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GOVERNANCE INSIGHT

ACTING IN CONCERT, ACTING TOGETHER

No Longer Acting Alone: How Germany's Regulatory Reset Changes Investor Engagement And What It Means For The Market

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Acting in Concert, Acting Together—No Longer Acting Alone

How Germany's Regulatory Reset Changes Investor Engagement And What It Means For The Market

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If you have spent any time dealing with collaborative engagement campaigns across borders, you will know the feeling: a room full of like-minded investors, a shared concern amongst stakeholders about a company's governance or climate trajectory, and then a question brings tension to the room — "Could we be seen as acting-in-concert?" For stewardship professionals and portfolio managers, this question has been the invisible constraint on one of the most effective tools in engagement.

Fundamentally, the logic of collaborative engagement is sound — individual engagement with a large corporation often has limited impact for minority shareholders. Collaboration amplifies voice, shares costs, and produces more constructive dialogue with boards. For corporate issuers, facing a collective is even more daunting than having to deal with individual investors as usually this is accompanied by larger attention, possibly media, and clearly increases the pressure.

We noted the change of tone in the ICGN Global Stewardship Principles (International Corporate Governance Network) from investors "should be prepared to collaborate with other investors to enhance engagement outcomes" (2020 version, Principle 4), to "Investors may consider collaborating with other investors to engage with companies and issuers on specific issues, as appropriate. Investors should disclose collaborations undertaken, engagement objectives, time frames, key engagement milestones, and outcomes, as appropriate." (2024 version, Principle 3.7).

The same change of tone can be seen in the UK Stewardship Code, where collaboration was required, had its own dedicated principle and was explicitly highlighted alongside engagement and escalation acknowledging that collective engagement can enhance stewardship effectiveness (2020 version, Principle 10). Today, in the newest version, collaboration is no longer a standalone principle and is treated as one tool among many rather than a focal concept (2026 version, Principle 3).

These changes reflect a more cautious approach towards collaborative engagement adopted by global investors in recent years, a practice also observed in Germany.

GERMANY: WHEN STEWARDSHIP MET TAKEOVER LAW

German law has historically taken a comprehensive view of acting in concert, capturing not only formal agreements but also coordinated behaviour aimed at influencing corporate strategy. Under BaFin's previous administrative practice, Section 34(2) WpHG was read broadly: voting rights could be attributed to shareholders who coordinated their behaviour vis-à-vis an issuer — even where that coordination was limited to ESG dialogue. If aggregated voting

rights crossed the 30% threshold under the WpÜG (Wertpapiererwerbs- und Übernahmegesetz — Germany's Takeover Act), investors could face a mandatory takeover bid obligation.

Investors found themselves caught between SRD II (the EU's Shareholder Rights Directive II, which actively encourages engagement and collaboration) and Germany's national transparency rules, which could penalise the very same behaviour. BaFin attempted to provide clarity in a 2023 article, acknowledging that mere platform membership would not automatically trigger acting-in-concert provisions.

But considerable grey areas remained around coordinated voting or specific demands of boards. Adding to the misalignment with EU sustainable finance policy and industry standards, research throughout the last years found that the acting-in-concert regulation in Germany, while protecting market integrity and minority shareholders, acts as a structural barrier to collaborative investor action, and thereby potentially slows down sustainable economic transformation in both Germany and the EU context.

The Working Group on Engagement of the Sustainable Finance Advisory Committee to the last German Federal Government suggested in their report 2024 to set-up a platform for collaborative investor engagement. But, on 20 March 2026, BaFin (Germany's Federal Financial Supervisory Authority) issued a supervisory notice fundamentally altering its administrative practice on voting rights attribution under the WpHG (Wertpapierhandelsgesetz — the German Securities Trading Act). This followed a landmark ruling by the CJEU (Court of Justice of the European Union) on 12 February 2026, holding that Germany's broad interpretation of "acting in concert" was incompatible with EU law.

> *Investment stewardship teams spent many hours with compliance and legal teams explaining the precautionary measures they adopted whenever they participated in initiatives such as Climate Action 100+ (CA100+). The prospect of an asset manager being forced into a takeover bid simply for discussing decarbonisation pathways with fellow shareholders was unrealistic — but it was a risk compliance teams took seriously.*

ISSUER PERSPECTIVE: OPERATING UNDER THE OLD REGIME

For corporate issuers, the previous legal landscape created its own set of tensions. Investor relations and legal teams at German-listed companies found themselves managing engagement requests against an opaque backdrop: were the investors they were meeting with acting in concert? Could a coordinated dialogue mean something bigger or could it even trigger a mandatory bid obligation that would fundamentally alter the shareholder register?

In practice, many IR teams and their advisors observed that collaborative engagement was already occurring — but the legal ambiguity made it significantly more difficult to engage openly and productively. Companies that wished to encourage deeper, sustained investor dialogue on governance or sustainability topics faced the paradox that the very investors most interested in such dialogue were constrained in how they could coordinate their asks.

Board members and CFOs regularly fielded engagement requests from individual institutions that were, in effect, delivering messages shaped by collective deliberation — yet could not say so explicitly. Sometimes, the dilemma was used to fend off engagement requests of "unwanted" parties or was used as a defence mechanism in more hostile situations. Overall, this created a fragmented, inefficient engagement dynamic that served neither party well.

THE CJEU RULING AND BAFIN'S RESPONSE

The CJEU's February 2026 ruling in Case C-864/24 cut through this ambiguity. The Court held that stricter national attribution regimes are permissible only where "directly connected with takeover bids, mergers, or other transactions affecting ownership structure or control." Germany's sweeping application — which had caught ESG engagement in its remit — went beyond what EU law permits. BaFin responded swiftly.

Under its new practice, "acting in concert" attribution will apply only where there is an agreement binding parties to pursue, on a long-term basis, a common policy regarding the issuer's management. For stewardship professionals, this means collaborative (ESG) engagement — whether through established initiatives or ad hoc coalitions — carries significantly reduced legal risk, provided there is no binding agreement to jointly control management policy. The distinction between stewardship dialogue and control-seeking behaviour has finally been drawn with greater clarity.

IMPLICATIONS FOR CORPORATE ISSUERS: AGMS AND M&A

BaFin's revised practice and the underlying CJEU ruling carry significant practical consequences for companies with a German listing, their supervisory boards, IR teams, and legal advisers. Rather than viewing these developments purely through an investor lens, issuers should consider what they mean for their own governance and corporate action planning.

Annual General Meetings

The AGM season is the most visible arena where the effects of BaFin's new practice will be felt by issuers. Companies should expect a more coordinated investor voice ahead of and during general meetings — not as a threat, but as an expression of more structured and confident stewardship.

In practical terms, this may manifest in more aligned shareholder questions, more consistent pre-AGM engagement requests across institutional investors, and — in some cases — coordinated abstentions or votes against specific resolutions, particularly on executive remuneration, board composition, or climate-related disclosures. IR and governance teams should treat this as an opportunity to understand investor concerns more efficiently rather than through fragmented bilateral exchanges.

Where investor groups are acting transparently and on a non-binding basis, issuers benefit from engaging directly with the emerging consensus rather than waiting for voting outcomes to signal dissatisfaction. The ESMA white list remains a useful reference point for issuers interpreting the scope of permissible investor coordination. Coordinated AGM proposals or bloc voting on board appointments remain sensitive territory, and companies facing such pressure should seek specialist legal counsel.

However, coordinated votes against remuneration reports or aligned abstentions on capital measures are now more clearly a feature of the engagement landscape rather than evidence of a control-seeking coalition. Boards and remuneration committees that engage proactively with leading investors ahead of the AGM will be better positioned to anticipate and respond to coordinated voting signals.

M&A Transactions and the Acting-in-Concert Boundary

The CJEU ruling introduces an important nuance for M&A practitioners and corporate advisers. The Court expressly confirmed that stricter national acting-in-concert regimes remain permissible where investor coordination is "directly connected with takeover bids, mergers, or other transactions affecting ownership structure or control."

This means that while ESG-related collaborative engagement now sits on much firmer legal ground, coordinated investor opposition to — or support for — a specific transaction remains a different matter. Companies involved in public M&A processes in Germany must still assess whether investor coalitions forming around the terms of a bid, a scheme, or a restructuring could trigger mandatory offer obligations under the WpÜG.

The dividing line between stewardship dialogue and control-seeking action is most acute precisely where an M&A transaction is live. For target company boards, this creates both risk and opportunity. On the risk side, a more liberated collaborative engagement environment makes it easier for activist or ESG-minded shareholders to align messaging around deal opposition, placing pressure on premium adequacy, governance conditions, or sustainability commitments attached to a transaction.

> *Corporate defence advisers, as ourselves at Embera Partners, will need to factor this into their shareholder analysis and engagement strategies from an earlier stage. Transparent pre-bid or pre-vote engagement with collaborative investor platforms can be an effective tool to secure majority support and signal quality governance.*

Legal and compliance teams at both bidder and target companies should note that the revised BaFin practice applies to attribution under the WpHG (voting rights transparency), while the mandatory offer threshold under the WpÜG continues to be assessed on its own terms. In any transaction context, a careful analysis of whether collaborative investor activity crosses from stewardship into control-seeking remains essential. Where doubt exists, early and documented engagement with BaFin or specialist counsel is advisable.

THE GLOBAL FRAMEWORK: ICGN, PRI AND ESMA

Overall, this development enables the German market to align more closely with international standards. In many other jurisdictions, 'acting in concert' rules have been interpreted less strictly than in Germany, allowing a range of collaborative engagement platforms to emerge, such as the Investor Forum in the UK, Ethos in Switzerland, and Eumedion in the Netherlands. Furthermore, PRI (Principles for Responsible Investment) runs multiple collaborative programmes including PRI Advance.

At the European level, ESMA's "white list" (European Securities and Markets Authority) of permissible cooperation activities under the Takeover Bids Directive protects discussions with fellow shareholders, representations to boards, tabling draft resolutions, and even agreeing to vote the same way on particular resolutions — with the notable exception of coordinated voting on board appointments.

While technically non-binding, this white list has served as an important reference point for national regulators in delineating stewardship from control. Stewardship Codes worldwide (including Germany's DVFA Stewardship-Guidelines) strengthen and legitimise collaboration between investors. The system has transitioned from a deterrence-based model of coordination to a controlled facilitation of collaborative stewardship — but full legal clarity has not yet been achieved.

REFERENCE POINT JAPAN: FROM RELUCTANCE TO "IMPORTANT OPTION"

Japan's experience offers an instructive parallel. The FIEA (Financial Instruments and Exchange Act) imposes reporting obligations on "joint holders" — broadly analogous to acting-in-concert rules — triggered when aggregated holdings exceed 5%. The ambiguity around what constituted "joint holding" meant investors who merely discussed governance concerns risked classification as joint holders. In a market culture that prizes consensus and quiet dialogue, this had a pronounced dampening effect.

The FSA (Financial Services Agency) addressed this in its June 2025 revision of the Stewardship Code (Version 3.0), elevating collaborative engagement from a recognised practice to an "important option." The revision followed deliberation by the FSA's Expert Panel from late 2024 through early 2025.

The revised Code explicitly encourages collective engagement to address governance or sustainability challenges more effectively, and the FSA clarified the scope of "joint holders" and "acts of material proposal," drawing a clearer line between stewardship dialogue and coordinated influence over management outcomes. What remains sensitive is coordination approaching a "material proposal" — joint AGM proposals, campaigns to replace board members, or bloc voting on management composition.

The distinction is functional: Japan now distinguishes between voice (engagement and dialogue) and control (coordinated action to determine management outcomes).

CONVERGENCE WITH LOCAL TEXTURE

The trajectories in Germany and Japan reveal a common pattern: both are moving towards greater accommodation of collaborative engagement while maintaining guardrails around control-seeking behaviour. Germany now applies a more understandable definition — aiming at long-term binding agreements on management policy. Japan has adopted a principles-based approach encouraging collaboration while maintaining sensitivity around board composition campaigns.

For portfolio managers and stewardship teams, the practical implication is clear: collaborative engagement on governance and sustainability best practices is on firmer ground. But any engagement perceived as coordinated voting on board composition or control-oriented demands requires careful legal analysis and local counsel.

With Japan (like numerous other markets) having a Stewardship Code first introduced in 2014 and revised in 2017 and 2020, it is worth noting that Germany still lacks a comprehensive framework. For corporate issuers, this convergence carries a practical message: the distinction between voice and control is now the central analytical frame, not just for investors but for the companies on the receiving end of engagement.

IR teams that understand where collaborative investor activity falls within the voice-control spectrum will be better equipped to respond constructively — and to calibrate when escalating investor coordination warrants legal advice. The German market is becoming more like other major European markets in this respect, and the best-practice IR approaches familiar from the UK, Netherlands, or Switzerland — structured multi-stakeholder engagement programmes, systematic pre-AGM outreach, and transparent governance disclosure — are now more applicable in Germany than before.

LOOKING FORWARD

We would encourage stewardship professionals to view BaFin's announcement as a milestone rather than an endpoint. It might be time to think about a German Stewardship Code, supported by the broader financial community to enhance the current situation. The DVFA Stewardship Guidelines, last updated 2023, could serve as a basis.

The CJEU ruling provides a foundation for challenging overly broad acting-in-concert regimes across the EU. The EFAMA Stewardship Code, first adopted in 2011 and last revised 2018, should take this into consideration. Japan's revised Code demonstrates how principles-based regulation can accommodate collaboration without compromising market integrity.

> *Effective stewardship requires, as we have long believed, a strong core and a light touch — firm conviction that collaborative engagement is essential to responsible ownership, combined with sensitivity to regulators' legitimate concerns about orderly markets. Collaborative engagement is not a threat to market integrity. It is one of the most effective tools we have for promoting the long-term sustainable value creation that benefits companies, investors, and the communities in which we all operate.*

A NOTE FOR CORPORATE ISSUERS

For boards, IR teams, CFOs, and general counsel at German-listed companies, this regulatory evolution calls for a recalibration of engagement strategy. We offer the following practical observations.

First, treat coordinated investor engagement as signal, not immediately as threat. Where a group of investors — whether through an established platform or an ad hoc coalition — approaches a company with aligned asks on sustainability strategy, capital allocation, or board quality, this is increasingly the normal expression of professional stewardship rather than a precursor to activist action. Engaging openly and in good faith with such groups, at the right level of seniority, will generally serve the company better than defensive postures.

Second, review IR and governance disclosure practices with the new environment in mind. As investors become more confident in coordinating their stewardship activities, the quality, accessibility, and specificity of a company's governance and sustainability disclosures will increasingly determine the starting point for dialogue. Companies that publish clear, decision-useful information on board effectiveness, remuneration rationale, and sustainability strategy reduce the need for investors to rely on assumptions — and are less likely to face coordinated push-back based on incomplete information.

Third, for companies involved in or contemplating M&A activity, ensure that your legal advisers explicitly consider the new acting-in-concert framework in transaction structuring and defence planning. The clarity that BaFin has now provided on ESG engagement does not eliminate the WpÜG mandatory offer risk in the context of transactional investor coordination. A careful and documented legal assessment remains essential wherever collaborative investor activity may cross from stewardship into influence over ownership or control.

Finally, the development of a German Stewardship Code — if it comes to pass — will be an opportunity for the issuer community to contribute actively to its design. Germany's Aktiengesetz (Stock Corporation Act) tradition places significant emphasis on formal shareholder rights and supervisory board accountability. A future Stewardship Code should reflect those structural features while equipping both investors and issuers with a shared framework for constructive dialogue. IR professionals, Aufsichtsrat members, and CFOs are well placed to engage with industry bodies — including DVFA, DAI, and the GCGC — as these conversations develop.

REFERENCES

- BaFin, "Collaborative Engagement and the Attribution of Voting Rights," BaFin Journal, March 2023.
- BaFin, Supervisory Notice on Changes to Administrative Practice, 20 March 2026, via Global Regulation Tomorrow.
- CMS Law-Now, "Collaborative Engagement and Acting in Concert," April 2025.
- Morgan Lewis, "Collaborative Engagement and Acting in Concert at Listed Companies," June 2023.
- ICGN, Global Stewardship Principles, October 2024.
- NBIM, "Revision of the ICGN Global Stewardship Principles," Consultation Response, 2024.
- ESMA, "Shareholder Cooperation and Acting in Concert under the Takeover Bids Directive," ESMA/2014/677-REV, 2019.
- DVFA Germany, DVFA_Stewardship-Leitlinien_2023-10.pdf; October 2023.
- Noerr, "Attribution of Voting Rights Under the Acting in Concert Rule," 2026.
- Japan FSA, "Revision of the Stewardship Code," 26 June 2025.
- Japan FSA, "Draft Revisions to Japan's Stewardship Code," March 2025.
- ACGA, "Decoding Japan's New Stewardship Code," 2025.
- Ghetti, "Acting in Concert in EU Company Law," SSRN.
- Benjamin Ruppert, 2022. Acting in Concert: kapitalmarktrechtliche Hürden für einen nachhaltigen Finanzmarkt, Zeitschrift für das gesamte Kreditwesen, Vol. 75.2022, 18 (15.9.), p. 916–921.
- Benjamin Ruppert, 2023. Die Bedeutung der kapitalmarktrechtlichen Sanktionen bei Acting in Concert für die nachhaltige Transformation in Deutschland. Master Thesis.
- Dimson, Elroy / Karakas, Oguzhan / Li, Xi. Coordinated Engagements, ECGI Finance Working Paper No. 721/2021, May 2023.
- Hastreiter, Nikolaus, Can investor coalitions drive corporate climate action? (August 2025). LSE Grantham Institute.