Global Financial Services Regulatory Guide - Germany

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

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# 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.

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