

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

– New obligations for intermediaries –

Implementation guide for the German market

– **Module 0: Introduction and General Part** –

Version: 4.0<sup>1</sup>

Version dated: 30 November 2020

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<sup>1</sup> Version 4 contains editorial amendments and additions.

## I. Introduction

This Implementation Guide<sup>2</sup> is addressed to intermediaries, issuers and service providers affected by the Shareholder Rights Directive II (EU) 2017/828 (SRD II), the 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. Not all groups have completed their work. Some market standards are still at a draft stage, others have already been finalised and published.<sup>3</sup> The Guide takes all the market standards into account, including those still in draft status. 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.

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<sup>2</sup> Retrievable in German and English at <https://bankenverband.de/service/auslegungs-und-anwendungshinweise/>

<sup>3</sup> Retrievable at <https://www.ebf.eu/home/european-industry-standards/srd-ii-market-standards/>

## II. General Part

### 1. Legal sources and market standards

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

- Act Implementing the Second 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://dip21.bundestag.de/dip21/btd/19/097/1909739.pdf>

- 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>

- National transposition laws of the EEA states
- European market standards on
  - Shareholder Identification
  - General Meetings
  - Golden Operational Record (GOR) for Corporate Actions and General Meetings
  - ISO messaging standards

Available at:

<https://www.ebf.eu/home/european-industry-standards/srd-ii-market-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*), AktG Section 67d(1) in conjunction with Section 3(2), 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:

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

## b. Material scope

The material scope in Germany comes from AktG Section 67a(4) and the relevant individual provisions (e.g. AktG Sections 67a – f and 125). 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) (AktG Section 67a(4)). 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 AktG Section 3(2) that the company’s shares must be admitted to trading on a regulated market as defined by WpHG Section 2(11).<sup>4</sup>

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 [DZs]).

Additionally, the shares must

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

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” should be selected in the “Entity type” field. If you click on “Search”, 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.

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<sup>4</sup> Also applies to shares issued by a partnership limited by shares (Kommanditgesellschaft auf Aktien, KGaA) or a European company (societates Europaeae, SE).

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 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. And 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 have announced that they will indicate in their data fields whether or not a security is SRD II-relevant. This will apply to all securities from EEA countries. The German data provider Wertpapiermitteilungen (WM), for example, has a master data field that shows whether a security falls within the scope of SRD II.

## **Recommendations for the German market (0.1.):**

Specific national solutions adopted by other member states should be examined to establish whether national rules governing data protection, for example (AktG section 67e), 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.

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) of the Implementing Regulation, the other intermediaries in the chain are not obliged to conduct such a verification.

### **Recommendation for the German market (0.2.):**

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). Issuers could, for example, publish a corresponding notice on their website, e.g. that a shareholder identification request has currently been initiated.

## Recommendation for the German market (0.3.):

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 (Article 10(2) of the Implementing Regulation).

## 4. Legal framework governing the right to reimbursement of expenses under AktG Section 67f

ARUG II establishes a regime for costs in implementation of Article 3d of SRD II. AktG Section 67f, 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 non-electronic, i.e. postal, transmission of information to the shareholder in accordance with AktG Section 67b(1), sentence 1. This essentially concerns information on corporate actions.<sup>5</sup> For the transmission of the notification of a general meeting, the basic requirement for companies issuing bearer shares to reimburse expenses continues to apply. Companies issuing registered shares, by contrast, do not have to reimburse expenses incurred by intermediaries entered in the share register when forwarding the notice convening a general meeting (AktG Section 125(2) and (5) in conjunction with Sections 67a and 67b). If a retail shareholder is entered in the register of shares, the company itself usually transmits the information about the general meeting, so no reimbursable costs are incurred by intermediaries anyway.

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 basically continue to apply,<sup>6</sup> though the amounts listed there are to be regarded merely as indicative and as providing guidance. The transitional period will end on the promulgation of a new regulation governing costs, but at the latest on 3 September 2025.

The promulgation of a new regulation governing costs is provided for by ARUG II and, according to the explanatory memorandum<sup>7</sup> to ARUG II, is regarded by lawmakers as an alternative solution if intermediaries and companies are unable to reach agreement.

<sup>5</sup> Which excludes general meetings.

<sup>6</sup> *Verordnung über den Ersatz von Aufwendungen der Kreditinstitute* of 17 June 2003 (Federal Law Gazette I page 885)

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

## a. Rule/exception principle under AktG Section 67f(1)

Put simply, the following rule/exception principle applies:

### **Basic rule** (AktG Section 67f(1), sentence 1)

The company has to bear the expenses necessarily incurred by intermediaries under AktG Sections 67a to 67d, also in conjunction with AktG Section 125, and under AktG Section 118, provided that these are incurred using state-of-the-art technology.

### **Exceptions** (AktG Section 67f(1), sentence 2)

Not covered by the company's obligation to reimburse are expenses necessarily incurred by the last intermediary for the non-electronic transmission of information pursuant to AktG Section 67b(1), sentence 1 (i.e. information on corporate actions)<sup>8</sup> and expenses necessarily incurred by intermediaries entered in the register of shares when forwarding the invitation to a general meeting (AktG Section 125(2) and (5) in conjunction with Section 67a and 67b).

## b. Scope of services reimbursable in principle

The precise scope of the services which are in principle reimbursable can only be determined after taking a close look at the numerous references to the German Stock Corporation Act. It may then be concluded that issuers should in principle reimburse intermediaries for the following services:

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<sup>8</sup> Which excludes general meetings.

- **Transmission of the notice convening a general meeting**

(a) **from intermediary to intermediary** (AktG Sections 125(5), sentence 3, and 67a(3))

- for bearer shares (+)<sup>9</sup>
- for registered shares (normally (-))

(b) **from the last intermediary to the shareholder** (AktG Sections 125(5), sentence 3 and 67b(1))

- for bearer shares (+) in the event of both electronic and non-electronic transmission<sup>10</sup>
- for registered shares (normally (-))

- **Transmission of information on corporate actions from intermediary to intermediary and from last intermediary to shareholder** (AktG Sections 67a and 67b) for bearer and registered shares)

- in principle (+)
- but: for information forwarded to shareholders, only if transmitted in electronic form (AktG Section 67f(1), sentence 2 no. 1)

- **Transmission of information to the company** (AktG Section 67c), including proof of share ownership for exercising shareholder rights at the general meeting (+)

- **Transmission of information on shareholder identity** (AktG Section 67d) **to issuers** (+)  
(In addition, the right to reimbursement for the transmission of shareholder data to the register of shares in accordance with AktG Section 67(4) is retained.)

- **Transmission to the shareholder of the company's confirmation that their vote has been received**  
(AktG Section 118(1), sentences 3 to 5) (+)

- **Transmission to the shareholder of the company's confirmation that their vote has been recorded and counted**  
(AktG Section 129(5), sentence 3)  
(basically (+), literature is inconclusive as to whether the company or the shareholder is liable for reimbursement.)

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<sup>9</sup> (+) yes, costs are in principle reimbursable; (-) no, costs are in principle not reimbursable

<sup>10</sup> Because AktG Section 128 has been deleted, companies are no longer able to use their by-laws to restrict transmission to electronic means under AktG Section 128, sentence 1. Instead, AktG Sections 125, 67a, and 67 b AktG apply. Issuers therefore always have to reimburse the costs incurred when informing shareholders by post about the convening of a general meeting.

## c. Limitation of the right to reimbursement to necessary expenses incurred using state-of-the-art technology

Intermediaries can only claim reimbursement for the cost of services they have provided and which are in principle reimbursable if the services were necessary and performed using state-of-the-art technology (AktG Section 67f(1), sentence 1).

The practical significance of these prerequisites for reimbursement has been considerably limited, for a transitional period at least. This is because, pursuant to Section 26(5) of the Introductory Act to the Stock Corporation Act (*Einführungsgesetz zum Aktiengesetz – EGAktG* (introduced by Article 2 of ARUG II), the requirements of the KredInstAufwV of 17 June 2003 will basically continue to apply until further notice (though not beyond 3 September 2025). Under the KredInstAufwV, the transmission of information to shareholders in non-electronic form is still permissible and reimbursable except under the circumstances relating to registered shares set out in AktG Section 67f(1), sentence 2 no. 1.

The official justification cites the following examples of reasons for non-reimbursement:<sup>11</sup>

- Avoidable multiple notifications by intermediaries if, for example, the company has already transmitted the information to shareholders direct.
- Avoidable multiple notifications if the intermediary knows that the next intermediary in the chain has already received the information from another source.
- Disproportionately long chains of intermediaries, although it is unclear when this is deemed to be the case.

An issue of practical importance when dealing with retail clients is likely to be the potential impact on the right to reimbursement if, following timely transmission of information in accordance with the Implementing Regulation, a further notification has to be sent to customers to enable them to exercise their shareholder rights in practice. Whether this second notification is also a “necessary expense” within the meaning of AktG Section 67f(1) will have to be assessed on a case-by-case basis.

It is open to question whether avoidable multiple notifications can occur at all in an STP-based information regime. Information is transmitted within the chain of intermediaries automatically and in a fully automated manner in accordance with Article 3(2) of the Implementing Regulation. It is not possible to check whether the next intermediary in the chain has already received the information through other channels, so multiple messages in the intermediary chain cannot be avoided. When information is transmitted to retail

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<sup>11</sup> Bundestag printed matter 19/9739, page 71

shareholders, multiple transmission is likely to be reimbursable especially in cases where the last intermediary has a legal obligation to inform the shareholder.

#### **d. Settlement of standardised reimbursement rates**

Under EGAktG Section 26(5), the KredInstaufwV should be applied as follows:

- KredInstAufwV Section 3 is to be applied mutatis mutandis to notifications in accordance with AktG Section 67(4), sentences 1 to 5 and, in the case of listed companies, in accordance with AktG Section 67d.
- KredInstAufwV Section 1 is to be applied mutatis mutandis to notifications in accordance with AktG Sections 67a to 67c, also in conjunction with AktG Section 125(1), (2) and (5).

For the disclosure of shareholder identity in accordance with AktG Section 67d, it would therefore seem appropriate to claim reimbursement for expenditure in accordance with KredInstAufwV Section 3(1) no. 2 per data set/shareholder (without shareholder number).

For the transmission *to the shareholder* of the notice convening a general meeting, (where companies domiciled in Germany are concerned) the former process remains unchanged. With the exception of intermediaries entered in the register of shares, intermediaries can now also claim the reimbursement of expenses for transmitting information *within the chain of intermediaries* in accordance with the reimbursement rates pursuant to KredInstAufwV Section 1 no. 2 (e.g. for information relating to domestic bearer shares).

#### **e. Reimbursement for services performed for issuers domiciled outside Germany**

AktG Section 67f(1), sentence 5 merely states that differences in charges for cross-border services provided by intermediaries are generally not permissible, but does not address the question of whether the rules on reimbursing costs under AktG Section 67f(1) also apply in relation to foreign companies registered in the EU/EEA. Nor does SRD II provide clarity on this point. While Article 1(2), sentence 1 of SRD II suggests that the legal system of the relevant company should be applied, Article 3d of SRD II, under which any rules issued refer only to the legal systems of the member states in which the intermediaries have their registered office, could suggest that AktG Section 67f should also apply to services with a cross-border dimension.

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If one concludes that the legal system of the company should determine the issue of costs, then German principles governing what costs a company has to bear will not be applicable to foreign companies registered in the EU and EEA. Instead, the reimbursement rules of the issuer's home country should apply. This is likely to generate a considerable amount of time and effort as intermediaries will need to check for each individual case whether and which reimbursement rules are applicable.

If, on the other hand, AktG Section 67f is also considered relevant for services performed for foreign issuers, the reimbursement of expenses could be claimed accordingly.

### **f. Disclosure of charges**

Under AktG Section 67f(1), sentences 3 and 4, intermediaries are required to disclose the charges levied for providing each service under AktG Sections 67a to 67e, AktG Section 118(1), sentences 3 to 5 and (2), sentence 2, AktG Section 125(1), sentence 1 (2) and (5), and AktG Section 129(5). Disclosure must be made separately, both to the company and to the shareholders for whom they provide the service. According to the official justification,<sup>12</sup> this is intended to help ensure that intermediaries do not levy unnecessary or excessive charges.

When it comes to dealing with retail clients, in particular, the question arises as to whether charges should be disclosed at all if they are not levied on customers since AktG Section 67f,(1), sentence 1 requires the company to reimburse intermediaries for their expenses. A reimbursement "gap" would only arise if information about corporate actions and possibly confirmations following the exercise of voting rights had to be sent by post, or if the company was located outside Germany.

The same problem applies to institutional custody business with regard to statutory reimbursement requirements. Especially when it comes to any economically insignificant individual services that may not be reimbursable, the relationship between disclosure requirements and contractual freedom is unclear.

As to legally required disclosure to companies, given the legal nature of the German requirements governing the reimbursement of expenses (KredInstAufwV), there is a need to clarify what exactly has to be disclosed.

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<sup>12</sup> Bundestag printed matter 19/9739, page 71