
1 Overview

After decades of political tug-of-war, the European Takeover Bids Directive (2004/25/EG)\(^1\) finally entered into force in May 2004. Its aim is to harmonise and – by breaking down the barriers to takeovers – liberalise provisions in the Member States concerning the takeover of companies listed on the stock market.


For the implementation of these remaining points, the Federal Parliament ("Bundestag") adopted the governmental draft\(^2\) for the Takeovers Bid Directive Implementation Act as amended by the resolution of the parliamentary Finance Committee\(^3\) on 19 May 2006. The act became effective on 14 July 2006 (hereinafter also “WpÜG n.v.”)

For German companies, the Takeover Bids Directive Implementation Act brings new developments in the following areas:

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\(^2\) Printed matter of the Federal Parliament (Bundestag) No. 16/1003, available in German language only at: http://dip.bundestag.de/btd/16/010/1601003.pdf

\(^3\) Recommendationary resolution and report of the parliamentary Finance Committee as of 17 May 2006, printed matter of the Federal Parliament (Bundestag) No. 16/1541, available in German language only at: http://dip.bundestag.de/btd/16/010/1601541.pdf
• **Breaking through takeover barriers:** Companies will be able to curb their right to defensive action with regard to takeovers. In this respect, shareholders of listed German companies will be required to take the necessary strategic decisions (see under 2.).

• **Stating takeover barriers in the management report:** Listed companies must henceforth disclose their capital and controlling structures including certain takeover barriers in their management report or group management report. Potential offerors shall hereby be enabled to obtain an overall impression of the target company and to ensure an early identification of possible takeover barriers (see under 3.).

• **Determination of the consideration:** The reference period taken into account to determine the minimum price on the basis of previous purchases made by the offeror is extended. In a takeover or mandatory offer, the consideration offered by the offeror must henceforth - inter alia - be in line with the highest price paid by the offeror in a period ranging from six months before the tender offer until the end of the acceptance period (hitherto three months). Also where the obligation to make a cash offer is concerned, the reference period for previous acquisitions is modified and the provision governing simultaneous acquisitions relaxed (see under 4.).

• **Squeeze-out under takeover law:** If a participation quota of 95% is reached, offerors will in the future be able to effect the exclusion of the minority shareholders by way of a court order following a public offer. In case of an acceptance quota of 90 % of the shares comprised in the tender offer, the offer price is regarded as appropriate compensation in the Squeeze-Out pursuant to takeover law (see under 5.).

• **Sell-out under takeover law:** Where the requirements for the exclusion of minority shareholders by the offeror are met, the minority shareholders can demand acquisition of their shares by the offeror (see under 6.).

• **International scope of application of the WpÜG:** The scope of application of the WpÜG will be restricted for domestic target companies and expanded for target companies domiciled in other states of the European Economic Area (see under 7.).

• **Other changes:** In other respects, the Takeover Bids Directive Implementation Act provides for a redefinition of “persons acting in concert”, broadens the provisions
governing the attribution of voting rights in case of subsidiaries, introduces the Electronic Federal Gazette as publication medium and expands the investigative competence of the Federal Authority for Financial Services Supervision ("BaFin"). Furthermore, the additional information on the contents of the offer document are expanded by information relating to the offeror and the offeror’s obligation to notify its employees is introduced (see under 8.).

The WpÜG in its hitherto existing version applies to public offers to acquire securities whose offer document was published up to and including 13 July 2006, viz the WpÜG applies for the last time to the offer of Crystal Capital GmbH for the shares of WMF Württembergische Metallwarenfabrik AG and to the offer of Marivag AG for the shares of WESTGRUND Aktiengesellschaft. The amended WpÜG then applies to public offers whose offer document is published on or after 14 July 2006.

2 Removal of barriers to takeovers

Following extremely controversial negotiations on the future admissibility of defensive measures by the managing bodies of the target company and of defensive rights, contractual and set out in the articles of association, the Takeover Bids Directive provides for a two-stage option model as a compromise solution for the removal of such takeover barriers. The so-called Restriction on Frustrating Actions basically forbids the company’s management to take measures that might frustrate a takeover or a mandatory offer. Due to the so-called Breakthrough Rule of the Takeover Bids Directive, existing voting rights or transfer restrictions do not take effect during a takeover offer and multiple voting rights entitle the holder to one vote only.

The first level of the option model provides Member States with the option not to apply the two provisions of the Takeover Bids Directive on the Restriction on Frustrating Actions and the Breakthrough Rule. Insofar as a Member State makes use of the opportunity, the second level of the option model gives companies themselves the opportunity to apply the relevant provisions of the directive voluntarily by way of a resolution of the general meeting to amend the articles of association.

Already under the previous legal situation, the board of directors of a target company must not perform acts which might frustrate the success of the offer. This restriction on frustrating actions applies from the publication of the offeror’s decision to make a tender offer until the publication of the outcome of the tender offer. The restriction on frustrating actions, however, is considerably cut back by several exceptions. In addition to the public refusal of the tender offer and the
search for a competing offeror, the WpÜG permits actions that have been approved by the supervisory board or would have also been taken by a prudent and conscientious manager of a company not affected by a takeover bid, and also permits resolutions by the general meeting that authorise the corporate management to implement defensive measures. German takeover law allows the respective resolutions to be passed as global resolutions in advance. The WpÜG does not specify any provision comparable to the Breakthrough Rule yet.

The WpÜG n.v. leaves these rules in existence and therefore takes advantage of the possibility not to implement the Restriction on Frustrating Actions and the Breakthrough Rule with generally binding effect.

The innovation of the WpÜG n.v. is that – in the course of implementing the second level of the option model – the shareholders of listed companies are able to decide whether the “European” Restriction on Frustrating Actions and/or the Breakthrough Rule should be applicable to the company. Insofar, relevant provisions must be incorporated into the company’s articles of association. The shareholders are free to allow the application of just one of the provisions or both provisions cumulatively.

2.1 European Restriction on Frustrating Actions

Insofar as the shareholders of a company choose to apply the “European” Restriction on Frustrating Actions, the exceptional circumstances for a restriction on frustrating actions that existed up to now are partly constrained. Thus, under the “European” Restriction on Frustrating Actions, defensive measures by virtue of global resolutions of the general meeting or approved by the supervisory board are inadmissible, as long as they do not satisfy the requirements of exceptions which continue to be valid. The general meeting is only permitted to authorise the implementation of defensive measures after the specific tender offer has become known.

The public rejection of an offer and the search for a competing offer, however, continue to remain admissible. As further exception, actions are admissible which form part of the normal course of business and actions beyond the normal course of business that serve to implement decisions that were passed before the offer became known and have not yet been fully implemented. This is based upon a similar fundamental rationale as the exemption hitherto existing for actions that would have also been taken by a prudent and conscientious manager of a company not affected by a takeover bid. The wording of the exception to the “European” Restriction on Frustrating Actions, however, is narrower and in particular does not leave any room for actions beyond the ordinary course of
business decided on after the publication of the intention to make an offer.

2.2 European Breakthrough Rule

2.2.1 Content of the Breakthrough Rule

If the shareholders of the relevant company chose to apply the Breakthrough Rule, certain provisions inhibiting takeovers are abrogated or broken through in the event of a takeover. This involves differentiating between two periods:

(i) During the acceptance period, restrictions on the transferability of shares in the target company do not apply vis-à-vis the offeror (sec. 33b para. 2 no. 1 WpÜG n.v.). It is in principle irrelevant in this context whether the restriction arises from the articles of association, from contractual agreements between the company and the shareholders, or from agreements between the shareholders themselves. With regard to contractual restrictions the Breakthrough Rule, however, applies only to agreements concluded after the Takeover Bids Directive was made public on 21 April 2004. This provision covers, for example, registered shares with restricted transferability and pre-emption rights in pooling agreements.

In addition, voting trust agreements that were entered into after 21 April 2004 have no effect in a general meeting resolving on defensive measures (sec. 33b para. 1 no. 2 WpÜG n.v.). In such cases, multiple voting shares entitle the holder to a single vote only. This provision, however, is virtually irrelevant in Germany.

(ii) If, following a takeover or mandatory offer, the offeror holds 75 per cent of the target company’s voting rights, voting trust agreements entered into after 21 April 2004 have no effect in the first general meeting (sec. 33b para. 2 no. 3 WpÜG n.v.). In addition, any shareholders’ rights – stipulated in the articles of association – for the nomination or abrogation of management or administrative body members do not apply. Also, securities with multiple voting rights have only one vote. This only applies, however, if the general meeting is called at the offeror’s request in
order to amend the articles of association or to decide on the members of the company’s management bodies.

One exception to the breakthrough rule are preferential shares without voting rights. The holders of these shares are still not entitled to a voting right in spite of application of the Breakthrough Rule.

The wording of the act does not make clear whether the articles of association may contain the provisions quoted in sec. 33b para. 1 no. 1 to no. 3 WpÜG n.v. only as a group of provisions or separately as individual provisions. The notion of harmonisation of the directive would tend to suggest the former, however. Also, the splitting up of provisions would lead to complicated states of affairs, particularly with regard to the principle of reciprocity (see under 2.5).

2.2.2 General meeting at short notice

In order to enable the offeror, whom the Breakthrough Rule benefits, to exercise his rights adequately, he is given the opportunity to call a general meeting at short notice. However, the offeror may only request the calling of the general meeting if he aims to make a change to the articles of association or to the members of the supervisory board. Yet, the statement of grounds of the governmental draft deems it without detrimental effects if this general meeting also resolves on other measures.

2.2.3 Compensation obligation

The offeror must provide appropriate pecuniary compensation for the loss of any legal positions. This applies only, however, if these rights were established prior to the publication of the decision to make a tender offer and are known to the target company. This restriction shall thwart the danger of abuse with regard to contractual restrictions on transferability and voting trust agreements. The compensation claim can only be lodged at court within two months after the removal of rights. This period commences in case of a breakthrough of voting right restrictions on the day after the relevant general meeting took place and in relation to transferability restrictions on the day after the offer period’s expiry. Contrary to the requirements of the Takeover Bids Directive, the WpÜG n.v. does not specify any concrete criteria according to which compensation could be determined.
2.3 Introduction of the Restriction on Frustrating Actions and the Breakthrough Rule

The aforementioned provisions on the European Restriction on Frustrating Actions and/or the Breakthrough Rule will be introduced by way of amendment to the articles of association. This requires a corresponding resolution in the general meeting and the entry of the amendment to the articles of association in the Commercial Register. The resolution in the general meeting requires in principle a majority of \( \frac{3}{4} \) of the share capital represented at voting, unless provisions of the articles of association prescribe a lower or higher capital majority. It is thus up to the shareholders of a company whether they wish to allow the Restriction on Frustrating Actions and/or the Breakthrough Rule to be applied. The decision to introduce the Restriction on Frustrating Actions and/or the Breakthrough Rule is reversible, and it may thus be rescinded by a further change to the articles of association. Voting on the introduction of the Restriction on Frustrating Actions and/or the Breakthrough Rule can either be proposed by the board of directors or demanded by the shareholders according to the general provisions of the German Stock Corporation Act.

As the Takeover Bids Directive Implementation Act became effective on 14 July 2006, the introduction of the Restriction on Frustrating Actions and the Breakthrough Rule respectively is unlikely to be significant for the 2006 general meeting season.

2.4 Notification obligations of the company

Insofar as a company resolves to introduce the European Restriction on Frustrating Actions and/or the Breakthrough Rule by amending the articles of association, the company’s board of directors must without delay notify both BaFin and the supervisory authorities of the states of the European Economic Area in which the company has securities admitted to trading on an organised market that a relevant provision of the articles of association has been approved.

2.5 Reciprocity provision

The reciprocity provision concerns domestic target companies that have opted for the application of the European Restriction on Frustrating Actions and/or the Breakthrough Rule. The general meeting of these target companies can exclude the applicability of the Restriction on Frustrating Actions and the Breakthrough Rule if the offeror is not subject to equivalent restrictions in a takeover (“requirement of reciprocity”). This
applies regardless of whether the offeror is from a state of the European Economic Area or from a third country.

If the offeror is a company directly or indirectly controlled by another company, then the reciprocity requirement applies to the controlling company and not to the company making the offer. This provision aims at preventing the circumvention of the reciprocity principle by use of a subsidiary submitting the offer instead of the parent company.

The reservation of reciprocity in relation to the European Restriction on Frustrating Actions and the Breakthrough Rule can be approved in a single resolution. The relevant resolution by the general meeting in which the reciprocity requirement is applied, must not have been passed more than 18 months prior to the announcement that an offer has been submitted. In practice, therefore, voting on such a resolution to grant authority must take place every year at the ordinary general meeting, if necessary. The management board of the target company has to communicate the authorisation without delay to the BaFin and to the supervisory authorities of those states within the European Economic Area in which voting shares are admitted to trading on an organised market. In addition, the authorisation must be published without delay on the company’s website.

3 Specify takeover barriers in the target company's management report

In future, extended disclosure obligations will affect listed companies with regard to their structure. This applies regardless of whether a takeover offer has been submitted or is expected. The intention is to enable potential offerors to gain an overall impression of the target company, particularly with regard to its structure and possible takeover barriers. This will make it easier for companies to prepare for takeovers.

In detail, the management report in connection with the annual financial statement must contain the following information:

- composition of subscribed capital; where shares are of different types, the proportion of the share capital occupied and the associated rights and obligations must be stated for each type of share;

- restrictions with regard to voting rights and the transferability of shares; the notification obligation also covers contractual agreements between shareholders where these are known to the company's board of directors;
direct or indirect participations in capital that exceed 10% of the voting rights (e.g. reciprocal shareholding, pyramid structures);

- the holders of shares with special rights; the special rights must be described;

- the type of control over voting rights where employees participate in capital and do not directly exercise their rights of control;

- the statutory provisions and those of the articles of association with regard to the appointment and replacement of members of the management board and with regard to the amendment of the articles of association;

- special rights of the management board, in particular the authorisation to issue and repurchase one's own shares;

- so-called Change-of-Control provisions in material agreements and any consequences thereby arising, where disclosure does not result in significant detriment to the company; the notification obligation pursuant to other statutory provisions is not affected;

- compensation agreements concluded with management board members or employees for the termination of service agreements and employment contracts due to a takeover offer.

The relevant information relating to the parent company must be made in the group management report.

As part of the management report, the notification obligations are subject to review by the supervisory board and the auditing obligation of the auditor.

In order to inform shareholders of the existing structures and defensive measures, the supervisory board’s written report to the general meeting must henceforth include an explanation of the additional information on takeover barriers provided in the management report.

The amended provisions concerning the management report or group management report will be applicable in connection with the annual financial statements and group financial statements for the business year beginning after 31 December 2005 – thus, not until the annual financial statement for the 2006 business year, where this corresponds to the calendar year. If the business year deviates from the calendar year, the new transparency provisions first apply to the business year 2006/2007.
4 Determination of the consideration

4.1 Extension of the prior acquisition period of relevance to the amount of the consideration

According to the previous legal situation, in case of takeover offers and mandatory offers the offeror had to offer - inter alia - consideration in at least the amount that it, a person acting in concert with it, or a subsidiary of the person acting in concert paid or agreed to pay to acquire shares in the target company in a period of three months before the publication of the offer document. This time period is now being extended to six months, which has significant consequences in practical terms.

4.2 Obligation to make a cash offer

According to the previous legal situation, the offeror had to offer the shareholders of the target company cash as consideration if it or persons acting in concert with it had against payment of a cash sum collectively acquired at least 5% of the shares or voting rights in the target company in the three months before announcement of the bid, or at least 1% of the shares or voting rights in the target company after the announcement of the offer until the publication of the outcome of the tender offer following the expire of the acceptance period.

For purposes of implementing the Takeover Bids Directive, there will no longer be any distinction of the criteria of prior acquisition and simultaneous acquisition and the basis to be taken into consideration will be whether, during the six months prior to the publication of the decision to make a tender offer until the expiry of the acceptance period, a total of at least 5% of the shares or voting rights in the target company were acquired against payment of a cash consideration.

5 Squeeze-out pursuant to takeover law

In supplementation of squeeze-outs pursuant to the Stock Corporation Act, the Takeover Bids Directive Implementation Act provides for the introduction of squeeze-outs pursuant to takeover law. If certain participation quotas are reached, this enables the offeror to squeeze out the remaining shareholders from the company by a court order.

5.1 Squeeze-out requirements

The offeror is entitled to squeeze out the remaining holders of voting shares if, following a takeover or a mandatory offer, it holds at least 95% of the registered share capital carrying voting rights. If the offeror simultaneously holds shares amounting to 95 per cent of the overall
registered capital, then, upon its application, the preference shares without voting rights are also to be transferred to it. Shares which are held by a dependent enterprise, by a third party for the account of the offeror, or by an enterprise dependent on such third party are insofar also attributed to the offeror.

The offeror only has to reach these thresholds in a close temporal connection with the offer, whereas the statement of grounds of the governmental draft merely mentions a couple of examples in this respect without stipulating this criterion more precisely. The achievement of the threshold need not be based on the acceptance of the offer. Pursuant to the statement of grounds of the governmental draft, shares acquired outside the offer procedure, e.g. through the acquisition of blocks of shares in the off-market, are also accounted for in calculating the required majorities.

The offeror is obliged to publish the achievement of the threshold required for the squeeze-out of the minority shareholders.

5.2 Compensation of the withdrawing shareholders

The withdrawing shareholders must be granted an appropriate compensation for the loss of their membership in the company.

The nature of the compensation granted must correspond to the consideration of the takeover or mandatory offer. However, should the consideration offered in the offer procedure not be in the form of a cash payment, the offeror must offer the withdrawing shareholders the option of a cash settlement.

The compensation to be granted to the withdrawing shareholders must be appropriate. Of considerable importance insofar is whether the offeror has acquired at least 90 per cent of the shares comprised in the offer through the acceptance of the takeover or mandatory offer. In this case, the consideration granted in the course of the takeover or mandatory offer is irrefutably deemed to be appropriate.

The acceptance quota must be calculated separately for voting shares and for non-voting preference shares.

5.3 Squeeze-out procedure

In comparison to a squeeze-out pursuant to the Stock Corporation Act, the squeeze-out pursuant to takeover regulations facilitates proceedings, since no resolution of the general meeting is required to implement the squeeze-out. This is rather effected by way of a court order. The reporting obligations of the main shareholder with regard to the fulfilment of the squeeze-out requirements and the appropriateness of the cash
compensation as well as the necessity to have the appropriateness of the compensation audited by a court appointed auditor cease to apply. This should lead to a considerable cost reduction that would otherwise arise due to the preparation and monitoring of general meetings dealing with a squeeze-out.

The offeror must apply to the Regional Court of Frankfurt am Main to squeeze out the remaining shareholders. In the application, the offeror must also state the compensation sum offered. The application must be made within three months of the expiry of the acceptance period. This rigid deadline regulation would be problematic in relation to offers subject to conditions (e.g. merger control conditions) which might not be fulfilled until after the expiry of the acceptance period. An offeror which is unable to execute the offer until after expiry of the three months period due to such conditions would be practically excluded from the possibility of conducting a squeeze-out pursuant to takeover law. Thus, the WpÜG n.v. provides that the acquisition of a 95 per cent majority is only required for the execution of the squeeze-out, but not for the initiation of the squeeze-out procedure. The offeror can already submit the application if the takeover or mandatory offer is accepted in an amount that would make - in the case of a subsequent execution of the tender offer - the offeror hold shares equal to the participation in the registered voting share capital required for a squeeze-out. The court has to cause publication of the application for squeeze-out in the company’s designated journals.

The court decides on the application by way of a court order setting out the grounds on which the decision is based. The court order may be issued at the earliest one month after the announcement of the application in the Electronic Federal Gazette and is subject to the offeror’s substantiation by prima facie evidence that it holds shares amounting to 95 per cent of the registered voting share capital or the overall registered share capital. The court order must be served on the company filing the application, the target company and the shareholders who have been heard in the court order procedure. An immediate appeal against the decision is permissible. The appeal court with jurisdiction is the Regional Appeal Court of Frankfurt am Main. The applicant and all shareholders of the target company affected thereby have a right of appeal. The appeal period is two weeks and begins with the court’s announcement in the electronic Federal Gazette, but for the applicant and the shareholder heard in the procedure not before service of the Regional Court’s decision. Further appeal is excluded. The actual proceedings are governed by the provisions of the Act on Court Procedure in Non-litigious Matters.

The shares are only transferred after the legally binding conclusion of the proceedings. The management board of the target company must submit
the legally binding decision to the Commercial Register without undue delay.

The wording of the act does not contain any specifications as regards the question of where and how the appropriateness of the compensation offered in the squeeze-out procedure is to be examined. One can assume from the German constitutional provisions on the protection of property that a shareholder must have the opportunity to have the compensation amount examined by a court. Failing any reference to the Award Proceedings Act, the obvious answer appears to be to have the appropriateness of the compensation offered examined in future within the course of the court order or appeal proceedings. However, to the extent the presumption of appropriateness is not applicable, the consequence of this would be that one would have to expect considerable delays until the issue of a legally binding decision to transfer the shares.

5.4 Relationship to the squeeze-out pursuant to the Stock Corporation Act

Squeeze-out procedures pursuant to takeover law and the Stock Corporation Act cannot be pursued simultaneously according to the statement of grounds of the governmental draft. The WpÜG n.v. explicitly stipulates that one cannot revert to the squeeze-out provisions of the Stock Corporation Act after filing the squeeze-out application pursuant to the WpÜG until the final conclusion of the squeeze-out procedure.

6 Sell-out pursuant to takeover law

To the extent the requirements of a squeeze-out pursuant to takeover law have been fulfilled, in future shareholders which have not yet accepted the offer can demand within a period of three months as of the expiry of the acceptance period that the offeror acquires their shares. The shareholders thus have a right of tender. The offeror is obliged, under the aforesaid requirements, to assume the shares. The consideration for the shares corresponds in this case to the consideration offered in the offer procedure.

7 International scope of applicability of the WpÜG

The WpÜG n.v. also includes provisions on the applicability of the WpÜG in an international context. The registered seat of the target company and the location of its stock exchange listing are of particular importance in this context.
If the registered seat of the target company is in Germany and the shares of the target company are admitted to trading on an organised market in Germany, then the WpÜG must be applied. This applies irrespective of any further stock market listings abroad.

In contrast, however, for target companies with seat in Germany whose securities carrying voting rights are admitted to trading on an organised market in another state of the European Economic Area, the WpÜG will no longer be fully applicable in future. Rather, takeover and mandatory offers are subject to the WpÜG only in respect of issues of a corporate law nature.

If the target company has its seat in another state of the European Economic Area and if its securities carrying voting rights are solely admitted in Germany, then the WpÜG applies in respect of the bidding procedure but not in respect of corporate law issues. The same applies where the shares of the foreign target company are admitted to organised trading in several states of the European Economic Area and the shares were initially listed in Germany or - in case of simultaneous admissions in several states of the European Economic Area - the company opted for the BaFin as supervisory authority. The latter two alternatives yet again presuppose, however, that the shares of the target company are not admitted to organised trading in the state of the registered seat.

If the target company has its seat in another state of the European Economic Area and if its securities carrying voting rights are admitted to trading on an organised market there, then the takeover law of this state is exclusively applicable, irrespective of any stock market listing in Germany.

8 Other amendments

8.1 Revision of the definition of “persons acting in concert”

The term “persons acting in concert” is extended to include persons which act in concert with the target company. Persons acting in concert with the target company are natural or legal persons coordinating measures with the target company to thwart a takeover or mandatory offer.

Moreover, in future subsidiaries will not only be deemed to be persons acting in concert with the persons controlling them, but also acting in concert with each other.

As a consequence of the extension of the term of persons acting in concert, in future information on the persons acting in concert with the target company will also have to be included in the offer documents, to the extent known to the offeror. In cases where a multitude of
subsidiaries exists, the result will be that the offer documentation will be overloaded with information of little relevance. To date, however, the BaFin has tolerated in their examination of the offer document the fact that offerors with a multitude of subsidiaries might not have named all of them in the bid documentation, although the wording of the law seems to require that.

8.2 Enlarged voting rights attribution in relation to subsidiaries

Under the hitherto existing legal situation, the voting rights of a subsidiary were solely attributed to the offeror, a reciprocal attribution of voting shares held by the parent company to the subsidiary did not take place. Henceforth, the voting rights of its controlling person are attributed to the subsidiary as well as voting rights held by another subsidiary of the controlling person.

As a consequence of this extension of the attribution of voting rights introduced only on recommendation of the parliamentary Finance Committee, each company in a group of companies will in the future exercise control within the meaning of takeover law over the target company according to the amended provision. In an announcement published on 20 July 2006, the BaFin has only clarified that the obligation to make a tender offer is not triggered just because of the enlarged provision on the attribution becoming effective. It is expressly stated, however, that attributions occurring after the attribution provision became effective shall not be covered by this exemption. This should mean that each acquisition and each new formation of a subsidiary – whether pursued by the offeror of a former mandatory offer, the controlling person, or an affiliated company – would constitute an acquisition of control due to the enlarged voting rights attribution, and an application would have to be filed with the BaFin for an exemption from a further mandatory offer. Likewise, each company of the same group would have to be included in the notification of the acquisition of control over a target company. Both outcomes are not sensible as regards content and could not actually be intended by the amendment. The BaFin, however, seems to have difficulties to adopt a current practice deviating from the clearly expressed intent of the legislator to bring about changes, only because this amendment of the law ultimately leads to difficult results possibly unintended in their actual form.

8.3 Publication media

From 1 January 2007 compulsory publications will no longer be made in a supra-regional official bourse gazette but in the Electronic Federal Gazette. This change affects all official publications pursuant to the
WpÜG apart from the publication of the decision to make an offer. However, the replacement of publication in the official bourse gazette with publication in the Electronic Federal Gazette is problematic as regards the “sea level” reports to be published. In these reports the offeror has to state the number of securities held by it or attributed to it as well the amount of securities whose holders have accepted the tender offer. In the last week before the expiry of the acceptance period the “sea level” reports must be given on a daily basis. Publications in the electronic federal gazette, however, take a certain amount of time, which means that the daily status reports will each appear with a delay of between 2 to 2 ½ days.

8.4 Investigative Powers of the BaFin

In order to improve the monitoring of the provisions of the WpÜG, the Takeover Bids Directive Implementation Act extends the investigative powers of the BaFin and adapts these to the powers of the BaFin within the framework of the Securities Trading Act. To the extent the enforcement of the obligations pursuant to the WpÜG requires, the BaFin is entitled in future not only to demand information, documentation and the provision of copies from the offeror, target company, and domestic stock exchanges, but from any source. In particular, it can demand information on portfolio changes in financial instruments as well as information on the ordering party or business partners. Moreover, the BaFin is entitled to summon and question persons. Furthermore, in future it will be permitted to access business premises during normal working hours, insofar as this is necessary for the performance of its functions under the WpÜG. If the business premises are located in a residential site, however, it only has access if this is necessary to avert imminent danger for reasons of public safety and good order.

8.5 Extended content of the bid documentation

In future, the offeror must describe in the offer document in addition to its intention in terms of the future company activities of the target company also its intention in relation to own business activities insofar as they are affected by the offer.

In the event the target company should provide for a Breakthrough Provision in its articles of association, the offeror must provide information in the offer document on the amount of the compensation offered in return for the removal of rights and its calculation.
8.6 Notification obligations vis-à-vis employees

To date, only the management board of the target company was obliged to notify the employees of the target company or their representatives of the offeror’s decision to make an offer and of the offer itself. Now, the law also provides for a notification obligation of the offeror vis-à-vis its employees on the decision to make an offer and on the offer itself.
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