third country issuer of shares that has opted for the Federal Republic of Germany as its home country).

I.2.5.8 Shares lodged as collateral and exercise of voting rights (section 34 (1) sentence 1 no. 8 of the WpHG)

The attribution criterion in section 34 (1) sentence 1 no. 8 of the WpHG also serves to fully implement the requirements of the Transparency Directive. It applies to cases when voting shares are lodged as collateral with the party subject to the notification obligation. The holding of voting rights attached to the shares of the third party (collateral provider) lodged as collateral with the party subject to the Section 34 (1) sentence 1 no. 8 of the WpHG serves to implement notification obligation, as the collateral taker, are attributed to the latter, provided that it holds the voting rights and declares its intention of exercising them. In addition to the typical contractual retention obligation, there must therefore be a corresponding collateral agreement between the third party (collateral provider, generally the shareholder) and the party subject to the notification obligation (collateral taker). Section 34 (1) sentence 1 no. 8 of the WpHG differs from the allocation of voting rights under no. 3 in that, in the case of no. 3, the party subject to the notification obligation is the collateral provider and the shares are lodged as collateral with the third party as collateral taker, i.e. the shares are held by the third party, whereas in the case of no. 8, the party subject to the notification obligation holds the shares (as collateral). Section 34 (1) sentence 1 no. 8 of the WpHG should be regarded as specific law that overrides attribution under section 34 (1) sentence 1 no. 6 of the WpHG. In contrast to section 34 (1) sentence 1 no. 6 of the WpHG, lodging of the shares to which the voting rights are attached as collateral is specifically not necessary.

I.2.5.9 Equal status of subsidiaries (section 34 (1) sentence 2 of the WpHG)

Under section 34 (1) sentence 2 of the WpHG, all voting rights that are attributed to the subsidiary itself under sentence 1 nos. 2 to 8 are also attributed in full to the party subject to the notification obligation.

I.2.5.10 Acting in concert (section 34 (2) sentences 1 and 2 of the WpHG)

Attribution of voting rights based on a common understanding on the coordinated conduct, better known as “acting in concert”, is covered by section 34 (2) of the WpHG. Under section 34 (2) sentence 1 of the WpHG, voting rights attached to shares in an issuer whose home country is the Federal Republic of Germany that are owned by a third party with which the party subject to the notification obligation or its subsidiary coordinates its conduct in respect of the issuer on the basis of an agreement, or otherwise, are attributed to the party subject to the notification obligation, although agreements in individual cases shall be exempted. Under section 34 (2) sentence 2 of the WpHG, acting in concert in this context requires the party subject to the notification obligation or its subsidiary and the third party to reach an understanding on the exercise of voting rights or otherwise collaborate with the aim of bringing about a lasting and material change in the issuer’s business strategy.

57 Supreme Court of the German Reich (Reichsgericht), decision of 31 March 1931 – II 222/30, reproduced in: RGZ 132, 149, 158 et seq.; Federal Court of Justice, decision of 17 November 1986 – II ZR 96/86, headnote 1 and juris para. 9.
58 Section 34 (1) sentence 1 no. 8 serves to implement point (c) of Article 10 of the Transparency Directive; see also explanatory memorandum for the government draft, Bundestag printed matter 18/5010, page 45.

59 Point (e) of Article 10 of the Transparency Directive II sets out that only certain attribution criteria (points (a) to (d) of Article 10 of the Transparency Directive II) apply to the parent company of the recipient of the attribution. Section 34 (1) sentence 2 of the WpHG extends this to all attribution criteria following the harmonisation with the requirements of takeover law (see section 30 (1) sentence 2 of the WpÜG) as an expressly permitted exception to the principle of maximum harmonisation (point (iii) of subparagraph (4) of Article 3(1a) of the Transparency Directive).
60 Section 34 (2) of the WpHG is based on point (a) of Article 10 of the Transparency Directive, but does not correspond to it verbatim. This is another instance of an exception to the European legal principle of maximum harmonisation based on harmonisation with the parallel requirements of takeover law in section 30 (2) of the WpÜG.
For the attribution of voting rights on the basis of acting in concert, it does not matter whether the party subject to the notification obligation itself holds shares with voting rights attached or whether voting rights are attributable to it by reason of other attribution criteria. This is because the effective influence of the party subject to the notification obligation to be captured by attribution under section 34 (2) of the WpHG, even without the influence conferred under company law by shares held by or attributable to the party subject to the notification obligation, may otherwise arise on the basis of sufficiently established coordination and subsequently take effect through the involvement of a third party as a shareholder of the issuer.61

I.2.5.10.1 Forms and substance of acting in concert

The first condition to be satisfied for acting in concert under section 34 (2) of the WpHG is a communication process between at least two persons that culminates in an agreement being reached or in policy being otherwise coordinated.62 Section 34(2) sentence 1 of the WpHG covers both forms of acting in concert: voting and pooling agreements certainly fall under the definition of “agreements” (first alternative); as a general rule, however, it encompasses all forms of contract under civil law. The second alternative (“otherwise” acting in concert), by contrast, is designed to capture those instances where a common understanding is reached without any formal agreement being concluded (such as a gentlemen’s agreement). Section 34 (2) sentence 2 of the WpHG refers to the substance of acting in concert: acting in concert may relate on the one hand to an understanding between the party subject to the notification obligation or its subsidiary and a third party on the exercise of voting rights at the issuer’s general meeting. However, it is irrelevant whether the voting rights are actually exercised, and the corresponding intention of the parties acting in concert is sufficient. In addition, the subject of acting in concert is any other collaboration with the aim of bringing about a permanent and material change in the issuer’s business strategy.

The types of acting in concert described in section 34 (2) sentence 1 of the WpHG (“agreement” or “otherwise”) also apply to the two contexts of acting in concert provided for in section 2 (“understanding on the exercise of voting rights” and “otherwise collaborate with the aim of bringing about a lasting and material change in the issuer’s business strategy”). As a result, any agreement on the exercise of voting rights, regardless of its substance and significance, constitutes a corresponding understanding on the exercise of voting rights within the meaning of sentence 2; in this context, the specific understanding may be classified as an agreement or as otherwise acting in concert within the meaning of sentence 1.

The criterion of otherwise acting in concert with the aim of bringing about a lasting and material change in the issuer’s business strategy is also designed to cover acting in concert outside the general meeting.63 The term “business strategy” in any case covers the purpose of the company as defined in its articles of association as well as its company policy. The latter defines the essential features of the company’s future activity, meaning the elaboration and implementation of objectives and actions relating to the company as a whole.64 It is only designed to cover cases in which the influence exerted on the company’s business strategy is also the actual objective of acting in concert.65 There is a lasting change in respect of the issuer if it is not possible to foresee when the effects will end. For example, if one or more members of the management board resign as a result of influence exerted by the shareholders, this can at all events be qualified as a lasting change. The materiality of a change can only be assessed in relation to the company’s parameters. It is important in this regard to consider differences in economic holdings, among other aspects, since what is ultimately decisive is the overall assessment of the changes with regard to the company. An abstract individual enumeration of material and non-material changes is not possible.66 According to the explanatory memorandum to the Risk Limitation Act,67 there are no grounds for attribution in the case of acting in concert that opposes changing a company’s business strategy (i.e. aimed at preserving the status quo) by rejecting planned corporate measures such as utilising authorised capital or acquiring treasury shares. This is

61 This corresponds to the intent and purpose of the attribution provisions of section 34 (1) und (2) of the WpHG, namely to disclose the ability to influence the exercise of voting rights; see Federal Court of Justice, decision of 19 July 2011 – II ZR 246/09, juris para. 32.
62 Higher Regional Court in Düsseldorf, decision of 13 June 2013 – I-6 U 148/12, 6 U 148/12, juris para. 131: “(...) A condition for attribution is namely the mutual coordination of policy directed at the decision-making process of the issuer on the basis of conscious intellectual contact.”
67 See report of the Finance Committee on the Risk Limitation Act, Bundestag printed matter 16/9821, page 11.
because cases in which the status quo is maintained are not based on a longer-term strategy, since preventing changes does not (help) shape company policy. The attribution criterion of section 34 (2) applies to those persons who are party to the agreement or act in concert coordinately (see I.2.5.10.4). Under the terms of an administrative trust for the benefit of others, voting rights of a third party who acts in concert with the trustor are therefore not attributed to the trustee under section 34 (2) of the WpHG, subject to the trustee’s own involvement in acting in concert.

I.2.5.10.2 Derogation in individual cases

Under section 34 (2) sentence 1 2nd half-sentence of the WpHG, an attribution of voting rights is expressly exempted in the case of agreements in individual cases. When clarifying the concept of individual cases, what is decisive is the distinction between a "longer-term strategy for the joint pursuit of corporate objectives" and mere "selective influence exerted on the issuer". Otherwise acting in concert with the aim of bringing about a lasting and material change in the company’s strategy does not constitute a derogation in individual cases since this is more than merely selective influence exerted on the issuer. Nor is it decisive whether the change in strategy is the result of only a single general meeting of the issuer or is based on many individual resolutions. Strategies are fundamental decisions defining the basic strategy for the company’s business by the company. The legislator believes that selective influence is not generally held to constitute acting in concert if there are individual agreements on different matters or repeated decisions on the same matter. Merely agreeing a policy on several items to be resolved at the general meeting is not in itself deemed to result in attribution of voting rights. In turn, it is necessary to examine on a case-by-case basis the impact this will have on the company. An abstract enumeration of individual cases within the meaning of the provision is not possible. The following criteria can be used for the assessment in this context: (the impact on) the purpose of the company, revenue, profit, debt, headcount, membership of governing bodies, business units, sales areas, etc.

I.2.5.10.3 Legal succession: mutual attribution of voting rights

A consequence of section 34 (2) of the WpHG is the mutual attribution of all voting rights included in acting in concert. This means that each party subject to the notification obligation involved in acting in concert by reason of an agreement or otherwise is attributed all voting rights of the other parties involved in acting in concert. It is not generally decisive for an attribution under all possible variants of acting in concert whether the party 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 attribution criteria (i.e. section 34 (1) sentence 1 nos. 1 to 8 of the WpHG). As a result, attribution only under section 34 (2) of the WpHG may give rise to notification obligations under section 33 (1) sentence 1 of the WpHG. Attribution does not depend on the actual ability of a party involved in acting in concert to exert an influence on the decision on the concerted exercise of voting rights. There are no indications in the WpHG supporting the view, sometimes held in the literature, that voting rights are only attributable (unilaterally) to a person controlling a pool of voting rights. Attribution must be reciprocal since it follows from the wording ("all") 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 each subject to the notification obligation for a total holding of 13.5%. Under section 34 (2) of the WpHG, the holdings are attributed as follows: 4.5% to A, 9.5% to B, 13.0% to C, and 13.5% to D.

68 Higher Regional Court in Düsseldorf, decision of 13 June 2013 – I-6 U 148/12, 6 U 148/12, juris para. 125.
69 See Federal Court of Justice, decision of 19 July 2011 – II ZR 246/09, headnote 2, which annulled a ruling by the Higher Regional Court in Munich of 9 September, ref. 7 U 1997/09, in which the Higher Regional Court in Munich had (also) presumed the attribution of voting rights to a trustee subject to a notification requirement as owner under section 21 (1) of the WpHG (old version); because the trustor acted in concert with other shareholders/voting rights holders under section 22 (2) of the WpHG (old version). The Federal Court of Justice held that the trustee had no ability to exert influence on the other voting rights if only the trustor was acting in concert.
73 Hoppe/Michel, BaFin Journal 04/2010, page 3 (4) with a reference to the Report of the Finance Committee on the Risk Limitation Act (Bundestag printed matter 16/9821, page 111), under which undisturbed communication between the shareholders should not be hindered by the attribution criterion in section 34 (2) of the WpHG (agreeing to preserve the status quo by rejecting planned corporate measures, such as utilising authorised capital or acquiring quos).
As a rule, the number of attributable voting rights is determined on the basis of the underlying agreement or otherwise acting in concert: if the parties involved hold a great number of shares and voting rights and commit only some of them to acting in concert, only such committed voting rights will be attributed. However, if no such quantifiable restriction has been agreed between the persons or entities, all shares and voting rights of the respective person will be assumed to have been committed for acting in concert.74

Example

A and B enter into a voting agreement. A holds 4.0% and B holds 12%. Under the voting agreement, B expressly undertakes to act in concert with A only in respect of 3.0%. A and B are subject to the notification obligation: A notifies 7.0%, of which 3.0% is attributed to it under section 34 (2) of the WpHG. B notifies 16.0%, of which 4.0% is attributed to it under section 34 (2) of the WpHG

I.2.5.10.4 Notification obligations of the parent undertaking if a subsidiary is party to a voting agreement or both companies are parties to a voting agreement

Under section 34 (2) sentence 1 of the WpHG, voting rights of a third party with which the party subject to the notification obligation or its subsidiary agrees its voting policy are attributed to the party subject to the notification obligation. Thus, the parent undertaking is also attributed the voting rights of the third party with which its subsidiary agrees its voting policy under section 34 (2) of the WpHG, whereas the voting rights of the subsidiary are attributed to the parent undertaking under section 34 (1) sentence 1 no. 1 of the WpHG.75

If the parent undertaking 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 undertaking under section 34 (2) of the WpHG. In addition, the voting rights of the subsidiary are also attributable to the parent company under section 34 (1) sentence 1 no. 1 of the WpHG. In this respect, the subsidiary is itself a “third party” for the parent undertaking within the meaning of section 34 (2) 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 under section 34 (2) of the WpHG. The parent undertaking of A likewise notifies a total of 11.0%, of which 7.0% is attributed to it under section 34 (2) of the WpHG and 4.0% under section 34 (1) sentence 1 no. 1 of the WpHG.

A (4.0%) and its parent undertaking 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 under section 34 (2) of the WpHG. C also 12.0%, of which 11.0% is attributed to it under section 34 (2) of the WpHG, however, and of that total 4.0% also under section 34 (1) sentence 1 no. 1 of the WpHG.

In the case of a voting agreement exclusively between a parent and a subsidiary, we recommend contacting BaFin in advance.

I.2.5.11 Discontinuation of subsidiary status (section 35 (2) to (6) of the WpHG)

I.2.5.11.1 Subsidiaries (section 35 (1) of the WpHG)

Section 35 (1) of the WpHG defines subsidiaries as companies that are classified as subsidiaries within the meaning of section 290 of the HGB (no. 1) or companies that can be controlled (no. 2), irrespective of their legal form and registered office (for more details see I.2.5.1.1 on section 34 (1) no. 1 of the WpHG).

The discontinuation of subsidiary status is governed uniformly by section 35 (2) to (6) of the WpHG in conjunction with sections 2 and 3 of the TranspRLDVO. The exemption from the subsidiary status applies solely to investment services enterprises and management companies and requires independence from the parent undertakings with regard to the exercise of voting.

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74 Higher Regional Court in Düsseldorf, decision of 13 June 2013 – I-6 U 148/12, 6 U 148/12, juris para. 132: “Rather, as already mentioned, there is an at least abstract ability to influence the voting policy only with regard to the shares included in the pooling agreement, which is the condition for attribution on the basis of acting in concert.”

75 See also Higher Regional Court in Düsseldorf, decision of 13 June 2013 – I-6 U 148/12, 6 U 148/12, juris para. 125.
rights in listed issuers. If the individual independence conditions in section 35 (2) to (4) of the WpHG in conjunction with sections 2 and 3 of the TranspRLDVO are satisfied, the consequence for the notification obligations under sections 33 et seq. of the WpHG are that voting rights held or managed by the investment services enterprise or management company are not (or no longer) attributed to the parent undertaking.

I.2.5.11.2.1 Statement of independence issued to BaFin

The specific independence conditions for investment services enterprises and management companies whose registered office is in the EU or the EEA are given in section 35 (2) and (3) of the WpHG in conjunction with sections 2 and 3 of the TranspRLDVO. In particular, the parent undertakings must submit a written declaration to BaFin giving the name of the investment services enterprise or the management company and the authority responsible for its supervision according to which the conditions for independence have been met. This statement of independence states that:

1. the parent undertakings and other companies controlled by it do not influence exercise of the voting rights through direct or indirect instructions or by other means, and that the company is free in every respect to exercise the voting rights attached to shares it manages independently from any influence of the parent undertaking;
2. the company manages the investments in accordance with Directive 2009/65/EC (UCITS Directive) or manages them in accordance with conditions that are equivalent to Directive 2009/65 EC;
3. the organisational structures of the parent undertaking and the company are such that the voting rights can be exercised independently from the parent undertakings;
4. the persons who decide how the voting rights will be exercised act independently; and
5. in the event that one of the parent undertakings or another company controlled by the them is a client of the company or holds an interest in the assets managed by the company, there is a clear written mandate governing an independent client relationship between the parent undertakings or the other companies controlled by them and the company, or there will be for any such case in future.

The parent undertakings must continuously update the list with the names of the investment services enterprises or management companies and the authority (or authorities) supervising them, i.e. in the event of changes, and must submit the list to BaFin. The aforementioned statement must be filed together with an organisational chart of the or of each individual parent undertaking of the investment services enterprise or management company; note that it is possible for the statements to be made by one parent undertaking in its own name and on behalf of the other (individually named) parent undertakings.

Where the conditions as described above are satisfied only at a later time (i.e. after the parent undertakings have become subject to the notification obligation and notifications have already been submitted), the voting rights of the investment services enterprise or management company are no longer attributable to the parent undertakings. If in these cases the parent undertakings fall below thresholds, they are in turn subject to the notification obligation under section 33 of the WpHG.

If one of the conditions described above no longer applies, section 35 (2) or (3) of the WpHG is no longer applicable and the investment services enterprise or management company is classified again as a subsidiary under section 35 (1) of the WpHG. In this case, the notification obligation for the parent undertakings of the investment services enterprise or management company is restored.

I.2.5.11.2.2 Partial independence in groups of companies

When the TRL-AndRL-UmsG came into force on 26 November 2015, BaFin modified its administrative practice such that partial independence in groups of companies is possible (abandonment of the all-or-nothing principle). For example, the ultimate group parent undertaking can even declare that all of its subsidiaries are independent if they are subject to instructions between each other. In this case, voting rights of the management companies are no longer attributable under section 34 (1) sentence 1 no. 1 of the WpHG to the ultimate parent undertaking.

Example

X SE has two subsidiaries, Y GmbH and Z AG, which are both asset management companies. As the ultimate parent undertaking, X SE meets the independence conditions under section 35 (3) of the WpHG with regard to Y GmbH. As the ultimate parent undertaking, X SE meets the independence conditions under section 35 (3) of the WpHG with regard to Y GmbH.

76 See Recital 21 of the Transparency Directive.
In this case, X SE can declare that Y GmbH and Z AG are independent (section 35 (3) of the WpHG), with the result that they no longer have the status of a subsidiary and voting rights are no longer attributed to X SE (case of partial independence). X might then have to file a notification that a holding of voting rights had fallen below a threshold. Z AG remains a subsidiary of Y GmbH, with the result that the voting rights of Z AG have to be attributed to Y GmbH.

1.2.5.11.2.3 Exception from discontinuation of subsidiary status (section 35 (5) of the WpHG)

Despite the applicability of the aforementioned conditions of section 35 (2) or (3), however, an investment services enterprise or asset management company/EU management company is classified as a subsidiary under section 35 (5) of the WpHG if

1. the parent undertaking or another company controlled by it holds an interest in common funds of the investment services enterprise or management company and
2. the investment services enterprise or management company cannot exercise the attached voting rights at its discretion, but only on the basis of instructions.

In such cases the investment services enterprise or management company remains a subsidiary with regard to this common fund (section 35(1) of the WpHG). These units of the investment services enterprise or management company must therefore be attributed to the parent undertaking under section 34 (1) sentence 1 no. 1 of the WpHG.

Example

An asset management company manages four funds, each of which contains 1.0% of a listed issuer’s shares. The parent undertaking of the asset management company holds a 50% interest in one of the four funds. The following applies to attribution to the parent undertaking:

If the parent undertaking of the asset management company can issue instructions regarding the exercise of voting rights, the asset management company is deemed to be a subsidiary with regard to the voting rights held in this fund (i.e. 1.0%) (section 35 (1) of the WpHG).

On the other hand, if there is a clear written mandate between the asset management company and the parent undertaking governing an independent client relationship, the asset management company is not deemed to be a subsidiary (section 35 (3) of the WpHG), with the result that the voting rights held as fund’s assets are also not attributed to the parent undertaking under section 34 (1) sentence 1 no. 1 of the WpHG.

However, it should be noted that, as an investor in the fund, it may be that the parent undertaking will be proportionately attributed 0.5% of the voting rights under section 34 (1) sentence 1 no. 2 of the WpHG (holding for third party account), which in the aggregate with other voting rights may result in thresholds being triggered.

1.2.5.11.2.4 Companies whose registered office is in a third country (section 35 (4) of the WpHG)

For a company whose registered office is in a third country and that would require authorisation for financial portfolio management under section 32 (1) sentence 1 in conjunction with section 1 (1a) sentence 2 no. 3 of the KWG or permission under section 20 or section 113 of the KAGB if its registered office or head office was in Germany, the conditions in section 35 (4) of the WpHG in conjunction with sections 2 and 3 of the TranspRLDVO apply. Accordingly, the parent undertakings must submit a written declaration to BaFin indicating the name of the company and the authority responsible for supervising it, according to which:

- the legislation of the company’s home country sets out that the company must in all cases be able to exercise the voting rights it manages freely and independently, and that it is not required to consider the interests of the parent undertakings or of other undertakings controlled by them in the event of conflicts of interests,
- under the legislation in the company’s home country, the company at all events exercises the voting rights it manages freely and independently from the parent undertakings or from any other company controlled by the parent undertakings, and it is not required to consider the interests of the parent undertakings or of the other companies controlled by the parent undertakings in the event of conflicts of interests,
- the organisational structures of the parent undertakings and the company are such that the voting rights are exercised independently from the parent undertakings,
the persons who decide how the voting rights are to be exercised act independently.

- in the event that one of the parent undertakings or any other company controlled by the parent undertakings is a client of the company or is invested in the assets managed by it, there is a clear written mandate governing an independent client relationship between the parent undertaking or another company controlled by the parent undertakings and the company, or there will be for any such case in future.

In this case as well, the parent undertakings must update the list with the names of the companies and the authority (or authorities) supervising them on an ongoing basis, i.e. in the event of changes. Equally, a parent undertaking can submit the statements in its own name as well as in the name of and on behalf of the other parent undertakings. The exception to the discontinuation of subsidiary status (section 35 (5) of the WpHG) applies mutatis mutandis.

I.2.5.12 Notification obligations in connection with collective investment undertakings

Voting shares are often held by collective investment undertakings, which can be organised in a wide range of forms. As soon as the collective investment undertaking holds a notifiable holding of voting shares, it must be examined which parties may be subject to reporting requirements. The collective investment undertaking itself, the management company and the investors are to be considered.\(^77\)

I.2.5.12.1 Notification obligations of the collective investment undertaking (sections 91 et seq. of the KAGB)

A collective investment undertaking can only itself be subject to a notification obligation under sections 33 et seq. of the WpHG if it is a separate legal entity (for example an investment stock corporation). The question of whether this is the case must be decided on the basis of the relevant applicable jurisdiction\(^78\), and it may be difficult to make this distinction in individual cases. The assets belonging to the collective investment undertaking can only be “owned” by it and it can only be the addressee of a notification obligation if the rights and obligations are attributable to the collective investment undertaking.

By contrast, if the collective investment undertaking is not legally dependent, it is a common fund in accordance with sections 92 et seq. of the KAGB only notification obligations for the management company and for the investors can be considered.

I.2.5.12.2 Notification obligations of the management company

The management company, which manages the voting shares or instruments belonging to the collective investment undertaking and exercises the voting rights attached to the shares, is always subject to the notification obligation:

- If the collective investment undertaking is a separate legal entity, the collective investment undertaking “owns” the assets and its notification obligation results already from sections 33 and 38 of the WpHG. In the case of an external asset management company (section 18 of the KAGB), the voting rights belonging to the collective investment undertaking are attributed to the management company under section 34 (1) sentence 1 no. 6 of the WpHG.

- If the collective investment undertaking is not a separate legal entity, the question is whether the management company holds the voting rights as fiduciary owner for the account of the investors (“trust solution”), or whether the assets held by the collective investment undertaking belong to the investors as co-owners (“co-ownership solution”\(^79\)). If the management company acts legally as a trustee, it notifies the corresponding voting rights as the direct owner of the voting rights. In the case of the co-ownership solution, legal title to the shares is attributed to the investors, and the voting rights are attributed to the management company (just as in the case of the collective investment undertaking being a separate legal entity) under section 34 (1) sentence 1 no. 6 of the WpHG.

I.2.5.12.3 Notification obligations of the investors in collective investment undertakings

Because of the derogation in section 1 (3) of the WpHG, investors in retail investment funds are generally not subject to any notification obligation with regard to voting rights of the collective investment undertaking. The following remarks on notification obligations therefore relate only to investors in special investment funds. To determine the potential notification obligation applicable to investors, a

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77 For full details, see Dietrich, ZIP 2016, 1612.
78 Closed-ended German collective investment undertakings are always legally independent (see section 139 of the KAGB).
79 This distinction was codified in section 94 (2) sentence 3 of the KAGB.
distinction must be made in turn whether the investment fund is a separate legal entity or not:

- If the special investment fund is a separate legal entity and hence itself the owner of the notifiable voting shares, these can be attributable to an investor under section 34 (1) sentence 1 no. 2 of the WpHG, because the investment fund holds the voting rights for the account of the investors (by analogy with section 1 (10) KAGB), or under section 34 (1) sentence 1 no. 1 of the WpHG, if the investor holds the majority of the shares or units in the investment fund (in the case of non-voting shares of an investment stock corporation (section 109 (3) of the KAGB), for example, control by an investor cannot be considered because non-voting shares do not convey any voting rights).

- By contrast, if the special investment fund is not a separate legal entity, the notification obligations applicable to the investors depend on the chosen allocation of title in the assets of the investment fund (trust or co-ownership solution): If the investors are co-owners of the voting shares, they are subject to a notification obligation under section 33 (1) of the WpHG from their proportionate share of voting rights held in the investment fund (direct holding); if the management company is the fiduciary owner of the voting shares, the investors receive a proportionate attribution as beneficial owners under section 34 (1) sentence 1 no. 2 of the WpHG. In both cases, there is therefore a proportionate attribution to the investors of the voting rights held in the investment fund.

### Example

An asset management company manages 2.0% of the shares of a security in fund A, which is not a separate legal entity (co-ownership solution), and 5.0% of the shares of the same security in fund B (trust solution). Investor X is the sole investor in fund A and holds a 50% interest in fund B.

The asset management company notifies a total of 7.0%, of which 2.0% is attributable to it under section 34 (1) sentence 1 no. 6 of the WpHG. Investor X notifies a total of 4.5%, of which 2.5% is attributable to it under section 34 (1) sentence 1 no. 2 of the WpHG.

### 1.2.5.12.4 Notification obligations in the case of collective investment undertakings established in other jurisdictions

The above remarks apply to foreign management companies (EU/EEA and third countries) *mutatis mutandis*. In this case, too, the starting point for examining any notification obligation is always the question of the extent to which the collective investment undertaking is a separate legal entity and who is the legal owner of the shares. Some typical fund structures under other jurisdictions are examined in the following with respect to notification obligations under sections 33 et seq. of the WpHG.

### 1.2.5.12.4.1 Société d’Investissement a Capital Variable (SICAV)

A SICAV (*Société d’Investissement à Capital Variable*) is comparable to an investment stock corporation (*Investmentaktiengesellschaft*) with variable capital under German law. In this case, too, a fund has the legal form of a company that may either manage itself or appoint an external management company. The shares with voting rights attached are owned by the SICAV. Its notification obligations are therefore determined by section 33 of the WpHG. In many cases, the voting rights in such cases are exercised by investment managers. Since they can normally exercise the voting rights at their own discretion, attribution in this case is governed by section 34 (1) sentence 1 no. 6 of the WpHG (see externally managed investment stock corporation).

In addition, attribution to investors under section 34 (1) sentence 1 no. 2 of the WpHG may be considered because the (special) SICAV normally holds the shares for the account of the investors. At the same time, the SICAV units represent the company’s shares, with the result that, in the event of a share of more than 50% in the SICAV being the asset management company, attribution under section 34 (1) sentence 1 no. 1 of the WpHG is also conceivable.

### 1.2.5.12.4.2 Funds with own legal capacity

Funds in Anglo-American jurisdictions often have own legal capacity (e.g. in the legal form of a limited company) and are therefore themselves subject to the notification obligation under section 33 of the WpHG if they trigger a threshold. In the case of these funds, management is usually performed by management companies, which also exercise the voting rights among other things. Since they can normally exercise the voting rights at their own discretion, the voting rights are also attributed to these companies under section 34 (1) sentence 1 no. 6 of the WpHG. Likewise, voting rights may be attributed to investors under section 34 (1) sentence 1 no. 2 of the WpHG because the funds with
legal capacity commonly hold the shares for the account of the investors. At the same time, the fund units represent the company’s shares, with the result that, in the event of a share in the fund of more than 50%, attribution under section 34 (1) sentence 1 no. 1 of the WpHG is also conceivable.80

Examples

Fund A Limited holds 2.0% of the shares of a security in its assets, fund B Limited holds 4.0% of the same security in its assets. The common management company is C Management Limited. Investor X holds 40% of the units in each of the funds A and B.

Of the two funds, only fund B Limited is subject to a 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 under section 34 (1) sentence 1 no. 6 of the WpHG. Investor X is not subject to any notification obligation because it is attributed a proportionate share of only 2.4% under section 34 (1) sentence 1 no. 2 of the WpHG.

Fund A Limited holds 4.0% of the shares of a security in its assets. The management company is C Management Limited. Investor X holds 80% of the units in fund A Limited. In this case, fund A Limited and C Management Limited each notify 4.0%. All of the voting rights are attributable to C Management Limited under section 34 (1) sentence 1 no. 6 of the WpHG. Investor X also notifies 4.0%, all of which is attributable to it under section 34 (1) sentence 1 no. 1 of the WpHG (because it accounts for more than 50% of the units in the fund); however, 3.2% of it is also attributable to Investor X under section 34 (1) sentence 1 no. 2 of the WpHG because the fund holds shares in the amount of 80% for investor X.

Special case: Investment compartments (subfunds)/umbrella funds

Foreign funds with legal capacity are sometimes subdivided into subfunds. Since these subfunds generally do not have any legal capacity of their own and hence cannot be subject to the notification obligation, only their legal owner, the (umbrella) funds with legal capacity, can be subject to the notification obligation. In such cases, the sum of the units held by the investors in the relevant subfunds corresponds to the shares in the (umbrella) funds, which means that there are no differences for investors in subfunds compared with investors in funds without subfunds. These statements apply to umbrella investment stock corporations mutatis mutandis.

Example

Fund A Limited has two legally dependent subfunds B and C. Both subfunds each hold 2.0% of an issuer. D Management Limited is the management company. Investor X holds 25% of subfund B and 50% of subfund C. Only fund A Limited, as owner of the two subfunds B and C, as well as D Management Limited, which is attributed the voting rights (4%) under section 34 (1) sentence 1 no. 6 of the WpHG, are subject to the notification obligation. Investor X is not subject to the notification obligation since its total proportionate share in the issuer’s voting rights is only 1.5% (0.5% through subfund B and 1.0% through subfund C), whereas it holds 37.5% of the units in fund A Limited.

I.2.5.12.5 Excursus: Prime brokerage

Prime brokerage is the term used for a bundled package of services that a bank offers to an investor, often a (hedge) fund; the concrete legal structures used for this may differ considerably. BaFin’s experience is that regularly if a prime broker is engaged, it is important to precisely examine the legal ownership of the shares and the rights and obligations agreed between the parties (bank and client) in this context, including the applicable national legislation, in order to identify any existing notification obligations. The following remarks also apply to arrangements that the parties involved do not regard as prime brokerage, or as non-typical prime brokerage. In prime brokerage, the client generally grants the custodian bank a right of use (which, as an instrument, is generally subject to a notification obligation) to the shares belonging to the client; in other words the right to use shares of the client in its portfolio for the bank’s own transactions and to acquire them for this purpose. However, the bank is partly also the formal legal owner (of the shares it holds in custody), with the result that the client is “only” the beneficial owner of the shares. In this case, the right of use is not subject to

80 See in particular on the question of control by virtue of a capital majority (but not a majority of voting rights) I.2.5.1.1.2 above.
any notification obligation as an instrument of the bank, because the bank is already the owner of the shares held in custody and has to file a notification under section 33 of the WpHG.

If the bank exercises its right of use, the client normally has the right to require the account to be replenished. As a general rule, this right is an instrument subject to a notification obligation for the client under section 38 of the WpHG, whereas the client’s holding of voting rights under section 33 of the WpHG is correspondingly reduced. To comply with its notification obligation, the client is reliant in this respect on correct information from the bank about its current custody account balance. As an additional service, prime brokers often offer their clients hedging transactions in which the bank sells a put option and in return the client sells a call option to the bank (collar). Notification obligations for instruments in this context depend on whether the bank is to be regarded as the owner of the shares held in custody. It has emerged in practice in this context that banks and clients do not pay sufficient attention to the notification obligations of the parties in the case of prime brokerage. As a result, both the banks – which cannot make use of the depositary exemption (see 1.2.6.5) because of their own economic interest in the shares held in custody – and the clients notified the shareholdings as “direct” holdings. In such cases, consulting BaFin in good time is advisable.

1.2.6 Non-consideration of voting rights (section 36 of the WpHG)

1.2.6.1 General guidance

1.2.6.1.1 Overview of exemption criteria

Section 36 of the WpHG sets out that, when calculating the holdings of voting rights, voting rights attached to shares of an issuer are disregarded if they

- are held by credit institution or investment services enterprise in the trading book (section 36 (1));
- have been acquired for the sole purpose of clearing and settlement within the usual short settlement cycle (section 36 (3) no. 1);
- are held by a depositary and can only be exercised on the basis of specific instructions (section 36 (3) no. 2);
- are acquired or sold by a market maker (section 36 (5));
- were acquired for stabilisation purposes (section 36 (2));
- are provided to members of the European System of Central Banks to carry out their specific functions (section 36 (4)).

With the exception of shares held by depositaries (section 36 (3) no. 2 of the WpHG), voting rights that are disregarded under section 36 (1) to (5) of the WpHG may not be exercised (section 36 (6) of the WpHG).

Under section 38 (1) sentence 2 of the WpHG, the exemption criteria in section 36 of the WpHG also apply to voting rights relating to instruments.

1.2.6.1.2 Calculating holdings of voting rights for voting shares held in the trading book and by market makers

To calculate the voting rights in the trading and market making book, section 36 (8) of the WpHG sets out that the requirements in Article 9(6)(b) and 13(4) of the Transparency Directive must be observed. The regulatory technical standards (RTS) in Articles 2 and 3 of the directly applicable Commission Delegated Regulation (EU) 2015/761 of 17 December 2014 apply in this respect. Under Article 2 of Commission Delegated Regulation (EU) 2015/761, the voting rights attached to shares under sections 33 and 34 of the WpHG and the voting rights relating to instruments under section 38 of the WpHG must be aggregated for the purpose of calculating the trading book and market making exemptions (“horizontal aggregation”).

Under Article 3 of Commission Delegated Regulation (EU) 2015/761, the trading book and market making exemptions within groups of companies – which comprise all parent-subsidiary relationships with the exception of the cases described in section 35 (2) to (6) of the WpHG – are calculated in accordance with section 34 (1) sentence 1 no. 1 of the WpHG, in other words from “bottom” to “top” (“vertical aggregation”).

Example

A AG has two direct subsidiaries, B AG and C AG. The trading book holdings are as follows: B AG 3.5% voting rights, C AG 1.0% instruments and A AG 2.5% voting rights. In this case, A AG must aggregate all trading book positions of voting rights and instruments. With 7.0%, A AG exceeds the 5% threshold (under section 36 (1) of the WpHG) in the trading book and must therefore disclose this holding.

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81 Articles 2 and 3 of Commission Delegated Regulation (EU) 2015/761 refer in each case to the relevant requirements of the Transparency Directive. For example, Article 2 refers to Articles 9, 10 and 13 of the Transparency Directive, meaning the notification requirements due to major holdings of voting rights attached to directly held (Article 9) or attributed (Article 10) voting shares and voting rights attached to financial instruments (Article 13). Article 9 corresponds to the notification requirement in section 33, Article 10 to the attribution requirements in section 34 and Article 13 of the Transparency Directive corresponds to section 38 of the WpHG.
I.2.6.1.3 Separate applicability of the trading book and market making exemption criteria

Provided the requirements of the individual criteria have been satisfied, they exist separately in parallel under BaFin’s existing administrative practice. This means that institution acting as a market maker and also holding voting rights in the trading book may utilise the maximum limits of both criteria to the full extent in each case. However, this practice is under discussion at European level, and there may be changes in the future in connection with European harmonisation.

Example (column 1 of the table below)

A company holds 2.9% of the voting rights attached to an issuer’s shares in its non-trading book, 4.9% in its trading book and a further 1.0% of the voting rights of the same issuer’s shares in its market making book. In this case, the company is not subject to any notification obligation because it does not exceed the permissible maximum limits in its trading and market making books and remains below the 3% threshold with its share in the non-trading book. Nor is there any attribution to its parent undertaking.

Table 1: Other 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>
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<td>2.9%</td>
<td>2.9%</td>
<td>2.9%</td>
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</tr>
<tr>
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<td>5.0%</td>
<td>5.1%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>5.0%</td>
</tr>
<tr>
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<td>6.0%</td>
<td>10.0%</td>
<td>2.0%</td>
<td>9.9%</td>
</tr>
<tr>
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<td>9.0%</td>
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<td>8.9%</td>
<td>12.9%</td>
<td>11.0%</td>
<td>17.8%</td>
</tr>
</tbody>
</table>

3% 3% 3%

Notifiable thresholds

- - 3% - 5% -

5% 10% 5%

voting rights

2.9% 2.9% 4.0% 8.0% 2.9% 12.9% 9.0% 2.9%
I.2.6.2.2 Non-inclusion up to and including a 5 per cent holding of voting shares

All voting rights up to and including 5.0 per cent attached to shares held in the trading book are considered to be exempt; above 5 per cent plus 1 voting right, however, all of the voting rights must be included.

Example

An investment services enterprise holds 1.5% of the voting rights attached to shares in its non-trading book and 3% of the same security in its trading book. There is no notification obligation because the shares held in the trading book are disregarded. If the investment services enterprise acquires an additional 3% for the trading book, this triggers the notification obligation because the 3% and 5% thresholds are exceeded by the (now) 7.5% holding.

If an additional 2% is added to the non-trading book, the holding reaches 3.5% in the non-trading book, but the investment services enterprise still holds 9.5% in total, so no new notification obligation is triggered because the 10% threshold is not reached or exceeded.

Non-consideration of all voting rights attached to shares in the trading book applies again as soon as the holding in the trading book reaches 5 per cent or less.

Example

An investment services enterprise holds 3.5% of the voting rights attached to shares in the non-trading book and 7% of the voting rights attached to shares in the trading book; it had already filed a corresponding notification for 10.5%. If the investment services enterprise sells 3% from the trading book, a notification obligation for falling below the 10% and 5% thresholds to 3.5% is triggered because the 4% in the trading portfolio is disregarded.

I.2.6.2.3 Non-consideration of voting rights relating to instruments (section 38 (1) sentence 2 of the WpHG) in the trading book

The following must be noted when section 36 (1) of the WpHG is applied to voting rights relating to instruments (section 38 (1) sentence 2 of the WpHG): based on the requirements of Article 2 of the directly applicable Commission Delegated Regulation (EU) 2015/761, both the holdings under sections 33 and 34 of the WpHG and the instruments must be aggregated (horizontal aggregation). Non-consideration under section 36 (1) of the WpHG can only be considered after aggregation.

I.2.6.3 Voting rights held for stabilisation purposes (section 36 (2) of the WpHG)

I.2.6.3.1 Stabilisation in accordance with Regulation (EC) No. 2273/2003 and the Market Abuse Regulation

Under section 36 (2) of the WpHG, voting rights attached to shares are disregarded when calculating the holdings of voting rights

- if they were acquired for stabilisation purposes under Regulation (EC) No. 2273/200382;
- if the holder of the shares ensures that the voting rights attached to the shares in question are not exercised or otherwise used to exert influence over the management of the issuer.

Until it was withdrawn as of 3 July 2016, Regulation (EC) No. 2273/2003 set out the conditions for buy-back programmes and measures to stabilise the price of financial instruments; it was withdrawn by sentence 1 of Article 37 of the Market Abuse Regulation83. Since 3 July 2016, stabilisation measures have been governed by Article 5(4) of the Market Abuse Regulation in conjunction with Commission Delegated Regulation (EU) 2016/1052 of 8 March 2016.

I.2.6.3.2 Definition of (price) stabilisation

Price stabilisation means a purchase or offer to purchase securities, or a transaction in associated instruments equivalent thereto, which is undertaken by a credit institution or an investment firm in the context of a significant distribution of such securities exclusively for supporting the market price of those securities for a predetermined period of time, due to selling pressure in such securities (Article 3(2)(d) of the Market Abuse Regulation).

This aims to enhance the confidence of investors and issuers in the financial markets, in particular in the case of larger share issues.84

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Ancillary stabilisation is of practical relevance in connection with the agreement of over-allotment (greenshoe) options used when shares are oversubscribed. This agreement allows the underwriter (or underwriters acting in a syndicate) to accept subscriptions or offers to purchase in the underwriting agreement that are greater than the originally planned placement volume. Granting such an over-allotment option in favour of an investment services enterprise or a credit institution involved in the offer allows them to purchase a certain amount of additional securities at the offer price for a certain period of time after the offer.²⁵

I.2.6.3.3 Addressees of the exemption

Based on the definition of price stabilisation, addressees of the exemption under section 36 (2) of the WpHG can only be investment services enterprises (Article 3(1) no. 2 of the Market Abuse Regulation) and credit institutions (Article 3(1) no. 3 of the Market Abuse Regulation). Because of the clearly defined group of addressees, the exemption for stabilisation measures cannot be considered for retransfer claims (= instrument within the meaning of section 38 of the WpHG) of existing shareholders who made existing shares available to the underwriter in order to settle over-allotments (= greenshoe shares).

I.2.6.4 Clearing and settlement (section 36 (3) no. 1 of the WpHG)

This exemption applies only to clearing and settlement in the narrower sense, i.e. the shares in question must have been acquired on- or off-exchange solely for the purpose of clearing and settlement. An additional requirement is that the shares are not held for longer than three trading days. The clearing and settlement business does not have to be the sole service offered by the company, but the share purchase must be exclusively a clearing and settlement transaction. BaFin has now changed its administrative practice regarding notification obligations when new shares are subscribed by an underwriter or an underwriting syndicate (sections 185 and 186 (5) of the AktG). It can be assumed in these cases that shares are held solely for clearing and settlement. If the other conditions set out in section 36 (2) no. 1 of the WpHG have been met, underwriters or syndicates can disregard such shares. The background to the change in administrative practice is the introduction of the exemption criterion for holding shares in conjunction with stabilisation measures (section 36 (2) of the WpHG) - if such transactions do not trigger any notification obligation, it would be contradictory to assume a notification obligation when such shares are subscribed. The same applies to the purchase of existing shares, i.e., shares that have already been issued, for the purpose of placing them on the market.

I.2.6.5 Depositaries (section 36 (3) no. 2 of the WpHG)

In Germany, the depositary exemption under section 36 (3) no. 2 of the WpHG applies to the activity of financial services institutions under section 1 (1) no. 5 of the KWG (safe custody and management of securities for others [safe custody business]). In Germany, however, the exemption is only of minor importance in practice because it only covers those depositaries that are the legal owner of the shares held in safe custody and exercise the voting rights attached to the shares held in safe custody (belonging to the depositary) only on the basis of instructions given in writing or by electronic means.

Under German law, the custodian (depositary) bank does not normally become owner of the shares held in safe custody, so non-consideration under section 36 (3) no. 2 of the WpHG is out of question; additionally, the custodian banks are not normally attributed the voting rights attached to shares owned by their clients under section 34 (1) sentence 1 no. 6 of the WpHG, as they can generally only exercise the voting rights in accordance with the instructions of their clients.²⁶

This primary application case in practice is therefore that of depositaries of fund managers outside Germany, since the depositaries there may acquire title in the shares held in safe custody. The voting rights are attributable to the funds, as the economic beneficiaries (section 34 (1) sentence 1 no. 2 of the WpHG). However, it may be necessary in individual cases to agree the conditions for application of the depositary exemption with BaFin, because BaFin’s administrative practice means that the exemption set out in section 36 (3) no. 2 of the WpHG can only be exercised if the activity of the depositary is limited to pure safe-keeping. If other agreements are made by the depositary and the client over and above pure safe-keeping that grant the depositary (beneficial) rights to the shares held in custody in certain circumstances, e.g. in the context of prime brokerage services, the depositary exemption cannot be exercised. If the depositary exemption applies (and it the depositary is the owner of the shares

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²⁵ See points (e) to (g) of Article 1 of Commission Delegated Regulation (EU) 2016/1052.

²⁶ See already under I.2.5.3.3.
held in custody), the depositary is not named in the notifications (see no. 4 in the mandatory standard form under section 12 (1) of the WpAV in conjunction with the Annex to the WpAV).

**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. X’s activity is limited to the pure safe-keeping of shares.

Depositary X and fund B Limited are not subject to the notification obligation because depositary X, under section 36 (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% under section 34 (1) sentence 1 no. 2 of the WpHG as the beneficiary, C Management Limited is attributed a total of 6.5% under section 34 (1) sentence 1 no. 6 of the WpHG. However, neither of them may name depositary X in their notifications.

In this regard, the designation as market maker is not decisive for being classified as a market 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 holdings of a market maker are considered to be exempt if the person in question:
- acts in its capacity as a market maker,
- is authorised under section 32 (1) sentence 1 in conjunction with section 1 (1a) sentence 2 no. 4 of the KWG,
- does not intervene in the management of the issuer and does not exert any influence on the issuer to buy the shares in question or to support the share price, and
- notifies BaFin without undue delay, and at the latest within four trading days, that it acts as market maker, disclosing the shares in question.

Market makers must also notify BaFin if they no longer offer shares or other financial instruments on a continuous basis (section 4 (1) of the TranspRLDVO). Both notifications may be submitted to BaFin by mail or fax.

All voting rights attached to shares held in the market making book are considered to be exempt up to 10 per cent minus one voting right; if the voting rights attached to shares total to 10 per cent or more, all of the voting rights must be included.

**Example**

A market maker holds 4% of the voting rights attached to an issuer’s shares in its non-trading book and 9% of the voting rights of the same issuer’s shares in its market making book. The market maker has notified that the 3% threshold was exceeded, reaching 4%; it was not required to notify the holding held in the market making book. If the market maker acquires an additional 3% of voting rights attached to shares for its market making book, this triggers the notification obligation because the 5%, 10% and 15% thresholds are exceeded to reach 16%.

Non-consideration of all the voting rights attached to shares in the market making book applies again as soon as the holding in the market making book falls below 10 per cent.

1.2.6.6 Market makers (section 36 (5) of the WpHG)

Under the legal definition in section 36 (5) of the WpHG, a market maker means any person that holds itself out on a market on a continuous basis as being willing to buy or sell, by way of proprietary trading, shares or other instruments at prices defined by it. The definition of a market maker in section 36 (5) of the WpHG corresponds to the requirements of point (n) of Article 2(1) of the Transparency Directive and covers activity on a publicly accessible market in which the market maker holds itself out as a buyer or seller on this market by submitting quotes in order to ensure the liquidity of a particular security. The term is therefore narrower than the concept defined in point (k) of Article 2(1) of the European Short Selling Regulation, which also includes fulfilling orders initiated by clients or in response to clients’ requests to trade.
I.2.7 Notifications by parent undertakings ("group notifications") (section 37 of the WpHG)

Under section 37 (1) of the WpHG, a subsidiary is exempted from the notification obligations under sections 33, 38 and 39 of the WpHG if the notification is filed by its parent undertaking or, if the parent undertaking is itself a subsidiary, by this parent undertaking ("group notifications").

I.2.7.1 Group notifications

In a group notification, changes in investments or holdings within a group are notified by the parent undertaking in a single voting rights notification. The law (section 37 of the WpHG in conjunction with section 12 (2) of the WpAV) does not limit this form of notification to groups as defined by the AktG, but allows a single notification for all parent–subsidiary relationships (section 35 (1) of the WpHG). In a group notification, the parent undertaking files a notification and thus notifies its direct and indirect holdings. Group notifications are therefore not possible in the cases described in section 35 (2) to (6) of the WpHG, as in these cases the entity subject to the reporting requirement is not classified as a subsidiary. According to the applicable provisions, there is generally a notification obligation under sections 33 and 34 of the WpHG for each entity in a group whose holdings of voting rights triggers a notifiable threshold. However, the group notification also fulfills the notification obligation of each subsidiary since the parent undertaking’s notification already contains the relevant information relating to its subsidiaries. That is because each company in a group must include information about the group as a whole in the mandatory standard form (in no. 8).

According to the legislator’s intention, it is not problematic that in individual cases the information contained in the notification by the parent undertaking relating to its subsidiaries does not correspond 1:1 to the information that the relevant subsidiary would disclose if it filed its own notification. However, according to the legislator’s intention, the single holdings of the individual group companies are not decisive in a parent–subsidiary relationship, but rather the total holdings of voting rights, instruments and aggregate holdings within the group.

There is no statutory obligation to file a group notification, but if the ultimate parent undertaking has to file a notification because it has itself triggered a threshold in the case of sections 33, 38 and/or 39 of the WpHG, notifications filed by the subsidiaries become obsolete because, as explained above, the notification of the parent undertaking already contains the relevant information relating to its subsidiaries, and this is regarded as fulfilling the notification obligations of the subsidiaries; there is therefore no longer a notification obligation for the subsidiary. In these cases, the subsidiaries may not file voluntary notifications because they would run counter to the legislative purpose – only a single notification in the group. The exemptive effect of group notifications also applies to cases in which notification obligations are only triggered at the level of the subsidiaries (e.g. in the case of intragroup transfers of investments), but not also at the level of the parent undertaking. Section 12 (2) of the WpAV refers to the “filing of a notification” by the parent undertaking and not to a parent undertaking “meeting its own notification obligation”. A voluntary group notification by the parent undertaking is not only able to satisfy the notification obligations of the subsidiaries, BaFin also expressly encourages the filing of a group notification in such cases because this ensures the continuity of the notifications by the party subject to the notification obligation and provides an up-to-date overview of the holdings in the group.87

I.2.7.2 Filing a group notification using the standard form

Certain information must be included in the mandatory standard form in the case of parent–subsidiary relationships. More detailed guidance can be found in the form available on BaFin’s website.

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Example

If, in the above example (16% in total, of which 12% in the market making book), the market maker again sells 5% from its market maker book, this triggers the notification obligation because the portfolio falls below the 15%, 10% and 5% thresholds to reach 4%, as all of the 7% in the market making book is disregarded.

If so required by BaFin, the market maker must be able to prove which shares or other instruments it holds in its capacity as market maker and in what amount – if it is unable to do so, BaFin may order it to hold the shares or other instruments in custody in a separate account (section 4 (2) of the TransPRLDVO).

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87 See also ESMA Q&A, available at op cit., no. 25.
I.2.8 Notification obligations relating to holdings of instruments (section 38 of the WpHG)

I.2.8.1 Instruments

Notification obligations apply to directly or indirectly held instruments\(^{88}\) that give their holder the right to acquire, unilaterally under a legally binding agreement, issued shares with voting rights attached of an issuer whose home country is the Federal Republic of Germany, or that grant the holder a corresponding option to acquire such shares (section 38 (1) no. 1 of the WpHG) and for instruments with a similar economic effect (section 38 (1) no. 2 of the WpHG). When the TRL-AndRL-UmsG came into force on 26 November 2015, the notification obligations previously governed by sections 25 and 25a of the WpHG (old version) were absorbed into the new section 38 of the WpHG. Section 38 (1) no. 1 of the WpHG corresponds to section 25 WpHG (old version) and section 38 (1) no. 2 of the WpHG corresponds to section 25a WpHG (old version). Whereas the former requirements of section 38 of the WpHG referred to the option to acquire shares, the new requirements of section 38 (1) no. 2 of the WpHG focus on the similar economic effect of an instrument with the right to acquire shares. Ultimately, there is no substantive change compared with the previous requirement.\(^{89}\) As before, the scope of this provision is thus very broad. According to the explanatory memorandum to section 25a of the WpHG (old version) all instruments that effectively or constructively enable the acquisition of shares are covered.\(^{90}\) It is sufficient if the acquisition could follow the economic logic of the instrument.\(^{31}\) The term “instrument” is deliberately not defined in section 38 of the WpHG in order to capture all cases that have a similar economic effect to instruments within the meaning of section 38 (1) sentence 1 no. 1 of the WpHG. The term instrument includes in particular call and put options, futures and contracts for difference. However, there was an amendment of the previous legal position in the case of cash-settled instruments: If, as a general rule, the number of underlying shares must be used for instruments for the calculation under section 38 (3) sentence 1 of the WpHG, the number of shares in case of instruments that provide exclusively for a cash settlement under section 38 (3) sentence 2 of the WpHG is calculated solely on a delta-adjusted basis. The details of delta-adjusted calculations are governed by Article 5 of Commission Delegated Regulation (EU) 2015/761 of 17 December 2014. This stipulates that a generally accepted standard pricing model taking into account the elements relevant for the valuation of the instrument must be used consistently for the calculation. For the other conditions, in particular the factors to be taken into account for the calculation, refer to Article 5 of Commission Delegated Regulation (EU) 2015/761 of 17 December 2014.

An exhaustive list of the instruments covered by section 38 of the WpHG is not possible. The list in Article 13(1b) of Directive Amending the Transparency Directive (Transparency Directive III = [TDIII], which was added to section 38 (2) of the WpHG, makes no claim to be exhaustive. Nor is the “Indicative list of financial instruments that are subject to notification obligations according to Article 13(1b) of the revised Transparency Directive” maintained and published by ESMA to be regarded as exhaustive. For this reason, only certain typical scenarios and instruments will be addressed in the following.

I.2.8.1.1 Instruments under section 38 (1) no. 1 of the WpHG

- Forwards/futures/call options
  Forwards/futures and call options, provided that they convey not only the right to cash settlement but (also) the right to delivery of the shares, are typical instruments within the meaning of section 38 (1) no. 1 of the WpHG. By contrast, it is irrelevant for classification as an instrument whether or not the instrument is fungible or 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 party subject to the notification obligation either directly or indirectly holds instruments in an amount relevant for a threshold, a threshold may be triggered even if the exercise period has not yet been reached.

- Securities lending and repurchase agreements
  Rights to recall lent securities under securities lending and repurchase agreements may also fall within the scope of section 38 (1) no. 1 of the WpHG. However, this is only the case if the other conditions have been satisfied, in particular that the right to recall lent securities depends only on the holder of the right or the passage of time. This is not the case, for

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\(^{88}\) Section 38 of the WpHG refers only to “instruments”. Because this is due to the fact that the term “financial instruments” is legally defined in section 2 (4) of the WpHG, but this is too narrow for the purposes of section 38 of the WpHG, the term “financial instruments” is nevertheless used in the following for ease of understanding, without meaning financial instruments in the sense defined by section 2 (4) of the WpHG.

\(^{89}\) See Bundestag printed matter 18/5010, page 46.

\(^{90}\) See Bundestag printed matter 17/3628, page 19.

\(^{91}\) See Bundestag printed matter 17/3628, page 20.
example, with a non-genuine repurchase agreement (section 340b (3) of the HGB). In such cases, however, section 38 (1) no. 2 of the WpHG may be applicable. There is a general problem in connection with section 33 (3) of the WpHG, on the basis of which the focus is on the timing of the settlement of the transaction: on the basis of section 33 (3) of the WpHG, the dates on which the threshold is triggered differ in the lender’s notifications under section 33 of the WpHG and under section 38 of the WpHG, because the right to recall lent securities only arises on delivery (= transfer) of the shares to be borrowed. To avoid any artificial splitting up of the uniform securities lending transaction by two notifications in close succession, BaFin allows the date on which the threshold is triggered by the right to recall lent securities to be brought forward to the date on which the threshold is triggered under section 33 of the WpHG.

- Purchase agreements subject to conditions precedent
  Purchase agreements such as M&A agreements often contain conditions precedent. As with futures and forwards, the notification obligation under section 38 (1) no. 1 of the WpHG depends on the extent to which the purchaser can unilaterally bring about or waive fulfilment of the condition. If section 38 (1) no. 1 of the WpHG does not apply, the conditions set out in section 38 (1) no. 2 of the WpHG still have to be examined in such cases.92

I.2.8.1.2 Instruments under section 38 (1) no. 2 of the WpHG

- Cash-settled instruments
  These include, but are not limited to, contracts for difference, swaps (in particular cash-settled equity swaps) as well as call options and futures/forwards, to the extent these are cash-settled. The extent to which the counterparty hedges the transaction is irrelevant.

- Instruments conveying the right or obligation to acquire shares
  These include in particular the call options not already falling within section 38 of the WpHG and futures/forwards that provide for physical delivery of the shares, but that are subject to an additional condition precedent whose fulfilment cannot be brought about unilaterally by the holder of the call option or the future/forward. However, it also includes writing put options that provide for physical delivery.

- Baskets and indices
  Baskets of shares and indices may also constitute instruments. Under Article 4 of Commission Delegated Regulation (EU) 2015/761 of 17 December 2014, holdings of shares in baskets of shares and indices are only included if either the voting rights in a specific issuer held through financial instruments referenced to the basket or index represent one per cent or more of the voting rights attached to shares of that issuer, or the shares of the issuer represent 20 per cent or more of the total value of the securities in the basket or index.

- Convertible bonds
  Because instruments as defined by section 38 of the WpHG must reference shares that have already been issued, convertible bonds only fall within the scope of the provision if the issuer can settle the bond using its treasury shares when the bondholder exercises the conversion right. However, because the holder of the conversion right does not normally have the unilateral right to acquire shares that have already been issued, these instruments are subject to the reporting requirement set out in section 38 (1) no. 2 of the WpHG.

- Non-genuine repurchase transactions
  Unlike genuine repurchase transactions (section 340b (2) of the HGB), non-genuine repurchase agreements (section 340b (3) of the HGB) do not impose any retransfer obligation on the transferee for the previously acquired shares. The transferee is merely entitled to retransfer the shares. In this respect, non-genuine repurchase transactions are similar to a physical put option and thus fall under section 38 (1) no. 2 of the WpHG.

- Cash settled put options
  Cash settled put options must be included by the option writer under section 38 (1) no. 2 of the WpHG. When a put option is entered into, the writer can enable the counterparty to build a position in the share in question that the option writer may have access at a later time.

- Chain financial instruments
  “Chain” financial instruments are also normally instruments within the meaning of section 38 (1) no. 2 of the WpHG: “Chain” financial instruments are instruments whose exercise initially leads to the

92 Regarding the distinction from section 33 (3) of the WpHG, see I.2.3.3.2 above.
acquisition of another instrument, and only result in
the acquisition of shares with voting rights attached
when that second instrument is exercised, for example
an option with a future as the underlying.

I.2.8.1.3 Other instruments

- Case of a holding company
  In its established administrative practice, BaFin treats as
an instrument a right (possibly subject to a condition precedent) to acquire a majority interest in a (holding)
company, which in turn holds a notifiable holding of
voting shares of an issuer, or a security interest granting
a right of separation relating to the shares held by
the (holding) company (such as in the case of shares
held by the company in trust for the shareholders,
section 34 (1) sentence 1 no. 2 of the WpHG). On
completion of the acquisition, the acquirer becomes
the controlling company and it is attributed all of the
voting rights of the (holding) company. In the period
before completion of the acquisition, the right to
acquire the majority interest in the (holding) company
is a notifiable instrument in the amount of the holding
company’s share of the voting rights in the issuer.

- Irrevocables
  Irrevocables (also known as irrevocable undertakings)
are of relevance particularly in company takeovers,
and in this context mean the irrevocable commitment
to accept an offer within the meaning of the WpÜG.
In practice, irrevocables normally fall under the
notification obligation of section 38 (1) no. 2 of the
WpHG, as they often do not grant the beneficiary (the
bidder in a takeover bid) an unilateral, unconditional
right to acquire the shares subject to the irrevocable.
In other cases, 38 (1) no. 1 of the WpHG) will apply.

- Acceptance of takeover bids under the WpÜG
  Before TDII was implemented in November 2015, the
legal position was that the acceptance of takeover
bids under the WpÜG, through which a purchase
agreement subject to a condition precedent relating
to the shares tendered to the bidder was entered
into by the bidder and the shareholder in accordance
with the conditions of the offer document, did not
represent a notifiable instrument for the bidder
because the bidder published the holdings of voting
rights attached to the shares tendered to it under
section 23 of the WpÜG. Despite the withdrawal of the
corresponding provision, BaFin continues to presume
in its established administrative practice that there is
no notification obligation for the bidder in this case,
because the reasons for the exemption continue
to apply and, due to the disclosure requirements
under the WpÜG, there is no need, for reasons of
transparency, for a parallel disclosure requirement
under the WpHG.

- Pre-emptive rights in shareholders’ agreements
  Shareholders’ agreements (in particular joint
ventures/voting pools/family pools) often contain
a range of acquisition or sale agreements between
the shareholders. Such agreements may represent
instruments if they grant the right to the other
shareholders to acquire voting shares (standard
case under section 38 (1) sentence 1 no. 2 of the
WpHG, unless a case of section 38 (1) sentence 1
no. 1 of the WpHG already exists). By contrast, if the
pre-emptive right relates to shares of a (holding)
company that in turn holds the notifiable holdings of
voting rights, there is a general notification obligation
under section 38 of the WpHG in accordance with
the administrative practice for the holding company
case described above, because each person entitled
to pre-emption can become the majority shareholder
of the company through the potential acquisition
of the other shares of the company (section 34 (1)
sentence 1 no. 1 of the WpHG); the same applies if the
shareholder entitled to pre-emption has the right to
separate the shares the shares held by the (holding)
company. Confidentiality clauses in the shareholders’
agreements are not relevant in this context.
In practice, pre-emptive rights place a special role
in shareholders’ agreements aiming to preserve
shareholdings in a family unit. In order to safeguard
the influence of a family over a listed issuer for
future generations, shares are mostly bundled in
a family pool or in holding companies, and pre-
emptive rights to the shares are granted to the other
members or shareholders in the event that a family
member leaves the pool or a shareholder withdraws
from the (holding) company. In such cases, BaFin
does not presume (or no longer presumes) that
there is a generally notifiable instrument, regardless
of the extent to which the voting rights are in any
case already attributable to the shareholders under
section 34 of the WpHG, and in particular under
section 34 (2) of the WpHG. The transferability to
other scenarios must be examined on a case-by-case
basis and should be agreed in good time in advance
with BaFin.

- Tag-along and drag-along clauses
  Tag-along clauses provide for a shareholder’s co-sale
rights if the other shareholder (often the majority
shareholder) wishes to sell its shares with voting
rights attached. By contrast, drag-along clauses are
cosale obligations. From the view of the beneficiary
or obliged shareholder, such clauses are not relevant with regard to section 38 of the WpHG. This also applies from the perspective of the shareholder wishing to sell shares, since although selling the shares enables a third party to acquire shares with voting rights attached, this case of an acquisition option by a third party is not covered by section 38 of the WpHG, in contrast to section 25a of the WpHG (old version). In such cases, notification obligation can only arise for the third party.

- Master agreements
  In the case of complex transactions or transactions that contain several partial executions, master agreements are often entered into by the parties that contain fundamental arrangements relating to the overall transaction and form the legal basis for executing the individual transactions. If these agreements relate to instruments (options, contracts for difference, etc.) and contain the principal arrangements relating to instruments, especially the (maximum) amount of shares to be acquired, entering into such a master agreement can already represent a notifiable instrument under section 38 of the WpHG.

- Pledge on shares
  Including in the case of a commercial pledge under section 1259 of the BGB, in which the holder of the pledge has a right of appropriation instead of a right to realise through sale, a pledge on shares is not an instrument under section 38 (1) sentence 1 no. 2 of the WpHG because pledges are agreed solely to secure claims established by other means and the pledgee is not normally entitled to exercise the voting rights.  

- Compensation/exchange offers in domination and profit and loss transfer agreements, merger agreements, and similar agreements
  Under BaFin’s administrative practice, domination and profit and loss transfer agreements are also not covered by section 38 of the WpHG. Although such an agreement relating to an issuer gives rise to the obligation under section 305 (1) of the AktG to purchase the shares of the remaining shareholders against a fixed cash compensation at their request, it is highly unlikely in this context that a holding can be built up unnoticed, since the shareholders must consent to the profit and loss transfer and control agreement by a resolution at the general meeting adopted by a 75% per cent majority, and because the agreement must be entered in the commercial register (section 294 of the AktG). There is therefore no need for an additional disclosure obligation via section 38 of the WpHG. This case is similar in this respect to the submission of an offer under the WpÜG, which the German legislator had excluded from the scope of section 25a of the WpHG (old version) (section 25a (1) sentence 4 of the WpHG (old version)).

The same applies to other compensation offers under company law, for example mergers and similar agreements, to the extent that transparency in the commercial register about such offers is ensured.

- Letter of intent, memorandum of understanding, term sheets, gentlemen’s agreement
  Letters of intent, memorandums of understanding and term sheets entered into prior to the conclusion of a contract typically contain an agreement on certain framework data for the subsequent contract negotiations, for example non-disclosure agreements, agreement on due diligence, possibly exclusive negotiations in a defined period and similar arrangements. Under BaFin’s administrative practice, such pre-contractual agreements are normally not regarded as instruments, even if they relate to the intention to acquire a notifiable package of shares, as an acquisition with regard to the subject of the subsequent negotiations is still too remote. This may be assessed differently if a result of the agreement is that the other party can understand that the purchase of shares is likely. In this respect, in particular apparently non-binding agreements that cannot be enforced in a court (gentlemen’s agreements) can be classified as an instrument if it can be assumed on the basis of the agreement that the intended acquisition of shares will happen.

- Share issues and initial public offerings (IPOs)
  Share issues and IPOs (with or without the issuance of new shares) do not themselves constitute an instrument, but comprise numerous different individual agreements that may fall under the scope of several notification obligations. To answer the question of whether and for whom (underwriting banks, existing shareholders, new shareholders) which notification obligations are triggered, it is also important in the first instance to determine the precise facts, to clarify the issues of who owns the (new and existing) shares in the course of the share issue or IPO, and only then to examine notification obligations, if any, under section 38 of the WpHG. Here, too, the designation of the agreements by the parties will not always be accurate.
What is important with regard to any notification obligations under section 38 of the WpHG is the distinction between existing and new shareholders. As stated previously in the case of convertible bonds, there is only a notification obligation under section 38 of the WpHG if the right to acquire shares relates to shares that have already been issued. Consequently, if an existing shareholder, for example, exercises its preemptive rights before implementation of the capital increase has been registered accordingly has a claim to subscribe for new shares, this does not yet trigger any notification obligation under section 38 of the WpHG. By contrast, however, an existing shareholder holds a retransfer claim subject to the notification obligation if, before the capitalisation measure is recorded in the commercial register, that shareholder has lent existing shares to the banking syndicate by way of a securities lending transaction (over-allotment option, see below).

- **Over-allotment option (greenshoe)**
  An over-allotment option or “greenshoe” is frequently agreed in connection with an IPO or the placement of new shares on the market by underwriters, granting the underwriters access to additional shares in order to service additional demand for shares or use them for price stabilisation. As a rule, this option to access additional shares is implemented by way of a securities lending transaction, which generally features an obligation to return the borrowed shares. If the underwriters exercise this option, this may trigger notification obligations for the lender, normally an existing shareholder, under sections 33 and 38 of the WpHG. Due to potential notification obligations for the underwriter, section 36 of the WpHG must always be observed (see I.2.6.3).
  To the extent that the underwriter exercises the greenshoe, the terms and conditions of the agreement entitle it to pay cash compensation to settle the securities lending transaction instead of returning the borrowed shares. The consequence thereof for the notification obligations applicable to the lender (often the existing shareholder that makes its shares available) is that it must notify its claim for retransfer against the underwriter as an instrument under section 38 (1) sentence 1 no. 2 of the WpHG, because it cannot control whether it will actually receive shares or not.

- **Instruments in connection with prime brokerage** See I.2.5.12.5 above.

### I.2.8.2 Other conditions

An instrument is directly held if it is held by its owner, i.e. if the instrument is owned by a person. In the past, an instrument is indirectly held if it is held by subsidiaries or in administrative trust (Verwaltungstreuhand). In addition to these two criteria, cases of acting in concert and authorisation as proxy are also covered as indirect holdings by the notification obligation of section 38 of the WpHG in the course of European harmonisation. 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 per cent, i.e. whenever the holder of the instrument is entitled or, as the case may be, ceases to be entitled to acquire a corresponding quantity of shares with voting rights attached.

Holdings that exceed or fall below notification thresholds and fall below or exceed the thresholds again within one day also generally trigger a notification obligation under section 38 of the WpHG. In such cases, however, BaFin allows the amounts exceeding and falling below the thresholds to be netted. By contrast, netting long and short positions, such as call and put options, is not permitted (section 38 (4) sentence 2 of the WpHG).

If different instruments within the meaning of section 38 of the WpHG refer to shares of the same issuer, the holder of the instruments must aggregate the voting rights attached to these shares (section 38 (4) sentence 1 of the WpHG).

#### Special case: Call options under section 34 (1) no. 5 of the WpHG

Instruments that are already covered by section 34 (1) sentence 1 no. 5 of the WpHG (e.g. call options conferring rights in rem) are only included once in the calculation of the aggregate holding of voting rights. Generally, each case described in section 34 (1) sentence 1 no. 5 of the WpHG is also an instrument under section 38 of the WpHG. However, this is not necessarily the case the other way around, as rights in rem must be conferred for attribution in accordance with section 34 (1) sentence 1 no. 5 of the WpHG, which is specifically not what is required by section 38 of the WpHG.

#### Special case: Claims to retransfer under intragroup securities lending transactions

As a general rule, claims to retransfer under securities loans must be aggregated (section 38 (4) sentence 1 of the WpHG). BaFin allows an exception to this in cases where only a single retransfer claim needs to be notified if shares between different group companies are essentially retransferred within a group by way of further securities lending transactions, and the individual securities lending transactions arising between the group companies concerned are effectively deemed
to be a single group securities lending transaction. A condition for this assumption is that the existence of the individual securities lending transactions is dependent on the other securities lending transactions. For this purpose, it must be ensured, based on the agreements or the mutual understanding of the parties, that the retransfer of the shares from the "final borrower" or the right to recall the shares of a lender triggers and brings about the immediate maturity of the other retransfer claims with the result that the chain of securities lending transactions as a whole must be reversed. That means that the securities loans must have substantially the same terms. Another condition is that the parties are able to distinguish the securities lending chain from other (securities lending) transactions in the same underlying, and that above all there is no netting of reciprocal claims.

Sections 36 and 37 of the WpHG apply mutatis mutandis to instruments held (section 38 (1) sentence 2 of the WpHG).

Section 33 (2) of the WpHG also applies to the holding of instruments at the date of the initial admission of the shares to trading on an organised market.

I.2.9 Notification obligations for holdings of voting rights and instruments (section 39 of the WpHG)

I.2.9.1 Conditions

Under section 39 (1) of the WpHG, the notification obligation under section 33 (1) and 2 of the WpHG applies mutatis mutandis to holders of voting rights (sections 33 and 34 of the WpHG) and instruments (section 38 of the WpHG) if the aggregated holdings relevant under sections 33, 34 and 38 of the WpHG reach, exceed or fall below the thresholds referred to in section 33 (1) sentence 1, with the exception of the 3 per cent threshold. Section 39 of the WpHG is therefore a pure aggregation-based notification criterion. As in the case of section 38 of the WpHG, section 39 of the WpHG is based on thresholds being triggered hypothetically. The notification obligation under section 39 of the WpHG applies if the aggregate voting rights (section 33 of the WpHG) and holdings of voting rights relating to instruments hypothetically reach, exceed or fall below the thresholds of 5, 10, 15, 20, 25, 30, 50 or 75 per cent. Under BaFin's administrative practice, a notification obligation under section 39 of the WpHG arises if the holdings fall below and then exceed again one or more thresholds within one day and at the end of the day have triggered a relevant threshold (intraday aggregation or netting of triggered thresholds).

Special case: Voting rights relating to instruments only included once

Exceptionally, instruments relating to voting rights, already subject to attribution are only included once if the instruments in question and the attribution criterion are linked in such a way that exercising the instruments results in disapplication of the attribution criterion and, conversely, ending the attribution criterion results in discontinuation of the instrument. This may be case, for example, for pooling agreements in which the parties bundle their voting rights in the pooled shares to bring about acting in concert within the meaning of section 34 (2) of the WpHG and the parties additionally hold pre-emptive rights with regard to the shares held by the other members of the pool. In this case, the voting rights for the member of the pool that are attributed to that member under section 34 (2) of the WpHG are identical to the voting rights which that member may acquire on the basis of the pre-emptive rights as an "other financial instrument" within the meaning of section 39 (1) of the WpHG. The voting rights are only included once in this situation, provided that the pre-emptive rights can be settled exclusively using the pooled shares, with the result that attribution under section 34 (2) of the WpHG of voting rights in shares that are the subject of the pre-emptive right ceases to apply when the pre-emptive right is exercised.

Example

A company holds 4% of the voting rights and is attributed further 2% of the voting rights from another company under section 34 (2) of the WpHG. For the 2% voting rights of the other company, the first company also holds a pre-emptive right that falls under section 38 (1) of the WpHG. The existence of the pre-emptive right and the agreement to act in concert are interdependent. In this case, the company discloses in its notification for the holding under section 33 (1) of the WpHG a total of 6%, of which 2% is attributed under section 34 (2) of the WpHG. For the holding under section 38 of the WpHG, the company also discloses 2%, because it holds instruments in this amount. For the aggregate holding under section 39 of the WpHG, however, only 6% is disclosed because the 2% is only included once. In the notification, the company can disclose under “Other information” that there was no aggregation because the attribution and the instruments relate to the same shares.
Any questions arising with regard to the once-only inclusion of voting rights should be clarified with BaFin at an early stage.

I.2.9.2 Notification obligations for holders of major holdings (section 43 of the WpHG)

Under the new rule introduced by the Risk Limitation Act, a party subject to the notification obligation within the meaning of sections 33 and 34 of the WpHG that reaches or exceeds the threshold of 10 per cent of the voting rights attached to shares, or a higher threshold, must, within 20 trading days of reaching or exceeding those thresholds, inform an issuer whose home country is the Federal Republic of Germany of the goals pursued by the funds and the source of those funds. If the goals within the meaning of sentence 1 change, this must also be notified within 20 trading days. In respect of the goals pursued with the purchase of the voting rights, the party subject to the notification obligation must disclose under section 43 (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 from 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 equity and debt and the dividend policy.

The list of goals in sentence 3 above is exhaustive. With regard to the source of the funds used, the party subject to the notification obligation disclose state under sentence 4 whether the funds raised by party subject to the reporting requirement to finance the purchase of the voting rights are equity or debt. In the case of mixed financing, the proportionate share of the financing forms in the total financing must be disclosed. Under section 43 (1) sentence 5 of the WpHG, there is no notification obligation under sentence 1 if the threshold has been reached or exceeded as a result of an offer within the meaning of section 2 (1) of the WpÜG.

56 Under section 43 (1) sentence 6 of the WpHG, there is also no notification obligation for asset management companies as well as foreign management companies and investment companies within the meaning of Directive 2009/65/EC that are subject to a prohibition corresponding to sentence 1 of Article 56(1) of Directive 2009/65/EC, to the extent that an investment limit of 10 per cent of less has been stipulated; there is also no notification obligation if there is an exemption under sentence 1 of Article 57(1) and subparagraph (2) of Directive 2009/65/EC if investment limits are exceeded. Sentence 1 of Article 56(1) of Directive 2009/65/EC is transposed by section 210 (2) of the KAGB. Asset management companies and EC collective investment undertakings subject to the requirements of the UCITS Directive, and their management companies, are therefore exempt from the notification obligation under section 43 (1) sentence 6 of the WpHG because they are generally not permitted to hold any interest in the relevant amount in this case of at least 10 per cent of the voting rights. The reference to sentence 1 of Article 57(1) and subparagraph (2) of Directive 2009/65/EC, which was transposed by section 211 (1) and (2) of the KAGB, also exempts the companies from the notification obligation in cases where the investment limit is briefly exceeded.

In addition to the issuer’s obligation to publish information under section 43 (2) 1st half-sentence of the WpHG, there is also an obligation of issuers under section 43 (2) 2nd half-sentence of the WpHG to transmit the information to the Company Register under section 8b of the HGB for storage. This ensures that the publications are made permanently available to the capital markets.

Section 43 (3) of the WpHG enables issuers domiciled in Germany to exempt themselves from the notification obligation with regard to the goals and sources of funds in subsection (1) and from the disclosure under subsection (2) by including a provision to this effect in their articles of association. The exemption may only be provided for all of the disclosures under 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, with the corresponding modifications, to issuers whose registered office is outside Germany.

I.2.10 Legal consequences of violations of the notification obligation

I.2.10.1 Administrative fine proceedings

Intentional or negligent violations of the obligations under sections 33 (1) and (2), 38 and 39 of the WpHG are administrative offences under section 120 (2) no. 2 (d) and (e) of the WpHG. The relevant fines for individual offences are up to two million euros. A higher administrative fine that may not exceed the higher of
ten million euros or five per cent of the total revenue of the most recent financial year of the legal entity or association of persons can be imposed on legal entities.

I.2.10.2 Loss of rights under section 44 of the WpHG

Under section 44 sentence 1 of the WpHG, rights attached to shares held by the party subject to the notification obligation are disqualified for the period during which the notification obligations are not met. This does not apply to claims under section 58 (4) of the AktG (claim to net retained profits) and section 271 of the AktG (claim to liquidation surplus) if the failure to file the notification was unintentional and this was subsequently remedied. The loss of rights also extends to voting rights attributed to the party subject to the reporting requirement under section 34 of the WpHG. The previous restriction to the attribution criteria set out in subsection (1) nos.1 and 2 of section 34 of the WpHG was withdrawn. Under section 44 (1) of the WpHG, the loss of rights therefore applies to all attribution criteria in section 34 of the WpHG. The background to this is that TDIII does not make a distinction by attribution criteria and the previous distinction for the loss of voting rights appeared arbitrary in practice, because the attribution criteria used to attribute voting rights to the party subject to the notification obligation were sometimes a matter of chance (for example in the investment business, where holding or attribution of voting rights under sections 33 and 34 (1) no. 1 or no. 6 of the WpHG depends merely on the legal form chosen for the collective investment undertaking, without any materially relevant differences).

Under section 44 (2) of the WpHG, the loss of rights also extends, in application of section 44 (1) of the WpHG mutatis mutandis, to violations of notification obligations in the case of instruments relating to shares with voting rights attached. The loss or rights is limited to the actual party subject to the reporting requirement under sections 38 and 39 of the WpHG. The violation of the notification obligation and hence the loss of rights under section 44 of the WpHG ends with a proper notification of the instruments held or, if the instruments have expired, by their exercise or lapse.

For cases in which the violation of the notification obligation under section 33 of the WpHG relates to the amount of the shareholding, the new section 44 (1) sentence 3 of the WpHG inserted by the Risk Limitation Act provides for tougher penalties. This states that the loss of rights is not limited to the period up to fulfilment of the notification obligation, but is rather, in the case of the intentional or grossly negligent violation of notification obligations, extended to a period of six months thereafter. This is designed to prevent a situation in which shareholders who fail to comply with the notification obligations are able to build up a shareholding unnoticed between two general meetings, without being penalised by the loss of voting rights, if the party subject to the reporting requirement subsequently files the notification just before resolutions are adopted by the general meeting. Under section 44 sentence 4, however, sentence 3 of section 44 does not apply if the difference in the amount of the voting rights disclosed in the preceding incorrect notification is less than 10 per cent of the actual holding of voting rights, and there has been no failure to file a notification that the holding has reached, exceeded or fallen below one of the thresholds referred to in section 33 of the WpHG. Sentence 4 excludes minor violations from the penalty of losing rights for six months in the event of failure to notify the holdings of voting rights. In the case of minor differences of less than 10 per cent of the correct holding of voting rights, parties subject to the notification obligation are able to publish a correction without triggering the tougher penalty in sentence 3.

I.3 Publication and transmission requirements

I.3.1 Addressees of the publication and transmission requirements

Any domestic issuer of shares within the meaning of section 2 (14) nos. 1 and 2 of the WpHG in conjunction with section 33 (4) of the WpHG is required to publish notifications and transmit them to the Company Register. This requirement extends to:
- issuers whose home country is the Federal Republic of Germany and whose shares are admitted to trading on an organised market in Germany or in another EU member state or a signatory state to the EEA (exception: issuers whose shares are admitted to trading not in Germany, but only in another EU member state or a signatory state to the EEA are not classified as domestic issuers, subject to the further conditions of section 2 (14) no. 1 of the WpHG),
- issuers whose home country is another EU member state or a signatory state to the EEA, but whose shares are only admitted to trading on an organised market in Germany.
I.3.2 Issuer’s publication requirement and transmission to the Company Register (section 40 of the WpHG)

I.3.2.1 Publication

An entity subject to the publication obligation under section 40 (1) sentence 1 of the WpHG is required to publish voting rights notifications under sections 33 and 39 of the WpHG by providing the notifications to media for dissemination across Europe. The issuer is not required to ensure that the publication is actually effected.

Shareholders of domestic issuers whose home country is not the Federal Republic of Germany are not subject to the notification obligations under sections 33, 38 or 39 of the WpHG. Nevertheless, these issuers are required to publish voting rights notifications under section 40 of the WpHG. In this case, the publication obligation extends to notifications received by the issuer in accordance with the legal requirements of its home country.

In addition to voting rights notifications, a domestic issuer is also required to publish a notification whenever it reaches, exceeds or falls below the 3, 5 and 10 per cent thresholds in respect of its treasury shares. For domestic issuers whose home country is not the Federal Republic of Germany, this only applies to the 5 and 10 per cent thresholds (see I.2.2.1.6 for more details.)

Special case: Issuers in insolvency proceedings

Under section 24 (1) of the WpHG, the insolvency administrator is obliged to assist the issuer, among other things, in the performance of its obligations under section 40 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 management board the voting rights notifications addressed to the domestic issuer, unless the insolvency administrator itself files the publication for the domestic issuer.

If a provisional insolvency administrator is appointed prior to the opening of insolvency proceedings, the provisional insolvency administrator must, under section 24 (2) of the WpHG, assist the debtor in discharging its obligations, in particular by consenting to the funds being used by the obliged party or, if a general restraint on disposition has been imposed upon the obliged party, by providing the funds from the assets under its management.

I.3.2.1.1 Time limit

The issuer is required to fulfil the publication obligation without culpable delay (section 121 of the German Civil Code). Under section 40 (1) sentence 1 first half-sentence of the WpHG, however, the publication must be made 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 of the Federal States (Länder) (section 47 (1) of the WpHG).

To calculate the time limit, BaFin provides for a calendar of trading days in accordance with section 47 of the WpHG on its website.

I.3.2.1.2 Content of the publication (section 15 of the WpAV)

Under section 15 of the WpAV, the publication must generally contain all information given in the notification. With the introduction of the mandatory standard form by the TRL-AndRL-UmsG (see under 1.2.2.1), section 15 of the WpAV was also modified and, as a consequence, the notification must be published in the same format of the standard form. This ensures a consistent look and file for published voting rights notifications and makes them considerably easier to read, which enhances the transparency of notified equity investments.

I.3.2.1.3 Modalities of the publication (section 16 in conjunction with section 3a of the WpAV)

I.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 WpAV). According to the German legislator’s intention, the issuer is required to use a pool of different types of media.

94 The starting point for section 24 (1) of the WpHG was the Federal Administrative Court, decision of 14 April 2005 – 6 C 4/04: “The insolvency administrator is not required to publish notifications about notifiable changes in proportions of voting rights received after opening of the insolvency proceedings in a national newspaper for statutory stock exchange announcements; despite the opening of insolvency proceedings, this obligation under securities trading law, which exists in the interests of capital market transparency, is the responsibility of the management board of the listed issuer that is still in office.”

95 www.bafin.de » Undertakings» Stock exchanges and markets » Transparency requirements » Major holdings of voting rights » Calendar of trading days.
Under section 3a (2) sentence 1 no. 1 of the WpAV, media that are capable of actively disseminating 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 the relevant media type are determined by the circumstances of each individual case. Circumstances that the issuer must consider when selecting the type and number of media include, in particular, the number and location of its exchange listings in countries within and outside Europe, as well as its shareholding structure. According to the legislator’s explanatory memorandum, 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 compliance with a minimum standard. Accordingly, a reasonable pool of media must comprise, as a minimum:

- all five types of media specified in the explanatory memorandum,
- 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 as a minimum 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 per 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 member state or signatory state to the EEA, the 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 the additional listing.

I.3.2.1.3.2 Requirements for transmitting publications to the media pool

When forwarding the notifications intended for publication to the various media, the issuer must give due regard to technical and content-related requirements.

In technical terms, it must ensure, under section 3a (2) sentence 1 no. 2 of the WpAV, that:

- the sender can be clearly identified,
- the data is 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.

I.3.2.1.3.3 Content-related requirements

For the purpose of classifying the notification, the issuer must provide the following information (content-related requirements) when transmitting a notification:

- the name and address of the issuer subject to the publication obligation,
- the phrase “Publication of a notification under section 40 (1) of the WpHG” in the subject line,
- the date and time of transmission,
- the objective of disseminating the information as prescribed information across Europe.

I.3.2.1.3.4 Service providers

Under section 3a (4) of the WpAV, the issuer may make use of a third party, for example a service provider. In this case, however, it must consider that it remains responsible for fulfilling its publication obligation.

I.3.2.1.4 Language of the publication

The language of the publication is governed by section 3b in conjunction with section 16 of the WpAV.

Language of publication:

- Home country is the Federal Republic of Germany and admitted to trading only in Germany: German
- Home country is the Federal Republic of Germany and admitted to trading also in the EU/EEA: German or English and (at the issuer’s option) a language accepted by the other EU/EEA country or English (subsection (2)), i.e. the publication may be made in two languages or only in English.
- Registered office in the EU/EEA and admitted to trading only in Germany (section 2 (14) no. 2 of the WpHG): German or English (subsection (3) sentence 1).
- Registered office in Germany and admitted to trading only in several EU/EEA countries: at the issuer’s option, in a language accepted by the other EU/EEA country or English; German is possible as an additional language (subsection (3) sentence 2).
- Registered office outside Germany: English or, on a voluntary basis, German (subsection (1)).

By way of derogation from the general requirement governing language in section 3b of the WpAV, the domestic issuer may also publish a notification that it has received in English exclusively in English (section 16 of the WpAV).

If the issuer has received a notification in only one language (German or English), but wishes to publish it in both languages, the issuer must ensure that the relevant disclosures, such as disclosures on the other reasons for the notification, are correctly translated. For example, the
I.3.2.1.5 Publication of corrections

As a general rule, domestic issuers have to publish corrections if the notification was incorrect and a correcting notification has been issued, or if a domestic issuer has incorrectly published a correct notification. Corrections must be published if relevant disclosures in the notification (e.g. the date the threshold was triggered, the percentage and absolute number of voting rights, names of parties subject to the notification obligation) differ from the content of the publication. In view of legal actions against resolutions adopted by general meetings on the basis of section 44 of the WpHG, such corrections are also in the interest of the party subject to the notification obligation.

Corrections published due to both incorrect publications and corrected notifications must be designated as such in the heading of the publication (“Correction of a voting rights notification published on…”). It should also be ensured that reference is made to the publication that is being corrected. In order to ensure that the correction being published is correctly associated with the publication being corrected, it may be necessary to consult with the relevant service provider. The published correction must reflect the completed and correct notification.

I.3.2.1.6 Publication of an electronic voting rights notification

Following BaFin’s launch of the procedure for transmitting voting rights notifications electronically effective as of October 30, 2018, parties subject to the notification obligation now use a publication dataset to electronically transmit the notification obligation to the issuer together with a readable format; the details are governed by the Stimrmv. This is designed to make it easier for issuers to publish voting rights notifications, a process that is time-consuming and prone to errors in practice.

I.3.2.1.7 Special case: Publication relating to treasury shares (section 40 (1) sentence 2 of the WpHG)

Treasury shares are not only shares held by a domestic issuer directly, but also

- shares held by a person acting in its own name but for the account of the domestic issuer or
- held by a subsidiary of the domestic issuer.

Advance notifications to BaFin are not necessary in any of these cases. There is no publication requirement corresponding to section 33 (2) of the WpHG applying to the initial admission of the shares to an organised market.

A separate form for such publications is available on BaFin’s website.

I.3.2.2 Transmission of notifications to the Company Register

Under section 40 (1) sentence 1 2nd half-sentence of the WpHG, the issuer must, without undue delay, also transmit the information subject to the publication requirement to the Company Register for storage. However, the information may not be transmitted for storage before it has been published. The requirement to transmit the information to the Company Register as the central storage mechanism within the meaning of the Transparency Directive already follows from section 8b (2) no. 9 in conjunction with subsection (3) sentence 1 no. 2 of the HGB. However, the WpHG stipulates when the transmission to the Company Register must be made to ensure that all investors are informed quickly and consistently. The Company Register is maintained by Bundesanzeiger Verlagsgesellschaft mbH on behalf of the Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz – BMJV) (www.unternehmensregister.de).

I.3.2.3 Issuer’s obligation to produce evidence of publication to BaFin (section 40 (2) of the WpHG)

In addition to the publication itself, the issuer must also notify BaFin that the publication has been made. The domestic issuer must notify BaFin of the publication immediately following the publication (“simultaneously”). The notification must contain the content 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 17 in conjunction with section 3c of the WpAV).

The notification of the publication to BaFin by the domestic issuer may also be sent by email, in contrast to the notification by the party subject to the notification obligation.
Under section 3a (3) of the WpAV, the issuer must be able, for a period of six years, to provide BaFin with the following information:
- 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 to the media, and
- where applicable, all data relating to any delay in the publication.

Special case: Initial admission of the domestic issuer’s shares

Usually, the initial admission of an issuer’s shares (IPO) to an organised market is preceded by a capital increase.

Example

Domestic issuer A is planning an IPO. To do this, it first implements a capital increase against contributions. Implementation of the capital increase is recorded in the commercial register (section 189 of the AktG) on 5 October, and the shares are admitted to trading on 6 October. There is no further change in the share capital during that month.

In this case, the total number of voting rights changed prior to the IPO, and thus before the time when the obligations under sections 33 et seq. of the WpHG arose. There is therefore no notification obligation under section 41 of the WpHG.

If the shares are initially admitted and the capital increase is registered with the commercial register on the same day, for the sake of simplicity BaFin allows the party subject to the reporting requirement to generally base its notifications under section 33 (2) of the WpHG on the increased share capital, regardless of whether the entry in the commercial register actually followed the formal resolution on admittance to trading or not. In this case, BaFin also does not expect any publication under section 41 of the WpHG.

The issuer must only ensure that a publication is made under section 41 of the WpHG if the capital increase follows the IPO; in the example shown above, this would have to be within two trading days at the latest.

The manner and language of the publication are governed by the general requirements (IV.6; I.3.2.1.3). In addition to publication, the information must also be transmitted to the Company Register for storage and BaFin must be notified of the publication (IV.6.4; I.3.2.3).

I.3.3.2 Content

Publications under section 41 of the WpHG must contain the following disclosures:
the total number of voting rights and

in the case of other capitalisation measures within the meaning of section 41 (1) of the WpHG, the effective date.

If new shares out of a contingent capital increase are issued (section 41 (2) of the WpHG), it is sufficient to disclose the total number at the end of the month (“balance at”) in which the new shares were issued. Shares held by the domestic issuer (“treasury shares”) must not be deducted from the total number of voting rights. This is because any change in the holding of own (treasury) shares would trigger a publication obligation under section 41 of the WpHG. However, that would render a separate publication obligation for treasury shares (section 40 (1) sentence 2 of the WpHG) superfluous.

### I.3.4 Exemptions from the obligations under section 40 (1) and section 41 of the WpHG for third country issuers (section 46 (1) and (2) of the WpHG)

Section 46 of the WpHG contains exemptions for issuers from third countries from the publication obligations under sections 40 (1) and 41 of the WpHG.

Section 44 (1) of the WpHG allows BaFin to exempt issuers whose registered office is in a third country and whose home country is Germany from the obligations governed by sections 40 (1) and 41 of the WpHG, provided that those issuers are subject to equivalent requirements of a third country or commit themselves to comply with such requirements. Such requirements may be the requirements of the third country in which the issuer has its registered office or those of another country that the issuer has committed to complying with. This rule prevents issuers from being burdened by two equivalent regulatory regimes. The concept of a “third country” is defined in section 2 (12) of the WpHG.

The requirements of equivalence of third-country requirements are clarified in the TranspRLDVO. Section 5 of the TranspRLDVO governs the criteria for determining whether a third country’s requirements are equivalent to the time limits to be observed for the issuer’s publication obligations under section 40 (1) sentence 1 of the WpHG. A condition for the equivalence criteria to be met is that the time limit, within which the issuer whose registered office is in the third country must be informed about changes in the holding of voting rights and within which the issuer must publish those changes, may not be more than seven trading days.

Section 6 of the TranspRLDVO sets out the criteria for determining whether a third country’s requirements are equivalent with regard to the issuer’s publication obligations to be met for treasury shares. These requirements depend on the permissible holding of treasury shares. If an issuer is permitted to hold no more than 5 per cent of its treasury shares with voting rights attached, the equivalence criteria are satisfied if the issuer is required to notify that this threshold has been reached or exceeded. If an issuer is permitted to hold between 5 and 10 per cent of its own voting shares, it is required to notify that it has reached or exceeded the 5 per cent threshold or the applicable maximum threshold. An issuer who is permitted to hold more than 10 per cent of its own voting shares must notify that it has reached or exceeded the 5 per cent threshold as well as the 10 per cent threshold. For the purposes of equivalence, a notification obligation above the 10 per cent threshold is not necessary.

Section 7 of the TranspRLDVO sets out the criteria for determining whether a third country’s requirements are equivalent in terms of the issuer’s publication obligations to be met with regard to the total number of voting rights. The requirements of a third country are deemed to be 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.

Under section 41 (2) of the WpHG, issuers who are exempted by BaFin under section 41 (1) of the WpHG from complying with the obligations under sections 40 (1) of the WpHG and 41 of the WpHG must nonetheless ensure that the general public in the EU and EEA is informed about the matters described there. To do this, they must publish in the EU and EEA any information they are also obliged to provide to the general public under the foreign requirements – corresponding to sections 40 (1) of the WpHG and 41 of the WpHG – in the manner prescribed by section 40 (1) of the WpHG, and to submit the notification to BaFin as set out in section 40 (2) of the WpHG. The obligation to transmit the information to the Company Register is set out in section 8b (2) no. 9 in conjunction with subsection (3) sentence 1 no. 2 of the HGB.

### I.3.5 Publication obligation under section 43 (2) of the WpHG

An issuer whose home country is the Federal Republic of Germany must publish the information received under section 43 of the WpHG or the fact that the notification obligation under section 27a (1) of the WpHG was not fulfilled, in accordance with section 40 (1) sentence 1 of the WpHG in conjunction with the regulation that can be issued under section 40 (3) no. 1 of the WpHG.
II Information necessary for exercising rights attached to securities (sections 48 et seq. of the WpHG)

II.1 Introduction

Since the Transparency Directive was transposed by the TUG96 effective as of 20 January 2007, section 7 of the WpHG governs a range of conduct, information and publication obligations of issuers whose securities are only admitted to an organised market in a member state of the EU other than Germany or a foreign signatory state to the EEA (section 2 (11) of the WpHG). The purpose of these publication obligations is to ensure that investors have all information they need to enable them to exercise their rights attached to the securities. For this reason, sections 48 et seq. of the WpHG make a distinction in some cases between an issuer whose home country is the Federal Republic of Germany and an issuer who is purely a domestic issuer. In addition to the obligations of issuers already existing under the relevant requirements of company law, the introduction of sections 48 et seq. of the WpHG transposed the requirement set out in the Transparency Directive to submit the (in part identical) obligations for issuers in the organised market to supervision by BaFin. Where reference is made to the provisions of the German Stock Corporation Act, the following remarks are addressed to issuers with the legal form of a German stock corporation (Aktiengesellschaft – AG), European company (SE) and or a German partnership limited by shares (Kommanditgesellschaft auf Aktien – KGaA), in each case with their registered office as defined in their articles of association in the Federal Republic of Germany, and to which the specified provisions under German stock corporation law apply. For issuers whose registered office as defined in their articles of association is in a country other than the Federal Republic of Germany, the applicable requirements of the relevant national legislation may govern the obligations under sections 48 et seq. of the WpHG.

II.2 Issuers’ obligations to holders of securities (section 48 of the WpHG)

II.2.1 General information

Section 48 of the WpHG governs general obligations that an issuer within the meaning of section 2 (13) of the WpHG whose home country is thus the Federal Republic of Germany must fulfil in respect of holders of securities issued by that issuer, if its securities are admitted to trading on an organised market in Germany or in another member state of the EU or a signatory state to the EEA. The requirement set out in section 48 of the WpHG generally covers all securities that are admitted to trading within the meaning of section 2 (1) of the WpHG, and section 48 (3) of the WpHG provides that certificates representing shares are deemed equivalent to shares admitted to trading in certain cases.

II.2.2 Obligations of issuers to holders of securities and debt securities admitted to trading

II.2.2.1 Section 48 (1) no. 1 of the WpHG

Under section 48 (1) no. 1 of the WpHG, the issuer must, above and beyond the information obligations, ensure equal treatment of all holders of securities that meet the other criteria set out under section 48 (1) no. 1 of the WpHG. By virtue of the principle of equal treatment set out in section 48 (1) no. 1 of the WpHG, the different treatment of holders of securities is permitted only if they are not in the same situation. Any unequal treatment of holders of securities requires an objective reason for justifying it or the express consent of all...
II.2.2.6 Section 48 (1) no. 6 of the WpHG

If debt securities admitted to trading have been issued, section 48 (1) no. 6 of the WpHG results in a requirement that parallels section 48 (1) no. 5 of the WpHG. According to this, a form for granting a proxy for the general meeting of debt securities holders must be made available in text form on request to each person entitled to vote, either simultaneously with the invitation to the general meeting of debt securities holders or after the general meeting of debt securities holders has been convened.

II.2.2.5 Section 48 (1) no. 5 of the WpHG

In the case of shares admitted to trading, a form for granting a proxy for the general meeting must be made available in text form on request to each person entitled to vote, either together with the invitation to the general meeting or after the general meeting has been convened. The proxy form may be provided to the shareholder either as a paper form or electronically.

II.2.2.4 Section 48 (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), through which all necessary measures in respect of the securities can be implemented free of charge.

The term “financial institution” may be misleading. What is meant are credit institutions under section 1 (1) sentence 1 of the KWG. Unless the issuer is a credit institution itself, it is no longer acceptable for the issuer to appoint itself as the paying agent. This option was eliminated when section 39 (1) no. 2 of the Stock Exchange Act (Börsengesetz – BörsG) (old version) was withdrawn.

II.2.2.3 Section 48 (1) no. 3 of the WpHG

This requirement establishes the obligation of the issuer to ensure that the data of holders of securities is provided with all facilities and information they need to exercise their rights. Section 48 (1) no. 2 of the WpHG is merely a catch-all clause because there are already specific statutory obligations for establishing the material conditions and publication of the underlying information (see section 48 (1) no. 4 of the WpHG under II.2.2.4, or section 49 (1) and (2) of the WpHG under II.3).

II.2.2.2 Section 48 (1) no. 2 of the WpHG

This states that securities holders in Germany must be provided with all facilities and information they need to exercise their rights. Section 48 (1) no. 2 of the WpHG is merely a catch-all clause because there are already specific statutory obligations for establishing the material conditions and publication of the underlying information (see section 48 (1) no. 4 of the WpHG under II.2.2.4, or section 49 (1) and (2) of the WpHG under II.3).

II.2.2.1 Section 48 (1) no. 1 of the WpHG

This requirement establishes the obligation of the issuer to ensure that the data of holders of securities is protected from access by unauthorised persons.

II.2.1.1 General information

The requirement of equal treatment of the holders of shares of an issuer whose registered office is in Germany also follows from section 53a of the AktG. In the context of selling treasury shares, selling them via the stock exchange is sufficient under section 71 (1) no. 8 of the AktG.

II.2.1 General information

For issuers of shares admitted to trading whose home country is the Federal Republic of Germany, section 49 (1) of the WpHG provides for a number of publication obligations in respect of the general meeting and relating to dividends, the issuance of new shares, the agreement or the exercise of exchange, pre-emptive, redemption or subscription rights, as well as the resolution on these rights. Under section 49 (2) of the WpHG, issuers of debt securities admitted to trading 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 interest payments, repayments, drawings and units that have been cancelled or drawn but have not yet been redeemed. The publications must be made in the (electronic) Federal Gazette (Bundesanzeiger) and hence in the same medium in which publications for issuers subject to German company law regularly have to be published in the “company news” (Gesellschaftsblätter).

Lastly, section 49 (3) of the WpHG sets out the requirements to be met for electronic transmission of information to holders of securities, although electronic transmission may not substitute publication under subsections (1) or (2).

As a general principle, publications under section 49 of the WpHG must be made in German. Section 49 of the WpHG also applies to issuers from a third country, provided that their home country is the Federal Republic of Germany. Publication in English is also permitted in this case.

II.3.2 Section 49 (1) sentence 1 no. 1 of the WpHG

II.3.2.1 Convening general meetings, including the agenda

Under section 49 (1) sentence 1 no. 1 of the WpHG, an issuer of shares admitted to trading is required to publish in the Federal Gazette the following circumstances relating to the general meeting:

- the notice convening the general meeting, including the agenda,
- the total number of shares and voting rights at the time the general meeting was convened, and
- the rights of shareholders with respect to attendance at the general meeting.

II.3.2.1.1 Total number of shares and voting rights

The publication obligation in respect of the total number of shares and voting rights based on the implementation of Article 17(2) of the Transparency Directive means that the issuer is required to disclose in its publication in the Federal Gazette the number of all issued ordinary and preferred shares and the number of voting rights at the date when the general meeting was convened. The relevant number must be disclosed irrespective of any excluded voting rights. Preferred shares are only included in the number of voting rights if, as an exception subject to the conditions of section 140 (2) of the AktG, these preferred shares also start carrying voting rights, or if and to the extent that a special resolution of the holders of preferred shares is expected to be adopted under section 141 (3) of the AktG. Additionally, the issuer is also permitted, but not required, to disclose how many shares it holds as own stock.

If the company has issued new shares out of contingent capital increase, it may be difficult to determine the current total number voting rights at the date of the invitation in specific cases, because under section 200 of the AktG the issuance of new shares and the associated increase in the share capital are only completed legally once the new shares have been credited to the securities account of the beneficiary and the issuer may not be aware when such transfer has been made. For the purposes of section 49 (1) sentence 1 no. 1 of the WpHG, however, for practical reasons BaFin allows the issuer to include in the total number of issued voting rights those new shares for which it has already issued an instruction to its mandated institution to credit the new shares to the securities accounts of the beneficiaries.

Examples of correct disclosures of the total number of shares and voting rights at the date on which the general meeting is convened:

- “The company’s share capital is composed of 9,500,000 no-par value shares each conferring one vote. The total number of voting rights is thus 9,500,000. At the date on which the general meeting was convened, the company holds 2,839 treasury shares that do not confer any voting rights.”

- “At the date on which the general meeting was convened, the total number of shares of the company was 50,000,000, of which 40,000,000 shares are ordinary voting shares each conferring one vote. 10,000,000 shares are non-voting preferred shares. The total number of voting rights at the date on which the general meeting was convened is 40,000,000.”

In this regard, the statement of the total number of treasury shares in the first example is a voluntary disclosure by the issuer.

II.3.2.1.2 Date on which the general meeting is convened

The date on which the general meeting is convened is determined in accordance with the AktG. Under section 121 (2) sentence 1 of the AktG, the general meeting is convened by the management board. It is not the resolution adopted by the management board that constitutes the notice convening the general meeting; rather, the announcement of the resolution in the company’s news (Gesellschaftsblätter) is decisive, i.e. under section 25 sentence 1 of the AktG the date on which the announcement was posted in the Federal Gazette. In the case of German stock corporations, a one-time publication is sufficient under section 49 (1) sentence 2 of the WpHG, provided that the
content-related requirements set out in section 49 (1) no. 1 of the WpHG have been met, since the date and medium of the publication under the WpHG and the AktG are identical.

II.3.2.1.3 Shareholders’ attendance rights
When the general meeting is convened, the issuer must publish the rights of shareholders to attend the general meeting. The issuer must draw attention to the option to appoint proxies (see section 125 (1) sentence 2 of the AktG) and indicate that proxy forms are available as well as indicate the contact address for the company from which they can be obtained. It is also necessary to provide information about the proxies designated by the company and to explain how shareholders may submit counter motions to the agenda. Publication of the rights to which the shareholders are entitled during the general meeting is not required.

II.3.3 Section 49 (1) sentence 1 no. 2 of the WpHG

II.3.3.1 General information and amendment of administrative practice following transposition of TDIII

Under section 49 (1) sentence 1 no. 2 of the WpHG, an issuer must disclose the distribution and payment of dividends, an announcement about the issuance of new shares, the agreement or the exercise of exchange, subscription, redemption and subscription rights, and any resolution on these rights. The requirements of the TRL-AndRL-UmsG and the 1. FiMaNoG resulted in changes regarding the publication obligations under section 49 (1) sentence 1 no. 2 of the WpHG. There were no changes with regard to the link between the publication obligation and, for example, the distribution/payment of dividends and the requirements governing subscription and retirement rights. However, there have been changes with regard to the timing of publications. For example, since the 1. FiMaNoG came into force, the issuer must announce the forthcoming issuance of shares, not the already effected issuance. In addition, the publication requirement resulting from the TRLAndRL-UmsG is now linked to the “resolution” about the rights referred to in section 49 (1) sentence 1 no. 2 of the WpHG. The addition to the wording by the term “resolution” serves, among other things, to clarify the publication obligations for “agreements”, for example with regard to pre-emptive rights, which have been controversial in the past. The exclusion of subscription rights in the course of capital increases or the sale of the company’s treasury shares therefore continues to be subject to the publication obligation.

Additionally, BaFin used the occasion of the changes in the wording and the legislative material to amend some of its administrative practice on application of the publication obligations. The most important changes:

1. First, publication obligations are only triggered if the rights of the shareholders are actually affected. The consequence of this is that authorisations adopted by general meeting resolutions no longer trigger a general publication obligation, but only the actual exercise of the authorisation by the governing bodies (management board and, possibly, the supervisory board). This applies in particular to the publication obligations in the context of creating authorised capital and redemption of shares.

2. Second, the aim is to avoid duplicated publications with the same content. This also corresponds to the legal principle set out in section 49 (1) sentence 2 of the WpHG, under which a separate publication under section 49 (1) sentence 1 no. 2 of the WpHG superfluous if a corresponding publication in the Federal Gazette is already stipulated. For example, the publication of the subscription offer in the Federal Gazette pursuant to section 186 (5) sentence 2 of the AktG is deemed to be a publication that corresponds to the prescribed publication of the announcement of the forthcoming issuance of new shares and, simultaneously, of the resolution on pre-emptive rights under section 49 of the WpHG if the publication of the subscription offer is made without undue delay within the meaning of section 49 (1) sentence 1 no. 2 of the WpHG following the resolution (by the general meeting or the management board if authorised capital is utilised) and if it contains all the notifiable circumstances under section 49 (1) sentence 1 no. 2 of the WpHG.

Under the principle set out above, under which the shareholders must be informed if their rights are actually affected, it is no longer only the exclusion of pre-emptive rights, but actually their grant, which is subject to the notification obligation. However, if the conditions for the corresponding publication in the form of the subscription offer apply, a separate publication under section 49 (1) sentence 1 no. 2 is superfluous in cases in which pre-emptive rights are granted. A publication under section 49 (1) sentence 1 no. 2 of the WpHG with regard to the announcement of the forthcoming issuance of new shares and the exclusion of shareholders’ pre-emptive rights is only required in cases in which the shareholders have no pre-emptive rights and there is thus no subscription offer within the meaning of a corresponding publication.
II.3.3.2 Notifiable standard resolutions

II.3.3.2.1 Dividend payments
Under section 49 (1) sentence 1 half-sentence 2 of the WpHG, the issuer must publish the distribution and payment of dividends without undue delay in the Federal Gazette. The concept of a “dividend” only includes “genuine” dividends within the meaning of the AktG, i.e. the amount or the non-cash asset distributed to the shareholders out of the net retained profits whose appropriation is determined by a resolution under section 174 of the AktG, but not other payments whose amounts are guided by this. For example, a compensation payment or the resolution adopting it under section 304 of the AktG therefore does not constitute a dividend within the meaning of section 49 (1) sentence 1 no. 2 of the WpHG.

II.3.3.2.2 Resolution on pre-emptive rights and announcement of the issuance of new shares in the context of a regular capital increase
As since the 1. FiMaNoG an earlier publication in connection with the issuance of new shares is required, the publication obligation in the case of a regular capital increase under section 49 (1) sentence 1 no. 2 of the WpHG will, in future, be linked to the respective resolution of the general meeting. The resolution becomes effective immediately after its adoption. Linking the publication obligation to the registration of the capital increase resolution in the commercial register is not rational because publication is now required as soon as the forthcoming issuance of new shares has been announced and, in practice, the capital increase resolution is registered in the commercial register together with the implementation of the capital increase (section 188 (4) of the AktG). The shares have already been issued at this point, however, with the result that publication of the announcement of the forthcoming issuance would no longer be possible.

A distinction must be made as regards the publication requirement, depending on whether shareholders are granted pre-emptive rights or pre-emptive rights have been excluded. If a subscription offer to the shareholders under section 186 (5) sentence 2, subsection (2) sentence 1 in conjunction with section 25 of the AktG is published in the Federal Gazette without undue delay following the resolution of the general meeting, this is deemed to be an appropriate publication for both the announcement of the forthcoming issuance of new shares and for the exclusion of pre-emptive rights without undue delay following the resolution of the general meeting.

II.3.3.2.3 Resolution on pre-emptive rights and announcement of the issuance of new shares in the case of contingent capital
In the case of a contingent capital increase (Bedingtes Kapital), the publication obligation of section 49 (1) sentence 1 no. 2 of the WpHG due to the issuance of new shares is linked to the resolution of the general meeting, as in the case of a regular capital increase, because the effectiveness of the resolution to issue new shares does not depend on its entry in the commercial register, even if it cannot be implemented prior to entry in the commercial register under section 197 of the AktG. The content of the resolution must be published in the Federal Gazette under section 49 (1) sentence 1 no. 2 of the WpHG without undue delay after its resolution.

If contingent capital has been resolved, there is an additional publication obligation due to the simultaneously resolved purpose of the contingent capital, i.e. specifically the termination about who is to receive the subscription rights to the new shares, as this is a resolution about pre-emptive rights within the meaning of section 49 (1) sentence 1 no. 2 of the WpHG. In such cases, it is also conceivable for the general meeting to already resolve the specific arrangements for pre-emptive rights. Because the resolution is already legally valid when the general meeting adopts the resolution, the publication obligation under section 49 (1) sentence 1 no. 2 of the WpHG is also linked to the resolution adopted by the general meeting with regard to the arrangements for pre-emptive rights in order to avoid separate publications in quick succession in practice.

The resolution on the contingent capital increase is often linked to the shareholders’ resolution authorising the management board to issue a convertible bond. This resolution only triggers a publication obligation under section 49 of the WpHG if the general meeting resolves upon an arrangement for pre-emptive rights to subscribe for the convertible bond (section 221 (4) of the AktG); on the other hand, if the general meeting authorises the management board to decide the arrangements for pre-emptive rights to subscribe for the convertible bond, or even to exclude those rights, the publication under section 49 (1) sentence 1 no. 2 of the WpHG due to the resolution on pre-emptive rights must only be made when this authorisation is exercised by the management. In turn, the applicable principle here is that, if the shareholders are granted a pre-emptive right
to subscribe for the convertible bonds, publication of
the subscription offer (under section 221 (4) sentence 2
in conjunction with section 186 (5) sentence 2 of the
AktG) is deemed to be a publication by other means
within the meaning of section 49 (1) sentence 2 of the
WpHG.

II.3.3.2.4 Resolution on pre-emptive rights
and announcement of the issuance of
new shares in the case of authorised
capital

In the case of authorised capital, the publication
obligation due to the announcement of the forthcoming
issuance of new shares arises when the issue of new
shares is actually about to happen. The decisive linking
factor is therefore the resolution by the management
board (following the necessary approval of the
supervisory board) to exercise the authorisation to issue
new shares under the authorised capital.

Here, too, the principle is that if the management
board’s resolution is followed without undue delay by
a subscription offer to the shareholders, the respective
publication in the Federal Gazette constitutes a
corresponding publication by other means within the
meaning of section 49 (1) sentence 2 of the WpHG, and
there is thus no need for a separate publication due to
the announcement of the forthcoming issuance of new
shares and the granting of pre-emptive rights under
section 49 (1) sentence 1 no. 2 of the WpHG.

A publication under section 49 of the WpHG due to
the announcement of the forthcoming issuance of new
shares and of the exclusion of pre-emptive rights is
only required in cases where the subscription offer is
not made immediately after the management board’s
resolution.

II.3.3.2.5 Resolutions under section 71 (1)
no. 8 of the AktG

Resolutions under section 71 (1) no. 8 sentence 6 of the
AktG relating to the acquisition of treasury shares that
authorise the management board to redeem the shares
do not, in the first instance, trigger any publication
obligation under section 49 (1) sentence 1 no. 2 of the
WpHG. This is only subject to a publication obligation
under section 49 (1) sentence 1 no. 2 of the WpHG as a
resolution on redemption rights when the management
board exercises the authorisation to redeem shares.

If the management board is authorised by a resolution
of the general meeting to sell own (treasury) shares
without observing the principle of equal treatment
(section 53a of the AktG), this is treated in the same way
as the exclusion of pre-emptive rights under section 71
(1) no. 8 sentence 5 of the AktG in conjunction with
sections 186 (3) and(4) and 193 (2) no. 4 of the AktG. In

this case, the publication obligation under section 49 (1)
sentence 1 no. 2 of the WpHG arises when the general
meeting adopts a resolution on the permitted utilisation
purposes, which has the same effect as the exclusion of
pre-emptive rights.

II.3.3.3 Publication must be made without
undue delay

A publication is made without undue delay within the
meaning of section 49 (1) sentence 1 no. 2 of the WpHG
only if it is made without culpable delay. As a rule,
BaFin will regard a publication as having been made
without undue delay if a subscription offer (serving as a
corresponding publication by other means) is published
within 14 days after the resolution of the general
meeting (in the case of a regular capital increase) or the
management board (in the case of authorised capital
or the retirement of treasury shares), provided that the
management board drives forward the implementation
of the capital increase without further delay; in individual
cases, however, a separate publication under section 49
of the WpHG may be advisable if publication of the
subscription offer in the Federal Gazette is delayed.
Specific questions should be clarified with BaFin in good
time.
II.3.3.4 Overview and summary of publication obligations under section 49 (1) sentence 1 no. 2 of the WpHG

<table>
<thead>
<tr>
<th>Event at issuer</th>
<th>Publication under section 49 (1) sentence 1 no. 2 of the WpHG (under section 49 no. 2 of the WpHG) by other means in the Federal Gazette</th>
<th>Publication date/time limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Resolution on appropriation of net profit (general meeting)</td>
<td>Publication under section 49 no. 2 of the WpHG due to dividend distribution/payment</td>
<td>Without undue delay after effective resolution of the general meeting</td>
</tr>
<tr>
<td>(2) Regular capital increase (resolution of the general meeting) (a) ... with pre-emptive rights for shareholders</td>
<td>Subscription offer under section 186 (5) sentence 2 of the AktG if published in Federal Gazette without undue delay</td>
<td>Without undue delay after effective resolution of the general meeting</td>
</tr>
<tr>
<td></td>
<td>Otherwise: Separate publication under section 49 no. 2 of the WpHG is necessary for pre-emptive rights and announcement of issuance of shares</td>
<td></td>
</tr>
<tr>
<td>(b) ... with pre-emptive rights excluded</td>
<td>Publication under section 49 no. 2 of the WpHG due to exclusion of pre-emptive rights and announcement of issuance of shares</td>
<td>Without undue delay after effective resolution of the general meeting</td>
</tr>
<tr>
<td>(3) Utilisation of authorised capital (resolution of management board/supervisory board) (a) ... with pre-emptive rights for shareholders</td>
<td>Subscription offer under section 186 (5) sentence 2, subsection (2) sentence 1, section 25 of the AktG if published in Federal Gazette without undue delay</td>
<td>Without undue delay after resolution of management board/supervisory board to exercise the authorisation by the general meeting</td>
</tr>
<tr>
<td></td>
<td>Otherwise: Separate publication under section 49 no. 2 of the WpHG is necessary for pre-emptive rights and announcement of issuance of shares</td>
<td></td>
</tr>
<tr>
<td>(b) ... with pre-emptive rights excluded</td>
<td>Publication under section 49 no. 2 of the WpHG due to exclusion of pre-emptive rights and announcement of issuance of shares</td>
<td>Without undue delay after resolution of management board/supervisory board to exercise the authorisation by the general meeting</td>
</tr>
<tr>
<td>(4) Contingent capital (resolution of the general meeting) (a) ... to settle convertible bonds (linked to resolution of the general meeting under section 221 (1) sentence 1 of the AktG)</td>
<td>Publication under section 49 no. 2 of the WpHG due to announcement of the issuance of shares and arrangements for pre-emptive rights; due to arrangements for pre-emptive rights to subscribe for convertible bonds (section 221 (4) sentence 2 in conjunction with section 186 of the AktG)</td>
<td>Without undue delay after effective resolution of the general meeting</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) ... for other purposes</td>
<td>Publication under section 49 no. 2 of the WpHG due to announcement of the issuance of shares and arrangements for pre-emptive rights</td>
<td>Without undue delay after effective resolution of the general meeting</td>
</tr>
<tr>
<td>(5) Sale of treasury shares (without pre-emptive rights)</td>
<td>Publication under section 49 no. 2 of the WpHG due to exclusion of pre-emptive rights</td>
<td>Without undue delay after effective resolution of the general meeting</td>
</tr>
<tr>
<td>(6) Redemption of shares (resolution of the management board/supervisory board)</td>
<td>Publication under section 49 no. 2 of the WpHG due to right of redemption</td>
<td>Without undue delay after resolution of management board/supervisory board to exercise the authorisation by the general meeting</td>
</tr>
<tr>
<td>(7) Compulsory redemption of shares</td>
<td>Publication under section 49 no. 2 of the WpHG due to right of redemption</td>
<td>Without undue delay after effective resolution of the general meeting (for permitted compulsory retirement) or after resolution of the management board (for mandated compulsory retirement)</td>
</tr>
</tbody>
</table>
II.3.4 Section 49 (2) no. 1 of the WpHG

Section 49 (2) no. 1 of the WpHG stipulates a publication obligation for issuers of debt securities admitted to trading under section 48 (1) no. 6 of the WpHG with regard to the place, time and agenda of the meeting of debt securities holders as well as the notices concerning the right to attend that meeting. It is thus an obligation corresponding to section 49 (1) no. 1 of the WpHG for debt securities admitted to trading within the meaning of section 49 (1) no. 6 of the WpHG.

II.3.5 Section 49 (2) no. 2 of the WpHG

For issuers of debt securities admitted to trading within the meaning of section 48 (1) no. 6 of the WpHG, section 49 (2) no. 2 of the WpHG stipulates publication obligations similar to the those set out in section 49 (1) sentence 1 no. 2 of the WpHG for issuers of shares admitted to trading. Publication is required for the exercise of any conversion, subscription and cancellation rights, as well as interest payments, repayments, drawings and units that have been cancelled or drawn but have not yet been redeemed. The term “interest payments” 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 a publication obligation, in which case the interest rate determined or effective at that time must also be published.

Publication under section 49 (2) no. 2 of the WpHG is exceptionally not required for debt securities admitted to trading if, in the case of a fixed interest rate and predetermined payment dates, the necessary information has already been provided in the prospectus. Since section 49 (2) no. 2 of the WpHG corresponds to the wording used by the previous requirement in the Regulation Concerning the Admission of Securities to Official Listing on a Stock Exchange (Verordnung über die Zulassung von Wertpapieren zum regulierten Markt einer Wertpapierbörse – BörsZulVO), this interpretation can continue to be applied.

II.3.6 Section 49 (3) of the WpHG

Section 49 (3) of the WpHG governs the conditions under which the electronic transmission of information to holders of securities admitted to trading is permitted. The publication obligations under subsections (1) and (2) remain unaffected by these additional new information channels, i.e. these publication obligations must be satisfied in full irrespective of any electronic transmission.

Information within the meaning of section 49 (3) of the WpHG may be any notification (both mandatory and voluntary) by an issuer to a holder of securities admitted to trading; in particular, section 49 (3) of the WpHG covers more than the information referred to in section 49 (1) and (2) of the WpHG.

Information within the meaning of section 49 (3) of the WpHG may thus be any information originating from the sphere of an issuer and disclosed by that issuer to any or all of the holders of securities admitted to trading. It is not possible to limit this to particular obligations, for example under the AktG.

II.4 Change in the legal basis of the issuer (section 30c of the WpHG (old version)) and applicability to issuers from the EU and the EEA (section 30d of the WpHG (old version))

Section 30c of the WpHG (old version), which formerly governed the notification obligations in the case of planned changes in the legal basis of the issuer, was withdrawn without replacement by the TRL-ÄndRL-UmsG. Section 30d of the WpHG (old version) was also withdrawn due to a lack of applicability.

II.5 Publication of additional disclosures and transmission to the Company Register (section 50 of the WpHG)

II.5.1 General information

Section 50 of the WpHG governs the publication obligations of domestic issuers in the case of changes in the law relating to the relevant respective securities as well as in the case of the bond issues. In addition, the publication obligation is established in respect of information published in a third country. The manner and language of the publication are governed by the general requirements to which section 22 of the WpAV refers (IV.6.1, IV.6.2). For the language in which information under section 50 (1) sentence 1 no. 3 of the WpHG is published, section 22 of the WpAV provides an option to publish the information only in English. In addition to publication, the information must also be transmitted to the Company Register for storage and BaFin must be notified of the publication (IV.6.4, IV.6.5).
II.5.2 Section 50 (1) sentence 1 no. 1 of the WpHG

II.5.2.1 Overview

Under section 50 (1) sentence 1 no. 1 1st half-sentence of the WpHG, domestic issuers are required to publish without undue delay any modification of the rights attached to securities admitted to trading and to notify this publication to BaFin. Special requirements arise under (a) in the case of shares admitted to trading for rights attached to derivative securities issued by the issuer itself, provided that they grant conversion or acquisition rights in respect of the issuer’s shares admitted to trading, and under (b) in the case of securities admitted to trading other than shares, for modifications to the terms or conditions of these securities, to the extent that the rights attached to those securities are indirectly affected. Point (c) was deleted without replacement by the TRLandRL-UmsG.

II.5.2.2 Section 50 (1) sentence 1 no. 1 1st half-sentence of the WpHG – Catch-all provision

Section 50 (1) sentence 1 no. 1 1st half-sentence of the WpHG corresponds to the wording of section 66 of the BörsZulVO (old version), which was a catch-all provision for information relating to securities whose publication is not prescribed elsewhere. The publication obligations were not extended by the transposition of the Transparency Directive. As a result, in cases where a publication obligation is established by other requirements, there is no additional publication obligation under section 50 (1) sentence 1 no. 1 1st half-sentence of the WpHG.

Under section 50 (1) sentence 1 no. 1 1st half-sentence of the WpHG, only those modifications that directly impact the rights attached to the securities are subject to the publication obligation.

Individual cases:
The conclusion of a control and profit and loss transfer agreement does not constitute any modification of the rights attached to securities admitted to trading that is subject to the publication obligation under section 50 of the WpHG. There is no direct impact in this case, in particular because the dividend entitlement continues to exist at a formal level. Legal consequences that may arise under the AktG do not, as a rule, lead to a publication requirement under section 50 (1) sentence 1 1st half-sentence of the WpHG, with the result that neither reverse stock split

or squeeze-out resolutions are subject to a general publication obligation.

Nor does a publication obligation exist in the case of a resolution within the meaning of section 49 (3) no. 1 a) of the WpHG, since there is no direct modification of the rights attached to the securities.

Equally, a change in the remuneration of the supervisory board/management board does not lead to a publication obligation under section 50 (1) sentence 1 no. 1 1st half-sentence of the WpHG, as in this case, too, there is no direct link to the rights of holders of the securities. Such a link might only exist if the change in remuneration was highly significant for the issuer’s economic position. In such cases, however, there would be an obligation to publish an ad hoc disclosure, thus leaving no room for any obligation for a publication under section 50 (1) no. 1 of the WpHG.

II.5.2.3 Section 50 (1) sentence 1 no. 1 a) of the WpHG

This requirement contains a publication obligation for domestic issuers of shares admitted to trading in respect of a change in rights attached to derivative securities issued by the issuer itself, to the extent that the securities convey conversion or acquisition rights in respect of the issuer’s shares admitted to trading.

For example, in the case of convertible bonds or bonds with warrants relating to shares admitted to trading of an issuer whose registered office is in Germany, there is a publication obligation under section 50 (1) sentence 1 no. 1 a) of the WpHG in the case of the retrospectively valid extension of the conversion period in the sense of a modification of contract.

II.5.2.4 Section 50 (1) sentence 1 no. 1 b) of the WpHG

The publication obligation of section 50 (1) sentence 1 no. 1 (b) of the WpHG only covers changes in the terms of the securities admitted or the conditions attached thereto. Interest rates are listed as one example in this context. Since section 50 (1) no. 1 (b) of the WpHG requires publication in respect of changes in terms, section 50 (1) sentence 1 no. 1 (b) of the WpHG only prescribes publication relating to interest rates if these have been amended retrospectively, for example in the course of a general meeting of debt securities holders. In the other cases, the publication obligation under section 49 (2) no. 2 of the WpHG applies (II.3.5).

The “securities” referred to in this provision must be securities admitted to trading. This follows from the
The wording of Article 16(2) of the Transparency Directive. The publication obligation under section 50 (1) sentence 1 no. 1 b) of the WpHG applies to modifications to the conditions of the securities that require the consent of the debt securities holders under general principles of civil law. As a general rule, these include a change in the obligor, for example.

II.5.3 Summary of the requirements to be met by a publication or notification under section 50 (1) sentence 1 no. 1 of the WpHG

<table>
<thead>
<tr>
<th>Publications</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Timing of the publication</strong></td>
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<tr>
<td><strong>Addressee of the publication</strong></td>
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<tr>
<td><strong>Language of the publication</strong></td>
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<tr>
<td><strong>Content of the publication</strong></td>
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<table>
<thead>
<tr>
<th>Notification about the publication</th>
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<tbody>
<tr>
<td><strong>Timing of the publication</strong></td>
</tr>
<tr>
<td><strong>Addressee of the notification</strong></td>
</tr>
<tr>
<td><strong>Content of the notification</strong></td>
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<table>
<thead>
<tr>
<th>Transmission to the Company Register</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Timing of the transmission</strong></td>
</tr>
<tr>
<td><strong>Content of the transmission</strong></td>
</tr>
</tbody>
</table>
II.5.4  Section 50 (1) sentence 1 no. 2 of the WpHG

II.5.4.1  General information

Section 50 (1) sentence 1 no. 2 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 information gaps should be prevented, so all relevant information must be made available to all investors.

II.5.4.2  No general obligation for publication in full text

The full text of information within the meaning of section 50 (1) sentence 1 no. 2 of the WpHG must generally be published regardless of its length. This follows from the wording of section 50 (1) sentence 1 no. 2 of the WpHG. However, in the case of substantial publications, such a publication may place considerable burdens on issuers, while being of limited 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 under section 50 (1) sentence 1 no. 2 of the WpHG, it is not sufficient to provide a reference to a website that requires a further search to access 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.

II.5.4.3  Publication in the third country

Publication in another EU member state/signatory state to the EEA in addition to the publication in the third country rules out the publication obligation under section 50 (1) sentence 1 no. 2 of the WpHG. Section 50 (1) sentence 1 no. 2 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 gaps between third countries and the EU/EEA, which is why section 50 (1) sentence 1 no. 2 of the WpHG should be read as follows: “... information that it” only publishes in a third country”.

II.6  Exemption (section 51 of the WpHG)

Under section 51 of the WpHG, BaFin may exempt domestic issuers whose registered office is in a third country from the obligations under sections 48, 49 and 50 (1) sentence 1 no. 1 of the WpHG if those issuers are subject to equivalent requirements of a third country or they have committed to complying with such requirements. There is equivalence under section 9 of the TranspRLDVO with reference to meetings in respect of the requirements under section 49 (1) sentence 1 no. 1 of the WpHG if the requirements 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 51 (2) of the WpHG requires information on circumstances within the meaning of section 50 (1) sentence 1 no. 1 of the WpHG that must be made available to the general public in accordance with equivalent requirements of the third country to be published under section 50 (1) of the WpHG in conjunction with the WpAV, and to notify the publication simultaneously to BaFin. In addition, the information must be transmitted to the Company Register without undue delay, but not before its publication.

II.7  Administrative offences

Under section 120 of the WpHG, violations of the obligations under sections 48 et seq. of the WpHG are punishable by administrative fines. The administrative fines for individual offences range up to 500,000 euros.