

German Securities Trading Law - New Share Ownership Notification Rules

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A. Introduction

On January 20, 2007, the *Transparenzrichtlinie-Umsetzungsgesetz* (Transparency Directive Implementation Act or TUG)¹ came into effect implementing the European Transparency Directive.² It entails some significant changes to the disclosure requirements of German listed corporations, such as a newly introduced *Bilanzeit* (confirmation of the balance sheet). In addition, material alterations to the share ownership notification rules in the *Wertpapierhandelsgesetz* (German Securities Trading Act or WpHG) have been made. The latter changes should be carefully observed by investors and are analyzed in this article.

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¹ "Gesetz zur Umsetzung der Richtlinie 2004/109/EG des Europäischen Parlaments und des Rates vom 15. Dezember 2004 zur Harmonisierung der Transparenzanforderungen in Bezug auf Informationen über Emittenten, deren Wertpapiere zum Handel auf einem geregelten Markt zugelassen sind, und zur Änderung der Richtlinie 2001/34/EG (Transparenzrichtlinie-Umsetzungsgesetz – TUG)", BGBl. I 2007, 10; see further Beiersdorf/Buchheim, *Entwurf des Gesetzes zur Umsetzung der EU-Transparenzrichtlinie: Ausweitung der Publizitätspflichten*, BETRIEBS-BERATER (BB) 2006, 1674; Beiersdorf/Rahe, *Verabschiedung des Gesetzes zur Umsetzung der EU-Transparenzrichtlinie (TUG)* BB 2007, 99; Bosse, *Wesentliche Neuregelungen ab 2007 aufgrund des Transparenzrichtlinie-Umsetzungsgesetzes für börsennotierte Unternehmen*, DER BETRIEB (DB) 2007, 39; Fleischer, *Der deutsche "Bilanzeit" nach § 264 Abs. 2 S. 3 HGB*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 2007, 97; Heldt/Ziemann, *Sarbanes Oxley in Deutschland?*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 2006, 652; Hutter/Kaulamo, *Transparenzrichtlinie-Umsetzungsgesetz: Änderungen der Regelpublizität und das neue Veröffentlichungsregime für Kapitalmarktinformationen*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2007, 550; Nießen, *Die Harmonisierung der kapitalmarktrechtlichen Transparenzregeln durch das TUG*, NZG 2007, 41; Pirner/Lebherz, *Wie nach dem Transparenzrichtlinie-Umsetzungsgesetz publiziert werden muss*, DIE AKTIENGESELLSCHAFT (AG) 2007, 19; Rodewlad/Unger, *Zusätzliche Transparenz für die europäischen Kapitalmärkte - Die Umsetzung der EU-Transparenzrichtlinie in Deutschland*, BB 2006, 1917.

² EC Directive 2004/109 of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, Official Journal dated December 31, 2004, L 390/98.

B. Legislative Background

Shareholders of a stock corporation listed on an official German stock exchange are required to notify the *Bundesaufsicht für Finanzdienstleistungen* (Federal Securities Supervisory Authority or BaFin) and the corporation in question when their position exceeds or falls below specified percentages of voting rights. Notification obligations can be triggered not only through direct shareholdings but also, via a complicated system of attribution of voting rights, through indirect interests such as voting rights of subsidiaries or connected third parties.³ The notification does not have to state whether the shareholder has a strategic interest in the acquisition of the shares as under US securities laws.⁴ Prior to the 20 January 2007 amendments, the relevant thresholds were 5%, 10%, 25%, 50% and 75% of the voting rights.

Notifications had to be made within seven calendar days after meeting or falling below any applicable threshold. Shareholders failing to meet these notification rules lost their voting rights and dividends for these shares. In addition to that, a fine could be imposed on delinquent shareholders.

C. The New Notification Rules

These general rules still apply after January 20, 2007. However certain modifications have been made, in particular the following:

Most obviously, new thresholds in addition to the existing ones have been introduced. From January 20, 2007, shareholders will be required to notify BaFin and the company issuing the shares if they exceed or fall below 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% of the company's voting rights. It is interesting to note that the German legislator opted for a 3% threshold although this was not required by the European directive. This new 3% threshold brings the new German shareholder notification rules in line with European jurisdictions such as Italy and the United Kingdom.⁵ In addition to that, it will become more difficult for investors such as hedge funds to acquire substantial shareholdings in a German listed company without being noticed, a phenomenon which has been intensely discussed in Germany as a result of cases like Deutsche Boerse AG / TCI.⁶ Share

³ Section 22 WpHG.

⁴ See further Schedule 13D, 13G Securities Exchange Act 1934 (www.sec.gov).

⁵ See further BT-Drucks. 16/2498, 34.

⁶ See further also publication of BaFin dated October 19, 2005 (www.bafin.de).

ownership notifications have to be published as stipulated in the provisions on publications (WpAIV), which has also been substantially amended.⁷

Furthermore, the time limit to comply with shareholder notification has been shortened to four trading days (meaning calendar days other than Saturdays, Sundays and holidays listed on the BaFin website).⁸

The attribution of voting rights have been broadened with regard to Section 22(1) sentence 1 no. 6 WpHG. Shareholders now have to take into account not only voting rights deferring from shares entrusted to them by a third person, but also those voting rights for which they act as representatives. This rule, however, only applies if the representative in question is not bound by third persons' directions how to vote.⁹

Certain exemptions to these notification rules apply, e.g. if the shares are not held for more than three trading days and only for the purpose of settlement of accounts and transactions such as with banking institutions.

Moreover, the new shareholder notification rules apply to financial instruments, too, including *Terminingeschäfte* (forward transactions), the exercise of which is not depending on external circumstances, but is subject to the transferee's discretion. Financial instruments may be directly or indirectly held, e.g. by a subsidiary, but shall be taken into account cumulatively.¹⁰

Additionally, the corporation in question has to publish the information in a medium accessible throughout Europe. Such publication must be made within three trading days after shareholder notice is received. The company must also notify BaFin of the publication and must send the information, immediately after publication, to the new electronic *Unternehmensregister* (companies' register), which

⁷ "VERORDNUNG ZUR KONKRETISIERUNG VON ANZEIGE-, MITTEILUNGS- UND VERÖFFENTLICHUNGSPFLICHTEN SOWIE DER PFLICHT ZUR FÜHRUNG VON INSIDERVERZEICHNISSEN NACH DEM WERTPAPIERHANDELSGESETZ", published in Bundesgesetzblatt (Federal Gazette - BGBI). Vol. I 2004, 3376; see further Pirner/Lebherz, *Wie nach dem Transparenzrichtlinie-Umsetzungsgesetz publiziert werden muss*, AG 2007, 19; BaFin publication dated January 24, 2007 (www.bafin.de).

⁸ See further www.bafin.de.

⁹ Bosse, *Wesentliche Neuregelungen ab 2007 aufgrund des Transparenzrichtlinie-Umsetzungsgesetzes für börsennotierte Unternehmen*, DB 2007, 41.

¹⁰ See further BT-Drucks. 16/2498; Pirner/Lebherz, *Wie nach dem Transparenzrichtlinie-Umsetzungsgesetz publiziert werden muss*, AG 2007, 19, 21; Nießen, *Die Harmonisierung der kapitalmarktrechtlichen Transparenzregeln durch das TUG*, NZG 2007, 41.

was introduced on January 1, 2007, to enable an electronic access to all substantial company information within the European Union, such as all relevant information under the German Securities Trading Act, the commercial register as well as annual statements.¹¹

In case of a breach of the notification rules the shareholder loses his voting rights deferring from the shares he failed to notify as stated in Section 28 WpHG.¹² Infringements of shareholder notification rules are dealt with as misdemeanours and will be avenged by imposing fines up to EUR 200,000.¹³

D. Transition Rules

The introduction of the new notification thresholds is subject to detailed transition rules. If voting rights from a shareholder's existing portfolio exceed or fall below a threshold of 15%, 20% or 30% as of January 20, 2007, the concerned corporation has to be informed by March 20, 2007. However, this obligation only applies if the shareholder did not inform the company in question in an equivalent way before January 20, 2007, i.e. did not mention exact percentages in prior notifications.

Surprisingly, there is no obligation to notify about voting rights in excess of the new 3% threshold as of January 20, 2007. Apparently, this was overseen in the legislation proceedings.¹⁴

Notifications received under the transition rules must be sent by the corporation to BaFin by April 20, 2007 and, at the same time, must be submitted to the electronic companies' register.

These transition rules apply only to notifications required because an existing interest exceeds one of the new thresholds (e.g., a shareholder with a 17% interest

¹¹ "Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (EHUG)", BGBl. I 2006, 2553; see further Schlotter, *Das EHUG ist in Kraft getreten: Das Recht der Unternehmenspublizität hat eine neue Grundlage (Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister)*, BB 2007, 1; Meyding/Bödeker, *Gesetzesentwurf über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (EHUG-E): willkommen im online-Zeitalter!*, BB 2006, 1009; Liebscher/Scharff, *Das Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister*, NJW 2006, 3745.

¹² See further also publication of BaFin dated January 1, 2007.

¹³ See further Section 41 (5) WpHG.

¹⁴ See further also Bosse, *supra* note 9, at 39, 42.

would have had to notify that it held over 10% and now must also notify that it holds over 15%). If shareholders' interests exceed or fall below any threshold, including the new thresholds, as a result of transactions occurring after January 20, 2007, the new notification rules apply in full.

E. Summary

The new shareholder notification rules considerably increase the transparency of voting control of German stock corporations. Even the acquisition of a relatively small (3%) voting position now has to be notified and will be noticed by the market participants. However, it must be noted that the amendment will cause an enormous administrative workload for BaFin and stock corporations, even potentially for investors. The abundance of notifications after the implementation of the TUG has even led to speculations that the new rules may rather cause confusion than increase transparency.¹⁵ It remains to be seen how these challenges will be met and if the new transparency rules in Germany will contribute to a unitary European capital market.¹⁶

¹⁵ Daniel Schäfer and Norbert Küls, *Die Deutsche Handels-AG*, *Frankfurter Allgemeine Zeitung*, February 9, 2007, at 20.

¹⁶ See further Nießen, *supra* note 10 at 41, 46.