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By PwC Deutschland | 25. Juni 2026

ECJ: Allocation of voting rights when “Acting in Concert”

In a landmark judgment, the ECJ decided that attributing voting rights based on "acting in concert" without an explicit agreement, as in Section 34(2) Sentence 1 2nd alternative of the Securities Trading Act, is incompatible with EU law.

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Background

Pursuant to Section 33 of the German Securities Trading Act (STA), there is an obligation to report when certain ownership thresholds in listed companies are reached, exceeded, or fallen below. Section 34 (2) STA governs the attribution of third-party voting rights to the party subject to the reporting obligation in the context of “acting in concert,” i.e., the coordinated action of various shareholders. In its judgment of 12 February 2026, the European Court of Justice (ECJ) commented on the compatibility of Section 34(2), first sentence, alternative 2, STA with EU law (Case C-864/24 – *Valora*).

The question referred by the Federal Court of Justice for a preliminary ruling

Is subparagraph 4(iii) of Article 3(1a) of the Directive 2004/109 to be interpreted as precluding the second example of the first sentence of Paragraph 34(2) STA, according to which, in order to attribute voting rights, it is not necessary that the person subject to the reporting obligation and the third party have entered into an agreement on the exercise of voting rights, but rather it is sufficient for factual circumstances to reveal the existence of concerted action in another way?’

Article 3 (1a) subpara. 4 (iii) (of Directive 2004/109 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market) states that ‘the home Member State may not make a holder of shares, or a natural person or legal entity referred to in Article 10 or 13, subject to requirements more stringent than those laid down in this Directive, except when (iii) applying laws, regulations or administrative provisions adopted in relation to takeover bids, merger transactions and other transactions affecting the ownership or control of companies, supervised by the authorities appointed by Member States pursuant to Article 4 of Directive [2004/25].’

This is what the ECJ had to say:

In summary: *Point(iii) of the fourth subparagraph of Article3(1a) precludes legislation of a Member State which provides that the notification requirements, set out in Article9(1) and (2) of Directive 2004/109 also apply to holders of voting rights who act in concert in relation to the issuer of the shares to which those voting rights are attached in another way than on the basis of an ‘agreement’ concluded between those holders.*

The basis for the ECJ’s review was the Transparency Directive (Directive 2004/109/EC), which establishes uniform EU-wide standards for the disclosure of shareholdings in listed issuers. The Court found that Section 34(2), first sentence, alternative 2, STA violates the Directive to the extent that—contrary to Article 10(a) of the Transparency Directive—it does not require an agreement between the party subject to the reporting obligation and the third party for purposes of attributing voting rights. In fact, Section 34(2) of the German Securities Trading Act (WpHG) provides that even conduct that is merely de facto

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coordinated is sufficient for the attribution of voting rights. This goes beyond what is prescribed by the Transparency Directive.

As the ECJ said, this extension of the attribution of voting rights cannot be based on the exception provided for in Article 3(1a), subparagraph 4(iii) of the Transparency Directive, which permits Member States to apply stricter national attribution rules in certain circumstances.

According to the ECJ, this exception is subject to two conditions, the first being that the requirements are more stringent than those of Directive 2004/109 must be laid down by laws, regulations or administrative provisions relating to the types of transaction listed in the preceding paragraph above, and, the second, that those requirements should be supervised by the authorities appointed by Member States pursuant to Article 4 of Directive 2004/25. These two conditions are cumulative.

Stricter national attribution rules are permissible only to the extent that they are directly related to acquisitions, mergers, or similar transactions aimed at changing the ownership or control structure of the issuer.

In its Supervisory Circular 02/2026 (WA) of 20 March 2026, the **Federal Financial Supervisory Authority (BaFin)** adjusts the German interpretation of voting rights in stock corporations. Accordingly, it will interpret Section 34(2) STA with immediate effect to mean that voting rights are attributed only if “a vote is taken on the consensual exercise of voting rights pursuant to an agreement that obligates both parties to pursue a common policy regarding the management of the issuer in question over the long term.”

Source:

Source: ECJ, judgment of 12 February 2026 **C?864/24** *Valora Effekten Handel*.

Note: Part of this post is a free translation of the article published in the German Blog***Steuern & Recht*** with a reference to the authors as persons of first contact.

Schlagwörter

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