

## **Shareholder Rights Directive II/ARUG II**

– New obligations for intermediaries –

Implementation guide for the German market

– **Introduction and General Part** –

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## I. Introduction

This Implementation Guide is addressed to intermediaries, issuers and service providers affected by the Shareholder Rights Directive II (EU) 2017/828 (SRD II), Implementing Regulation (EU) 2018/1212 (in the following: the Implementing Regulation) and the Act Implementing the Second Shareholder Rights Directive (*Gesetz zur Umsetzung der zweiten Aktionärsrechterichtlinie* – ARUG II). The Guide is designed to provide practical assistance in implementing these new national and European regulatory requirements, and has a particular focus on operational considerations. The Guide therefore forms the basis for the market standards in Germany to be defined by issuers and intermediaries.

The General Part starts by presenting the relevant legal sources and market standards that were analysed and taken into account for the implementation of ARUG II. It also elaborates and presents general considerations and principles that apply to all subsequent considerations and recommendations. Examples of these include guidance on the material and geographical scope of ARUG II.

The main part addresses specific aspects of the new regulatory requirements and the processes required to implement them in three modules:

1. Shareholder identification (Module 1)
2. General meeting processes (Module 2)
3. Corporate actions (Module 3)

Four European task forces are currently actively seeking to reach agreement on European market standards for shareholder identification, general meetings and a golden operational record for corporate actions and general meetings, as well as ISO messaging standards for the transmission of information. These groups have not yet completed their work. The documents discussed there containing initial considerations for market standards are still at a draft stage, and any subsequent endorsement process has yet to be finally communicated. Nevertheless, the Guide takes these drafts into account. Any changes there will also be reflected in this Guide. The aim is to ensure that the recommendations for the German market are largely harmonised with the European standards.

Europe-wide standardisation of processes is not only called for by SRD II and the Implementing Regulation, it also constitutes considerable relief in practice for shareholder identification, general meeting and corporate action processes.

## II. General Part

## 1. Legal sources and market standards

The following legal sources and market standards are relevant in practice:

- Act Implementing the Shareholder Rights Directive (*Gesetz zur Umsetzung der zweiten Aktionärsrechterichtlinie* – ARUG II) (Federal Law Gazette I 2019, 2637)

Available at (in German):

[https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&start=//\\*\[@attr\\_id=%27bgbl119s2637.pdf%27\]#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl119s2637.pdf%27%5D\\_1579160243395](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*[@attr_id=%27bgbl119s2637.pdf%27]#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl119s2637.pdf%27%5D_1579160243395)

- Government draft of an Act Implementing the Second Shareholder Rights Directive (in the following: ARUG II)

Available at (in German):

[https://www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/DE/Aktionaersrechterichtlinie\\_II.html](https://www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/DE/Aktionaersrechterichtlinie_II.html)

- Directive (EU) 2017/828/EC of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (in the following: SRD II).

Available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017L0828&qid=1544439972860>

- Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights (in the following: the Implementing Regulation)

Available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1212&qid=1544440233507>

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- National transposition laws of the EEA states
- European market standards on (links will be added as soon as final versions are available)
  - Shareholder identification
  - General meeting
  - Golden operational record for corporate actions and general meetings
  - ISO messaging standards

## 2. Scope

### a. Geographical scope

Like SRD II, ARUG II applies to companies whose registered office is in a member state of the European Union (EU) or in another signatory state to the Agreement on the European Economic Area (EEA) and whose shares are admitted to trading on an organised market within the meaning of section 2(11) of the German Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*) (see e.g. sections 67a(1) and 67c(1) of the German Stock Corporation Act (*Aktiengesetz – AktG*), section 67d(1) in conjunction with section 3(2) of the AktG and section 32(1) of the German Stock Exchange Act (*Börsengesetz – BörsG*). It does not include companies whose shares are traded on the *Freiverkehr* market (regulated unofficial market).

The EEA comprises the following countries:

Belgium	Ireland	Malta	Slovakia
Bulgaria	Iceland (EEA)	Netherlands	Slovenia
Denmark	Italy	Norway (EEA)	Spain
Germany	Croatia	Austria	Czech Republic
Estonia	Latvia	Poland	Hungary
Finland	Liechtenstein (EEA)	Portugal	United Kingdom*
France	Lithuania	Romania	Cyprus
Greece	Luxembourg	Sweden	

\* until the withdrawal applied for by the UK on 29 March 2017 takes effect.

## **b. Material scope**

The material scope in Germany comes from section 67a(4) of the AktG and the relevant individual provisions (e.g. sections 67a – f and 125 of the AktG). These set out that intermediaries who provide safekeeping or management services for securities are subject to the new rulebook if the services are associated with shares of companies whose registered office is in a member state of the European Union (EU) or in another signatory state to the Agreement on the European Economic Area (EEA) (section 67a(4) of the AktG). To the extent that the term “listed company” is used in the relevant individual provisions (e.g. section 67a(1)), it follows from the statutory definition in section 3(2) of the AktG that the company’s shares must be admitted to trading on a regulated market as defined by section 2(11) of the WpHG.

As a result, only shares fall within the scope of ARUG II in Germany, but not funds, bonds, certificates and other instruments that represent shares, such as depositary receipts (ADRs, GDRs, German certificates).

The shares must also

- be issued by companies whose registered office is in the EEA and
- be admitted to trading on an organised market as defined by section 2(11) of the WpHG.

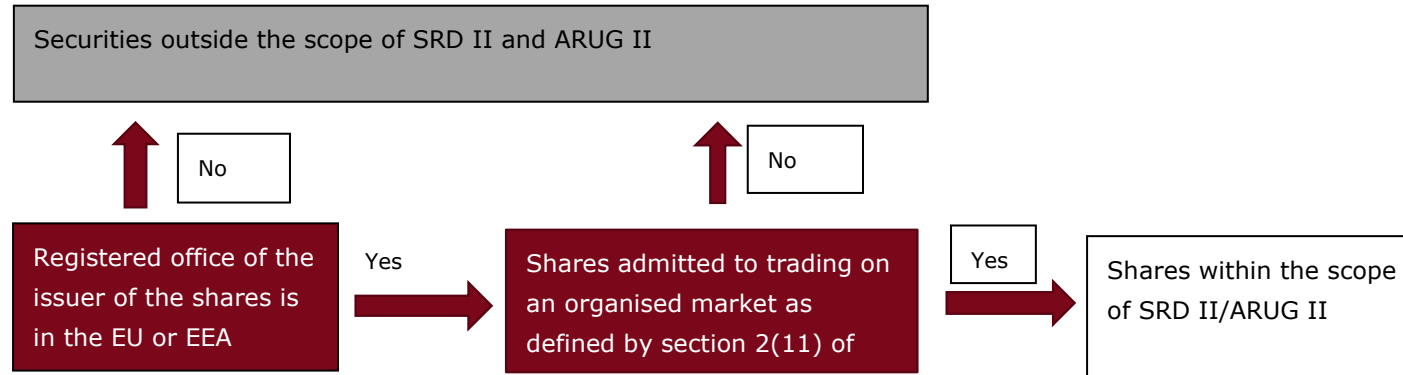
The European Securities and Markets Authority (ESMA) has published a list of regulated markets in Europe:

Available at:

[https://registers.esma.europa.eu/publication/searchRegister?core=esma\\_registers\\_upreg#](https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_upreg#)

In the link, “regulated markets” is already selected in the “Entity type” field. If you click on “Display Data”, a tabular overview of all regulated markets registered by ESMA in the EEA will appear. Click on “export csv” to download a list of the markets in Excel format.

The fact patterns resulting from a. and b. can be graphically represented in a decision tree as follows.



This means that all shares issued in one of the EU member states and listed on a regulated European market fall within the scope of the SRD II rulebook.

While the German lawmakers are sticking closely to the SRD II requirements, the transposition laws of other jurisdictions go beyond the European requirements and extend the material scope of SRD II. For example, both the French and the Italian lawmakers include corporate bonds in the scope of SRD II. This will pose major difficulties for intermediaries if information has to be transmitted across borders. In such cases, data protection authorisations will often be insufficient to handle national special cases. However, even the Implementing Regulation, which is directly applicable in the European member states, will not normally provide data fields for such national special cases. There is therefore a risk in cross-border scenarios that information relating to specific national solutions cannot be transmitted.

Service and data providers operating in Germany such as *Wertpapiermitteilungen* (WM) have announced that, in future, they will supply a master data field (GD field) that classifies whether a security is SRD II-relevant. This is expected to apply to all securities from EEA countries.

## **Recommendations for the German market (1):**

Specific national solutions adopted by other member states must be examined to establish whether national rules, for example governing data protection (section 67e of the AktG), allow customer data to be forwarded in these cases.

If there any doubts, the information should not be forwarded.

### **c. Third country intermediaries and service providers**

Intermediaries from third countries who hold shares falling within the scope of SRD II in custody and provide services under Article 1(5) of SRD II should verify that they meet the requirements of SRD II (see Article 3e of SRD II).

Service providers are not intermediaries within the meaning of SRD II. Contractual arrangements with the intermediaries oblige them to comply with the substance of SRD II, so they are indirectly affected by the requirements. Examples: general meeting service providers, central data providers.

### **3. Straight-through processing (STP)/Deadlines**

The information to be processed/forwarded (e.g. identification requests, notification of general meetings or corporate actions) must comply with the standardised requirements set out in the Annex to the Implementing Regulation and must be delivered in electronic and machine-readable formats that enable interoperability and straight-through processing (STP) (Article 2 of the Implementing Regulation). This principle lies behind the tight deadlines imposed by the Implementing Regulation, which in principle provides for same-day processing by intermediaries (Article 9 of the Implementing Regulation). The time zone of the recipient applies to the forwarding deadlines stipulated in Article 9 of the Implementing Regulation.

However, the deadlines under Article 9 of the Implementing Regulation do not apply if the intermediary receives information about corporate events or requests to disclose shareholder identity that cannot be processed/forwarded using STP. Same-day processing is generally not possible in such cases, because additional and possibly manual process steps by the intermediary may be required due to the media discontinuity, and these cannot be performed in such a short time. The principle of “without undue delay” then continues to

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apply, which is legally defined in Germany as “without culpable delay” (see section 121(1) sentence 1 of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB)).

The precise meaning of “without undue delay” will depend on the circumstances prevailing in each individual case. For example, forwarding a shareholder identification request received by an intermediary in an informal, non-machine-readable email is likely to require a significantly longer processing time than one day.

Details of the deadlines are given in the relevant modules.

Because Article 10 of the Implementing Regulation requires all intermediaries to implement appropriate measures to ensure the security, integrity and authentication of the information originated by the issuer or third party, there is no culpable delay on the part of the intermediaries if the situation is unclear. One example would be a free text in connection with corporate actions, or the provision of information in a language not agreed between the last intermediary and the shareholder.

Under Article 10(2) of the Implementing Regulation, the first intermediary to receive a request from the issuer or the third party nominated by the issuer is required to verify that a transmitted shareholder identification request or a message specified in the Implementing Regulation that is to be transmitted along the chain of intermediaries originates from the issuer. The issuers must take appropriate measures to ensure the integrity of such a request or information (e.g. a query feature on the website). Under Article 10(2) the other intermediaries in the chain are not obliged to conduct such a verification.

### **Recommendation for the German market (2):**

The issuer must take appropriate measures to ensure that the first intermediary can readily meet its obligation under Article 10(2) of the Implementing Regulation to verify the entitlement of the applicant or person transmitting the information (issuer, nominated third party). This will allow issuers to publish a corresponding notice on their website, e.g. that a shareholder identification request has currently been initiated.

### **Recommendation for the German market (3):**

The first intermediary to receive a request from the issuer or the third party nominated by the issuer is required to verify that a transmitted shareholder identification request or a message specified in the Implementing Regulation that is to be transmitted along the chain of intermediaries originates from the issuer.



## 4. Costs

ARUG II establishes a regime for costs in implementation of Article 3d of SRD II. Section 67f of the AktG, under which issuers must generally pay the costs of the expenditures necessarily incurred by the intermediaries, is relevant in this respect. There is an exception for the necessary expenditures of the last intermediaries for the last step in the chain, i.e. for the non-electronic transmission of information from the last intermediary to the shareholder. However, this exception does not apply if information concerning the convening of the general meeting of companies that have not issued registered shares is not provided by the final intermediary to the shareholder in electronic form.

For a transitional period, the repealed Regulation Governing the Reimbursement of Credit institutions' Expenses (*Verordnung über den Ersatz von Aufwendungen der Kreditinstitute* – KredInstAufwV 2003) will continue to apply<sup>1</sup>, with the necessary modifications, where the amounts given there are merely only indicative and provide guidance. The transitional period will end on the promulgation of a new regulation governing costs, but at the latest at the end of the 3 September 2025.

The promulgation of a new regulation governing costs is provided for by ARUG II and, according to the explanatory<sup>2</sup> memorandum to ARUG II, is regarded by the lawmakers as an alternative solution if intermediaries and companies do not reach agreement.

### **Recommendations for the German market (4):**

As a general rule, issuers should pay the costs of expenditures necessarily incurred by the intermediaries.

For a transitional period, but at the latest until 3 September 2025, the repealed Regulation Governing the Reimbursement of Credit institutions' Expenses (*Verordnung über den Ersatz von Aufwendungen der Kreditinstitute*) will continue to apply, with the necessary modifications, where the amounts given there are merely only indicative and provide guidance.

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<sup>1</sup> *Verordnung über den Ersatz von Aufwendungen der Kreditinstitute* of 17 June 2003 (Federal Law Gazette I page 885)

<sup>2</sup> See explanatory memorandum on Article 7 of ARUG II.