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Foreword

Dear Readers,

What is Europe's banking supervision supposed to look like in the future? More than almost any other issue, this is the question that is currently preoccupying the financial markets. The EU Commission recently presented its proposals for a common supervisory mechanism for euro zone banks, in which the European Central Bank is intended to assume a leading role. The Commission is planning to introduce the new supervisory mechanism in stages from 1 January 2013. In our interview with BaFin's President, Dr Elke König, starting on page 18, she explains what she thinks of these plans, what should be taken into account during their implementation and what the reforms will mean for BaFin.

The Internet has utterly revolutionised many sectors – not least telecommunications, the media or entertainment. Even the financial sector has been tapping into the advantages of the World Wide Web for quite some time now, whether in stock exchange trading, the transmission of information or online banking. However, a relatively new concept called crowdfunding has been developed in recent years. Crowdfunding allows projects to be financed by a multitude of capital investors, who are usually attracted to participate in the project via Internet platforms. The report starting on page 8 explains this form of financing in more detail and defines the supervisory requirements platform operators and offerors have to consider.

And, last but not least, a special note about this publication: The BaFinQuarterly, which enjoys a wide readership, will soon be celebrating its sixth anniversary. We would like to tailor our BaFinQuarterly to fit your interests even better and make it more reader-friendly. Please spare us a few minutes of your time to take part in our survey. Your feedback will help us to further improve our BaFinQuarterly.

Thank you very much for your support!

Dr Sabine Reimer, Head of Press and Public Relations

Current regulation

SUPERVISORY PRACTICE

BaFin looks back on ten years of supervisory work in area of market manipulation

Regina Schierhorn, BaFin

In 2012, BaFin marks two anniversaries: ten years of integrated financial services supervision, and thus at the same time ten years of supervisory work by BaFin in the area of market manipulation. Shortly after being established, it was assigned the task of monitoring manipulation in the area of securities trading as part of its securities supervision work.

The Fourth Financial Market Promotion Act of 21 June 2002 filled a considerable gap in the system of market supervision in Germany: the former prohibition of share price fraud in section 88 of the German Stock Exchange Act (*Börsengesetz* – BörsG) was modernised as of 1 July 2002 and integrated into the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG). Since then, supervision of market manipulation has been concentrated with BaFin.

One major revision of substantive significance was the introduction of a two-track sanctioning regime. The provision went from covering offences relating to strict liability (*Gefährdungsdelikt*) to offences defined in terms of the results produced (*Erfolgsdelikt*). In other words, acts of market manipulation became punishable as criminal offences only if they led to a result, i.e. to an actual impact on share prices, whereas attempts at market manipulation not resulting in this impact have been punishable by BaFin as administrative offences by fines of up to 1 million euros[1] .

From then on it was ensured nationally that all cases of suspicion are investigated uniformly. The scope of action of the stock exchange authorities of the federal states that had previously been responsible for this area had been limited to the respective federal state, which meant that section 88 of the BörsG was largely obsolete in federal states that did not have any exchange supervision of their own. This primarily concerned cases that were not directly related to the stock exchange, i.e. in which the offence was not committed directly on the stock exchange. Examples of this are statements made on Internet chat forums that drive up share prices, or factual misrepresentations in company publications of material importance for valuations.

Investor Protection Improvement Act

The Investor Protection Improvement Act (*Anleger-schutzverbesserungsgesetz* – AnSVG) of 28 October 2004, which implemented the EU Market Abuse Directive of 2003, reformed and tightened the provisions for monitoring market manipulation. From then on, it was no longer necessary to prove intent in cases of other deceptive acts, which simplified the task of furnishing proof. The German legislator also went beyond the European scope of the prohibition on manipulation, extending its application also to the regulated unofficial market (*Freiverkehr*).

[1] In 2002 the relevant fines were initially around 1.5 million euros, but were then reduced to 1 million euros.

Details on the offence of market manipulation are set out in the Regulation Clarifying the Prohibition of Market Manipulation (*Marktmanipulations-Konkretisierungsverordnung* – MaKonV) of the Federal Ministry of Finance, which entered into force on 11 March 2005 and replaced the previously applicable Regulation Clarifying the Prohibition of Stock Price and Market Manipulation (*Verordnung zur Konkretisierung des Verbots der Kurs- und Marktpreismanipulation* – KuMaKV) of November 2003.

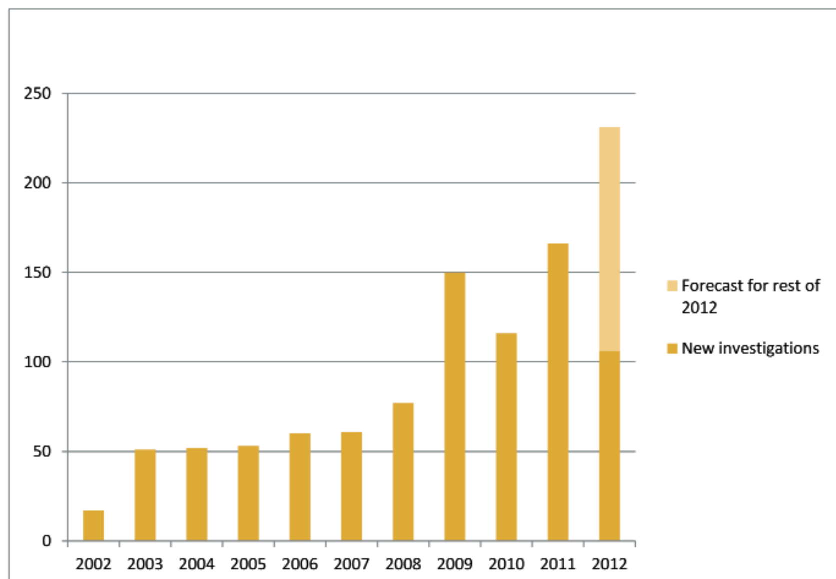
Essentially, three forms of market manipulation exist: information-based manipulation, for example resulting from the making of untrue statements; trade-based manipulation, in which the respective prices on a market are inadmissibly controlled through the way in which orders are placed; and mixed forms such as scalping with a combination of interest-led recommendations and related trading behaviour.

Predicate offence to money laundering

In retrospect, it is clear that the importance of this once little regarded area of regulation has grown steadily since 2002. Market manipulation is now seen for what it frequently is: serious and/or organised crime. In 2011 the German legislator responded and included the offence of market manipulation (whether committed in trading or by criminal organisations) amongst the predicate offences to money laundering pursuant to section 261 of the German Criminal Code (*Strafgesetzbuch* – StGB). This is likely to become relevant in practice e.g. where share transactions are used to move monies abroad so as to conceal their origin.

The heightened importance of this form of white collar crime is also reflected in the statistic of investigated market manipulation (see Fig. 1).

Fig. 1: Trend in cases of market manipulation



Source: BaFin (as at: June 2012)

Initially, there were essentially two types of cases that were of concern in practice. Firstly, untrue statements were frequently made e.g. in ad hoc disclosures pursuant to section 15 of the WpHG or in studies on specific issuers. Secondly, acts of trade-based manipulation were observed, such as wash trades (in which a trading participant trades with himself) and arranged transactions. In such cases, BaFin typically receives notices from the trading supervisory offices of the stock exchanges and then launches investigations.

Since November 2004, credit institutions and over-the-counter (OTC) markets have been required to report a suspicion of violations of the prohibition of insider trading or market manipulation pursuant to section 10 of the WpHG. Other useful sources of information are investor complaints and inquiries by the criminal prosecution authorities. Particularly the latter have seen a significant increase over the past years, and co-operation with public prosecutors (especially with certain specialised public prosecutor's offices) and the police authorities has also intensified. In 2009, the exchange of information of BaFin with the German Federal Criminal Police Office in the area of market abuse was moreover documented in a co-operation agreement.

Landmark decision of German Federal Court of Justice

In 2003, a case examined by BaFin resulted in the German Federal Court of Justice (*Bundesgerichtshof* – BGH) dealing with the issue of market manipulation for the first time.[2] The BGH at that

[2] BGH judgment of 6 November 2003: 1StR 24/03, BGHSt48/373.

time ruled that scalping is not to be regarded as insider trading (as found by the previous court instance, the District Court of Stuttgart) but – in the context of the EU Market Abuse Directive and the requirement for information to be disclosed to a third party – as market manipulation. The case in question was about an offender who acted as a journalist and fund adviser. Knowing about the price-influencing effects of his recommendations, he first acquired the shares and then sold them for a profit after his recommendations were implemented by the funds.

The decision also brought about a legal clarification that, for such statements aimed at promoting own interests, it does not matter whether the recommendations are objectively justified. This new position had just as great an impact on the further investigation practice as the statements of the BGH on the determination of the impact on the exchange or market price within the meaning of section 38 of the WpHG that defined market manipulation as a criminal offence for the first time. According to this, the requirements to be met by this element of offence must not be excessive. Normally, it suffices to view the price trend and trend in revenues without having to question the market participants why they purchased the recommended share.

Numerous scalping variants

Various types of scalping have been examined by BaFin for some years, with relatively unknown companies being promoted in most cases. With recommendations in stock pickers, through telephone marketing (cold calling), as well as spam advertising drives via e-mail and fax, efforts are aimed at arousing interest and demand with potential investors. Frequently, this type of market manipulation is conducted through networks organised on division of labour principles. Stock pickers allegedly acting independently promote the securities through concerted efforts.

With investors this creates the mistaken impression that the securities in question offer an attractive investment opportunity. In actual fact, though, the offenders specifically exploit investor interest to sell off their own holdings at artificially inflated prices. Once all the media hype has subsided, the exchange prices of the shares plummet. Frequently, the buyers are too late to notice that such companies, which prefer to state their field of activity as being commodities, had a business model that is at least questionable (or no operating business at all).

On its website, BaFin warns against such recommendations and calls on investors to inform themselves thoroughly about the stock in question before taking any investment decision. In some cases, the stock exchange has discontinued trading in the shares of the companies concerned.

These dubious issuers were especially common on the regulated unofficial market (*Freiverkehr*), especially in the First Quotation Board of the Frankfurt Stock Exchange. This segment will be closed at the end of 2012. It remains to be seen whether this will reduce the number of cases or whether the offenders will develop alternative strategies, e.g. by shifting their activities to other exchanges.

Unauthorised order placements

Another phenomenon that can be observed throughout Germany is market abuse by unauthorised telephone orders. Here, the offenders first obtain information about a securities deposit as well as the related access and identification data (e.g. securities account number or date of birth of the account holder). Sometimes it is the account holders themselves who carelessly disclose their account data to others. The offenders then contact the credit institution, pass themselves off as the account holders and place large volume orders under that person's securities account for shares that are usually little known and traded on the regulated unofficial market (*Freiverkehr*).

So far, 40 mostly foreign issuers are affected. The total damage amounts to over 6 million euros. BaFin issues warnings on its website when new shares become the targets of such unauthorised telephone orders. Since the credit institutions normally put these securities on their internal observation lists

and review such order placements, such offences are increasingly being nipped in the bud. Such efforts have already made it possible to avert a potential loss of more than 3 million euros. Criminal law investigations are conducted parallel to such preventive measures.

More and more cases of manipulation by organised groups

In summary it can be observed that increasingly large cases of manipulation are being uncovered which are being committed by groups of offenders on an organised basis, sometimes over a protracted period, successively in different securities and with losses running into the millions. The international dimension of market manipulation continues to be considerable. Suspicious transactions often originate with institutions abroad, particularly in countries outside the European Union such as Switzerland.

Even though this makes the investigations more complex and tedious, it is normally possible to identify the offenders also in such cases. Initial judgments on scalping in what are referred to as stock ticker networks, which carry heavy prison sentences following over a year of pretrial detention, show that the judicial authorities today ascribe considerable significance to this type of white collar crime.

Generally, an increase in the number of sentences for criminal market manipulation can be observed. Whereas in 2003 to 2008 up to five sentences each year were handed down by the criminal courts, this had risen to 14 sentences by 2009, nine sentences in 2010 and twelve in 2011. Parallel to this, the number of cases discontinued against payment of a fine pursuant to section 153 a of the StGB is also on the rise. In 2012, already nine cases were discontinued in this way up to and including June. A total of 13 cases were concluded in this way in 2011, 16 in 2010 and only nine in 2009.

New challenges

New developments on the markets are also changing the way abuse is prosecuted. For example, automated and algorithmic trading is increasingly coming under the scrutiny of supervisors. At the European level, the Market Abuse Directive, the decisive framework for market abuse, is currently being revised to cover – among other things – manipulative strategies in this area. Clarifying those cases requiring the assessment of large data volumes represents one of the current challenges when it comes to monitoring market manipulation.

The success story of the Minimum Requirements for Risk Management

Markus Hofer, BaFin
Christian Bothe, BaFin

On 2 May 2012 BaFin celebrated the 10th anniversary of its foundation. One of the success stories in the field of banking supervision is the development of the Minimum Requirements for Risk Management (*Mindestanforderungen an das Risikomanagement*, or MaRisk for short). They form a comprehensive framework for banks' own internal risk management that extends across different types of risk and attaches great importance to the quality of risk management.

One of the major triggers for the development of the MaRisk in 2005 was the Basel Committee on Banking Supervision's new framework for the capital adequacy of banks, which is generally referred to as "Basel II". In addition to the quantitative rules governing capital adequacy (Pillar I), Basel II also includes a more quality-based Supervisory Review Process (Pillar II), which was also incorporated in the EU Banking Directive. Under Pillar II institutions must establish appropriate management, monitoring and control processes ("robust governance arrangements") as well as strategies and processes that ensure that all material risks are covered by internal capital (Internal Capital Adequacy Assessment Process – ICAAP). The quality of these processes is to be assessed at regular intervals by the supervisory authority under the Supervisory Review Process. Since then these principles have been reflected in section 25a (1) of the German Banking Act (*Kreditwesengesetz* – KWG) and also in the MaRisk, which interpret the statutory standards.

The supervisory authority has succeeded in developing the MaRisk into a compact yet comprehensive framework. BaFin has thus made transparent how it will apply the rather vague legal terms of section 25a of the Banking Act in its supervisory practice. At the same time it gives institutions reliable suggestions for the appropriate

structuring of their own internal risk management. The requirements are drafted in such a way that they are applicable for all institutions and aresufficiently flexible. For instance, they give institutions the necessary organisational latitude in the implementation. BaFin deliberately avoided laying down detailed set rules in the MaRisk and instead placed the emphasis on the necessity of a principles-based approach. This approach enables a risk-based organisation of the individual elements of risk management in that it takes into account the size of the institution and the nature, scale, complexity and risk content of the activities it engages in.

In order to keep the MaRisk up to date with changes in market practices over time, BaFin has also set up a specialist committee which consists of representatives of BaFin, Deutsche Bundesbank and the associations, representatives of institutions and external and internal auditors which support BaFin in the further development of the MaRisk.

Comprehensive framework

Even before the MaRisk were first published in December 2005, BaFin had set qualitative standards for banks' risk management in the form of the Minimum Requirements for the Trading Activities of Credit Institutions (*Mindestanforderungen an das Handelsgeschäft* – MaH, 1995), the Minimum Requirements for the Internal Audit Function of Credit Institutions (*Mindestanforderungen an die Interne Revision* – MaIR, 2000) and the Minimum Requirements for the Credit Business of Credit Institutions (*Mindestanforderungen an das Kreditgeschäft* – MaK, 2002). However, these requirements only addressed the particular areas. For instance, in the MaH and MaK, BaFin set requirements for the organisation of the internal control systems for trading and lending. The MaIR contained requirements for the organisation of the internal audit function.

It was only with the MaRisk that the abovementioned documents were consolidated into one comprehensive risk management framework. BaFin used the incorporation of the "old" Minimum Requirements into the new framework as an opportunity to eliminate duplications, interface problems and inconsistencies. In addition, the MaRisk, while being modernised in this way, had other elements added to them which had been discussed in pertinent international papers but for which there were hardly any requirements – or even none at all – in Germany (for example, interest rate risks in the banking book). Together with the incorporation of the provisions of Basel II and the Banking Directive, BaFin was thus able to develop an all-embracing framework that for the first time addresses all core elements of risk management in banks in a consistent fashion.

Organisation and structure

The MaRisk are a principles-based approach which prescribes an action framework for the users but which also allows them extensive freedoms in the practical implementation, provided these are compatible with the statutory goal of the appropriateness and effectiveness of risk management. The advantage of this principles-based arrangement over a rules-based arrangement is that the MaRisk can be implemented individually, according to the size of the respective institution and the nature of the business activities that it engages in and its risk structure.

The MaRisk are divided into a General Section (*Allgemeiner Teil* – AT) and a Special Section (*Besonderer Teil* - BT), while each section is composed in a modular way. The General Section contains fundamental requirements which have no special reference to the types of business and risks dealt with in the Special Section. To that extent, because of their overarching nature they take precedence and are to be observed irrespective of the types of business engaged in and risks. The Special Section contains rules for the internal control system, the requirements for the organisational and operational structure in the lending and trading business, requirements for the risk monitoring and risk control processes. It also renders more precisely the requirements for internal audit.

Revisions

In the past few years the MaRisk have been revised and updated a number of times in the light of new international standards. After slightly less than two years, on 30 October 2007, the first amended

version of the MaRisk was published. The implementation of the Financial Market Directive of 16 July 2007 had also necessitated an amendment of section 25a of the Banking Act. In particular, the qualitative requirements for outsourcing were fundamentally revised and incorporated into the MaRisk in a more principles-based fashion.

The financial and economic crisis of 2008 and 2009, which among other things led to the collapse of Lehman Brothers Bank, demonstrated once again the importance of appropriate and effective risk management. Although the MaRisk already included a comprehensive set of requirements that extended across different types of risk, the consequences of the financial crisis and the regulation proposals they gave rise to at the international level meant that the MaRisk had to be added to and expanded in certain areas in 2009. For example, requirements for risk concentrations, stress tests, liquidity risk management and risk management at the group level, as well as remuneration systems, which are by now addressed in a separate Regulation, were added.

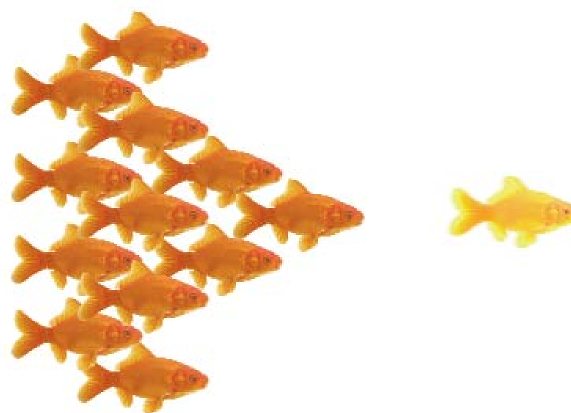
More and more regulation proposals were launched in the following years– either by the Basel Committee on Banking Supervision or by the predecessor institution of the European Banking Authority (EBA), the Committee of Banking Supervisors (CEBS). These entailed further amendments to the MaRisk. For instance, the MaRisk were also revised in 2010 in order to pick up aspects that had been identified by the aforementioned international institutions as weaknesses in banks' risk management in the financial crisis. Principally, this involved the introduction of a strategic planning process, the tightening up of the requirements dealing with risk concentrations (primarily those extending across different types of risk), additional requirements for institutions' stress test programmes (for example, the addition of inverse stress tests) and the building-up and composition of appropriate liquidity reserves.

With all these changes, BaFin has always sought to maintain as far as possible the principles-based structure of the MaRisk - even in the light of international standards that are becoming increasingly more specific.

Fourth amended version in preparation

The financial and economic crisis of the past few years has shown how rapidly financial stability in Germany and Europe can be jeopardised if institutions do not have robust risk management systems in place which identify critical developments and enable institutions to react promptly. The MaRisk make a major contribution to this. They provide institutions with an action framework for the organisation of their risk management systems, heighten risk awareness in institutions and make transparent how risk management may be organised in practice in order to comply with the law.

Further versions of the MaRisk will emerge in the future as well: the 4th amended version is scheduled to be published in the autumn of 2012; it has already been the subject of a consultation process. Experience from supervisory practice, findings from the work of the EBA, EU Banking Directive (CRD IV) requirements and other EBA guidelines will all be reflected in the new MaRisk.



Crowdfunding and supervisory laws

Jörg Begner, BaFin

Crowdfunding is a new form of financing by which a large number of persons invest in a project, usually via the Internet. Using special platforms, offerors seek to attract investors to participate in a venture or project on the spur of the moment. Combining supply and demand on such crowdfunding platforms often leads to binding investor commitments to investments that are often fully subscribed within a very short period.

But platform operators and offerors seeking capital investment should take note: crowdfunding raises several supervisory issues.

Crowdfunding
'Crowdfunding', also known as crowd financing, describes a type of funding that has been developed in recent years and is receiving increasing public attention. Crowdfunding allows projects to be financed by a multitude of capital investors, who are mostly attracted to the project via Internet platforms. The first platform in Germany started up in autumn 2011. Until now crowdfunding in Germany has been used mainly to fund social or creative projects, but has also been used to raise equity capital for start-up companies. As it is possible for investors to invest only very small amounts, the potential target group of investors is larger than for traditional forms of investment. Market participants predict that this form of funding has good growth prospects.

Numerous variations

Crowdfunding platforms and the investments offered are designed in very different ways. How are investors and offerors brought together? How is subscription organised – does the platform act as a broker or does the platform operator sell the investment directly? How is the transfer of investment capital effected – does the investor pay the capital to the offeror directly or does the platform act as neutral depository trustee or even as investment trustee? Is debt capital or equity raised, and in which investment form? How is the circle of investors configured? These questions are relevant not only from a corporate, tax and company law viewpoint, but also from a supervisory perspective.

Which supervisory regulations are applicable to crowdfunding depends on the design of the individual project and platform. Operation of a crowdfunding platform may involve authorisation requirements under the Banking Act (*Kreditwesengesetz* – KWG) or the Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz* – ZAG) and observation of other obligations such as under the Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG). Offerors of investments are faced with the issue of whether they are subject to an obligation to publish a prospectus under the Capital Investment Act (*Vermögensanlagengesetz* – VermAnlG) (only in German) or the Securities Prospectus Act (*Wertpapierprospektgesetz* – WpPG) . This also depends on how the investment and the modalities of the offer are designed.

Authorisation requirements

Due to the differences between individual crowdfunding platforms, it is not possible to make binding statements about authorisation requirements until the respective business model has been examined.

An authorisation pursuant to section 32 (1) sentence 1 of the KWG is required if banking business is to be conducted or financial services are to be provided in Germany commercially or on a scale which requires a commercially organised business undertaking.

An authorisation pursuant to section 8 (1) sentence 1 of the ZAG affects operators who wish to offer payment services as a payment institution in Germany – again on the basis that this is to be conducted commercially or on a scale which requires a commercially organised business undertaking.

Commercial or commercially organised business undertaking

Businesses are operated commercially if the business is established for a certain period of time and the operator intends to generate a profit. A particular indication of the intention to generate a profit is valuable consideration.

Whether or not the scale of the business requires a commercially organised business undertaking depends on the banking conception. However, as regards the authorisation requirement it is irrelevant whether or not the business is actually operated in that way.

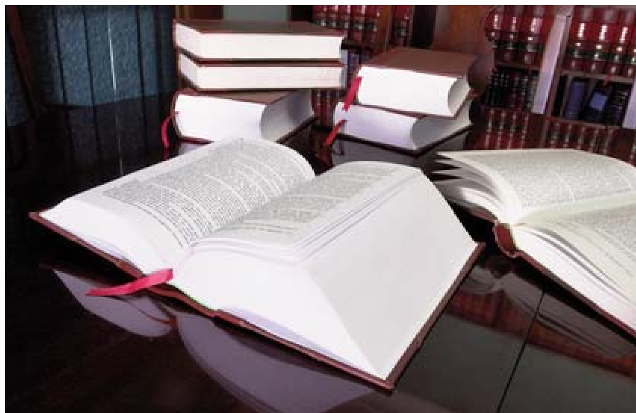
Financial instruments

An authorisation requirement for the provision of investment services which do not constitute banking business under the Banking Act presupposes that investments offered via the platform are financial instruments within the meaning of section 1 (11) of the KWG. Financial instruments include securities and capital investments (Vermögensanlagen) within the meaning of section 1 (2) of the VermAnlG, with the exception of shares in a cooperative.

Securities include all types of transferable securities (with the exception of payment instruments), which

by their nature are tradable on the capital markets. This includes in particular shares and comparable interest in legal persons, commercial partnerships and other enterprises. It also includes certificates representing shares, debt instruments (particularly participation certificates), bearer bonds and order bonds. On its website, BaFin has published a guidance notice (only in German) that further details financial instruments.

Capital investments within the meaning of the Capital Investment Act include shares that are not securitised within the meaning of the Securities Prospectus Act and which confer the right to participate in the earnings of a company (section 1 (2) no. 1 of the VermAnlG); it also includes participation rights (section 1 (2) no. 4 of the VermAnlG). If silent partnerships, participation rights or participation certificates are offered via crowdfunding platforms, these also fall under the term financial instruments like shares, limited partner's shares and shares in partnerships under the Civil Code (GbR).



Financial services

If the investments offered are financial instruments, the platform operator may be providing financial services either by way of investment broking or contract broking or placement business, which is a special type of contract broking.

Investment broking is defined in the Banking Act (KWG) as 'the brokering of business involving the purchase and sale of financial instruments'. Investment broking is provided by anyone who as agent of the investor transmits the investor's declaration of intent to buy or sell financial instruments to the entity with whom the investor wishes to conclude the transaction. The brokerage can also be carried out electronically: Anyone making an IT system available by which declarations of intent may be transmitted to potential contractual partners is also providing investment broking. This also applies to operators of crowdfunding platforms.

If the platform operator acts not only as agent but also as authorised representative, this may constitute contract broking. This is defined by statute as the purchase and sale of financial instruments in the name of and for the account of others (section 1 (1a) sentence 2 no. 2 of the KWG). The platform operator is an authorised representative if it is authorised to accept the investor's declaration of intent to buy a capital investment.

One special form of contract broking is placement business. This is provided by anyone who sells financial instruments upon emission – when they are first issued – on the capital markets or to a limited circle of investors on behalf of and for the account of third parties. The issuer must then have appointed the underwriter to place the financial instruments on the capital markets (placement agreement) without the underwriter being committed to buy the financial instruments. –

Current crowdfunding models do not appear to involve deposit-taking activities within the meaning of section 1 (1) sentence 2 no. 1 of the KWG, neither on the part of the (brokering) platform operators nor on the part of the capital investment offerors. These models do not envisage unconditional repayment claims for the investor, which is a prerequisite for deposit business.

Exceptions to authorisation requirements

Even if the platform operator effectively fulfils one of the specified authorisation requirements, pursuant to section 2 of the KWG under certain circumstances there will be exceptions to the authorisation requirement. A company does not require authorisation if it only operates investment broking and contract broking between customers and offerors or issuers of capital investments within the meaning of section 1 (2) of the VermAnlG – provided that the financial services are restricted to the specified capital investments and the company is not authorised to obtain ownership or possession of funds or securities of customers (section 2 (6) sentence 1 no. 8e of the KWG). The same applies if the company provides the placement business solely for offerors or issuers of capital investments within the meaning of section 1 (2) of the VermAnlG (section 2 (6) sentence 1 no. 19 of the KWG).

If a platform only offers silent partnerships or participation rights and under the business model the platform operators do not accept any monies from investors, they are not subject to authorisation requirements. The platform operator then also does not require authorisation for placement business pursuant to the Banking Act (KWG) if it accepts monies from investors.

Authorisation requirement according to the Payment Services Supervision Act

If the operator of the crowdfunding platform does not accept monies directly from investors, it does not provide payment services pursuant to the Payment Services Supervision Act (ZAG). However, if the operator does accept monies and passes these on to the offeror of the investments, an authorisation requirement pursuant to the ZAG may be applicable.

The same applies to the paying agent to which investors transfer the monies so that this can hold the monies until they are paid out and finally transferred to the offeror of the capital investment. Both instances may constitute money transfer services pursuant to section 1 (2) no. 6 of the ZAG.

Obligation to draw up a prospectus

Offerors or issuers of an investment may be subject to the obligation to draw up a prospectus pursuant to the Securities Prospectus Act (WpPG) or the Capital Investment Act (VermAnlG), which replaced the Prospectus Act (*Verkaufsprospektgesetz* – VerkProspG) on 1 June 2012. The determining factor is the nature of the offer, for example the type of investment, particularly the legal form (partnership investment, silent partnership, participation right etc.) or the issue volume.

Currently one often finds participation rights or silent partnerships on offer in the market via crowdfunding, and these could possibly require a prospectus under the Capital Investment Act. It is also possible that other investment or legal forms, such as limited commercial partnerships (KGs) or partnerships under the Civil Code (GbR), could also fall under the Capital Investment Act. There have been a few instances of shares being offered via crowdfunding. The public offer of shares and other securities may carry an obligation to draw up a prospectus under the Securities Prospectus Act.

Who is affected by the obligation to draw up a prospectus?

The obligation to draw up a prospectus always falls on the offeror of the investment. Who that will be depends on how the crowdfunding is set up. In practice, two different types of structure can currently be seen:

a) An offeror sets up the crowdfunding itself, collecting capital for a specific project by issuing capital investments.

   In such a case this may constitute a public offer of capital investments pursuant to the Capital Investment Act, so that in general there is a statutory obligation to draw up a prospectus. The question of whether an offer is subject to an obligation to draw up a prospectus or if an exception applies turns on the preconditions set out below.

b) The crowdfunding takes place via a platform to connect up offerors and investors. The platform operator merely provides a sort of forum to initiate contact, but has nothing to do with the contractual element of the offer and is not itself an offeror.

   The operator of such a platform is not itself subject to an obligation to draw up a prospectus. This obligation is incumbent upon the offeror that presents its capital investment for sale on the platform.

Capital investments

Crowdfunding is usually used for offers of capital investments within the meaning of the Capital Investment Act. The obligation to draw up a prospectus under section 6 of the VermAnlG generally applies to a public offer of capital investments that is designed to raise investor funds for projects under the crowdfunding concept. It is irrelevant whether the offer is made via the Internet or via other media such as advertisements or flyers.

As a rule, capital investments may not be publicly offered for sale in Germany without publication of a prospectus that has received prior approval from BaFin. The obligation to draw up a prospectus extends to company shares, shares in trust funds or units in other closed-end funds, participation rights and registered bonds that are not securitised. Company shares include capital investments in partnerships, shares in limited liability companies (GmbH), shares in partnerships under the Civil Code (GbR) and silent partnerships in the specified companies or specified assets of such companies, and investments in foreign companies with other legal forms. All types of investments in GbRs, such as for the financing of community solar energy facilities and investment clubs, are therefore also subject to the obligation to draw up a prospectus.

The minimum information published in a prospectus give the investors the minimum information they require to make an investment decision. The obligation to draw up a prospectus ensures greater transparency. This should allow potential investors to draw up their own opinion about the characteristics and risks of a project. It allows them to investigate investment opportunities more thoroughly.

Exceptions to the obligation to draw up a prospectus

In particular, section 2 no. 3 of the VermAnlG states that offers up to specific minimum limits are excepted from the obligation to draw up a prospectus. For example, the legislature proceeds on the assumption that an investor in emissions not exceeding €100,000 within a period of twelve months does not particularly need protection. This is intended to prevent overregulation. The €100,000 threshold is also in the Securities Prospectus Act (WpPG) and is derived from transposition of the EU Prospectus Directive. The minimum threshold following this Directive had already been set out in the Prospectus Act (VerkProspG) and it was also retained in the Capital Investment Act (VermAnlG).

Other exceptions under the Capital Investment Act, such as the limitation of the number of shares offered to no more than 20 or a minimum price for each share offered of at least €200,000, are not normally applicable to crowdfunding – which is based on the concept of securing a large number (a crowd) of investors and small investment sums for the investment.

BaFin does not make any general statements as to whether or not there is an exception from the obligation to draw up a prospectus considering section 21 of the VermAnlG stipulates (civil) liability for failure to publish a prospectus. Only civil courts can make a decision on cases brought on the basis of this liability provision and the courts are not bound by any decision of BaFin as the supervisory authority. Detailed information about how a capital investment prospectus should be drawn up and which minimum information it must contain can be found on BaFin's website.

Key information document

If an offer requires a prospectus, the offeror must also prepare a key information document prior to the public offer being made (section 13 of the VermAnlG). Otherwise BaFin may prohibit the offer from being made.

In addition to requirements on the offeror, the Capital Investment Act also imposes requirements on the issuers of capital investments. If the issuer is not already bound to observe the (increased) accounting and publication provisions pursuant to the Commercial Code (Handelsgesetzbuch – HGB) , section 23 of the VermAnlG et seqq. imposes the duty to prepare and publish audited annual financial statements and a management report.

Special note: BaFinQuarterly survey

BaFin's main English-language news review is the BaFinQuarterly, which has been keeping financial market operators and other interested parties up-to-date on key supervisory topics for almost six years now.

In order to tailor our BaFinQuarterly to fit your interests even better, we would like to further improve some of its features, such as selection and coverage of topics, design and other aspects. Please spare us a few minutes of your time to take part in our survey, which you can find on our website. The feedback we receive will enable us to make our BaFinQuarterly even more reader-friendly.

Thank you very much for your support!

SUPERVISORY LAW

CJEU Judgement on ad hoc notifications on inside information

An intermediate step preceding an official decision by a company listed on the stock exchange may in itself constitute inside information which the company must disclose to the financial markets. This is the content of a judgement issued by the Court of Justice of the European Union (CJEU). In its judgment, the CJEU fleshed out the provisions of the directive on insider dealing and market manipulation (market abuse) which obliges issuers of financial instruments to inform the public of inside information without undue delay.

Legal proceedings against Daimler

The underlying proceedings before the German Federal Court of Justice (*Bundesgerichtshof* – BGH) deal with the question whether Daimler AG had met its obligation to timely disclose information on the early departure of Jürgen Schrempp as Chairman of the Board of Management. On 17 May 2005, Mr Schrempp had already discussed his plans to resign with the Chairman of the Supervisory Board and, subsequently, other members of the Supervisory Board and the Board of Management were also informed. However, the respective decision of the Supervisory Board, which subsequently resulted in a significant rise in the Daimler share price, was not announced until 28 July 2005. The Plaintiff had already sold his Daimler shares before that announcement. The Federal Court of Justice has to clarify the question whether, as an intermediate step to his resignation, Mr Schrempp's declaration of intent in itself constituted precise information which Daimler would have been required to disclose to the public.

The Federal Court of Justice had sought clarification from the CJEU on the notion of 'precise information' and to provide a more detailed definition of sufficient 'likelihood' mentioned in section 13 (1) sentence 3 of the German Securities Trading Act (*Wertpapier-handelsgesetz* – WpHG). The Federal Court of Justice had enquired whether the individual intermediate steps in a protracted process could be considered precise information and thus be subject to the disclosure requirement. It was furthermore not clear whether sufficient 'likelihood' should be assessed by means of the possible effects on the prices of the financial instruments.

Intermediate steps may be relevant

According to the CJEU, in cases of a protracted process intended to bring about a particular circumstance or to generate a particular event, it is not only the circumstance or event itself that may constitute precise information within the meaning of the directive. Consequently, also the individual intermediate steps of that process which are connected with bringing about that future circumstance or event may be subsumed under such a concept. The decisive aspect determining the existence of sufficient 'likelihood' consists, as per the CJEU, of the fact that the underlying circumstance or event already exists or has already occurred, or that the circumstance or event may be expected to exist or occur in future due to the particular circumstances of the individual case. The degree of likelihood required does not, in the opinion of the CJEU, vary depending upon the share price.

The CJEU has now referred the case back to the Federal Court of Justice for a final decision. Thus, it remains to be seen whether a lower likelihood of events occurring in the future will apply following the pending Federal Court of Justice decision (previously: 50 per cent + x). Accordingly, the decision could also affect common practice in regard to future ad hoc announcements by issuers.

Court of Justice of the European Union

BaFin advises issuers to carefully review inside or ad hoc information even now. Accusations of price manipulation due to failure to publish ad hoc notifications, and hence fines or damages, may thus be avoided. Issuers should, however, also investigate whether they qualify for exemption from the obligation to publish ad hoc notifications.

International

REPORTS

BaFin consults industry representatives in regard to future ESMA standards under EMIR

On 13 July 2012, BaFin invited representatives from both the financial industry and the real economy to an open exchange of ideas on an almost 300-page consultation paper drafted by the European Securities and Markets Authority (ESMA). The subject of the consultation procedure was drafts drawn up by ESMA regarding technical standards under the European Market Infrastructure Regulation (EMIR).

In the context of several presentations, BaFin experts walked the public through the complex regulatory subjects. One of the central issues of the day consisted of the scope and design of the clearing obligation applying to OTC derivatives, risk mitigation techniques for contracts not cleared by a central counterparty, and the reporting obligations applicable to derivative transactions, whether handled through the stock exchange or on the OTC market. A lively discussion arose both on the extent to which hedging transactions are exempted from the clearing obligation and on the significance of the thresholds above which speculative dealings in futures or forward contracts undertaken by non-financial companies are subject to the clearing obligation.

Questions also arose in regard to the obligation to update notifications filed with transaction registers. In order to provide macro-prudential supervisory authorities, such as the European Systemic Risk Board (ESRB), with up-to-date data on the risks associated with individual market participants, dealers in derivatives will in future have to report any changes in the fair value on a daily basis.

Asset-Encumbrance: What will happen to unsecured bank bonds?

Dr Steffen Meusel, BaFin

The financial crisis led to a loss of confidence in banks. Investors became less willing to invest in unsecured bank bonds, or were only prepared to do so for higher rates of interest. This led to banks using increasingly secured funding—mainly covered bonds (in Germany Pfandbriefe), repurchase agreements (repos) and, due to the special circumstances, long-term refinancing operations (LTROs) of the European Central Bank (ECB). However, since the start of the crisis the proportion of asset-backed securities (ABS) has been falling. This article will throw more detailed light on how this development will affect the position of creditors holding unsecured claims.

Current figures confirm the trend towards more strongly secured forms of funding: In 2012 loans totalling €1,100 billion mature at eurozone banks, 80 per cent of which are unsecured – but of current 2012 refinancing only 20 per cent is unsecured. The increasing proportion of secured refinancing will mean that, in case of insolvency, an ever larger part of the assets of a bank will be pledged with priority to specified investors (asset encumbrance). In consequence, where there is insolvency of an issuer, creditors holding unsecured bonds will seek recovery from a relatively small and mostly less valuable insolvency estate. This does not affect the claims of depositors against deposit guarantee schemes: Each depositor will receive compensation up to a specified upper limit regardless of the amount of the insolvency estate, although the right of recourse of the deposit guarantee scheme would also suffer under asset encumbrance.

The insolvency estate available to creditors will also be diminished by the increasing importance to provide collateral in derivatives transactions. This development expressly follows the recommendations of the G20 and the new European regulatory initiatives, such as the proposed European Market Infrastructure Regulation (EMIR). According to the International Swaps and Derivatives Association (ISDA), coverage of OTC derivatives has increased from 65 per cent in 2007 to around 70 per cent in 2012.

Europe-wide increase

Although only limited data is available, most European countries have seen a significant increase in asset encumbrance compared to 2005. Along with Greece, the Spanish banking sector has by far the highest (and increasing) level of asset encumbrance in Europe. The aggregate value of the German banking sector is also over 10 per cent (see Fig. 1).

For the 'unsecured creditor', the change in the figures is more important than the absolute value of asset encumbrance. Due to over-collateralisation, an expansion of covered payment obligations of an issuer typically results in a disproportionate reduction of assets from the insolvency estate available to unsecured creditors. For creditors, if there is insolvency this entails a falling insolvency ratio or increasing loss-given default (LGD).

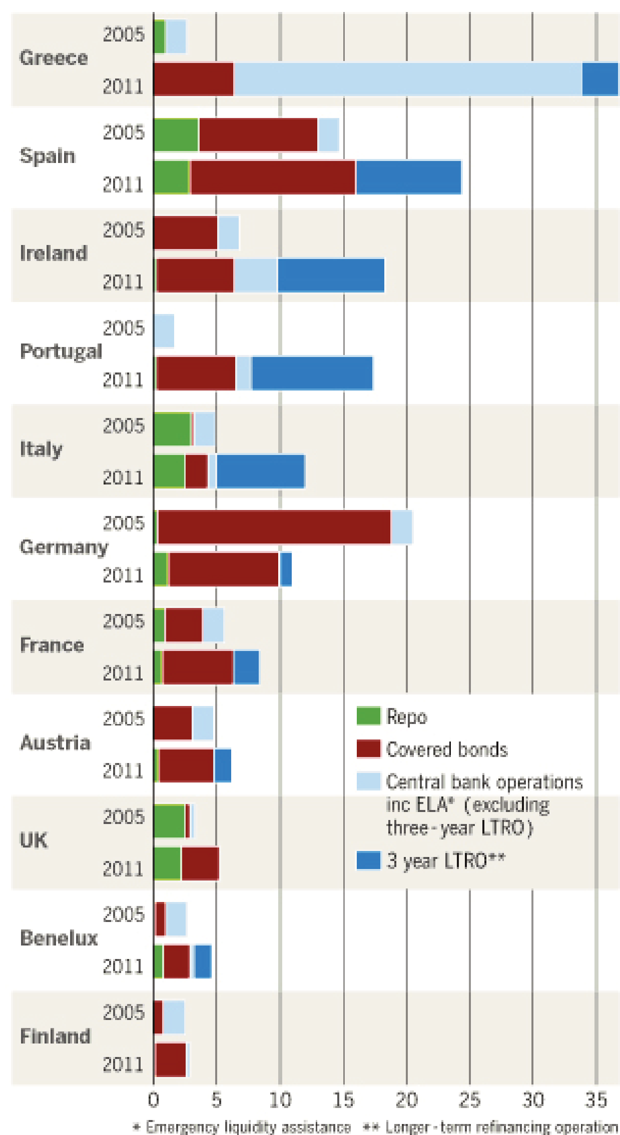
Covered bonds

Asset encumbrance for some European banks increased strongly in 2011. An important cause of this increase in asset encumbrance is the increased use or legal introduction of covered bonds as a form of refinancing. Only Germany, Ireland and Luxembourg — the three countries where public covered bonds (*Pfandbriefe*) dominate — registered a decrease (see Fig. 2).

According to the Association of German Pfandbrief Banks (Verband deutscher Pfandbriefbanken - vdp), the volume (nominal value) of mortgage Pfandbriefe in Germany in the first quarter 2012 fell slightly to €209 billion and public Pfandbriefe decreased significantly to €330 billion. Compared with the aggregated total assets of the German banking sector of €8,523 billion,[1] this appears to be relatively low. With respect to individual Pfandbrief banks, the share is naturally much higher.

[1] Source: Statistics of the Monetary Financial Institutions, Bundesbank.

Fig. 1: Asset encumbrance as percentage of aggregated total assets[2]



Source: Carmel Asset Management, April 2012

According to the vdp, for German Pfandbriefe the over-collateralisation ratio from 2008 to the first quarter 2012 for mortgage Pfandbriefe also increased from 20 to 29 per cent and for public Pfandbriefe from 11 to 21 per cent, which also further strengthens the encumbrance effect. For German banks the cover pool including over-collateralisation on the total assets is at least transparent due to section 28 of the Pfandbrief Act (*Pfandbriefgesetz* – PfandBG) (only in German).

[2] Double payments are possible, as covered bonds may also be used as collateral for LTROs.

Fig. 2: Outstanding covered bond volume

	Public	Mortgages	Total 2010	Increase over 2009	Share of total assets
Austria	21,126	9,647	**30,773**	23 %	3.1 %
Denmark	0	332,505	**339,227**[a)]	4 %	40.9 %
France	75,548	156,239	**320,480**[b)]	11 %	4.1 %
Germany	412,090	219,947	**639,842**[a)]	-11 %	7.7 %
Greece	0	19,750	**19,750**	204 %	3.8 %
Ireland	36,550	29,037	**65,587**	-19 %	4.3 %
Italy	10,092	26,925	**37,017**	61 %	1.0 %
Luxembourg	28,889	0	**28,889**	-9 %	2.7 %
Netherlands	0	40,764	**40,764**	44 %	1.8 %
Norway	1,837	69,871	**71,708**	32 %	14.5 %
Portugal	1,400	27,730	**29,130**	36 %	5.2 %
Spain	18,350	343,401	**361,751**	3 %	10.4 %
Sweden	0	188,750	**188,750**	41 %	16.4 %
UK	3,548	205,370	**208,918**	2 %	4.2 %
Total	**609,430**	**1,669,936**	**2,382,585**	**4 %**	**6.5 %**

Source: European Covered Bond Council ECBC, calculations by BaFin
a) including ship mortgages
b) including mixed assets

Internationally, the proportion of over-collateralisation is in some parts rising even more strongly. The reason for this is the increasing requirements of rating agencies on the cover pool, in order to maintain high bank ratings (AAA ratings where possible) for the covered bonds.

LTROs of the ECB

A second important reason for the increase in asset encumbrance is derived from two asset-backed three-year tenders of the ECB (LTROs). The volume of the three-year tenders given amounted to €489 billion in December 2011 with an additional €530 billion in February 2012; in total this means a volume of €1,019 billion plus shorter maturity LTROs.

LTROs also anticipate a relatively high over-collateralisation, particularly in the peripheral Euro countries, as their ECB Eligible Assets have been expanded with more risky assets with corresponding higher haircuts.

According to the ECB, many German banks have also participated in the three-year ECB tenders. The Bundesbank and BaFin are monitoring whether risks might arise from the use of the LTROs by German banks.

Effect on unsecured creditors

Finally, if there were to be insolvency, higher levels of asset encumbrance would also have a detrimental effect on the (few remaining) investors in unsecured forms of funding. The reason for this is that there are only a few remaining freely disposable assets and these are typically of lower quality than collateral for covered bonds or for repos. Thus rising encumbrance levels mean that there is a disproportionately large increase in the loss for unsecured creditors during insolvency.

Since the credit crunch the proportion of banks' cheap secured refinancing has increased significantly to the detriment of expensive unsecured funding. This results in a negative cycle of more secured funding and even more expensive unsecured funding that could become even more pronounced due to bail-in plans within the framework of restructuring laws.

Limit on asset encumbrance?

For this reason, efforts are taking place at national and international levels to limit asset encumbrance as a whole or, for example, to limit the emission of covered bonds or the size of the cover pool.

Similar proposals have been made at a European level as part of the negotiations regarding the regulatory package CRD IV. However, they are unlikely to be implemented or may only be implemented to some extent. An absolute limitation seems particularly critical, as they would endanger existing stable business models, particularly for issuers of mortgage Pfandbriefe. The banks would also lose operational options, particularly for refinancing shortfalls and rating downgrades.

EU Commission proposes flexible limit

Countries with new covered bond laws are limiting the volume of covered bonds in order to protect creditors of unsecured funding (for example, in Canada to 4 per cent of total assets, in Australia to 8 per cent, in New Zealand to 10 per cent). This appears to make sense, so as to improve acceptance of the new laws by creditors of unsecured claims and so that an overly sharp increase in encumbrance is limited from the outset.

A more flexible limit on asset encumbrance results from the proposal of the EU Commission for a Directive to establishing a framework for the recovery and resolution of credit institutions and investment firms dated 6 June 2012. Article 37 ff of the Proposal sets out the basis for a bail-in. Amongst other matters, the stipulation by national authorities that 'sufficient' amounts of liabilities be made available for restructuring should be ensured. This expressly excludes secured liabilities to the extent of the value of the collateral; a national option is currently planned for covered bonds within the meaning of Article 22 (4) of the UCITS Directive (also includes Pfandbriefe under the Pfandbrief Act).

Proposal for an EU Directive on insurance mediation

Dr Harald Eschmann, BaFin

The EU Commission has published its long-awaited proposal for a Directive on insurance mediation (Insurance Mediation Directive - IMD 2). The proposal is explained in more detail below.

The current Directive on insurance mediation (IMD 1) regulates selling practices and, to a certain extent, customer service activities such as the processing of insurance claims by insurance intermediaries. The IMD 2 proposal applies to all insurance products, i.e. there is no exclusion for specific types of insurance. For reasons of proportionality, some products will nevertheless be treated less rigorously – for example, if the mediation is in conjunction with the sale of another product. This would include comprehensive insurance for car hire, for instance, or holiday bookings with travel cancellation insurance. Another addition is that the Directive will also apply to direct sales, i.e. the mediation of products by the employees of an insurance company. Where products are offered as a bundled package, insurance companies must in future state explicitly that the products in the package may also be purchased separately.

Ursula Kaiser-Gerold and Dr Harald Eschmann represent BaFin on the EIOPA Committee on Consumer Protection and Financial Innovation which will develop the IMD 2 guidelines and recommendations.

Disclosure requirements

The Directive proposes that intermediaries be required to disclose conflicts of interest. This includes details about their respective status, i.e. whether they are tied agents, brokers or employees of the insurance company.

Intermediaries are also required to disclose their remuneration. During a five-year transition period, this will apply without restriction to the life-insurance sector only while other insurance sectors will be subject to an "on request" regime. This should make the transition easier for small and medium-sized intermediaries.

Stricter rules for PRIPs

Insurance products with an investment element – which also come under packaged retail investment products (PRIPs) – are expected to be subject to stricter disclosure requirements in relation to

insurance cover and investment risk. While this at the very least impacts on unit-linked insurance products, other types of insurance can also be included if they have PRIP characteristics.

The proposal for the Directive prohibits the acceptance of intermediation fees for independent mediation (broker) from anyone other than the client. Such a regulation is already in place in Scandinavia and the Netherlands. In Germany, the outcome would be that the customer pays the fee directly to the intermediary for the advice given if he uses the services of a broker. Thus, the current practice, whereby the insurer pays the commission and finances it from the policyholder's first premiums (as with the Zillmer adjustment, for example), would no longer be possible.

On the whole, life-insurance products with an investment element will be subject to regulations similar to those planned in the MiFID-II-directive (Markets in Financial Instruments Directive II). IMD2 is likely to be adopted under the co-decision procedure in mid-2013.

Key information documents

At the same time as the proposal for IMD2, the EU Commission published a draft regulation on key information documents for PRIPs. Initially, investment products for private clients are generally included in PRIPs, irrespective of their legal form (securities, insurance and banking products). Specific products are excluded a priori due to their simple nature (such as savings accounts) because they fall within the scope of Directive 2003/41/EC or 2009/138/EC or because they involve pension products where national law requires the employer to make a financial contribution and where the employee cannot chose the provider.

According to the draft regulation, a key information document (KID) containing all important information on the product should be available for PRIPs. Given that the information document will be used for all types of products, the latter will consequently be easier to compare.

As a rule, the key information document must be given to the customers in a timely manner prior to the agreement being concluded to ensure that they can take this information into consideration in their investment decision. This is the seller’s responsibility.

Directive on sanctions in the pipeline

EIOPA will draft guidelines for appropriate administrative sanctions to be imposed in the event of breaches of the new regulations. These will determine the type of administrative measures and sanctions, as well as the level of administrative fines. The legal basis for this is Article 16 of the EIOPA Regulation. Its aim is to guarantee a uniform and effective implementation of Union law within the scope of the European System of Financial Supervision.

Issue

INTERVIEW

Dr Elke König on banking union: “The timetable is more than ambitious”

The European Commission recently presented its proposals for a common supervisory mechanism for banks in the euro zone. The European Central Bank (ECB) is intended to assume a leading role in this. This role includes functions which currently fall within the remit of national supervisors. The ECB would thus be responsible, for example, for the authorisation of credit institutions and oversee whether the institutions are complying with the supervisory requirements in force. Financial conglomerates would also, to some extent, fall under its supervision in future.

The Commission is planning to introduce the new supervisory mechanism in stages from 1 January 2013. From that date the ECB would be able to assume full supervisory responsibility for any bank, especially if the bank is receiving or has applied for government financial support. From 1 July 2013 the ECB would also supervise all systemically important banks. From the beginning of 2014 all euro zone banks would be subject to supervision by the ECB under the Commission’s plans.

Dr Elke König,
Präsidentin der BaFin

Dr König, what do you think of the idea that the ECB should take over the supervision of euro group banks and financial conglomerates?

I share the Commission's view that we need strong and efficient banking supervision in Europe.

But...?

The EU Commission's proposal is a starting point for discussion. Involving the ECB in banking supervision raises many highly complex questions – of both a legal and a practical nature. I believe that these questions need to be answered first.

What questions are these, for example?

The question of how we deal with the conflicting goals of supervisory activities and responsibility for monetary policy. We need a strict separation here. In my view, it would be problematic if the ECB Council were to take final decisions in matters of banking supervision.

Another subject of vital importance is the accountability of the ECB to democratically legitimised bodies. After all, the ECB would be given wide-ranging powers of intervention. This might not comply with central bank independence.

And then there is the following point: national supervisors would be part of the new mechanism – as would the European Banking Authority. There will still be quite a few things to sort out here: who has what functions, and who bears responsibility? Supervisory activities and responsibility for them must come together under one roof. How are the interfaces to be designed? They must be defined precisely, and there shouldn't be too many of them.

These and many other questions need to be sorted out quickly, but above all carefully, in order to devise a sound construction that enjoys the confidence of the financial markets and the man in the street.

Apart from that, as a supervisor I can only urge the adoption of the Single Rule Book, which is to be created as part of the implementation of Basel III, before the new European supervisory system starts.

Will all this be possible, given the short time available? Although it will be implemented gradually, the new European banking supervision system has a launch-date of as early as the beginning of next year.

This timetable is more than ambitious. I can only confirm what the Federal Minister of Finance said: In any case quality must take precedence over speed. The future European banking supervision system can function properly only if – and when – the necessary legal and organisational conditions have been created. No mistakes must be made in this.

What is very important to me is that the changeover to the new supervisory mechanism must proceed smoothly and, above all, leave no loopholes. The new supervisory system must be fully functional operationally from the very first second. Anything else would be dangerous. BaFin is prepared to make its contribution to this.

And what comes next? Will BaFin lose work?

Most definitely not. BaFin – and the other national supervisory authorities – will still be indispensable under the new regime. But its role and its functions will change. We don't yet know just how. Here once again there is the question of responsibility and the interfaces. In any event, we will collaborate even more closely at the European level than is already the case now.

At the same time we remain the primary contact for institutions. One thing ought to be clear: a central European authority cannot do everything better. Just think of the problems that physical distance and language and cultural differences can give rise to.

Is it realistic anyhow to expect the ECB to supervise 6,000 banks? Because that is how many there are in the euro zone alone.

No doubt in the short term that would hardly be possible, especially since the institutions involved differ quite considerably. It therefore makes sense to concentrate initially at the European level on those institutions that are receiving or apply for government financial assistance, or which are of systemic importance. Banks that are not systemically important should as a matter of principle continue to be supervised nationally, for national supervisors are better able to assess the particularities of local banks and their environment. Under this arrangement, the Single Rule Book is a "must", however.

What do you think of subjecting only euro zone banks to ECB supervision and giving other EU members the option of signing up to the new mechanism?

Limiting banking union to euro zone banks creates a danger of arbitrage and distortions of competition. To that extent, a banking union that covers the whole of the EU would definitely be the better solution in the long term.

Is integrated financial supervision now passé?

Why should it be? The future supervisory mechanism, whatever form it takes, is not incompatible with the idea of integrated financial supervision at the national level. Integrated financial supervision has proved its worth in Germany. There is no reason to abandon it. Quite the contrary, in fact: the links between banks and insurers are important in terms of both micro and macro-prudential supervision.

Do savings banks and cooperative banks in Germany need to worry?

No, the three-pillar structure of the German banking system is not threatened by a banking union. It is and remains a major advantage. However, the institutions of all three pillars will have to prepare themselves for the new framework, as will we, as well. BaFin has, however, always followed the principle of "same business – same risk – same rules", which also means that different issues should not be treated identically. For that reason BaFin will continue to seek to ensure at the international level that due account is taken of the legitimate interests of all German banks.

Agenda

DIARY

22.-24.10.	**IOPS** Committee Meetings, AGM & OECD/IOPS Global Forum, Santiago de Chile
30.10.	**Joint Committee**, Paris
06.11.	**ESMA** Board of Supervisors, Nikosia
07.11.	**ESRB** Advisory Technical Committee, Frankfurt
14.11.	**EBA** Board of Supervisors, London
14.11.	**EIOPA** Conference, Frankfurt
14./15.11.	**Joint Forum**, Tokio
29./30.11.	**EIOPA** Board of Supervisors, Frankfurt
29.11.-02.12.	**NAIC** Fall Meeting, Washington D.C.
03.12.	**Joint Committee**, Paris
05./06.12.	**EBA** Board of Supervisors, London
11./12.12.	**BCBS**, Basel
18.12.	**ESMA** Board of Supervisors, Paris
18.12.	**JCFC**, Frankfurt
20.12.	**ESRB** General Board, Frankfurt

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