Global Financial Services Regulatory Guide - Germany

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# 1. Who regulates banking and financial services in your jurisdiction?

## Who regulates banking and financial services in your jurisdiction?

Germany has two national regulators that are responsible for authorizing and supervising banks, insurers and certain other financial sector companies  ̶  the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) and the German Federal Bank (“**Deutsche Bundesbank**”).

The BaFin and the Deutsche Bundesbank share supervisory responsibility, but not as a “twin peak” model. Pursuant to section 6 (1) of the Banking Act (*Kreditwesengesetz* or KWG) and section 5 (1) of the Securities Institutions Act (*Wertpapierinstitutsgesetz* or WpIG), the BaFin is the administrative authority responsible for the supervision of credit institutions and financial services institutions (under the KWG) and investment firms (under the WpIG). The Deutsche Bundesbank merely assists the BaFin in supervising these institutions. The cooperation of the BaFin and the Deutsche Bundesbank in the institutions’ ongoing supervision is governed by section 7 (1) of the KWG and section 9 (1) of the WpIG, which stipulate that, among other things, the Deutsche Bundesbank shall, as part of the ongoing supervision process, analyze the reports and returns that institutions have to submit on a regular basis and assess whether their capital and their risk management procedures are adequate. Ongoing monitoring of institutions by the Deutsche Bundesbank is normally carried out by its local head offices. In simplified terms, the Deutsche Bundesbank serves as the “eyes and ears” of the BaFin, but the Deutsche Bundesbank also provides input to the decision-making of the BaFin, even if the BaFin retains ultimate responsibility.

Under the EUs Single Supervisory Mechanism Regulation (SSM), the European Central Bank (ECB) carries out clearly defined supervisory tasks to protect the stability of the European financial system, together with the National Competent Authorities (NCAs) of participating member states. The SSM Regulation and the SSM Framework Regulation provide the legal basis for the operational arrangements related to the prudential tasks of the SSM.

The ECB is currently responsible for the direct supervision of approximately 24 German credit institutions representing the most important banks in the country and, as such, replaces the BaFin and the Deutsche Bundesbank under the relevant German supervisory laws. However, the two German regulators still form an important part of the regulatory institutions and participate in the supervision within the framework of the so-called Joint Supervisory Teams.

The ECBs responsibility extends to the following matters:

Licensing (grant and revocation)

Significant shareholdings (“**ownership control**”)

Capital requirements

Leverage ratio and liquidity requirements

Governance

Audits and stress testing

Consolidated supervision

Recovery plans, early intervention in case of breach of supervisory requirements

For the remaining less important credit institutions, the ECB has more limited supervisory powers but is directly responsible for the granting and withdrawal of licenses and the decisions on the ownership control procedure. In all cases, the decision will be prepared by the BaFin, but final decision-making takes place at the level of the ECB. In addition, the ECB has a step-in right in order to ensure consistent application of the rulebook (in consultation with the BaFin) and can also step in at the request of the BaFin.

Financial services institutions (not qualifying as credit institutions under the KWG), investment firms (not qualifying as credit institutions), payment services and e-money institutions, fund management companies, and, most recently added, credit service providers, are under the supervision of BaFin and Bundesbank in all respects.

In relation to recovery and resolution of banks under the rules implementing the EU Recovery and Resolution Directive (RRD), the responsible regulator is the Single Resolution Board (for the significant institutions that are under the direct supervision of the ECB) or BaFin (for the other German institutions).

In the area of insurance, the German national regulator in charge of supervising insurance and reinsurance undertakings and pension funds is the BaFin only. BaFin is in charge of licensing a new or foreign (re-)insurance undertaking or pension fund, it supervises the ongoing business of insurance and reinsurance companies and pension funds in Germany, it exercises the financial supervision over insurance undertakings and pension funds licensed in Germany as well as the legal supervision, possibly in cooperation with foreign insurance regulators in other EU countries, over all (re-)insurance undertakings and pension funds doing business in Germany.

On the EU level, the regulator in charge of the insurance business is the European Insurance and Occupational Pensions Authority (EIOPA). Unlike the ECB, the EIOPA is not in charge of a direct supervision of certain large insurance undertakings, but mainly focusses on the coordination of the national regulators and the rule-making in the EU.

Insurance intermediaries – which comprise, according to German law, insurance brokers and insurance agents – as well as independent insurance advisors are not subject to a direct supervision by the BaFin. Instead, they are licensed by the local Chamber of Commerce and Industry ("*Industrie- und Handelskammer*" – "IHK") that is in charge of businesses at the place where the insurance intermediary has its main office in Germany. The BaFin only carries out an indirect supervision over insurance intermediaries, since the BaFin is in charge of making sure that insurance undertakings doing business in Germany only cooperate with licensed insurance intermediaries (as far as a license requirement exists). Sanctions for non-compliance with the conduct of business rules for insurance intermediaries are typically imposed, depending on local laws, by the local trade supervisory authority and not by the local IHK.

# 2. What are the main sources of regulatory laws in your jurisdiction?

## What are the main sources of regulatory laws in your jurisdiction?

**Banking regulation**

The main sources of German regulatory laws applicable to credit institutions are the KWG, the Solvency Regulation (*Solvabilitätsverordnung* or "**SolvV"**), the Liquidity Regulation (*Liquiditätsverordnung* or "**LiqV"**) and the Large Exposures and Million Credits Regulation (*Groß- und Millionenkreditverordnung* or "**GroMiKV"**).

The KWG has implemented, among other things, the EU Capital Requirements Directive V (CRD V). The impact of the SolvV, the LiqV and the GromiKV has been drastically reduced as a result of the enactment of the EU Capital Requirements Regulation (CRR I and II). The CRR is directly applicable, i.e., it does not have to be implemented. The SolvV, the LiqV and the GroMiKV now only provide limited supplementary regulation on top of the CRR.

Further major banking regulations include the Ownership Control Regulation (*Inhaberkontrollverordnung*), which covers the ownership control procedure, and the Institutions Remuneration Regulation (*Insitutsvergütungsverordnung*), which deals with the regulation of variable compensation systems.

Under several provisions of the KWG, the BaFin may issue regulations, guidelines or orders that apply to those it regulates. Such (written) communications (other than those addressed to individual institutions) are disclosed on the BaFin or the Bundesbank website. Moreover, the BaFin provides guidance on its regulatory practice in circulars, guidance notices and interpretative letters.

Banking regulation for certain special banks is also contained in the Building Societies Act (*Bausparkassengesetz*) and the Mortgage-Covered Bond Act (*Pfandbriefgesetz*), which requires an additional license for banks that want to issue mortgage-covered bonds.

Savings and loan institutions (*Sparkassen*) are also regulated under the laws of the federal states since most such institutions are incorporated under public (state) law.

The BRRD (I and II) has been implemented in Germany in separate legislation, the Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz* or SAG).

**Regulation of financial services**

The KWG also regulates financial services providers (that qualify neither as credit institutions nor as investment firms), such as financial leasing companies and factoring companies. These services are not MiFID II investment services but are regulated under German law (i.e., the KWG).

**Regulation of investment services**

The WpIG introduced, on 26 June 2021, a regulatory regime that is applicable to investment firms that do not at the same time qualify as credit institutions under the provisions of the KWG; these investment firms are referred to as "securities institutions" (*Wertpapierinstitute)*, but which we will refer to as investment firms to keep the terminology consistent with the EU law. The WpIG has implemented Directive (EU) 2019/2034 (Investment Firm Directive or IFD) and goes along with Regulation (EU) 2019/2033 (Investment Firm Regulation or IFR).

The WpIG applies to all institutions providing investment services with the exception of those that qualify as CRR credit institutions under CRR (cf. section 32 (1) sentence 2 KWG) (so-called class 1a firms under the IFR) because they are deemed systematically important due to their business model and risk profiles being similar to those of significant credit institutions.

Also, large investment firms that meet certain size requirements that do not qualify as class 1a firms but whose size and activities present some risk to financial stability (so-called class 1b firms under IFR) are captured by the WpIG (and not the KWG) in principle but will remain subject to the CRR and CRD (and not the own prudential requirements of the IFR/WpIG) although not qualifying as credit institutions (as the class 1a firms do).

The remaining medium-sized investment firms (so-called class 2 firms) and small-sized investment firms (so-called class 3 firms) will be governed by the WpIG, including the prudential regime of the IFR.

The conduct of business supervision of investment firms continues to be based under the provisions of the Securities Trading Act (*Wertpapierhandelsgesetz* "WpHG"), which implements MiFID II. Germany has recently adopted the Remuneration Ordinance for Investment Firms (*Wertpapierinstituts-Vergütungsverordnung* or “**WpIVergV**”), which deals with the regulation of variable compensation systems of investment firms and which entered into force on 12 January 2024.

**Payment services regulation**

Payment services and e-money are regulated under the Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz* or ZAG). The ZAG implements Directive 2015/2366/EU (second Payment Services Directive) and Directive 2009/110/EC (second E-money Directive).Payment services institutions and e-money institutions are subject to supervision by BaFin and Bundesbank (the same cooperation principles apply as outlined above).

**Fund manager and fund regulation**

Fund management companies and investment funds are regulated by the German Capital Investment Code (*Kapitalanlagegesetzbuch* or KAGB). The KAGB implements Directive 2009/65/EC (UCITS Directive) and Directive 2011/61/EU (Alternative Investment Fund Managers (AIFM) Directive), but it also contains fund regulation for open- and closed-end investment funds marketed with the general public as well as regulation of institutional funds (so-called special funds). Fund management companies are subject to supervision by BaFin.

**Credit servicing regulation**

Since 30 December 2023, the Act on the Secondary Market for Distressed Land and regarding Credit Servicing Institutions (*Kreditzweitmarktgesetz* or "**KrZwMG**") entered into force, which implements Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers. The law created a licensing requirement for credit service providers. The competent supervisory authority is the BaFin, which cooperates with the Bundesbank for this purpose.

**Money laundering regulation**

An essential additional regulation applicable to all banks, financial services providers, investment firms, fund managers and payment services providers is contained in the Money Laundering Act (*Geldwäschegesetz* or GwG). In the financial sector, the competent regulator under the GwG is the BaFin.

**Insurance regulation**

The main sources of German regulatory laws applicable to insurance undertakings are the "Versicherungsaufsichtsgesetz" ("VAG") and the Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 ("**Solvency II Regulation**"), which is directly applicable in Germany without further implementation laws.

The VAG has implemented, among other things, the Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance ("**Solvency II Directive**"). Further major insurance regulations include the Ownership Control Regulation ("Inhaberkontrollverordnung"), which covers the ownership control procedure, and the Insurance Remuneration Regulation ("Versicherungs-Vergütungsverordnung"), which deals with the regulation of remuneration systems for the management and employees in insurance undertakings and pension funds.

Under several provisions of the VAG, the BaFin may issue regulations, guidelines and orders that apply to those companies it regulates. Such (written) communications (other than those addressed to individual institutions) are disclosed on the BaFin website. Moreover, the BaFin provides guidance on its regulatory practice in circulars, guidance notices and interpretative decisions.

**Insurance mediation regulation**

The licensing and business conduct rules for insurance intermediaries are mainly set out in section 34d of the Trade Regulation ("Gewerbeordnung" – "**GewO**") and in the Insurance Mediation Regulation ("Versicherungsvermittlungsverordnung"). Those two regulations have implemented, in particular, the corresponding rules of the Directive (EU) 2016/97 of 20 January 2016 on insurance distribution ("Insurance Distribution Directive" - "**IDD**").

# 3. What types of activities require a license in your jurisdiction?

## What types of activities require a license in your jurisdiction?

**Banking**

Pursuant to section 1 (1) of the KWG, credit institutions are undertakings that conduct banking activities commercially or on a scale that requires a commercially organized business undertaking. Banking activities are as follows:

The acceptance of funds from others as deposits or of other repayable funds from the public, unless the claim to repayment is securitized in the form of bearer or order debt certificates, irrespective of whether or not interest is paid (deposit business)

The business specified in section 1 (1), sentence 2 of the Pfandbrief Act (*Pfandbriefgesetz*) (Pfandbrief business)

The granting of money loans and acceptance credits (lending business)

The purchase of bills of exchange and checks (discount business)

The purchase and sale of financial instruments in the credit institution’s own name for the account of others (principal brokerage)

The safe custody and administration of securities for the account of others (security deposit business)

The activities as central securities depository (central securities depository business)

The obligation to repurchase previously sold loan receivables prior to their maturity (loan repurchase business)

The assumption of sureties, guarantees and other warranties on behalf of others (guarantee business)

The execution of a cashless collection of checks (check collection business), collection of bills of exchange (bill of exchange collection business) and the issue of traveler’s checks (traveler’s check business)

The purchase of financial instruments at the bank’s own risk in connection with the placement of such instruments in the market or the assumption of equivalent guarantees (underwriting business)

Any activity as a central counterparty within the meaning of Regulation (EU) No 648/2012 (EMIR) (central counterparty business)

Business is performed commercially if the operation is intended to continue for a certain period and is conducted with the intention of generating profits. Alternatively, the criterion that requires a commercially organized business undertaking applies. This criterion does not hinge on whether a commercially organized business undertaking exists but solely on whether the scale of the business objectively requires a commercially organized business undertaking.

**Financial services pursuant to KWG**

The definition of financial services is laid down in section 1 (1a) sentence 2 numbers 1 to 12 and section 1 (1a) sentence 3 of the KWG. Accordingly, financial services comprise:

1. The brokerage of transactions involving the purchase and sale of financial instruments (investment brokerage)

2. The provision of personal recommendations regarding transactions in specified financial instruments to customers or their representatives, provided that such recommendations are based on an examination of the investor’s personal circumstances or presented as being suitable for the investor and are not exclusively announced through information distribution channels or to the public (investment advice)

3. The operation of a multilateral system that brings together the interests of a large number of persons in the sale and purchase of financial instruments within that system according to specified rules in a way that results in agreements on the purchase of such instruments being entered into (operation of a multilateral trading system)

4. The placing of financial instruments without a firm commitment basis (placement business)

5. The operation of a multilateral system that is not an organized market or a multilateral trading system and that brings together the interests of a large number of third parties in the purchase and sale of debt securities, structured finance products, emission allowances or derivatives within the system in a manner consistent with a contract for the purchase of these financial instruments (operation of an organized trading system)

6. The sale and purchase of financial instruments in the name of and for the account of others (contract brokerage)

7. The management of individual portfolios of financial instruments for others on a discretionary basis (portfolio management)

8. Proprietary trading by accomplishing any of the following:

Continuous offering of financial instruments for purchase or sale on an organized market or on a multilateral trading facility at prices quoted by the institution

Organized and systematic trading on a frequent basis for the own account outside an organized market or a multilateral or organized trading facility by offering a system that is accessible to third parties to conclude transactions with them (systematic internalization)

Purchase or sale of financial instruments for the own account as a service provided to others

Purchase or sale of financial instruments for own account as a direct or indirect participant in an organized domestic market or a multilateral or organized trading facility via a high-frequency, algorithmic trading scheme characterized by the use of infrastructures intended to minimize latencies by system determination, generating, routing or execution without human intervention for individual transactions or orders and by high message intra-day rates that constitute orders, quotes or cancellations, even if a service is not provided to others (high-frequency trading)

9. The brokering of a deposit business with enterprises domiciled in a non-EEA state (non-EEA deposit brokerage)

10. The custody, administration and safe-keeping of crypto assets or private cryptographic keys that serve to hold, store or transfer crypto assets for others (crypto custody business)

11. Dealing in foreign notes and coins (foreign currency dealing)

12. Keeping a crypto securities register

13. The continuous purchase of receivables on the basis of framework agreements with or without recourse (factoring)

14. Entering into financial lease agreements as lessor and the administration of property companies within the meaning of section 2 (6) sentence 1 no. 17 outside the management of an investment fund within the meaning of section 1 (1) KAGB (financial leasing)

15. The purchase and sale of financial instruments outside the management of an investment fund within the meaning of section 1 (1) KAGB, for a syndicate of investors, who are natural persons, with a scope of decision making as regards the selection of financial instruments, provided that this is a focal point of the offered product and provided that it serves the purpose of the investors participating in the performance of the purchased financial instruments (investment administration)

16. The safe custody and administration of securities exclusively for alternative investment funds (AIF) within the meaning of section 1 (3) KAGB (limited custody business)

Moreover, proprietary trading is considered a licensable financial service if the entity is not otherwise regulated and operates the business with a view to generating profits or at a scale that requires a commercially organized undertaking and is part of a group of institutions, financial holding group, mixed financial holding group or financial conglomerate that includes at least one CRR credit institution. This rule is a consequence of the bank separation rule introduced in German law effective 1 July 2016, by which CRR credit institutions that exceed a certain size must segregate their proprietary trading activities and conduct such activities via a so-called trading institution. Financial instruments are defined in section 1(11) of the KWG and now also explicitly include crypto assets (as defined in section 1(11), sentence 4 of the KWG).

Banking services and financial services listed in the KWG that relate to financial instruments constitute, at the same time, investment services under the WpIG. This creates a very confusing overlap of regulation. In simplified terms: Entities that only provide such investment services (as well as ancillary investment services) and no other regulated services that subject them to banking regulation under the KWG qualify as investment firms that are subject to the WpIG (provided that they do not qualify as class 1a firm, in which case the KWG will apply).

**Investment services**

The definition of investment services is set out in section 2 (2), sentence 1, and numbers 1 to 10 of the WpIG (which refers to MiFID II).

Accordingly, investment services comprise:

The brokerage of transactions involving the purchase and sale of financial instruments (investment brokerage)

The purchase of financial instruments at the investment firm’s own risk in connection with the placement of such instruments in the market or the assumption of equivalent guarantees (underwriting business)

The brokerage of transactions involving the sale and purchase of financial instruments (investment brokerage)

The provision of personal recommendations regarding transactions in specified financial instruments to customers or their representatives, provided that such recommendations are based on an examination of the investor’s personal circumstances or presented as being suitable for the investor and are not exclusively announced through information distribution channels or to the public (investment advice)

The sale and purchase of financial instruments in the name of and for the account of others (contract brokerage)

The operation of a multilateral system that brings together the interests of a large number of persons in the sale and purchase of financial instruments within that system, according to specified rules in a way that results in agreements on the purchase of such instruments being entered into (operation of a multilateral trading system)

The operation of a multilateral system that is not an organized market or a multilateral trading system and that brings together the interests of a large number of third parties in the purchase and sale of debt securities, structured finance products, emission allowances, or derivatives within the system in a manner consistent with a contract for the purchase of these financial instruments (operation of an organized trading system)

The placing of financial instruments without a firm commitment basis (placement business)

The management of individual portfolios of financial instruments for others on a discretionary basis (portfolio management)

Proprietary trading by accomplishing any of the following:

Continuous offering of financial instruments for purchase or sale on an organized market or on a multilateral trading facility at prices quoted by the institution (market-making)

Organized and systematic trading on a frequent basis for the own account outside an organized market or a multilateral or organized trading facility by offering a system that is accessible to third parties to conclude transactions with them (systematic internalization)

Purchase or sale of financial instruments for the own account as a service provided to others

Purchase or sale of financial instruments for own account as a direct or indirect participant in a domestic organized market or a multilateral or organized trading facility via a high-frequency, algorithmic trading scheme characterized by the use of infrastructures intended to minimize latencies by system determination, generating, routing or execution without human intervention for individual transactions or orders and by high message intra-day rates that constitute orders, quotes or cancellations, even if a service is not provided to others (high-frequency trading)

There is a slight difference between the list of regulated investment services under the WpIG and the KWG. In particular, crypto custody business and keeping a crypto securities register is a regulated investment service under the KWG and is not licensable under the WpIG.

Ancillary investment services pursuant to § 2 (3) WpIG include:

The custody and administration of financial instruments with the exception of units of account and crypto assets for others, including custody and associated services such as cash management or the administration of collateral with the exception of the provision and management of securities accounts at the highest level (central account management);

The granting of loans or other credit to others for the performance of security services, provided that the company granting the credit or loan is involved in these transactions;

Advising companies on their capital structure, industrial strategy and advising and offering services on company acquisitions and mergers;

Foreign exchange transactions if these are related to the provision of investment services;

The preparation or dissemination of recommendations or proposals for investment strategies or of investment recommendations;

Services related to the underwriting business and services that relate to an underlying asset and are related to investment services or ancillary investment services.

"Financial instruments" is defined in section 2 (5) of the WpIG and includes foreign exchange, units of account and crypto-assets. In other words, this definition is wider than that under MiFID. This means that entities providing investment services solely in respect of foreign exchange, units of account and crypto-assets are not subject to the provisions of the German Securities Trading Act (WpHG), which uses the narrower definition from MiFID.

As of 30 December 2024, the provision of services related to crypto-assets will largely be regulated under Regulation (EU) 2023/1114 (the EU Markets in Crypto Assets Regulation or "**MiCAR**"), which will replace the current regime under the WpIG and the KWG.

**Payment services**

Under the ZAG, the following activities require a payment services license unless the payment services provider is a bank or an e-money issuer:

1. Services enabling cash to be placed on a payment account or enabling cash withdrawals from a payment account, as well as all the operations required for operating a payment account (pay-in and pay-out business)

2. Execution of payment transactions, including transfers of funds on a payment account with the user’s payment service provider or with another payment service provider by:

execution of direct debits, including one-off direct debits (direct debit business)

execution of payment transactions through a payment card or a similar device (payment card business)

execution without grant of credit (payment business)

3. Execution of payment transactions as described in number 2 above, where a credit line covers the funds for a payment service user (payment business with a grant of credit)

4. Issuance of payment instruments and/or acceptance and settlement of payment transactions (acquiring business)

5. A service where funds are received from a payer, without any payment accounts being created in the name of the payer or the payee, for the sole purpose of transferring a corresponding amount to a payee or to another payment service provider acting on behalf of the payee, and/or where such funds are received on behalf of and made available to the payee (money remittance business)

6. A service to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider (payment initiation services)

7. An online service for communicating consolidated information about a payment account or accounts of the payment service user to one or more other payment service providers (account information services)

**E-money**

The ZAG also requires a license for the issuance of "e-money", which is defined as electronically, including magnetically, stored monetary value as represented by a claim on the issuer, which is issued on receipt of funds for the purpose of making payment transactions and accepted by a natural or legal person other than the electronic money issuer.

**Fund management**

The KAGB requires a license for capital management companies (*Kapitalverwaltungsgesellschaft*), which are companies domiciled in Germany that manage domestic investment funds. Such is the case where the companies render at least portfolio management services or risk management for one or several investment funds. The license requirement also applies to internally managed investment fund companies.

Certain fund managers are exempt from regulation and merely require registration with the BaFin. Most importantly, this is the case for fund managers of special funds (i.e., not marketed to the general public) whose aggregate assets under management do not exceed EUR 500 million (unleveraged) or EUR 100 million (leveraged).

**Credit Servicing**

Credit services providers need a license under the KrZwMG. A credit service provider is a legal person that, in the course of its business, manages and enforces the rights and obligations related to a creditor’s rights under a non-performing credit agreement, or to the non-performing credit agreement itself on behalf of a credit purchaser, and carries out at least one or more of the following credit servicing activities:

Collecting or recovering from the borrower any payments due related to a creditor’s rights under a credit agreement or to the credit agreement itself

Renegotiating with the borrower any terms and conditions related to a creditor’s rights under a credit agreement, or of the credit agreement itself, in line with the instructions given by the credit purchaser where the credit servicer is not a credit intermediary

Administering any complaints relating to a creditor’s rights under a credit agreement or to the credit agreement itself

Informing the borrower of any changes in interest rates or charges or of any payments due related to a creditor’s rights under a credit agreement or to the credit agreement itself

**Insurance**

Pursuant to section 8 (1) of the VAG, insurance undertakings require a license for doing business in Germany. Insurance undertakings are defined in section 7 no. 33 of the VAG as direct insurers or reinsurers whose business is the conduct of insurance and who are not social security carriers.

There is no definition in German statutes about what "conduct of insurance" means, nor is there any statutory list of activities in the VAG. Instead, insurance has been defined by German case law on the basis of certain criteria, all of which would have to be fulfilled in order to qualify a guarantee/promise as insurance:

Assumption of risk

Against remuneration

Legal claim for benefits

Similarity of the risks

Calculation based on the law of large numbers

Independency of the promise from characteristics of a main contract

BaFin may decide, with binding effect for other administrative authorities, whether a particular undertaking is subject to insurance supervision (section 4 VAG).

**Insurance Mediation**

As a rule, whoever intends to mediate the conclusion of insurance or reinsurance contracts against remuneration requires an insurance mediation license pursuant to section 34d GewO. There are two types of licensed insurance intermediaries in Germany:

Insurance agents, who are in charge of mediating or concluding (re-)insurance contracts on behalf of one or more insurance undertakings or another insurance agent (section 34d sentence 2 no. 1 GewO).

Insurance brokers, who take over the mediation or conclusion of (re-)insurance contracts on behalf (and in the sole interest) of their client (typically the future policyholder), without being commissioned by an insurance undertaking or an insurance agent (section 34d sentence 2 no. 2 GewO).

Insurance intermediaries thus have to decide whether they want to act on behalf of and represent the interest of the insurance undertaking(s) or the client/future policyholder. They cannot hold an insurance mediation license simultaneously as an insurance agent and as an insurance broker.

# 4. How do the licensing requirements apply to cross-border business in your jurisdiction?

## How do the licensing requirements apply to cross-border business in your jurisdiction?

**Trigger points for license**

**Banking, financial services and investment services**

Where a bank, financial service provider or investment services provider outside Germany deals with a client or a counterparty located in Germany, its activities will typically be subject to German laws and regulations. The bank or service provider will need to consider whether they are triggering a local German licensing obligation. The BaFin issued a guidance note in 2005, clarifying the conditions under which cross-border activities of banks and financial services providers require a license in Germany. This guidance in our view, also applies to investment services as well as payment services and e-money services. The guidance note distinguishes between offering services in a “directed” or “target-oriented way” (which requires a license) and providing services passively, that is, on the initiative of German residents (which does not require a license). This distinction may be difficult to apply, but in general, a foreign institution that does not solicit clients in Germany may, without being licensed, offer banking services, financial services or investment services to German residents upon their initiative and request.

In order to be able to rely on this “passive freedom of services exemption,” it is advisable for the foreign institution to document that a transaction was made solely based upon the customer’s initiative. It is also advisable to rely on the passive freedom of services exemption only in isolated instances; reliance on the exemption for a multitude of transactions would arouse the suspicion of the BaFin. Furthermore, a general solicitation effort by the foreign institution would terminate the exemption.

It is important to note that the guidance note does not contain a “sophisticated investor” exemption. Providing cross-border services to a sophisticated person or institution is treated the same way as providing services to a retail customer. However, in practice, it is easier to rely on and prove facts for a passive sale exemption in the case of institutional clients and very difficult in the context of retail customers.

In general, according to the guidance note, foreign institutions are required to obtain a license in order to offer, on a cross-border basis, banking services, financial services or investment services to customers in Germany where they cannot rely on the passive freedom of services exemption. Except where the EU passport rules discussed below apply, a license requires a permanent establishment (headquarters or branch offices in Germany).

**Payment services**

Pursuant to section 10 (1) of the ZAG, an institution wishing to provide payment services as a payment institution in Germany, commercially or on a scale that requires a commercially organized business undertaking, needs written authorization from the BaFin.

While the BaFin has not issued any specific guidance as to when exactly the license requirement is triggered for foreign providers serving German customers, it can be safely assumed that the same principles apply as with banks and financial services providers and investment services providers, that is, any form of solicitation by any means addressed to German residents will trigger the license requirement.

**Fund managers**

For fund managers, regulation of funds is primarily exercised through the regulation of managers. It requires that the manager be either fully licensed or registered with the BaFin under the KAGB.

The triggering point for the license requirement would be the management of a fund set up under the KAGB, as funds set up under the KAGB may only be managed by a duly licensed or registered fund manager.

Non-EEA funds marketed in Germany do not necessarily have to have a fund manager duly licensed in Germany but would be subject to different rules for obtaining a registration for marketing in Germany under the KAGB.

At present, fund managers that are not domiciled in Germany cannot obtain a license under the KAGB.

**Credit service providers**

The license requirement is triggered whenever someone provides credit services commercially or at a scale that requires a commercially organized business undertaking.

The KrZwMAG is new, but regarding its international scope of application, it is to be expected that the BaFin will likely apply the same standard as regards banks and financial services providers, i.e., non-German credit services providers will fall under the German license requirements if they offer their services in a targeted manner to German clients.

**Insurance undertakings**

Insurance and reinsurance undertakings from a country outside the EEA, who want to carry out (re-) insurance business in Germany, require an insurance license pursuant to section 67 para. 1 sentence 1 VAG. However, if a reinsurance undertaking from a non-EEA country exclusively carries out the business of reinsurance in Germany, it does not require a German reinsurance license provided that the equivalence of the solvency regime for reinsurance undertakings from the respective non-EEA country has been confirmed by the European Commission pursuant to Article 172 para. 2 Solvency II Directive or that a special treaty on reinsurance with a third country applies (section 67 para. 1 sentence 2 VAG).

Even beyond the exception for reinsurance undertakings from third countries with an equivalent solvency regime or a corresponding treaty, it is generally accepted in Germany that a foreign reinsurer does not require an insurance license for carrying out the insurance business by way of correspondence. However, such correspondence will have to be initiated by the customer – i.e. an insurer located in Germany – without any promotional activities of the third country reinsurer directed to customers in Germany ("passive solicitation"). Accordingly, if a reinsurance intermediary is involved in establishing a business contact between the German insurer (customer) and the third country reinsurer, such reinsurance intermediary would have to limit its activities to passive solicitation as well. In 2016, BaFin issued an "Interpretative Decision on Aspects of Carrying out Reinsurance Business via Insurance Undertakings in a Third Country". This "Interpretative Decision" gives further guidance on how BaFin would handle the licensing requirement for third country reinsurers and the conditions under which it would accept "passive solicitation" as an exemption from the German insurance license requirements.

Although BaFin has limited its "Interpretative Decision" to the cross-border business of third country reinsurance undertakings, it is widely assumed in German legal literature that a similar license exemption also exists for direct insurance undertakings from third countries who conclude an insurance by way of correspondence upon the initiative of a customer located in Germany and who have not carried out any promotional activities in Germany. This can also be based on the reasoning of the German legislator and on the reservation in place for Germany under the OECD Code of Liberalization of Current Invisible Operations, pursuant to which insurance by way of passive solicitation shall be free. Accordingly, if an insurance undertaking from outside of Germany actively solicits customers who are located in Germany, the license requirement will typically be triggered. Only if the German customer travels abroad or initiates the business contact with a foreign insurance undertaking without being attracted by advertisements or websites that are directed to customers in Germany, the foreign insurance undertaking can profit from the license exemption for "passive solicitation".

**Insurance intermediaries**

There is no similar rule for the licensing requirement of insurance intermediaries from third countries doing business with customers located in Germany by way of correspondence only, but the analogous application of the rule of "passive solicitation" may well be reasonable. Due to the local structure of the licensing and registration of insurance intermediaries in Germany, however, in practice, the license requirement will only be triggered if an insurance intermediary from a third country starts or intends to start mediation activities in a particular city or local area in Germany.

**Exemptions from the license requirement**

**Banks, financial service providers and investment services providers**

Pursuant to section 2(5) of the KWG, foreign banks and financial service providers may be exempted from the license requirement. An exemption may be granted by the BaFin on a case-by-case review if “the enterprise does not require supervision, given the nature of the business it conducts.” Such an exemption from the license requirement can only be considered for limited business operations. In principle, it is only granted to entities that the BaFin can assume will not require additional supervision in Germany due to the effective supervision in their home country. Foreign institutions may be exempted for transactions involving interbank business and transactions with institutional investors, such as the German federal government, the states, local authorities and their institutions and credit institutions, financial services institutions and investment services institutions, insurance companies as well as certain major corporations. It is not entirely clear whether this exemption also applies to the provision of investment services by foreign investment firms (given that this exemption is in the KWG, but there is no parallel provision in the WpIG) but we believe the better arguments support the view that it is. At the moment, the BaFin is extremely reluctant to grant such exemptions to third-country firms.

Exemptions may also be granted where a foreign entity is a member of a group of an institution licensed in Germany. In particular, an exemption may be granted where a German-licensed institution transfers customers to its foreign parent/subsidiary/affiliate. However, an exemption will only be granted if the entity is effectively supervised in its home country by the competent authority according to international standards and the competent authority of the home state cooperates with the BaFin. Furthermore, the applicant must submit a certificate from the authority of the home country, which confirms that the foreign institution has a license in its home country, that the intended cross-border activities do not raise any supervisory concerns, and that any future concerns will be reported to the BaFin. Again, it is not entirely clear whether this applies to foreign investment services providers but we believe the better view is that it should.

Moreover, the foreign institution must nominate an authorized agent  for the service of documents in Germany.

An institution that is fully licensed in Germany must act as an intermediary if the institution intends to serve retail customers.

For Swiss banks, no intermediary needs to be used for contacting retail customers under a special regime agreed on with the Swiss FINMA subject to an obligation by the Swiss bank to comply with certain conduct of business rules based on MiFID II and compliance with German anti-money laundering rules.

In relation to certain limited activities relating to financial instruments (investment advice and investment brokerage), an exemption is available for intermediation between customers and domestic or “passported” banks and financial and investment services providers or fund managers if the instruments are limited to fund interests (other than hedge funds) registered for distribution in Germany, or certain alternative investments, and such intermediaries or advisers are not holding client assets. However, in such a case, a license requirement for financial investment intermediaries may arise under the German Trade Regulation (*Gewerbeordnung*). This exemption is also provided explicitly in the WpIG in the context of the provision of investment services.

**Payment services providers and e-money issuers**

No specific exemptions for foreign payment services providers or e-money issuers apply other than for activities that are generally exempt from the definition of payment services.

**Fund managers**

No specific exemptions for foreign fund managers apply, except that non-EEA-based funds managed by them may be marketed into Germany if they have been duly registered. In theory, marketing to retail investors is also possible, but in such cases, the requirements for registration are so onerous (including a full prospectus requirement) that there have not been many practical cases. Therefore, foreign fund managers will normally limit any marketing of their funds to professional investors. Still, the costs for obtaining a registration for marketing and ongoing compliance obligations are so high that it is not common practice for non-EEA-based fund managers to register their funds for marketing in Germany.

A reverse solicitation exemption applies to sales of fund interests to German residents, but for all practical purposes, this exemption can only be used with professional or semi-professional investors. Great care should therefore be taken to document the reverse inquiry. Under no circumstances should non-EEA fund managers rely on the reverse solicitation exemption as a strategic option to sell fund interests in Germany.

Pre-marketing, i.e., the provision of information or communication on investment strategies or investment ideas to potential investors, has become regulated in 2021. Such pre-marketing requires prior notification to the BaFin and excludes relying on reverse solicitation for 18 months thereafter with respect to those investors to which the relevant funds were pre-marketed.

It should be noted that there is no option for foreign small fund managers to opt for registration instead of a license if assets under management do not exceed EUR500 million (unleveraged) or EUR100 million (leveraged), except that EEA and non-EEA funds managed by such foreign small fund managers registered in another member state of the EEA may be registered for marketing in Germany under simplified conditions as set out in section 330a of the KAGB.

**Credit service providers**

No credit services license is required under the KrZwMG for German or EEA credit institutions, German or EEA fund management companies, and non-credit institutions supervised under the EU Consumer Credit Directive or the EU Residential Mortgage Credit Directive (such entities do not exist in Germany, though, and this is only relevant in the context of the EU passporting regime discussed below).

**Insurance undertakings**

The VAG does not provide for a specific rule that would allow BaFin to exempt certain foreign insurance or reinsurance undertakings from the licensing requirement in Germany. If a non-EEA insurance or reinsurance undertaking wants to do business in Germany without a German insurance license, it therefore has to remain within the limits of the statutory exemptions from the licensing requirement, such as passive solicitation or reinsurance from a country whose solvency regime has been confirmed as equivalent to EU standards.
However, based on customary practice of BaFin, insurance activities under the NATO Treaty do not require an insurance license if the foreign insurance undertaking only promotes insurance products (except mandatory TPL insurance) to members of the NATO troops (or their dependents) stationed in Germany.

**Insurance intermediaries**

No German insurance mediation license is required in the following scenarios:

If the insurance intermediary acts exclusively for one insurance undertaking (or for more insurance undertakings not competing with each other) that is licensed to do business in Germany and that has taken over the unlimited liability for the mediation activities of the insurance intermediary;

If the insurance intermediary is headquartered in another EU/EEA Member State and can demonstrate that it has been registered under the IDD;

If the insurance intermediary mediates insurance contracts on an ancillary basis only, provided that all of the following conditions set out in section 34 d para. 8 no. 1 GewO are met:

the insurance is complementary to the good or service supplied by a provider

the insurance covers: the risk of a defect, loss of, or damage to, the good or the non-use of the service or the damage to, or loss of, baggage and other risks linked to travel booked with that provider and

the amount of the premium paid for the insurance product does not exceed EUR 600 calculated on a pro rata annual basis; or

the amount of the premium paid per person does not exceed EUR 200, where the insurance is complementary to a service referred to in point (a) and the duration of that service is equal to, or less than, three months.

Should the above conditions not be met, an insurance intermediary who only mediates insurance contracts on an ancillary basis can still obtain an exemption from the licensing requirement upon application pursuant to section 34d para. 6 GewO if it has the necessary professional liability insurance and can demonstrate that it is of good repute, sufficiently qualified and financially stable. The latter requirements can be proven by a declaration of a licensed insurance undertaking or a licensed insurance intermediary, for which the insurance intermediary directly acts, confirming that they will secure the qualification of the insurance intermediary.

If the insurance intermediary mediates insurance products as part of a collective contract of a savings and loan association ("Bausparkasse") that only serve as security for the loan repayment claims of the savings and loan association (section 34d para. 8 no. 2 GewO);

In case of payment protection insurance, which are mediated in connection with loan or leasing agreements as additional service to the delivery of a good or a service, provided that the annual premium does not exceed EUR 500 (section 34d para. 8 no. 3 GewO).

In addition to the explicit exemptions set out in the GewO, it is also generally accepted under German insuranc law that mere "tipping", by which the intermediary does not point to a particular insurance product, but only generally establishes a contact between an insurance undertaking and a potential policyholder, does not require an insurance mediation license (Article 2 no. 2 lit. (c) and (d) IDD).

**Legal consequences of acting without a required license**

According to section 54(1)(no. 2) of the KWG and § 82 WpIG, a person who is conducting a banking, financial service or investment service without a license may be punished with imprisonment for up to five years or with a monetary fine. In the case of a company, the responsible officer may be punished. Moreover, according to section 37(1) of the KWG, the BaFin may order the immediate discontinuation of the business as well as its liquidation, and it may appoint a liquidator for that purpose. In addition, it may publish its intervention against such types of business. The purpose behind this is to prevent potential customers and business partners from concluding further business with the foreign institution concerned.

The same also applies to payment services providers or e-money issuers acting without a license. Under section 63 of the ZAG, the managers of these parties are subject to criminal sanctions; under section 7 of the ZAG, the BaFin may order the immediate discontinuation of such activities and the winding down of an existing business, and it may appoint a liquidator for such purpose.

Transactions concluded with an unlicensed party are not automatically invalid, but customers may have a claim in tort against such party with the remedy of “natural restitution,” that is, they can raise a claim to be put back in the same position as if the prohibited transaction or relationship had not been entered into.

Likewise, it is a criminal act to engage in fund management activities without the necessary license (section 339 of the KAGB). The BaFin can take all appropriate measures and issue administrative orders necessary to enforce the KAGB. While not explicitly mentioned, such authority likely includes issuing an order to immediately discontinue any activities conducted without a license and to stop the marketing and sale of fund interests.

Finally, providing credit services under the KrZwMG without a license (section 43 KrZwMG) is also a criminal act. Further, under section 38 of the KrZwMG, the BaFin may order the immediate discontinuation of such activities and the winding down of an existing business, and it may appoint a liquidator for such purpose.

If an insurance or reinsurance undertaking carries out the business of (re-)insurance in Germany without the required license, its managers commit a criminal act pursuant to section 331 para. 1 no. 1 or para. 3 VAG and may be punished with imprisonment for up to five years (or, in case of negligence, up to three years) or with a monetary fine. In addition, BaFin may order the immediate discontinuation and liquidation of the unlicensed business, it may appoint a liquidator for that purpose and it may publish its intervention against the unlicensed insurance activities (section 308 VAG). The (re-)insurance contracts concluded with a (re-)insurance undertaking without the necessary license will typically remain valid, but they may be subject to rescission by the policyholder.

Carrying out insurance mediation without the necessary license in Germany may be sanctioned by way of an administrative fine of up to EUR 5,000 (section 144 para. 1 no. 1 lit. k, para. 4 GewO); in case of repeated and persistent infringements, or if the illegal mediation puts the life, health or valuable property of a third party at risk, such behavior may also be sanctioned as a criminal act pursuant to section 146 GewO with imprisonment of up to one year or with a monetary fine.

# 5. What are the requirements to obtain authorization in your jurisdiction?

## What are the requirements to obtain authorization in your jurisdiction?

**Banks and financial services providers**

Authorizations may only be granted if certain requirements are met, such as under the following circumstances:

When an institution is established, it has to demonstrate that it is endowed with a minimum amount of initial capital, which will depend on the nature of its intended business. For investment banks, for example, the initial capital required is at least EUR 730,000, while for CRR credit institutions it is at least EUR 5 million. It is also possible for a non-German institution to apply for a license for a branch established in Germany. In this case, the minimum capital must be provided in the form of “dotation capital,” which is a sum of money put at the disposal of the branch in the same manner as equity capital.

Credit institutions, financial services institutions and investment firms that in the course of providing banking, financial and investment services are authorized to obtain ownership or possession of funds or securities of customers must have at least two senior managers (executive directors) who must be “fit and proper persons.” Being a “fit” person means that the persons concerned have acquired during their professional careers sufficient theoretical knowledge and practical experience to enable them to carry out their new jobs properly. The BaFin consults the Federal Central Register (*Bundeszentralregister*) for criminal offenses and the Central Trade Register (*Gewerbezentralregister*) for business offenses in order to verify whether they are “proper” (i.e., reliable) persons.

The applicant must also declare any holders of significant participating interests (10% or more) in the proposed institution and the size of any such interests. Any such persons must also be “proper” persons. If they are not, or if they fail to meet the standards required in the interest of sound and prudent management of the institution for any other reasons, the BaFin may refuse to grant the license.

In addition, the authorization application must contain a viable business plan indicating the nature of the proposed business, the organizational structure, and the proposed internal control systems. The BaFin checks whether the applicant is ready and able to take the necessary organizational measures to conduct their business in a proper manner.

**Payment services and e-money Issuers**

As part of the licensing procedure, both groups of institutions are required to submit a business model, a business plan with a forecast P&L and balance sheets for the first three financial years, a description of the measures required to fulfill the segregation requirements in relation to client monies of section 10 of the ZAG in the case of payment services firms and section 11a of the ZAG in the case of e-money issuers, as well as a description of the internal organizational structure necessary to ensure compliance with the applicable laws, a description of intended outsourcings, the use of agents and branch offices, and the participation in national and international payment systems.

As in the case of banks, financial services providers and investment firms, there are certain minimum initial capital requirements, which are between EUR 20,000 and EUR 125,000 for payment services providers (depending on the type of business) and EUR 350,000 for e-money issuers.

There are also “fit and proper” requirements for managers and owners of significant participating interest. In addition, the applicant must submit copies of constitutional documents and register excerpts as well as the name of its external audit firm.

**Fund managers**

The licensing procedure is a fully-fledged authorization process with requirements equivalent to the requirements for granting permission under article 8 AIFMD or article 6 of the UCITS Directive. The licensing procedure checks requirements, such as sufficient initial capital or own funds, fit and proper requirements for the directors, reliability of shareholders, and a proper organizational structure for the manager.

**Credit service providers**

The license requirements are similar to the licensing of other BaFin-regulated entities, i.e., the senior managers must be "fit and proper," and among other things, a business plan must be submitted which not only describes the planned business activities, but also the organizational structure and the measures taken to comply with the organizational duties set out in section 14 KrZwMG. The company must also provide evidence of a segregated bank account if it intends to accept funds from borrowers as part of its business activities. There are no minimum regulatory capital requirements for credit service providers.

**Insurance and reinsurance undertakings**

Similar to banks and financial service providers, insurance and reinsurance undertakings have to demonstrate that they meet a number of requirements in order to obtain a license, in particular:

An insurance or reinsurance undertaking with its registered seat in Germany has to be endowed with a minimum amount of eligible own funds, which cover at least the statutory minimum capital requirement (depending on the nature of its intended business) and the solvency capital requirement (to be calculated on the basis of the balance sheet and profit and loss account estimates for the first three financial years), whichever is greater. With the exception of certain small businesses, the absolute floor for the minimum capital requirements currently ranges between EUR 1.3 million for captive reinsurance, EUR 2.7 million for health and property insurance, EUR 3.9 million for reinsurance and EUR 4 million for life and third party liability insurance. In addition, the (re-)insurance undertaking also has to set up an organization fund that is available to cover the expenses necessary for the establishment of the administration and the network of agents.

If a non-EEA insurance undertaking applies for a license for a branch established in Germany, the solvency capital requirement has to be determined based on the business of the German branch. The underlying assets have to be located in Germany (at least in an amount covering the minimum capital requirement) and in the EEA and they must not be below 50% of the absolute floor for the minimum capital requirements applicable in case of an insurance license. Amounts of at least 25% of the absolute floor for the minimum capital requirements have to be placed on a bank account or deposit that requires BaFin's approval for any transaction.

All members of the management board and of the supervisory board, as well as all other persons who effectively run the (re-)insurance undertaking and the responsible actuary (where required) as well as the additional persons who perform other key tasks, must be fit and proper. Fitness requires professional qualifications, knowledge and experience in the area of insurance business, which typically presupposes, in case of lead positions, having been in a leading role at a comparable insurance undertaking for at least three years. The properness requirement can be in doubt in case of past supervisory measures, relevant criminal or administrative offenses or conflicts of interest.

The identity of all direct and indirect holders of significant participating interests (of 10% or more) has to be disclosed together with the size of their participating interest; they also have to fulfil the requirements of a "proper" person.

In addition, upon application for a license, the (re-)insurance undertaking has to submit a viable business plan to BaFin, outlining, inter alia, the details of the organizational structure of the undertaking, the territory of the envisaged business operations, the articles of the corporate undertaking, the classes of insurance, the basic feature of reinsurance and retrocession, the own funds, the organization fund, estimates of the balance sheet and the profit and loss account for the first three financial years as well as estimates of the solvency capital and the minimum capital requirement. Besides such business plan, the applicant also has to submit evidence for the fulfilment of the fit and proper requirements, it has to provide information about enterprise agreements, about contracts on the outsourcing of important functions or activities and about direct and indirect holdings of significant participating interest and other close links.

In case of mandatory (compulsory) insurance and health insurance, the insurance undertaking also has to submit a copy of the general insurance terms to BaFin.

Reinsurance undertakings may only apply for a license for the reinsurance business. In the area of direct insurance, the business of life, health and non-life insurance undertakings always has be separated, so direct insurance undertakings who want to cover more than one of those areas have to apply for separate licenses.

***(Re-)Insurance intermediaries***

In order to obtain a license as (re-)insurance intermediary in Germany, the applicant has to submit the following documents to the competent IHK:

Evidence for the fulfilment of the fit and proper requirements of its management;

Evidence for the existence of a mandatory professional liability insurance policy of the intermediary according to the specific requirements of German law;

Evidence for the professional qualification of the intermediary (or of a representative of the intermediary in charge of supervising the employees carrying out insurance mediation).

The fit and proper requirements are typically fulfilled by a clean excerpt from the registry of debtors and from the trade register. In order to fulfil the professional qualification requirements, the intermediary or its representative has to pass a particular qualification exam in the area of insurance offered by the IHKs in Germany or the intermediary has to possess another professional exam that is recognized as equivalent (e.g. an exam as insurance salesperson).

# 6. What is the process for becoming authorized in your jurisdiction?

## What is the process for becoming authorized in your jurisdiction?

Before formally submitting a license application, the applicant will usually request a meeting with the competent BaFin officials to present the project and the intended business model, introduce the managers, and discuss the licensing process. This helps identify problematic points, establish trust, and clarify a possible timeline for the authorization process.

The formal process starts with the submission of a written application (for which no form is required) as well as the submission of the necessary documents (see section 5).

The BaFin will examine the documents and flag any items that are missing. Also, the BaFin will typically ask for clarifications or for the removal of deficiencies in the documents.

There is a maximum period of review in which the BaFin must decide on the application. Such a review period only starts once complete documents have been submitted, and it is the BaFin who will decide when the submission is complete.

For banks, financial services providers and investment services providers, the review period is six months. The BaFins (or the ECBs) decision is not discretionary, that is, if all requirements have been met, the license must be granted. However, the competent regulator will, in practice, always find a reason to declare that the requirements have not been met. While a denial of a license can be challenged before the courts, this is usually not done as it will be too time-consuming and it is usually easier to address the BaFins or ECBs concerns.

For payment services providers and e-money issuers, the review period is three months from the date of submission of a complete document package.

For fund managers, the review period is six months for UCITS and three months for managers of AIFs.

For credit service providers, the review period is 90 days.

There is no maximum review period for (re-)insurance undertakings or (re-)insurance intermediaries.

# 7. What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

## What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

The single European passport is a system that allows credit institutions, certain financial services providers, and investment firms, (re-)insurance undertakings and (re-)insurance intermediaries legally established in one EU/EEA member state to establish/provide their services in another member state without further authorization requirements.

A CRR credit institution or an investment firm authorized to conduct business in a member state of the EEA may do so in another member state by providing cross-border services (for investment services also through a tied agent domiciled in the home member state of such institution) or by establishing a branch in such other member state or through a tied agent domiciled and registered in such other member state. A tied agent can only provide investment brokerage services, investment advice and placement services, and it exclusively acts for the account and under the "liability umbrella" of a CRR credit institution or an EEA investment firm.

No passport is available for banks that are not CRR credit institutions (i.e., special banks that do not take deposits) or financial services providers that are not investment firms under MiFID / WpIG, such as financial leasing or factoring companies.

**Banks and investment firms**

As a general rule, the process starts by notifying the competent home member state authority and then following the rules set out in the relevant legislation and rules of the home member state, which are based on the relevant passporting provisions of the applicable EU directive (CRD V, MiFID II, PSD II, UCITS Directive or AIFMD).

Once the submission has been reviewed by the home member state authority, it will be transmitted to the BaFin, which essentially has no further task or right to reject the notification.

**Freedom of establishment passport**

If the notifying bank or investment firm intends to establish a branch office, the BaFin must communicate within two months after receipt of documents what filing and notification requirements apply in Germany and what legal provisions of German law must be observed. As soon as such communication has been received, or at the latest after the end of a two-month period, the branch office can be established and business can be commenced.

Under the SSM, a slightly modified procedure applies: If a significant institution (credit institution) that is directly supervised by the ECB wishes to establish a branch within the territory of another participating member state via passporting procedures, it has to notify the NCA of the participating member state where it has its head office and provide the necessary documentation. On receipt of this notification, the NCA immediately informs the ECBs Authorization Division, which then assesses the adequacy of the administrative structure in light of the activities envisaged. Where no decision to the contrary is taken by the ECB within two months of receipt of the credit institution’s notification, the significant credit institution may establish the branch and commence its activities. A similar procedure applies for a significant credit institution that is from a non-participating member state, but whether or not ECB is competent will depend on the size of the branch. If it meets the size criteria for a significant credit institution, it will be (co-)supervised by ECB and ECB will take steps accordingly; otherwise, normal passporting happens, that is, the branch will be (co-)supervised by the BaFin.

**Freedom of services passport**

If the relevant institution merely wants to render services across the border into Germany without establishing a branch, the procedure is slightly simpler. Again, the institution will notify the competent authority of its home member state, which will review the notification and pass it on to the BaFin. While the BaFin again has two months to communicate applicable German law provisions to the institution, the business may be commenced immediately after the BaFin has received the notification. The names of tied agents domiciled in the home member state of the relevant institution that the institution plans to use to provide cross-border services is published by the BaFin.

Under the SSM, any significant supervised entity (credit institution) wishing to exercise the freedom to provide services by carrying out its activities within Germany for the first time shall notify the NCA of the participating member state, where the significant supervised entity has its head office, of its intention. The NCA shall immediately inform the ECB and the BaFin upon receipt of this notification.

If the relevant institution plans to provide services in Germany through a tied agent domiciled in Germany, the institution has to ensure that the tied agent is registered as such with the BaFin.

**Payment services providers and e-money issuers**

The passport system applies for payment services providers and e-money issuers from another EU/EEA member state in a similar manner as for banks and investment firms, except that there is no two-month waiting period for the establishment of a branch office, and that BaFin has taken the position that tied agents can only be used for providing payment services in Germany if they are located in Germany. The passporting system also allows services rendered via payment services agents or e-money distributors.

As such entities do not fall under the SSM, no special rules involving the ECB will apply.

**Fund managers**

A passport (cross-border services or branch establishment) is available for UCITS managers or AIFMs from other EEA member states.

For UCITS managers, a two-month waiting period as in the case of banks will apply in the case of establishment of a branch in Germany. As in the case of banks, there is no waiting period for a cross-border passport.

For AIFMs, the procedure is slightly different insofar as the competent home member state authority must have submitted the following documents to the BaFin: (i) a certificate confirming the due licensing of the AIFM in its home state; (ii) the notification of the intention to provide cross-border services; and (iii) a business plan that shows which special domestic AIF the AIFM intends to manage in Germany or which ancillary services shall be rendered. In the case of establishment of a branch, the BaFin must have received, in addition, information on the organizational structure of the branch, a domestic address where documents can be requested, and the name and contact details of the branch managers.

For the passporting of an AIFM, no concept of tied agents exists.

**Ongoing supervision by the BaFin**

The BaFin generally has only limited competencies for supervising the passported entities and primarily needs to contact the home member state authority if it suspects a breach of local law.

Generally, branches of foreign institutions must observe a large part of German anti-money laundering law.

Moreover, certain local regulations, such as liquidity rules, rules on million credits, automated access by the BaFin to bank account information, and certain information rights and emergency powers of the BaFin, apply to branch offices.

Branches of foreign investment firms must observe German conduct of business rules (but remain exclusively subject to the prudential rules of their home member state).

For branches of payment services providers and e-money institutions, money laundering law obligations apply, as well as certain information rights and emergency powers of the BaFin.

Branches of fund managers are subject to certain obligations to provide their services honestly, with the requisite skills and due care, and to act in the best interest of the investors and avoid conflicts of interest. Also, the branch must observe the German rules on the marketing of its funds. Additionally, if ancillary services that fall under MiFID are rendered, certain German conduct of business rules will apply.

**Credit service providers**

Section 23 KrZwMG provides for the possibility of credit service providers duly licensed in another member state of the EU/EEA to provide their services in Germany if (i) they have informed their home member state national competent authority and following receipt of a confirmation from the BaFin by the national competent authority that they have received the documents or (ii) if, after two months from the date the BaFin has received such documents from the national competent authority of the home member state, BaFin has failed to issue the confirmation. This passporting regime does not differentiate between the provision of cross-border services and the establishment of a branch office. Both types of activities are possible.

**(Re-)Insurance Undertakings**

Pure reinsurance undertakings that are licensed in another EEA member state can use that license for expanding their reinsurance business to Germany as well, both by way of freedom of services or by way of freedom of establishment. No notifications to the BaFin are required in such a case; the main representative in charge of a German establishment simply has to be registered with the local Commercial Register in Germany (sections 169, 68 para. 2 sent. 4 VAG).

If a direct insurance undertaking licensed in another EEA member state wants to expand its insurance business to Germany, it first has to notify this intention with its competent home member state authority, which will start the passporting process as set out in the rules of the home member state, which are based on the relevant passporting provisions of the Solvency II Directive. Accordingly, the home member state authority will transmit the information set out in Article 145 of the Solvency II Directive (in case of freedom of establishment) or in Article 148 of the Solvency II Directive (in case of freedom of services) to BaFin; for mandatory (compulsory) insurance and health insurance, the undertaking also has to submit the general insurance terms for BaFin. The insurance undertaking may start its business activities in Germany, in case of freedom of establishment, two months after the home member state authority has notified the undertaking that it has transmitted the required information to BaFin, and in case of freedom of services immediately upon such notification by the home member state authority. No notification is required at all if the insurance undertaking only wants to offer transport insurance, property insurance for vehicles or liability insurance for ships and aircrafts by way of freedom of services to customers in Germany (section 66 para. 1 VAG).

**(Re-)Insurance Intermediaries**

If a (re-)insurance intermediary who is registered in another EEA member state wants to expand its mediation business to Germany, it has to submit the respective information set out in Article 4 para. 1 IDD (for freedom of services) and Article 6 para. 1 IDD (for freedom of establishment) to its competent home member state authority. That authority has to transmit the respective information within a deadline of one month to the competent authority of the host member state – i.e. with the DIHK Deutscher Industrie- und Handelskammertag e.V. in Berlin -, who has to acknowledge receipt without delay. The competent authority of the home member state shall inform the intermediary in writing about such acknowledgement. In case of freedom of services, the intermediary may then commence its business in Germany under the applicable legal provisions, while in case of freedom of establishment, the intermediary has to wait another month until it can establish a branch and commence its business in Germany.

# 8. Authors and contact information

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