Global Financial Services Regulatory Guide - Germany

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

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# 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.

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