

German Law Publishers

Banking Regulation in Germany

VON
Peter Scherer, Sven Zeller

1. Auflage

Banking Regulation in Germany – Scherer / Zeller

schnell und portofrei erhältlich bei beck-shop.de DIE FACHBUCHHANDLUNG

MWV Medizinisch Wissenschaftliche Verlagsgesellschaft 2009

Verlag C.H. Beck im Internet:

www.beck.de

ISBN 978 3 941389 02 1



Table of Contents

Preface	XIII
1. The German Banking System PETER SCHERER	
1.1 Overview	I
1.2 The three pillars	2
1.2.1 Private banks	2
1.2.2 Cooperative banks	3
1.2.3 Public law banks	4
1.2.4 Foreign banks in Germany	6
1.3 German business	6
1.3.1 Universal banks	7
1.3.2 Specialised banks	8
1.4 Supervisors	8
1.4.1 Federal Financial Services Supervisory Authority, BaFin (<i>Bundesanstalt für Finanzdienstleistungsaufsicht</i>)	9
1.4.2 German Central Bank (<i>Deutsche Bundesbank</i>)	11
1.5 Legal system	11
1.6 Instruments of supervision	12
1.6.1 Licence requirements	12
1.6.2 Organisational requirements	14
1.6.3 Compliance	14
1.6.4 Special audits	15
1.6.5 Daily supervision	16
1.6.6 Capital requirements	18
1.7 Summary	21
2. Special Institutions MARC BENZLER	
2.1 Savings banks (<i>Sparkassen</i>)	23
2.1.1 Usage of term <i>Sparkasse</i>	24
2.1.2 Business activities	25
2.1.3 Maintenance obligation (<i>Anstaltslast</i>) and guarantee obligation (<i>Gewährträgerhaftung</i>)	26
2.1.4 Deposit protection systems	28
2.1.5 Investments in savings banks	29

TABLE OF CONTENTS

2.2 State banks (<i>Landesbanken</i>)	30
2.3 Cooperative banks (<i>Genossenschaftsbanken</i>)	31
2.4 Building societies (<i>Bausparkassen</i>)	33
2.5 Promotional banks (<i>Förderbanken</i>)	35
2.6 Covered bonds banks (<i>Pfandbriefbanken</i>)	37
2.6.1 Nature of a <i>Pfandbrief</i>	38
2.6.2 Types of <i>Pfandbriefe</i>	38
2.6.2.1 Mortgage cover pool	39
2.6.2.2 Public sector cover pool	43
2.6.2.3 Ship mortgage cover pool	44
2.6.2.4 Aircraft mortgage cover pool	45
2.6.3 <i>Pfandbriefbank</i>	46
2.6.4 Trustee (<i>Treuhänder</i>)	47
2.6.5 Insolvency treatment of <i>Pfandbriefe</i>	47
2.6.6 Alternative structures	48
2.6.7 Success of the <i>Pfandbrief</i>	50
3. Investment Funds	
SVEN ZELLER	
3.1 Introduction	53
3.2 The regulatory framework of German investment law	54
3.2.1 The German Investment Act	54
3.2.2 The system of the Investment Act	55
3.3 Investment funds under German law	55
3.3.1 Statutory definition of the term investment fund	56
3.3.2 Types of funds under German law	56
3.4 The German funds market	61
3.4.1 Domestic investment funds	61
3.4.2 Foreign investment funds	62
3.5 Investment management companies and custodian banks	63
3.5.1 Investment fund companies	63
3.5.2 Custodian banks	64
3.6 Investment stock corporations	66
3.7 Investment restrictions	67
3.7.1 Borrowings, short sales and leverage	67
3.7.2 Securities lending	68
3.7.3 Repurchase agreements	68
3.7.4 Purchasing other investment funds	69
3.7.5 Derivatives	69
3.7.6 Issuer limits	70
3.7.7 Other eligible assets	71
3.8 Distribution of units in foreign funds	71
3.8.1 Distribution to the public	72
3.8.2 Distribution by way of private placement	74
3.9 Certificates	75

TABLE OF CONTENTS

4. Licence Requirements

PETER SCHERER

4.1 Introduction	77
4.2 Banking operations	77
4.2.1 Deposit business (<i>Einlagengeschäft</i>)	78
4.2.2 Mortgage bond business (<i>Pfandbriefgeschäft</i>)	79
4.2.3 Lending business (<i>Kreditgeschäft</i>)	80
4.2.4 Discount business (<i>Diskontgeschäft</i>)	81
4.2.5 Financial commission agency business (<i>Finanzkommissionsgeschäft</i>)	82
4.2.6 Safe custody business (<i>Depotgeschäft</i>)	85
4.2.7 Investment fund business (<i>Investmentgeschäft</i>)	86
4.2.8 Entering in the obligation to acquire loan receivables prior to their maturity/revolving business (<i>Revolvinggeschäft</i>)	87
4.2.9 Guarantee business (<i>Garantiegeschäft</i>)	87
4.2.10 Giro business (<i>Girogeschäft</i>)	88
4.2.11 Underwriting business (<i>Emissionsgeschäft</i>)	88
4.2.12 E-money business (<i>E-Geld-Geschäft</i>)	89
4.2.13 Central counterparty (<i>zentraler Kontrahent</i>)	89
4.3 Financial services business	90
4.3.1 Broking business (<i>Anlage- und Abschlussvermittlung</i>)	90
4.3.2 Investment advice (<i>Anlageberatung</i>)	91
4.3.3 Portfolio management	92
4.3.4 Own-account trading	92
4.3.5 Other licensable financial services business	93
4.4 Non-licensable business	94
4.5 Exemptions	95
4.6 Commercial conduct	99
4.7 Cross-border business	100
4.8 Branches, EU branches and representative offices	102
4.8.1 Branches	102
4.8.2 EU branches	104
4.8.3 Representative offices	105
4.9 Licence proceedings	107
4.9.1 Licence criteria	107
4.9.2 Content of the licence application	109
4.9.3 Requirements for non-EU branches	113
4.9.4 Legal fees and timing	115
4.10 Further requirements	115
4.11 Future developments	118
4.11.1 Payment Services Directive implementation	118
4.11.2 Supervision Stengthening Act	121
4.12 Summary	122

TABLE OF CONTENTS

5. Capital Requirements

GERHARD DREYER

5.1	Introduction	123
5.2	Initial capital	125
5.3	Own funds	126
5.4	Tier 1 and tier 2 products	128
5.4.1	Tier 1	128
5.4.2	Tier 2	130
5.5	Basel I	131
5.6	Basel II (Pillar I)	132
5.6.1	Standardised approach	133
5.6.2	IRB approaches	134
5.7	Solvability regulation	134
5.7.1	Introduction	134
5.7.2	Credit risk	135
5.7.2.1	Credit Risk Standardised Approach	136
5.7.2.2	IRBA	137
5.7.2.3	Credit risk mitigation techniques and netting agreements	139
5.7.2.4	Securitisation rules	142
5.7.3	Operational risk	145
5.7.3.1	Basic Indicator Approach and Standardised Approach	146
5.7.3.2	AMA	147
5.7.4	Market risk	148
5.8	Liquidity Regulation	149
5.9	Large exposure rules	150
5.10	Basel II (Pillar II: Regulatory dialogue)	154
5.10.1	Basel II framework	154
5.10.2	Implementation in Germany	156
5.11	Basel II (Pillar III: Market discipline)	158
5.11.1	Basel II framework	158
5.11.2	Implementation in Germany	158
	(a) Own funds structure (section 324 of the Solvability Regulation)	160
	(b) Adequacy of own funds structure (section 325 of the Solvability Regulation)	160
	(c) Market risk (section 330 of the Solvability Regulation)	161
	(d) Operational risk (section 331 of the Solvability Regulation)	162
5.12	Outlook	162
5.13	Annex	165

TABLE OF CONTENTS

6. Daily Supervision and other Banking Act Provisions

RAINER GALLEI

6.1	Ownership control	167
6.1.1	Scope of notification	168
6.1.2	Ongoing notification requirements	168
6.1.3	Attribution of voting rights	169
6.1.4	Contents and form of disclosure	170
6.1.5	Sanctions	171
6.2	Participating interests and corporate ties	172
6.2.1	Participating interests	172
6.2.2	Corporate ties	173
6.3	Reporting/notifications and monthly returns	174
6.3.1	Notifications on regulatory capital	174
6.3.2	Notifications on large exposures and million loans	175
6.3.3	Notifications on liquidity	177
6.3.4	Monthly returns	178
6.3.5	Notifications on organisational and commercial changes	179
6.4	Audits	180
6.4.1	Rights of investigation	180
6.4.2	Audits of annual reports and financial statements	182
6.5	Supervisory measures in general	183
6.5.1	General authorisation	183
6.5.2	Co-operation with other authorities	184
6.5.3	Advertising	184
6.5.4	Revocation of licence	185
6.5.5	Dismissal of managers	186
6.5.6	Intervention against unlawful business	187
6.6	Supervisory measures in special cases	187
6.6.1	Intervention against terrorism financing	187
6.6.2	Measures in cases of inadequate own funds or inadequate liquidity	187
6.6.3	Measures relating to financial holding companies	188
6.6.4	Measures in relation to organisational shortcomings	188
6.6.5	Measures in cases of danger	189
6.6.6	Measures in cases of a danger of insolvency	189
6.7	Enforceability, sanctions, costs and charges	190
6.7.1	Enforceability	190
6.7.2	Sanctions	190
6.7.3	Costs and charges	191
6.8	Outlook	191

TABLE OF CONTENTS

7. Organisation and Compliance

MARC BENZLER

7.1	Introduction	193
7.2	Statutory basis	194
7.2.1	Summary	194
7.2.2	Compliance	195
7.2.3	Organisational duties	195
7.2.4	Securities law	197
7.3	Risk management	197
7.3.1	General	197
7.3.2	Structure and specific provisions of the MaRisk	199
7.3.3	Internal control system	199
7.3.4	Internal auditing	200
7.4	Outsourcing	201
7.4.1	Outsourcing provisions of the Banking Act and the MaRisk	201
7.4.2	Outsourcing and the Securities Trading Act	202
7.5	Group-wide compliance	203
7.6	Organisational and compliance provisions of the Securities Trading Act	203
7.6.1	The organisational duties provided for in section 33 of the Securities Trading Act	203
7.6.2	Insider and issuer compliance	204
7.7	Legal consequences of violations of statutory organisational, risk management or compliance requirements	206
7.7.1	Civil law consequences	206
7.7.2	Sanctions applied by the public agencies	207

8. Deposit Protection and Investors' Compensation

UTE BRUNNER-REUMANN

8.1	Introduction	209
8.1.1	Development of the German deposit protection schemes	209
8.1.2	Harmonisation of deposit protection and investor compensation	209
8.1.3	Current legislative developments	210
8.2	Structure and scope of the schemes under the Deposit Protection and Investor Compensation Act	211
8.2.1	General structure of the statutory compensation schemes	211
8.2.2	Schemes	212
8.2.3	Scope of protection under the statutory compensation schemes	213
8.3	Alternative guarantee schemes	216
8.4	The Deposit protection fund of German banks – the German voluntary deposit protection scheme	217
8.4.1	Structure of the Deposit Protection Fund of German Banks	217
8.4.2	Scope of protection	218

TABLE OF CONTENTS

8.5	Consequences of EU harmonisation: topping-up and export ban	219
8.6	Compensation procedure	220
8.7	Financing of the statutory compensation schemes	222
8.7.1	System	222
8.7.2	Criticism	222
8.7.3	Changes to the compensation schemes – a reform?	223
8.8	Annex – overview of deposit/investor protection in Germany	224
9.	Money Laundering	
	ANDREAS RIETH	
9.1	Introduction	227
9.2	What is money laundering?	227
9.3	Legal framework in Germany	228
9.3.1	German Money Laundering Act	229
9.3.2	German Criminal Code	232
9.3.3	German Tax Code	233
10.	German Rescue Package for the Financial Sector	
	MARC BENZLER/PETER SCHERER	
10.1	Introduction	235
10.2	Procedure	236
10.3	Conditions for drawing on SoFFin	237
10.4	Competition and state aid issues	238
10.5	Guarantees	239
10.5.1	Guarantee declaration	239
10.5.2	Requirements to be met by the Financial Sector Entity	240
10.5.3	Issue of debt instruments	240
10.5.4	Guarantees for SPVs	240
10.6	Recapitalisations	241
10.6.1	Requirements to be met by the Financial Sector Entity	241
10.6.2	Statutorily authorised capital	242
10.6.3	Regular capital increase with simplified exclusion of subscription rights	243
10.6.4	Terms and conditions of the shares (notably preference shares)	244
10.6.5	Profit participating rights (<i>Genussrechte</i>) and silent participations (<i>stille Beteiligungen</i>)	245
10.6.6	Issuance amount according to market price	245
10.7	Risk assumptions	245
10.7.1	Requirements to be met by the Financial Sector Entity	245
10.7.2	Accounting issues	246
10.7.3	Civil law issues	247
10.7.4	Risk assumption in the case of SPVs	247



TABLE OF CONTENTS

10.8	Nationalisation	248
10.9	Remuneration	249
10.10	Support from BaFin	250
10.11	Bad Banks	251
10.12	Exit issues	252
10.12.1	Resale	252
10.12.2	Sale to existing shareholders	252
10.12.3	Sale via the secondary market	253
10.12.4	Consolidation potential	253
10.13	Conclusion	253
 Abbreviations		 255
Bibliography		261
Index		269
Authors		279