



Bundesanstalt für Finanzdienstleistungsaufsicht

Guidance Notice on Members of Administrative and Supervisory Bodies pursuant to the German Banking Act (*Kreditwesengesetz – KWG*) and the German Capital Investment Code (*Kapitalanlagegesetzbuch – KAGB*)

Bonn/Frankfurt a. M., 4 January 2016 (as last amended on January 2017)

Provisions on vetting members of administrative and supervisory bodies were inserted in the **Banking Act** (*Kreditwesengesetz – KWG*) and the **Insurance Supervision Act** (*Versicherungsaufsichtsgesetz – VAG*) for the first time by virtue of the Act to Strengthen Financial Market and Insurance Supervision (*Gesetz zur Stärkung der Finanzmarkt- und der Versicherungsaufsicht*) of 29 July 2009, Federal Law Gazette I p. 2305. These provisions were further developed by virtue of the Act governing the Restructuring and Proper Liquidation of Credit Institutions, the Establishment of a Restructuring Fund for Credit Institutions and Extension of the Limitations Period in respect of Governing Body Liability under Stock Corporation Law (*Gesetz zur Restrukturierung und geordneten Abwicklung von Kreditinstituten, zur Errichtung eines Restrukturierungsfonds für Kreditinstitute und zur Verlängerung der Verjährungsfrist der aktienrechtlichen Organhaftung*) of 9 December 2010, Federal Law Gazette I p. 1900.

Standardising the vetting of the members of administrative and supervisory bodies forms part of a process of European harmonisation of supervisory law. The European provisions were enshrined in the **Banking Act** through the "Act on the Implementation of the Directive 2013/36/EU on Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms and on the Regulatory Alignment to the Regulation (EU) No 575/2013 on Prudential Requirements for Credit Institutions and Investment Firms (*Gesetz zur Umsetzung der Richtlinie 2013/36/EU über den Zugang zur Tätigkeit von Kreditinstituten und die Beaufsichtigung von Kreditinstituten und Wertpapierfirmen und zur Anpassung des Aufsichtsrechts an die Verordnung (EU) Nr. 575/2013 über Aufsichtsanforderungen an Kreditinstitute und Wertpapierfirmen- CRD IV-Umsetzungsgesetz*)" of 28 August 2013, Federal Law Gazette I p. 3395 and the "Act Amending Laws Relating to the Financial Market (*Gesetz zur Anpassung von Gesetzen auf dem Gebiet des Finanzmarktes- FinMarktAnpG*) of 15 July 2014, Federal Law Gazette I p. 934. Moreover, the recommendations of the European Banking Authority "EBA Guidelines on Internal Governance" (GL 44) of 27 September 2011 and the "EBA Guidelines on the Assessment of the Suitability of Members of the Management Body and Key Function Holders" of 22 November 2012 have been transposed into German law.

The third edition of this Guidance Notice outlines, among other things, the expanded requirements for the members of administrative and supervisory bodies resulting from the changes to the **Banking Act** in the area of supervision of credit institutions, financial services institutions, financial holding companies and mixed financial holding companies. Additionally, this Guidance Notice specifies for the first time the requirements for members of administrative and supervisory bodies covered by the **Capital Investment Code** (*Kapitalanlagegesetzbuch – KAGB*) are also the subject of the Guidance Notice for the first time.

For all of these supervisory areas, the issues notified in previous Guidance Notices have been updated on the basis of the supervisory authority's practical experience.

The Guidance Notice describes the supervisory requirements for the members of administrative and supervisory bodies and the corresponding notification obligations.

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I. Notification requirement and necessary documents

1. General guidance on notification requirements

Unless stipulated otherwise in this document, the notifications required under the **Banking Act** and any documents to be appended to these notifications have to be issued in duplicate. One copy has to be submitted to BaFin and a further copy to the locally competent Regional Office of the Deutsche Bundesbank.

The **credit institutions** which are members of a cooperative auditing association (*genossenschaftlicher Prüfungsverband*) or which are audited by the auditing body of a savings bank and giro association (*Sparkassen- und Giroverband*) are to send the notification and any documents to be appended via their association, together with an extra copy intended for that association.

Since 4 November 2014, the **European Central Bank (ECB)** has served as the supervisory authority responsible for significant German credit within the scope of the Single Supervisory Mechanism (SSM). The ECB supervises these significant institutions on the basis of national supervisory legislation, except where European law is directly applicable.

Legal basis:

The German "Regulation Concerning Reports and the Submission of Documentation under the Banking Act" - Reports Regulation (*Verordnung über die Anzeigen und die Vorlage von Unterlagen nach dem Kreditwesengesetz - AnzV*) regulates the details of notifications and the documents which must be submitted under the Banking Act. BaFin issued the AnzV in agreement with the Deutsche Bundesbank.

Section 1 of the AnzV: submission process,
Section 5- 5f of the AnzV: necessary documents

Legal basis:

The "**Council Regulation (EU) No 1024/2013 of 15 October 2013** conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions" (**SSM Regulation**) and the "**Regulation (EU) No 468/2014 of the ECB of 16 April 2014** establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities" (**SSM Framework Regulation**) regulate matters including the ECB's direct supervision of significant institutions within the scope of the Single Supervisory Mechanism and the details of its implementation.

Article 4 of the SSM Regulation: Tasks conferred on the ECB.

Article 6 of the SSM Regulation: Single Supervisory Mechanism, definition of a significant institution

Article 93 of the SSM Framework Regulation: Assessment of the suitability of members of management bodies

Article 94 of the SSM Framework Regulation: ongoing review of the suitability of management board members

List of SSM institutions: <http://www.ecb.europa.eu/pub/pdf/other/ssm-listofsupervisedentities1409de.pdf>

Section 1 (5) of the KWG:

The following institutions are supervisory authorities within the meaning of this Act

1. the European Central Bank, insofar as it acts in the performance of its tasks transferred pursuant to Article 4 (1) (a) to (i) and Article 4 (2) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287 of 29 October 2013, p. 63), and these tasks are not performed by BaFin pursuant to Article 6 (6) of this Regulation,
2. BaFin, insofar as the European Central Bank is not the supervisory authority within the meaning of this Act under point 1.

Section 24 (3c) of the KWG:

Insofar as the European Central Bank is the supervisory authority, the notifications required under subsections 1 to 3a shall also be submitted to BaFin. The notifications required under subsection 1 nos. 1, 2, 15 and 15a shall only be submitted to BaFin and the Deutsche Bundesbank...

The notification obligations and the statutory requirements for members of the administrative and supervisory bodies are stipulated in the **Banking Act** for significant German institutions. Significant institutions submit notifications concerning the appointment and resignation of members of administrative and supervisory bodies - including all of the documents to be appended - to **BaFin** and the **Deutsche Bundesbank**. BaFin notifies the ECB of notified changes to the administrative or supervisory body of the significant institution. The documents submitted by the significant institutions are processed/forwarded for the purposes of informing the ECB.

The European Central Bank is responsible for assessing the expertise, reputation and the available time of the members of administrative and supervisory bodies and will notify the institution of the result of its assessment directly. This assessment is made on the basis of the provisions of the Banking Act. However, the ECB is not bound by an existing national interpretation or administrative practice.

The **European Central Bank, BaFin and the Deutsche Bundesbank** shall be notified of other activities as management board member or member of an administrative or supervisory body of members of administrative or supervisory bodies of significant institutions.

A single copy of the notifications required of undertakings under the **Capital Investment Code** (KAGB undertakings) and any documents to be appended to these notifications shall be submitted to BaFin.

For the clear allocation of the notification and the necessary documents, the name of the institution, the financial holding company, the mixed financial holding company or the KAGB undertaking, the BAK number and the note "appointment supervisory board/management board" shall be indicated as the reference.

BAK number:

The BAK number is a six-digit number which BaFin assigns to each institution for internal classification purposes. It forms part of the BaFin reference number under which correspondence with an institution is registered and is listed in BaFin`s database of undertakings as the "ID".

The BAK number is not essential for notifications under the **Capital Investment Code**. However, where possible the reference number should be indicated.

The notifications and all documents and declarations to be appended must be submitted in German. The following deviating provisions apply to significant institutions directly supervised by the ECB. Where documents are not issued in German, a certified translation or a translation prepared by a publicly appointed or sworn interpreter or translator will be required in addition to the original version. The relevant BaFin division may waive the translation of English-language documents.

Significant institutions directly supervised by the ECB may submit the notification as well as all documents to be appended in either German or English. This is without prejudice to the use of language as agreed upon between the ECB and the institution.

The notifications prescribed by the **Banking Act** and the **Capital Investment Code** shall be submitted without delay. As a rule, BaFin will no longer assume that a notification has been submitted without delay if a period of **four weeks** has been exceeded following the appointment. The documents which have to be submitted under I.3.b (4) and I.3.b (5) (certificates of good conduct for official purposes, excerpt from the Central Trade and Industry Register (*Gewerbezentralregister*)) must have at least been applied for within the above-mentioned time limit.

BaFin may require further documents and information if this appears necessary in an individual case.

BaFin will not assume the costs associated with the required documents.

On their websites, BaFin and the Deutsche Bundesbank provide the following forms which are to be used for the individual notifications and for the declarations to be made.

These are:

Banking Act (cf. Reports Regulation):

- PVVA- Personnel changes in the administrative and supervisory body (see also I.3., I.4., AnzV Annex 2)
- PVZ- Details of reputation, available time and additional mandates (see I.3.b.(3), I.3.b.(6), I.3.b.(7), AnzV Annex 2a)
 - Declaration concerning criminal proceedings and proceedings for administrative offences, decisions under trade law and insolvency or enforcement proceedings
 - Declaration concerning familial relationships
 - Declaration concerning business relationships
 - Details of additional mandates as management board member or as a member of administrative and supervisory bodies
 - Details of available time
- NT- Additional activities of members of administrative and supervisory bodies (see also I.5., AnzV Annex 6)

Capital Investment Code:

- Personnel changes in the administrative and supervisory body (see also I.3., I.4.)
- Details of reputation (see I.3.b.(3))
 - Declaration concerning criminal proceedings and proceedings for administrative offences, decisions under trade law and insolvency or enforcement proceedings
 - Declaration concerning familial relationships
 - Declaration concerning business relationships
- Additional activities of members of administrative and supervisory bodies (see also I.5)

2. Group of persons subject to notification requirement

An appointment of a member of the administrative or supervisory body shall be reported without delay. The institution, the financial holding company, the mixed financial holding company or the KAGB undertaking must submit this notification.

Legal basis:

Section 24 (1) no. 15 of the KWG, section 5 of the AnzV
Section 24 (3a) sentence 1 no. 4, sentence 5 of the KWG

Section 18 (4) sentence 2 of the KAGB,
Section 119 (3) sentence 3 of the KAGB,
Section 147 (3) sentence 3 of the KAGB,
Section 153 (3) sentence 4 of the KAGB

This notification obligation also applies to members of non-mandatory administrative or supervisory bodies.

Within the scope of the **Banking Act**, the notification obligation may also apply to a member of an **advisory council**. The term administrative or supervisory body means the body responsible for supervising the management board of the undertaking. It is the rights and obligations assigned to the body that are decisive in this respect, rather than the specific name of this body. Also, it is not imperative that the supervisory powers of the body be provided for by law. Therefore an advisory council may also be subject to statutory requirements set forth in the Banking Act if the council's tasks and powers are analogous to those of an administrative or supervisory body and are regulated by law or in the articles of association or partnership agreement. The matter is assessed on a case-by-case basis.

Within the scope of the **Capital Investment Code**, membership of an advisory council within the meaning of section 18 (2) of the Capital Investment Code is subject to notification.

The notification obligation also applies to an **acting member** of an administrative or supervisory body at the time of his or her appointment, regardless of his or her actual service. By the term "acting member", BaFin means a person appointed for the event that an actual administrative or supervisory body member is incapacitated for a brief period, and who assumes the function of the relevant member for that period.

By contrast, a "**substitute member**", and by this BaFin means a person who replaces an actual member of the administrative or supervisory body if the latter stands down from the body permanently, is not required to meet all of the requirements of holding office until he or she actually replaces the original member. The same applies to the notification obligation.

The renewal of a member's current mandate by re-election does not require notification. This also applies for the significant institutions directly supervised by the ECB. Thus members of administrative and supervisory bodies appointed prior to 1 August 2009 are not subject to a retroactive notification obligation up until they permanently cease being a member of the administrative or supervisory body.

Insofar as a member of an administrative or supervisory body is reappointed within the scope of corporate transformations, this is subject to notification. Transformation and corporate law determine in which cases a new appointment takes place.

3. Notification obligation for appointments

The notification has to indicate the date when the member of the administrative or supervisory body was appointed.

a. Necessary documents

The following documents/declarations have to be appended to the appointment notification:

- Curriculum vitae - see b.(1)
- Proof of training - see b.(2)
- Details of the reputation of members of administrative and supervisory bodies - see b.(3)
- "Certificate of good conduct for presentation to a German authority", "European certificate of good conduct for presentation to a German authority" or "equivalent documents" from another country - see b.(4)
- Excerpt from the Central Trade and Industry Register - see b.(5)
- Details of additional mandates as management board member and in administrative and supervisory bodies - see also b.(6)
- Details of available time – see b.(7)

On its website, BaFin provides a "check list" which enables the notifying undertaking to check whether the documents to be appended are complete.

By submitting the information and declarations from the member of the administrative or supervisory body which have to be appended to the notification, the notifying institution, the notifying financial holding company, the notifying mixed financial holding company or the notifying KAGB undertaking confirms that the information submitted is accurate to the best of its knowledge.

If the newly appointed member has been or is already a management board member or a member of the administrative or supervisory body of an undertaking supervised by BaFin, all of the documents/declarations to be presented in connection with this notification have to be re-submitted. BaFin may waive this requirement in individual cases. For certificates of good conduct for official purposes and excerpts from the Central Trade and Industry Register, please refer to I.3.b.(4) and I.3.b.(5).

In accordance with section 18 (5) of the Capital Investment Code, the notification obligation does not apply to supervisory board members of a capital management company within the scope of the **Capital Investment Code** who were elected as members of the supervisory board or advisory council pursuant to the provisions of co-determination law.

b. Specific documents required

(1) Curriculum vitae

A curriculum vitae has to be appended to the appointment notification of the member of the administrative or supervisory body. This curriculum vitae must be complete and truthful and must be personally signed and dated. It has to include the following details:

- surname, all first names, birth name
- date of birth, place of birth
- place of residence
- nationality
- a detailed description of relevant education and training
- the names of all undertakings for which the member of the administrative or supervisory body currently works or has previously worked
- details of the nature and duration of the relevant activity, including secondary activities.

The curriculum vitae shall focus primarily on the positions held during the professional career. For these individual positions, the CV has to indicate not only the year, but also the month in which this position began or ended.

If a member of the administrative or supervisory body has resided outside Germany within the last ten years, the period and country in question must be indicated. If the place of residence of the member of the administrative or supervisory body and his or her place of work did not lie within the same country, this also has to be indicated. This information is relevant for BaFin insofar as this affects the register excerpts which must be submitted (see I.3.b.(4)).

(2) Proof of training

If a member of the administrative or supervisory body has acquired his or her expertise by participation in training courses, the proof of participation in such training is also to be appended to the appointment notification. The information has to include the organiser, contents and duration of the training.

(3) Details of the reputation of members of administrative and supervisory bodies

On the form "Details of reputation, available time and additional mandates", the member of the administrative or supervisory body has to issue a personally signed and dated declaration providing information on any criminal proceedings and proceedings for administrative offences, decisions under trade law and insolvency or enforcement proceedings.

The declaration need not include criminal proceedings which were pending and

- that were terminated for lack of sufficient evidence to support the suspicion of a criminal offence
- that were terminated because of a procedural bar
- which resulted in an acquittal
- by virtue of which an entry in the Federal Central Criminal Register (*Bundeszentralregister* – BZR) was deleted or cancelled, or
- that are not required to be disclosed according to section 53 of the German Federal Central Register Act (*Bundeszentralregistergesetz* – BZRG).

Entries which must be deleted from the Central Trade and Industry Register under section 153 of the German Industrial Code (*Gewerbeordnung* – GewO) need not be mentioned.

On the other hand, criminal proceedings terminated under sections 153 and 153a of the German Code of Criminal Procedure (*Strafprozessordnung* – StPO) have to be indicated. A termination under these provisions will not eliminate the assumption of innocence under criminal law; however, irrespective of this the circumstances of the case may give rise to indications for a lack of reputation, particularly in case of proceedings associated with punishable violations of relevant supervisory law, property or insolvency-related criminal offences or tax offences.

Similar situations in other jurisdictions also have to be indicated.

In case of doubt, the relevant division of BaFin should be contacted.

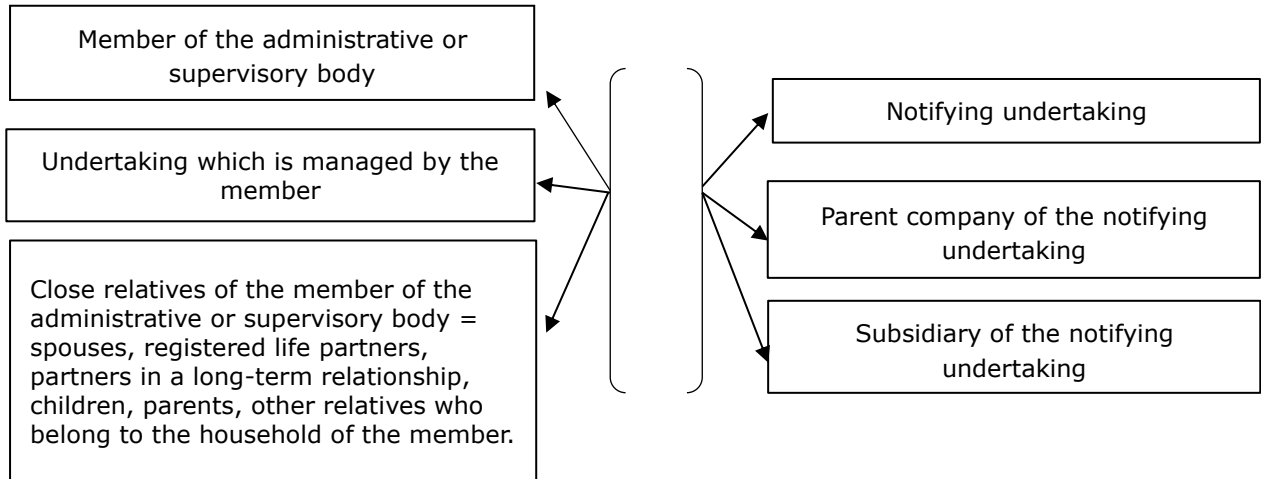
These details have to be complete and accurate. In the case of any notifiable proceedings, copies of the rulings, decisions, sanctions, notices or other relevant documents have to be appended. BaFin reserves the right to request additional information from the competent authorities, where necessary.

For an assessment of possible conflicts of interest, on the form "Details of reputation, available time and additional mandates" the member of the administrative or supervisory body must declare any familial relationships with members of management and the members of the administrative or supervisory body, both for the notifying undertaking and for its parent undertaking or subsidiary. If no details are provided on the form, this will be deemed a statement of "nil".

Relatives within the meaning of section 11 (1) no. 1 of the German Criminal Code (*Strafgesetzbuch* – StGB):

Relations by blood or marriage in direct line; the spouse, the life partner within the meaning of the Act on Registered Life Partnerships (*Lebenspartnerschaftsgesetz*- LPartG), the fiancé(e), siblings, spouses or life partners of siblings, siblings of spouses or life partners, even if the marriage or life partnership upon which the relationship was based no longer exists, or when the relationship by blood or marriage has ceased to exist; foster parents and foster children

On the form "Details of reputation, available time and additional mandates", business relationships which could result in a certain degree of commercial dependence on the notifying undertaking have to be indicated as follows. The nature of this relationship and the manner in which it is conducted have to be described. If no details are provided on the form, this will be deemed a statement of "nil".



(4) Certificate of good conduct for presentation to a German authority", "European certificate of good conduct for presentation to a German authority" or "equivalent documents" from another country

(a) General information on certificates of good conduct for official purposes

Depending on their nationality and place of residence, members of the administrative or supervisory body must submit the original copy of a "certificate of good conduct for presentation to a German authority (certificate of good conduct for official purposes)" (document type "O") issued by the Federal Office of Justice (*Bundesamt für Justiz*) in accordance with section 30 (5) of the BZRG ("criminal record check for authorities"), a "European certificate of good conduct for presentation to a German authority " in accordance with sections 30 (5) and 30b of the BZRG or certificates of good conduct equivalent to those named above, or certifications of reputation assessments performed by supervisory authorities in the country of residence after consultation with the relevant division of BaFin ("equivalent documents").

Federal Central Criminal Register

The Federal Office of Justice maintains the Federal Central Criminal Register, the details of which are stipulated in the BZRG. This register lists criminal convictions, decisions of administrative authorities and courts, notes on lack of criminal capacity and assessments made by German courts and authorities. These entries are removed subject to the provisions of this Act. Any individual may apply for a certificate of good conduct, and authorities are also entitled to require information subject to certain preconditions.

Members of administrative and supervisory bodies who have resided in different countries in the previous ten years must submit certificates of good conduct and relevant documents from each country. The relevant division of BaFin has to be provided with detailed information regarding any legal obstacles to their furnishment.

If the relevant documents are already available, they have to be submitted to BaFin together with the other documents to be appended to the notification of appointment. However, subsequent submission is also possible.

In countries in which certificates of good conduct are issued by a public agency, other documents may not be used as a substitute.

The "certificate of good conduct for presentation to a German authority" should not be confused with the "extended certificate of good conduct" referred to in section 30a of the BZRG.

The member of the administrative or supervisory body must submit a request for a "certificate of good conduct for presentation to a German authority" and a "European certificate of good conduct for presentation to a German authority" to his or her local registration office (*Meldebehörde*) (section 30 (2) sentence 1 of the BZRG) or electronically to the Federal Office of Justice (section 30c of the BZRG). German nationals who reside outside the Federal Republic of Germany may apply directly to the Federal Office of Justice as the registration authority (section 30 (3) sentence 1 of the BZRG).

To allow BaFin to allocate the certificates of good conduct which it receives to the undertaking to which the member of the administrative or supervisory body has been appointed, the name of the notifying undertaking and the BAK number have to be indicated as reference.

The certificate of good conduct for official purposes must be up-to-date, i.e. on the day of appointment of the member of the administrative or supervisory body it **may not be more than three months old**. The date of the document's issue will be key for this purpose.

In the event that a certificate of good conduct is to be used within BaFin for further checks as to the reputation of a person, this document **may not be more than twelve months old**.

The Federal Office of Justice sends both the "certificate of good conduct for presentation to a German authority" and the "European certificate of good conduct for presentation to a German authority" directly to BaFin. There is no need to request additional copies for the Deutsche Bundesbank or the auditing association, in the case of credit institutions that are members of one.

(b) Specific information on certificates of good conduct for official purposes

The following specific certificates of good conduct and documents must be submitted:

Members of administrative and supervisory bodies with		Document
German nationality and	residing in Germany	a "certificate of good conduct for presentation to a German authority" issued by the Federal Office of Justice
	residing in a Member State of the European Union or in a third country	a "certificate of good conduct for presentation to a German authority" issued by the Federal Office of Justice and "equivalent documents" from the country of residence
nationality of a Member State of the European Union and	residing in Germany	a "European certificate of good conduct for presentation to a German authority" issued by the Federal Office of Justice
	residing in a Member State of the European Union or in a third country	"equivalent documents" from the country of residence
nationality of a third country and	residing in Germany	a "certificate of good conduct for presentation to a German authority" issued by the Federal Office of Justice
	residing in a Member State of the European Union or in a third country	"equivalent documents" from the country of residence

Where there are special circumstances relating to residence (e.g. country of residence changed in the last ten years) or nationality (e.g. a national of multiple EU/EEA states or non-Member states) which are not covered by the situations described above, the documents to be submitted have to be agreed on with the competent division of BaFin.

European certificate of good conduct for presentation to a German authority

Since 27 April 2012, European certificates of good conduct for presentation to a German authority may be applied for following the German legislator's transposition, through section 30b of the BZRG, of the requirements of the *Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States* (OJ L 93 of 7 April 2009, p. 23).

The Federal Office of Justice has published information on the European certificate of good conduct on its website www.bundesjustizamt.de.

According to these explanations, nationals of other Member States of the European Union residing in Germany may, pursuant to section 30b of the BZRG, be issued a certificate of good conduct featuring information on the contents of the Federal Central Criminal Register and also the criminal register of their home Member State (European certificate of good conduct). An application for the grant of a European certificate of good conduct must be submitted to the competent registration office. The European certificate of good conduct may be issued for the applicant's own purposes (private certificate of good conduct) or for presentation to a German authority (certificate of good conduct for official purposes).

If a European certificate of good conduct is requested, the Federal Office of Justice will ask the applicant's home Member State to provide the contents of its register, so that this can be included in the certificate of good conduct. The information provided will not be translated and nor will its accuracy be verified.

(5) Excerpt from the Central Trade and Industry Register

The member of the administrative or supervisory body must also provide BaFin with and Industry Register, in accordance with section 150 of the GewO.

The member of the administrative or supervisory body must personally request an excerpt from the Federal Business Record Register from the local competent authority - generally the registration office or the trade regulatory authority - (sections 150 (2), 155 (2) of the GewO in conjunction with the laws of the relevant German federal state (*Land*) or electronically from the Federal Office of Justice (section 150e of the GewO). Persons who reside outside the Federal Republic of Germany may apply directly to the Federal Office of Justice as the registration authority (section 150 (3) of the GewO). The member of the administrative or supervisory body has to apply for the register excerpt as a natural person.

Central Trade and Industry Register (*Gewerbezentralregister* – GZR)

The Federal Office of Justice maintains a Central Trade and Industry Register, the details of which are stipulated in sections 149et seqq. of the GewO. This register lists decisions made by authorities, decisions on fines and criminal convictions associated with a commercial activity. For example, this includes the withdrawal of a commercial licence due to lack of reputation, decisions on fines due to offences under tax law and convictions under the German Act for the Prevention of Illicit Work (*Schwarzarbeitsbekämpfungsgesetz* – SchwarzArbG). These entries are deleted/removed subject to the provisions of the GewO. Any person may apply for a register excerpt and authorities are also entitled to require information, subject to certain preconditions.

The following instructions for the completion of the official form GZR 3 in the German Second General Administrative Regulation on Fulfilment of Section XI – Central Trade and Industry Register – of the Trade Regulation Code (*Zweite allgemeine Verwaltungsvorschrift zur Durchführung des Titels XI - Gewerbezentralregister - der Gewerbeordnung* – 2. GZRVwV - Ausfüllanleitung) shall be complied with:

- the key code number "1" shall be entered in field 01 document type ("Beleg-Art");
- both boxes should remain blank in field 20.

To allow BaFin to allocate separately received excerpts from the Central Trade and Industry Register to the undertaking to which the relevant member of the administrative or supervisory body has been appointed, the name of the notifying undertaking name and the BAK number have to be indicated as the reference.

The excerpt must be up-to-date, i.e. on the day of appointment of the member of the administrative or supervisory body it **may not be more than three months old**. The date of the document's issue will be key for this purpose.

In the event that an excerpt from the Central Trade and Industry Register is to be used within BaFin for further checks as to the reputation of a person, this document **may not be more than twelve months old**.

Due to the provisions of the GewO, the Federal Office of Justice will not send the excerpt from the Central Trade and Industry Register directly to BaFin and will instead send this to the applicant. If the relevant excerpt is already available, it has to be submitted to BaFin together with the other documents to be appended to the notification of appointment. However, subsequent submission is also possible. There is no need to request additional copies for the Deutsche Bundesbank or the auditing association, in the case of credit institutions that are members of one.

In the case of persons who have never resided or worked in Germany before, as a rule BaFin will not require these persons to submit an excerpt from the German Central Trade and Industry Register or to furnish similar foreign documents. BaFin reserves the right to request additional documents in individual cases.

(6) Details of additional mandates as a management board member or in administrative and supervisory bodies (Banking Act)

For an assessment of compliance with limitations of mandates of members of administrative and supervisory bodies and whether the relevant person has sufficient time, additional mandates of the relevant person in question must be indicated or a statement of "nil" must be provided. These details are to be provided on the form "Details of reputation, available time and additional mandates"; a statement of "nil" is submitted by ticking the relevant field on the form.

All activities as a management board member and any mandates on administrative and supervisory bodies of any undertakings must be indicated - regardless of whether these undertakings are supervised by BaFin and whether or not individual mandates are included in the maximum number of mandates permitted. For the maximum number of mandates permitted, a distinction must be made between significant CRR institutions and all other institutions (see the comments on limitations of mandates under II.7. and II.8.). Irrespective of this, all members of administrative or supervisory bodies must dedicate sufficient time to the performance of their duties.

Legal basis:

Section 25d (3) and (3a) of the KWG,
Section 5b (2) of the AnzV

Mandates on non-mandatory supervisory boards must also be indicated.

Mandates on advisory councils must be indicated if the duties and powers of the advisory council are analogous to those of an administrative or supervisory body and are regulated by law or in the articles of association or the partnership agreement.

Where multiple mandates held by a member of the administrative or supervisory body are considered to be a single mandate, this has to be documented by means of supporting statements or documents.

In the case of the heads of the administration of a local authority, a district or a city which is administrated as an independent district (*kommunale Hauptverwaltungsbeamte*) who are obliged to hold a mandate in a municipal undertaking or municipal special-purpose association, relevant municipal statute needs to be enclosed.

In the case of mandates held as a representative of the German federal government or the German federal states, the relevant legal basis has to be indicated or the relevant articles of association are to be appended.

(7) Details of available time (Banking Act)

The notification regarding the appointment of a member of an administrative or supervisory body must include the material facts for an assessment of whether sufficient time is available for the performance of the related duties. This information has to be provided on the form "Details of reputation, available time and additional mandates".

As a rule, BaFin assumes that a person will only accept an additional mandate if he or she considers himself or herself capable of fulfilling the time requirements associated with this activity. Accordingly, this person has to conduct an overall review of all of his or her current activities and mandates and estimate the amount of time associated with this new activity.

The following guidance notes shall be complied with in notifying BaFin of whether this person has sufficient time.

All activities and mandates, including the mandate subject to notification, are to be included. The time required to perform these activities and mandates is to be estimated and disclosed to BaFin as such.

All of the member's full-time and part-time professional activities must be indicated. All mandates in administrative and supervisory bodies must also be included. The amount of time required for a mandate on an advisory council must be indicated if the duties and powers of this advisory council are analogous to those of an administrative or supervisory body and are regulated by law or in the articles of association or the partnership agreement.

In the case of mandates in administrative and supervisory bodies, in addition to the time needed to take part in meetings, the time required for meeting preparation and post-meeting work is to be taken into account, as is participation in committees and travel, where applicable. The assessment shall also reflect the fact that an activity as a member of an administrative or supervisory body will also take up time outside the scope of regular meetings and that this time requirement may suddenly increase if the undertaking is faced with extraordinary situations.

As a rule, purely voluntary positions and activities which form part of the person's private life need not be included.

4. Notification obligation upon resignation

The resignation of a member of the administrative or supervisory body shall be reported without delay.

The notification obligation also applies when a member does not run for re-election after his or her term has ended.

Legal basis:

Section 24 (1) no. 15a of the KWG,
Section 24 (3a) sentence 1 no. 5, sentence 4 of the KWG,
Section 5b (3), (3a) of the AnzV

Section 18 (4) sentence 2 of the KAGB
Section 119 (3) sentence 3 of the KAGB
Section 147 (3) sentence 3 of the KAGB

BaFin requests that the grounds for resignation be indicated in the notification and for a current overview of the composition of the body to be provided.

5. Further notification obligations (Banking Act)

A member of the administrative or supervisory body of a significant CRR institution, a financial holding company or a mixed financial holding company shall report without delay any commencement and any termination of an activity as a management board member of another undertaking or as a member of the administrative or supervisory body of another undertaking.

This notification is necessary so that BaFin is able to regularly assess compliance with the limitations of mandates under supervisory law as well as the need for the person to have sufficient time available. This notification obligation applies irrespective of whether or not individual mandates are included in the maximum number of mandates permitted. Mandates on non-mandatory supervisory boards must also be indicated. Mandates on advisory councils must be indicated if the duties and powers of the advisory council are analogous to those of an administrative or supervisory body and are regulated by law or in the articles of association or the partnership agreement. It is also irrelevant for the notification obligation whether an activity is part-time or full-time in nature.

Legal basis:

Section 24 (2a) and (3c) of the KWG,
Section 10a of the AnzV

Significant institution (section 25d (3) sentence 8 of the KWG):

- total assets equal or exceed EUR 15 billion on average over the reporting dates of the preceding three completed financial years or
- this institution is supervised by the European Central Bank pursuant to Article 6 (4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287/63 of 29 October 2013), is supervised by the European Central Bank, or
- has been categorized as having the potential to pose a systemic risk within the meaning of section 20 (1) sentence 3 of the German Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz – SAG*) or
- is a financial trading institution within the meaning of section 25f (1) of the KWG

Where multiple mandates held by the member of the administrative or supervisory body are considered to be a single mandate, this has to be documented by means of supporting statements or documents.

In the case of the heads of the administration of a local authority, a district or a city which is administrated as an independent district who are obliged to hold a mandate in a municipal undertaking or municipal special-purpose association, relevant municipal statute needs to be enclosed.

In case of mandates held as a representative of the German federal government or the German federal states, the relevant basis in law has to be indicated or the relevant articles of association are to be appended.

For an assessment of whether the member of the administrative or supervisory body has sufficient time available, the notification must provide relevant details, including the new mandate (cf. I.3.b.(7))

6. Violation of notification obligations (Banking Act)

BaFin wishes to point out that a violation of the notification requirements will constitute an administrative offence, which may result in an administrative fine of up to one hundred thousand euros.

Legal basis:

Section 56 (2) no. 1f, (6) no. 4 of the KWG

Violation of the notification requirement means failing to make a notification or making such notification incorrectly, incompletely or not in due time.

II. Requirements for members of administrative and supervisory bodies

The members of the administrative and supervisory bodies must be reliable, have the necessary expertise to fulfil their control function as well as to assess and monitor the business of the undertaking, and devote sufficient time to performing their duties.

Legal basis:

Section 25d (1) of the KWG

Section 18 (4) sentence 1 of the KAGB

Section 119 (3) sentence 1 of the KAGB

Section 147 (3) sentence 1 of the KAGB

Section 153 (3) sentence 3 of the KAGB

For acting members - to the extent they are permitted by law - all of the requirements as to expertise, reputation, sufficient time and the limitation of permitted mandates apply *mutatis mutandis* to from the time they are elected.

Substitute members, on the other hand, are not required to meet all of the requirements of holding office until they actually replace the original member.

For the appointment of the member, his or her reputation, expertise and whether he or she has sufficient time will be assessed on the basis of the documents submitted. However, the criteria required by law must be fulfilled not only as of the time of appointment but also throughout the period of the member's activity. Upon request, the institutions, financial holding companies, mixed financial holding companies and KAGB undertakings are obliged to provide BaFin and the Deutsche Bundesbank (within the scope of the **Banking Act**) with further documents, e.g. administrative and supervisory body meeting minutes, and information.

1. Expertise (Banking Act)

Within the meaning of the **Banking Act**, expertise means that a member of an administrative or supervisory body has the professional knowledge necessary to adequately control and supervise the management board members of his or her institution, financial holding company or mixed financial holding company and actively monitor the development of the institution, financial holding company or mixed financial holding company. To this end, the person must understand the business carried out by the undertaking and be able to assess its risks. The member must be familiar with the most important legal provisions relevant for the undertaking. In principle, the member is not required to possess specialised knowledge, but must be able to recognise any need for advice that may arise.

The requirements for the expertise of the members of administrative and supervisory bodies will be determined on the basis of the scope and complexity of the business activities pursued by the institution, group of institutions or financial holding group, financial holding company or mixed financial holding company and will be assessed on a case-by-case basis.

In the case of capital market oriented corporations within the meaning of section 264d of the Commercial Code (*Handelsgesetzbuch* – HGB), section 100 (5) of the Stock Corporation Act (*Aktiengesetz* – AktG) requires at least one independent member of the supervisory board to possess expertise in the areas of auditing or accounting.

In addition to expertise requirements for individual members, the **Banking Act** also requires the administrative and supervisory bodies as a whole to possess the necessary knowledge, skills and experience.

Legal basis:

Section 25d (2) sentence 1 of the KWG

Members of administrative and supervisory bodies may have already acquired the requisite expertise through (previous) experience in the same sector, for example as a member of the management board or of the administrative or supervisory body of a comparable undertaking.

(Previous) experience gained in other sectors, public administration or while holding a political office may establish the required expertise if such experience substantially relates to commercial and legal issues, is acquired over an extended period, and was or is not entirely of a subordinate nature.

As a rule, general commercial expertise is assumed in the case of merchants within the meaning of sections 1 et seq. of the HGB and farmers and foresters and other traders within the meaning of section 141 of the Fiscal Code (*Abgabenordnung* – AO) who have an obligation to keep accounts. These persons may be considered to possess the necessary degree of expertise depending on the size and business model of the undertaking.

Please note the following special cases:

a. Members of administrative and supervisory bodies subject to co-determination

In the case of co-determined administrative and supervisory bodies, employees of the relevant corporate group who are directly involved in the commercial and legal processes of the supervised undertaking's day-to-day business are generally presumed to possess the requisite expertise. This also applies to exempted members of the works or staff council who are members of administrative and supervisory bodies, and to union representatives, provided they are familiar with the commercial and legal processes of the business based on their (previous) experience.

b. "Born" members

The chief administrative officials of regional or local public authorities (for example full-time mayors (*Bürgermeister*) or district administrators (*Landrat*)) are usually presumed to possess the requisite expertise, provided they carried out activities on a not insignificant scale for an extended period before or since they took office, and such activities substantially related to commercial and legal issues that were not entirely subordinate in nature. The same applies to treasurers (*Kämmerer*) of regional or local public authorities and employees in similar positions.

c. Further training

Membership of an administrative or supervisory body is not as a general rule precluded just because the requirements for presuming the requisite expertise have not been met. The necessary knowledge may also usually be acquired through further training. Having regard to the individual case and the relevant criteria, further training must encompass the basic commercial and legal processes of the day-to-day business of similar undertakings, risk management and the function and responsibility of the members of administrative or supervisory bodies, including in contrast with the role of the management board. It should address the basic principles of financial accounting and the law of supervision.

The question of whether further training can convey the necessary knowledge can only be determined on a case-by-case basis. For this reason, BaFin is unable to certify further training courses to the effect that participation in a certain course will always be deemed sufficient.

Further training may be undertaken before or immediately after notification of the appointment of the administrative or supervisory body member concerned.

If further training has been completed before notification of the appointment and it is relevant for assessing whether the requisite expertise is possessed, proof of attendance must be submitted together with the notice of appointment.

If the expertise is acquired through further training, but only after the notification of the appointment and after commencement of the relevant member's activities on the administrative or supervisory body, the further training should usually take place within six months of the appointment in order to ensure a reasonable correlation between the period spent obtaining the necessary qualifications and the term of office. In certain cases, the existential needs of the primary business in the case of farmers and other occupations that are just as heavily reliant on the seasons may justify a longer period. If this exemption is relied upon, it has to be specified in the notification together with a statement of reasons. The grace period of (usually) six months has no impact on liability under company law, which exists from the date of appointment.

In such cases, proof of attendance must be submitted without undue delay after completion of the further training.

The proof of attendance must allow identification of the course provider, the course content and the duration of the course.

d. Continuing education

Members of administrative and supervisory bodies must ensure that they always make decisions on the basis of up-to-date information. For this reason they are required to continually familiarise themselves with changes in the undertaking's environment, for example with new rules and legislation or developments in financial products both within the undertaking and on the market. To this end they should take appropriate measures to participate in continuing education to the necessary extent. The **Banking Act** requires the institutions to devote personnel and financial resources to facilitating such training as is necessary for the maintenance of the required expertise. However, an individual member may not derive from this any direct entitlement to have individual training

Legal basis:

Section 25d (4) of the KWG

courses approved. BaFin assumes that the administrative or supervisory body in its entirety determines the need for training, which may be satisfied by training courses for the entire body or its individual members.

2. Expertise (Capital Investment Code)

Expertise within the meaning of the **Capital Investment Code** means that a member of the supervisory board or an advisory council has the professional knowledge necessary to adequately control and supervise the management board members of the capital management company and actively monitor its development. To this end, the person must understand the business carried out by the company and be able to assess its risks. The member must be familiar with the most important legal provisions relevant for the capital management company. In principle, the member is not required to possess specialised knowledge, but must be able to recognise any need for advice that may arise.

3. Reputation

Members of administrative and supervisory bodies within the scope of the **Banking Act** must be of good repute. Reputation need not be positively documented. Reputation will be assumed in the absence of facts establishing a lack of reputation.

Persons will be deemed not of good repute if, based on general experience, their personal circumstances would justify the assumption that these circumstances could interfere with the prudent and proper exercise of their activity as a member of a body. The personal conduct and the business practices of the member of an administrative or supervisory body with regard to criminal, financial, property-related and supervisory issues will be considered. The commission of criminal or administrative offences - particularly those associated with positions held with undertakings, and within both the German legal system and a foreign legal system - is of particular relevance here.

Fault is not required in order to be considered lacking in reputation.

In the light of such circumstances, in each individual case BaFin will assess whether the member of an administrative or supervisory body may not, or may no longer, be deemed of good repute in relation to his or her performance of this activity.

For instance, the following criteria for a lack of reputation may apply:

- supervisory measures which BaFin has imposed against the member or an undertaking in which the member held or holds a mandate as management board member
- property and tax-related criminal offences or particularly serious crimes and money laundering

- breaches of administrative rules
- conflicts of interest

The personality of the members of supervisory bodies within the scope of the **Capital Investment Code** must enable them to protect the interests of the investors. In their substance, these requirements are equivalent to the reputation requirements set out above.

4. Conflicts of interest

Conflicts of interest exist where personal circumstances or personal economic activity on the part of the member of an administrative or supervisory body may be detrimental to the member's independence in performing his or her control and monitoring function. Permanent conflicts of interest will hinder his or her performance of the activity.

A conflict of interest may arise in that members of the administrative or supervisory body are related to each other or to one or more management board members. Whether or not this relationship is an obstacle to the member's activity has to be assessed on a case-by-case basis.

In principle, BaFin regards as irreconcilable a situation where an employee of an institution is a member of the institution's administrative or supervisory body, with the exception of cases where this is required by law, e.g. in co-determination or savings banks laws, or where the employee is a member of the works or staff council.

A conflict of interest may arise in that the member, a close relative of the member or an undertaking managed by the member maintains business dealings with the supervised undertaking, which could give rise to commercial dependence on this institution. For instance, this will apply if the member, a close relative of the member or an undertaking managed by the member arranges loans, other banking business, financial services or insurance products for the undertaking submitting the notification. In the case of tied agents or other agents commercially dependent on the institution, BaFin always regards as irreconcilable a simultaneous holding of an administrative or supervisory body post.

A conflict of interest also exists if the member – or the undertaking for which the member works or in which the member holds a stake – has borrowed from the supervised undertaking and is in danger of defaulting.

Members of administrative and supervisory bodies shall disclose possible conflicts of interest early on at least to the chair of the administrative or supervisory body. Any administrative or supervisory body has to appropriately document any existing conflicts of interest of individual members and how these conflicts of interest are handled.

5. Independent member of the supervisory board within the meaning of the Capital Investment Code

The independence of the member of the supervisory board, pursuant to section 18 (3) sentence 1, section 119 (3) sentence 2 and section 147 (3) sentence 2 of the Capital Investment Code, from the shareholders, undertakings affiliated with the shareholders and the business partners of the capital management company means first and foremost commercial independence. Commercial independence is regularly presumed when the supervisory board member's income from his or her activities for a shareholder, undertaking affiliated with the shareholder or a business partner of the capital management company did not exceed an average of 30 percent of his or her total income in the four years prior to his or her appointment. An affiliated undertaking is an undertaking affiliated within the meaning of section 15 of the German Stock Corporation Act (*Aktiengesetz*). A business partner means a natural or legal person that maintains business relationships with the individual in question. Neither the duration nor the extent of the business relationships is relevant. If the member of the supervisory board is commercially dependent on the capital management company the supervisory board he or she is a member of, the reasons for the choice of this member of the supervisory board are to be documented in a comprehensible manner.

6. Available time (Banking Act)

Members of administrative and supervisory bodies must devote sufficient time to performing their duties. This means that this member must be generally considered capable in view of his or her professional and social obligations to find a sufficient amount of time for the exercise of the individual function and actually does devote the necessary amount of time to this activity. It is a general responsibility of every member to only accept a mandate to which he or she will be able to devote sufficient time. Due to the applicable legal requirement, upon notification of the member's appointment and also in the course of the performance of the member's duties BaFin will review whether he or she has a sufficient amount of time available.

All of the member's full-time and part-time professional activities have to be included in the assessment. All positions in administrative and supervisory bodies must also be included. Mandates on advisory councils must be included if the duties and powers of the advisory council are analogous to those of an administrative or supervisory body and are regulated by law or in the articles of association or the partnership agreement. In addition to the time needed to take part in meetings, the time required for meeting preparation and post-meeting work is to be taken into account, as is participation in committees and travel, where applicable. The assessment must also reflect the fact that an activity as a member of an administrative or supervisory body will also take up time outside the scope of regular meetings and that this time requirement may suddenly increase if the undertaking is faced with extraordinary situations.

As a rule, purely voluntary positions and activities which form part of the person's private life need not be included.

The need for a sufficient amount of time will apply irrespective of the limitations of mandates for members of administrative and supervisory bodies. This means that a member may be unable to accept a further mandate because of time constraints, even if he or she has not yet reached the maximum number of mandates permitted under the **Banking Act**.

BaFin's general initial presumption is that every member actually does devote the time required by the mandate. In BaFin's view, though, this is not the case if a member, for instance, does not take part in most meetings of the administrative or supervisory body or fails to prepare for the meetings conscientiously.

7. Limitations of mandates (Banking Act - significant CRR institutions, financial holding companies, mixed financial holding companies)

Members of administrative and supervisory bodies must devote sufficient time to performing their duties. If a member holds an excessive number of management and supervisory mandates at the same time, this would prevent this member from finding the appropriate amount of time for each mandate. For this reason, the **Banking Act** restricts the number of mandates permitted. To prevent conflicts of interest, this Act also excludes certain combinations of different mandates.

Legal basis:

Section 25d (3) of the KWG

In terms of limitations of mandates, the **Banking Act** distinguishes between significant CRR institutions and all other institutions ("**Other Institutions**"). **This section outlines the limitations of mandates for members of administrative and supervisory bodies of significant CRR institutions.** The limitations of mandates for persons who only hold mandates administrative and supervisory bodies of non-significant institutions are outlined in the following section 8.

Significant institution (section 25d (3) sentence 7 of the KWG):

- its total assets equal or exceed EUR 15 billion on average over the reporting dates of the preceding three completed financial years or
- this institution is supervised by the European Central Bank pursuant to Article 6 (4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287 of 29 October 2013, p. 63) or
- it has been categorized as having the potential to pose a systemic risk within the meaning of section 20 (1) sentence 3 of the German Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz – SAG*) or
- it is a financial trading institution within the meaning of section 25f (1) of the KWG

If a financial holding company or mixed financial holding company has been designated superordinated undertaking and a CRR institution is subordinated to it, the explanations included in this section apply to the members of the administrative and supervisory bodies of these undertakings. For all other financial holding companies and mixed financial holding companies, the explanations provided in section 8 apply.

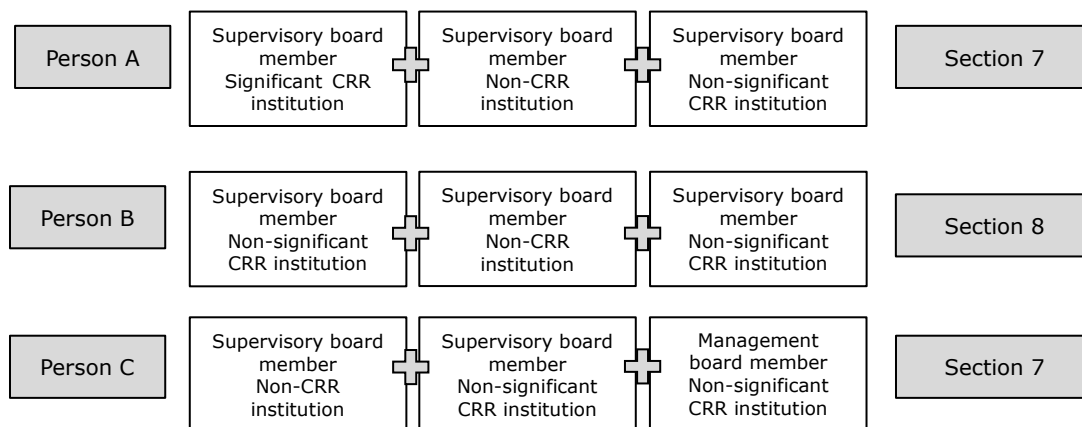
Legal bases:

Section 10a (2) sentences 2 and 3 of the KWG: Designating a financial holding company or mixed financial holding company as a superordinated undertaking

Section 12 (2) of the Supervision of Financial Conglomerates Act (*Finanzkonglomerate-Aufsichtsgesetz – FKAG*): Designating a mixed financial holding company as a superordinated undertaking

If an person is a member of the administrative or supervisory body or a management board member of a significant CRR institution, the limitations of mandates outlined in this section apply to all of his or her mandates (both as a management board member and as a member of administrative and supervisory bodies). A person will only be covered by the limitations of mandates outlined in the following section 8 if he or she exclusively holds mandates with "Other Institutions". This applies equally to a person holding a mandate in a financial holding company or a mixed financial holding company which has been designated as a superordinated company and a CRR institution is subordinated to it.

The following examples are provided by way of illustration:



If a CRR institution which has not been previously significant becomes significant, from the date of its obtaining this significant status the limitations of mandates outlined in this section will apply to the members of the administrative or supervisory body of this institution. This affects all of the mandates held by the members (both as management board members and members of administrative and supervisory bodies). Mandates exceeding the maximum number of mandates permitted are covered by the so-called "rules of protection for pre-existing mandates" or the transitional periods for discontinuation of mandates (see II.7.e. Pre-existing mandates, p. 39).

The limitations of mandates stipulated in the **Banking Act** do not replace the limitations of mandates provided for in other laws, such as the German Stock Corporation Act (*Aktiengesetz – AktG*) and the German Insurance Supervision Act (*Versicherungsaufsichtsgesetz – VAG*). These limitations also have to be complied with. BaFin wishes to point out that in the case of mandates held with foreign undertakings which are supervised by foreign financial supervisory authorities, possibly divergent limitations of mandates under the applicable supervisory law also have to be complied with.

a. Prohibition of simultaneous management and monitoring

Persons who are member of an administrative or supervisory body may not be a management board member of this institution, financial holding company or mixed financial holding at the same time. This eliminates, at the outset, the conflict of interest arising where a person manages an institution while simultaneously monitoring his or her own management.

Legal basis:

Section 25d (3) sentence 1 no. 1 of the KWG

b. Former management board members in administrative and supervisory bodies

In order to prevent former management board members from exerting too much influence over the current management body, a maximum of two former management board members are allowed to be members of an administrative or supervisory body. Under the **Banking Act**, appointing any more former management board members to the administrative or supervisory body is not permissible. In this context it is irrelevant how much time has passed since the person left the management board; on the other hand, the Banking Act does not require any cooling-off period when a management board member switches to the administrative or supervisory body.

Legal basis:

Section 25d (3) sentence 1 no. 2 of the KWG

c. Further management and supervisory mandates

Save for the exceptions described below, a member of an administrative or supervisory body may hold no more than four mandates in administrative and supervisory bodies simultaneously. Supervisory mandates in all undertakings are counted towards the maximum allowable number, regardless of whether or not the undertakings are supervised by BaFin.

Legal basis:

Section 25d (3) sentence 1 no. 3 and 4 of the KWG

As a rule, a person who manages an undertaking will, right from the outset, be obliged to devote a considerable amount of time to the performance of that duty. For this reason, subject to the following exemptions, management board members of undertakings may only hold a maximum of two additional mandates as members of administrative and supervisory bodies. It should be noted that this rule also limits the member of an administrative or supervisory body to a single mandate as a management board member, even if this mandate is held with non-supervised undertakings. However, in view of the exemptions outlined below this may in practice entail multiple activities.

In line with the definition provided in section 1 (2) of the KWG, for the purposes of section 25d (3) sentence 1 no. 3 of the KWG management board members are those natural persons who are appointed according to law, articles of association, articles of incorporation or a partnership agreement to manage the business of and represent an undertaking in the form of a legal person or a commercial partnership. Activities as a management board member of undertakings not supervised by BaFin must also be included. This is not prevented by the fact that the definition of the management board member in section 1 (2) of the KWG is limited to persons performing these activities in institutions. An activity will be considered relevant irrespective of whether it is a full-time or part-time position.

The maximum number of mandates held in administrative and supervisory bodies may neither be exceeded by accepting a further supervisory mandate with a supervised undertaking nor by accepting a further supervisory mandate with an undertaking which is not supervised by BaFin.

(1) Counting of multiple mandates as a single mandate

On account of the so-called "privileged counting", as a rule an unlimited number of mandates shall count as a single mandate, subject to the following preconditions, so that in practice a member of the administrative or supervisory body may hold more than the two or four permissible mandates. However, this member must still devote sufficient time to each individual mandate, irrespective of whether or not this person has already exhausted the maximum number of mandates permitted.

Legal basis:

Section 25d (3) sentence 3 nos 1 to 3 of the KWG

If a member of an administrative or supervisory body simultaneously holds a mandate on an undertaking's management board, the privileged counting also applies to management board mandates. Multiple mandates are counted as a single mandate in this case as well, under the following conditions. However, management board mandates and mandates as members of administrative and supervisory bodies will not be jointly counted as a single mandate.

– **Multiple mandates count as one mandate if these mandates are carried out at undertakings which belong to the same group of institutions, financial holding group, mixed financial holding group or mixed holding group.**

Only mandates which are held with undertakings belonging to one of the above-mentioned groups may be counted as a single mandate. Due to the clear wording of the applicable law, mandates held with undertakings in other groups – such as within the same insurance group or within a single corporate group – may not be privileged. This is particularly important for persons who hold additional mandates with insurance undertakings or commercial undertakings, since the Insurance Supervision Act and the Stock Corporation Act also allow individual mandates to be aggregated, but subject to different preconditions.

Legal basis:

Section 10a (1) of the KWG – definition of the group of institutions, the financial holding group and the mixed financial holding group

In practice, it has turned out that the members of administrative and supervisory bodies holding management board mandates at undertakings outside the financial sector face hurdles while exercising their tasks at institutions as they are subject to the same limits on the number of mandates held as institutions' management board members, but cannot use the same privileged counting for their mandates. In order to achieve a certain balance in the matter, for this group of persons BaFin regards it as justifiable to accept the privileged counting of mandates held at undertakings belonging to the same corporate group outside the financial sector.

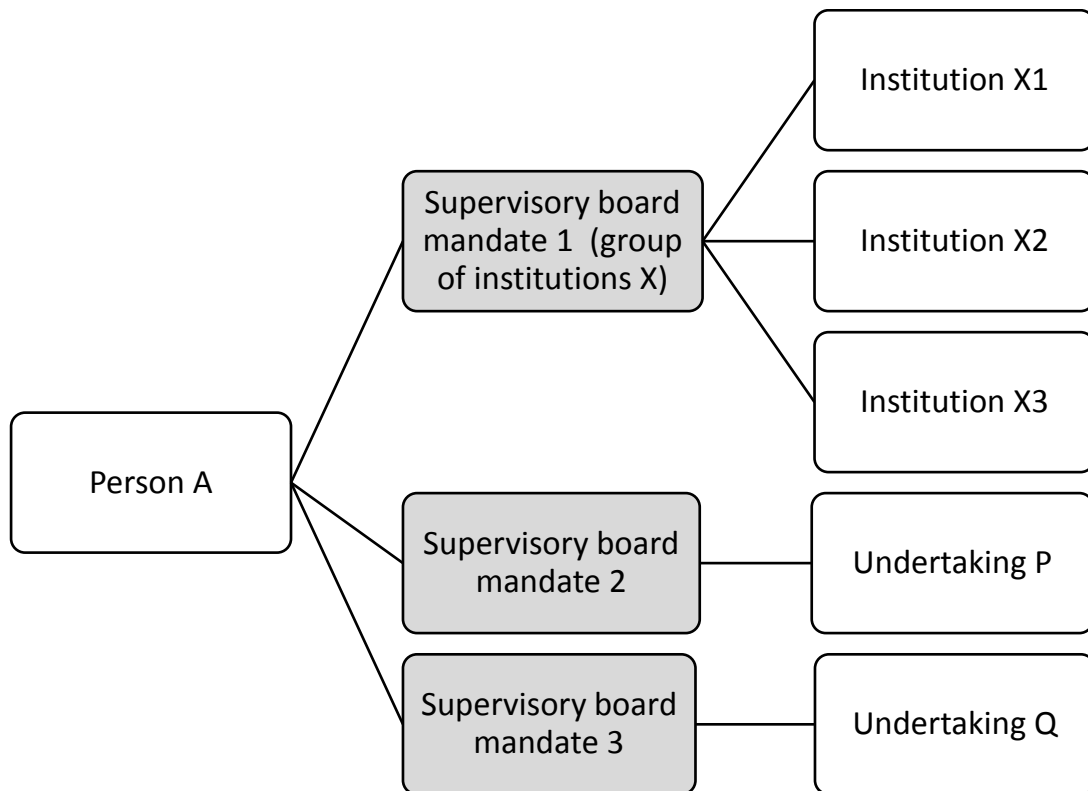
A **corporate group** means a group of undertakings subject to the common direction of the controlling undertaking. A corporate group comprises a parent undertaking and one or more subsidiaries. The subsidiaries are dependent on the parent enterprise in economic and financial terms, but are legally independent and issue their own balance sheets and income statements which are then aggregated (consolidated) to form the consolidated balance sheet and income statement.

The fact of belonging to a corporate group is based on the applicable accounting provisions or standards (e.g. section 290 et seq. of the Commercial Code, IFRS 10). **This applies to mandates in administrative and supervisory bodies held by persons with management board mandates at undertakings outside the financial sector.**

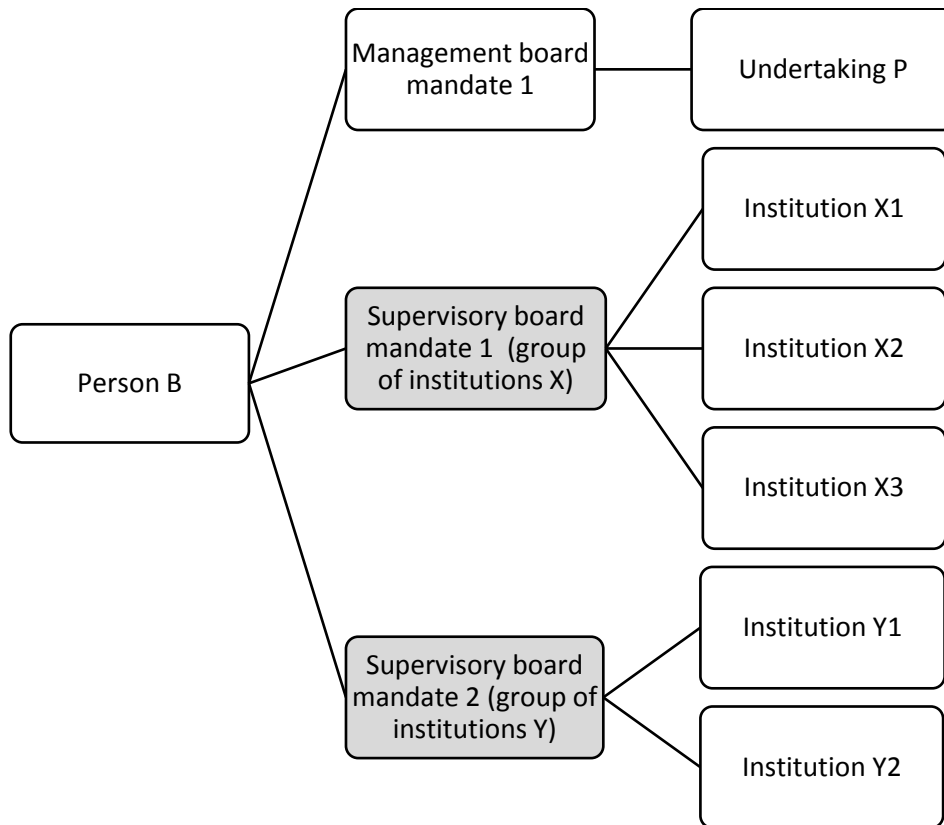
The **International Financial Reporting Standards (IFRS)** are international accounting standards for undertakings, which are published by the International Accounting Standards Board (IASB). Independent of national legislation, they are supposed to regulate the drawing-up of internationally comparable annual and consolidated financial statements.

The privileged counting of all mandates held within a group of institutions, a financial holding group, a mixed financial holding group or a mixed holding group will also apply if a person accepts additional mandates in administrative and supervisory bodies or is simultaneously the management board member of an institution. However, mandates as a management board member and as a member of an administrative or supervisory body will not be jointly counted as a single mandate, even if these are held with undertakings within the same group.

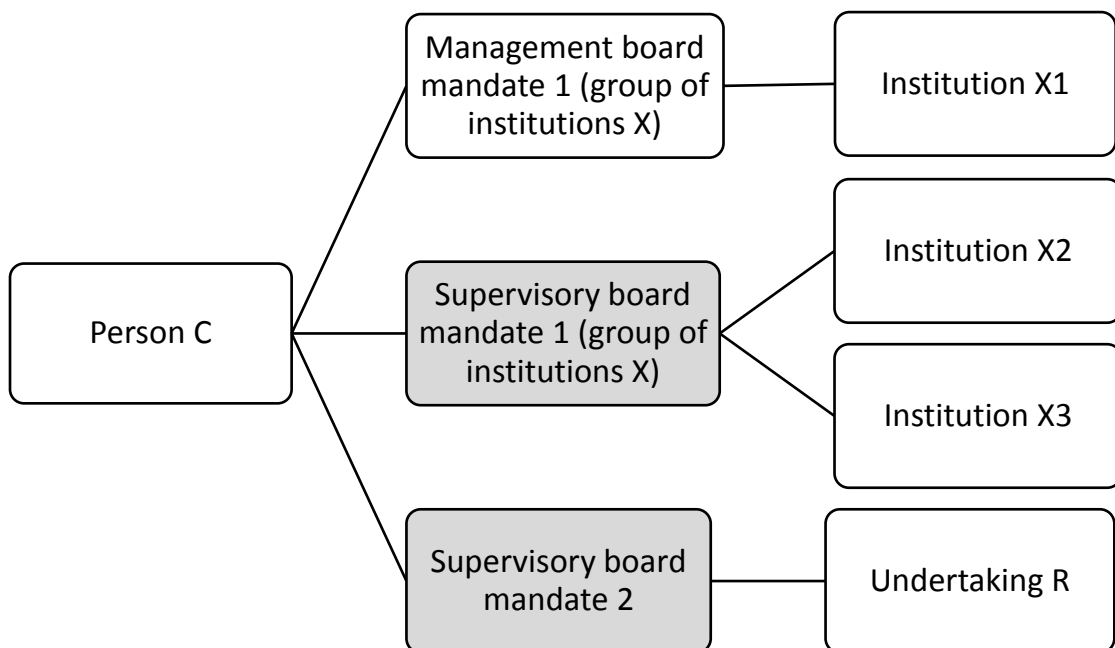
Example 1:

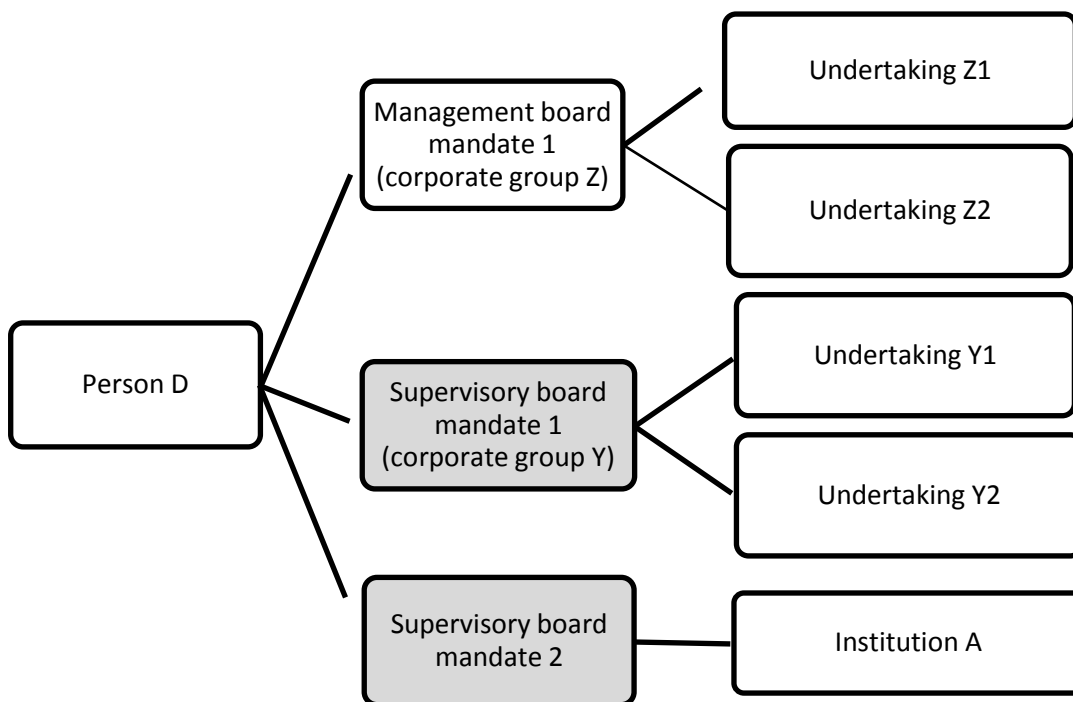


Example 2:



Example 3:



Example 4:

- **Multiple mandates count as one mandate if these mandates are carried out at undertakings which are members of the same institutional protection scheme.**

In Germany, the member institutions of the National Association of German Cooperative Banks (*Bundesverband der Volksbanken und Raiffeisenbanken e. V.*) constitute an institutional protection scheme. The member institutions are cooperative banks, savings and loans banks, PSD banks, Sparda banks, church credit cooperatives, cooperative central banks and mortgage banks as well as other specialist institutions belonging to this financial group such as Bausparkasse Schwäbisch Hall.

The cross-guarantee scheme of the Savings Banks Financial Group (*Sparkassen-Finanzgruppe*) is another institutional protection scheme in Germany, comprising savings banks, Landesbanks, DekaBank and regional building societies.

Mandates as a management board member and as a member of an administrative or supervisory body will not be jointly counted as a single mandate, even if these undertakings belong to the same institutional protection scheme.

Mandates with undertakings which belong to the respective association but are not included in this institutional protection scheme may not be privileged.

- **Multiple mandates will count as one mandate if these mandates are carried out at undertakings in which the institution holds a qualified participating interest.**

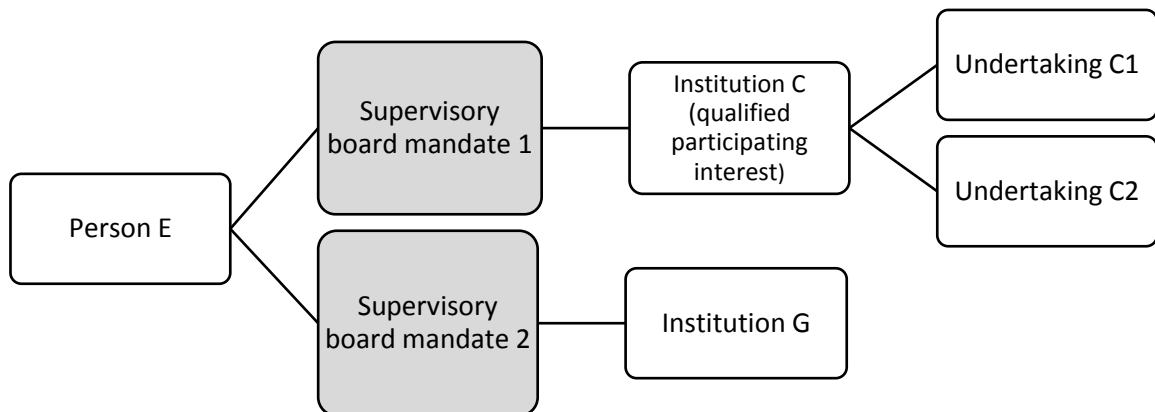
Only mandates with undertakings in which the institution holds a qualified participating interest may be privileged – but not mandates with undertakings which hold a qualified participating interest in the institution. It is not necessary for these undertakings to be supervised by BaFin.

A qualified participating interest means a direct or indirect holding in an undertaking which represents 10% or more of the capital or of the voting rights or which otherwise makes it possible to exercise a significant influence over the management of that undertaking.

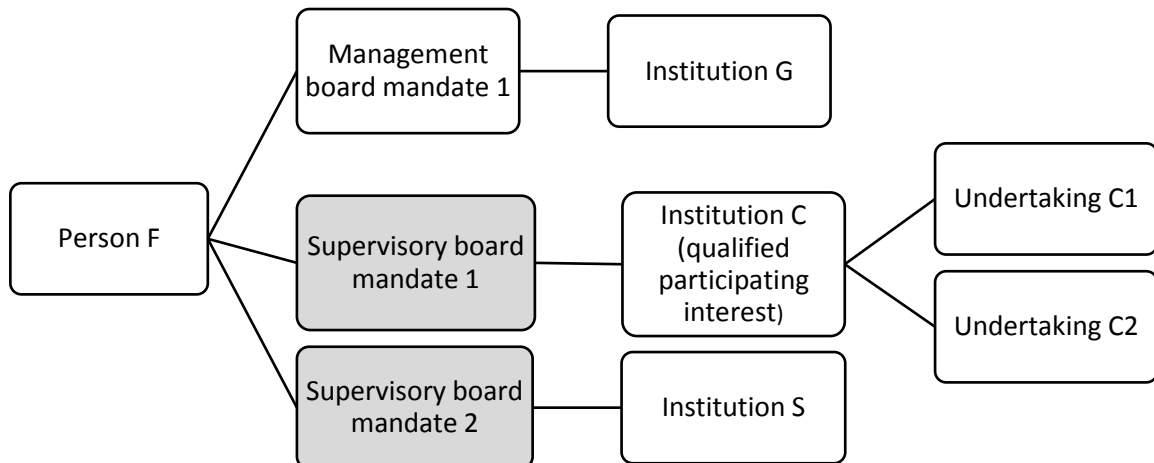
Section 1 (9) of the KWG in conjunction with Art. 4 (1) no. 36 of Regulation (EU) No 575/2013.

All mandates held in undertakings in which the institution holds a qualified participating interest will also be privileged if a management board member accepts further administrative or supervisory board mandates, irrespective of whether these are mandates as a management board member or in administrative or supervisory bodies. However, mandates as a management board member and as a member of an administrative or supervisory body will not be jointly counted as a single mandate, even in the case of corresponding participating interests.

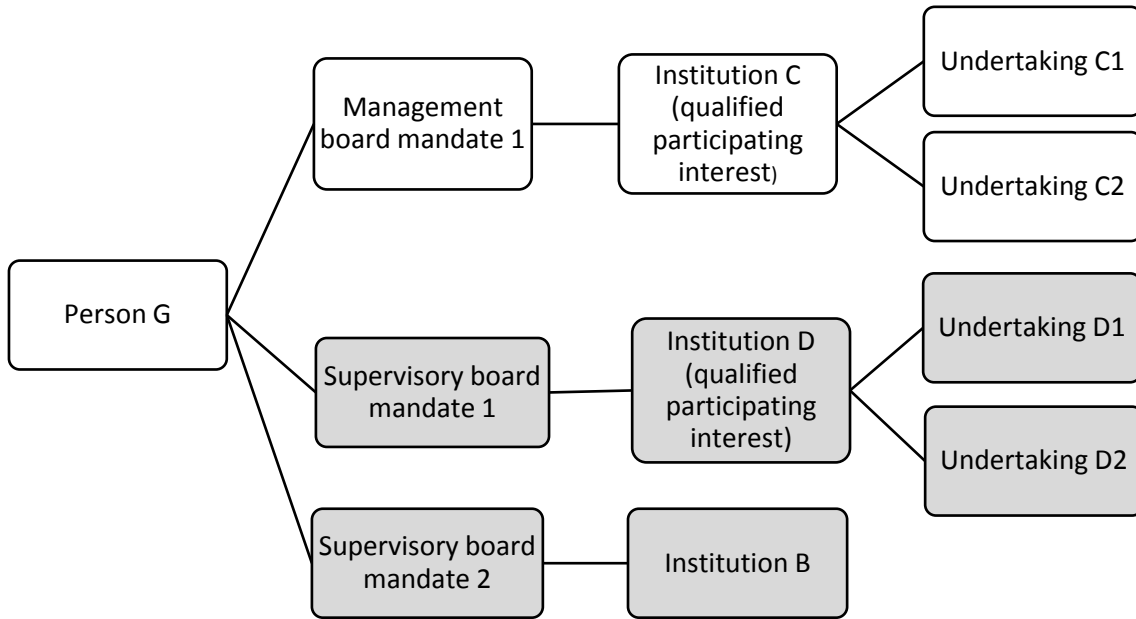
Example 5:



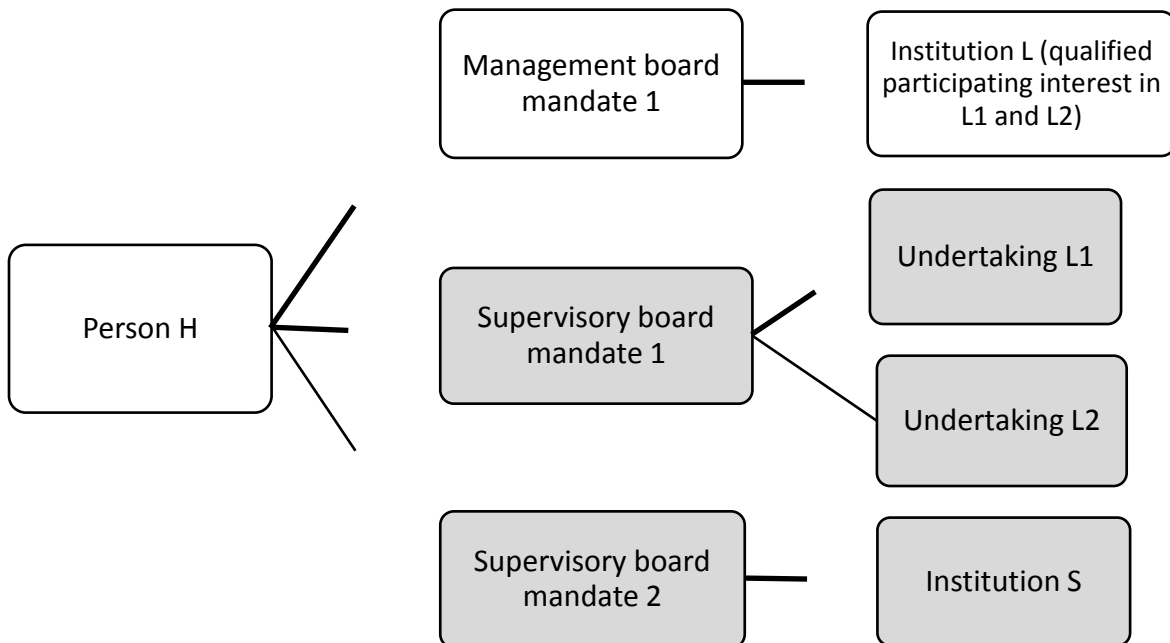
Example 6:



Example 7:

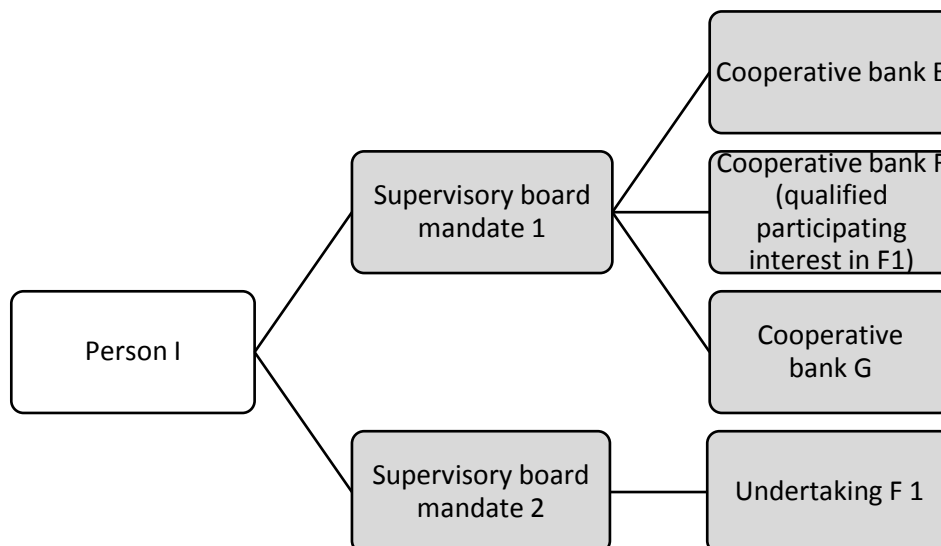


Example 8:



- **The different case groups for the privileged counting of mandates will be separately applied. It is not possible to combine different case groups or to apply the privileged counting at several different levels.**

Example 9:



- **Exemptions for mandates provided for under the Banking Act and the Insurance Supervision Act may not be reciprocally applied**

Persons who are members of the administrative or supervisory body of an institution, a financial holding company or a mixed financial holding company and of an undertaking which is subject to the **Insurance Supervision Act** have to comply with the limitations of mandates laid down both in the **Banking Act** and the **Insurance Supervision Act**. Exemptions for multiple mandates and privileged counting options provided for under the **Banking Act** and the **Insurance Supervision Act** may not be reciprocally applied.

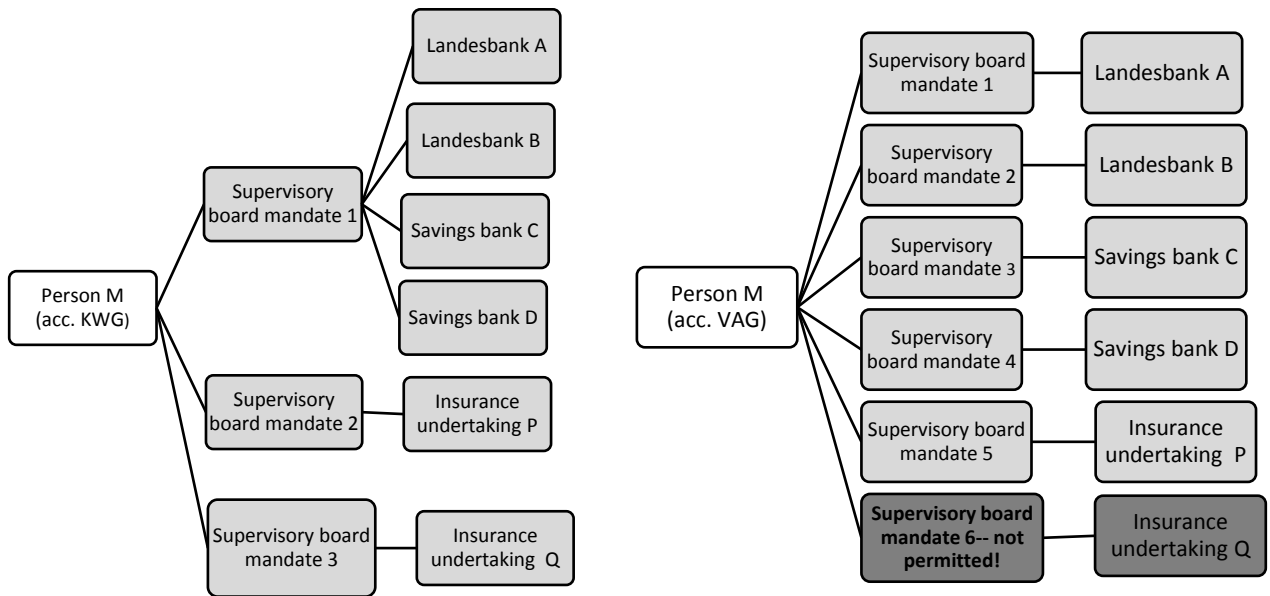
Section 24 (4) sentence 2 of the VAG

Requirements for persons who actually manage the undertaking or who perform other key duties:

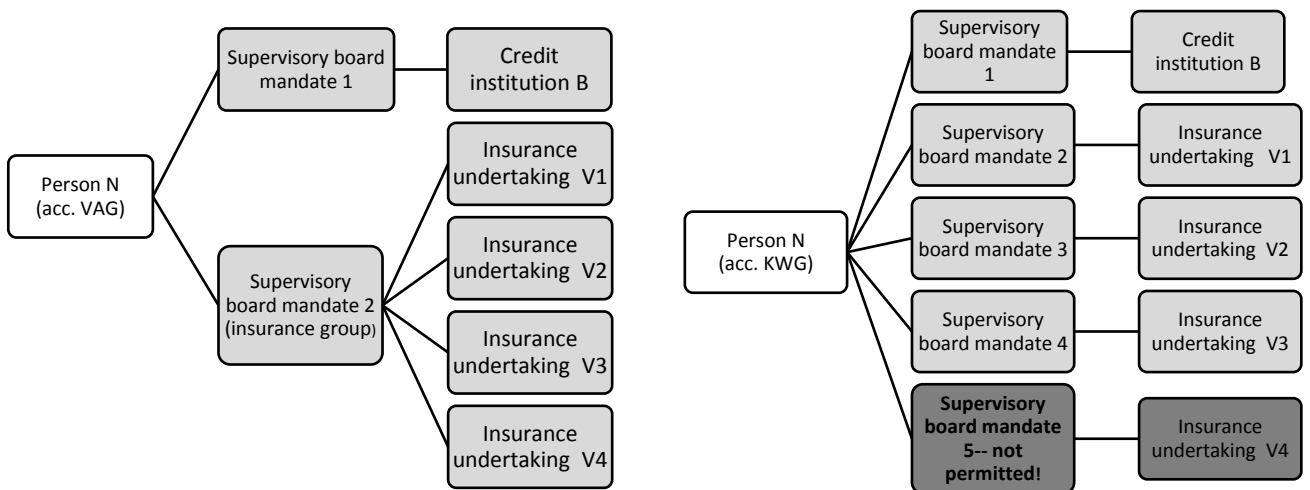
"A person who already holds five supervisory mandates with undertakings supervised by BaFin may not be appointed as member of the administrative or supervisory body; mandates held with undertakings in the same insurance or corporate group will not be included."

The exemption stipulated in section 24 (2) sentence 2 half-sentence 2 of the VAG will not apply in terms of the assessment of the permissibility of mandates covered by the **Banking Act**. In each case, only the relevant legal exemption may be claimed for any appointment. Even if a corporate group or a group of undertakings includes undertakings covered by the **Insurance Supervision Act** and undertakings covered by the **Banking Act**, the maximum number of supervisory mandates will always be separately assessed under the **Banking Act** and the **Insurance Supervision Act**. This must be noted, in particular, because a situation may arise – in view of the different exemptions provided by the **Insurance Supervision Act** and the **Banking Act** – where a mandate is permissible under the **Banking Act** but not under the **Insurance Supervision Act**, or vice versa.

Example 10:



Example 11:



(2) Mandates with organisations and undertakings which do not pursue predominantly commercial objectives

Mandates held with organisations and undertakings which do not pursue predominantly commercial objectives – in particular, undertakings which provide public services – will not be included in the maximum number of mandates permitted for management, administrative and supervisory bodies.

Legal basis:

Section 25d (3) sentence 4 of the KWG

The purpose of this rule is to exempt mandates with non-commercial undertakings, in particular charitable undertakings, and mandates with undertakings which provide public services. In view of the rationale behind the limitation of mandates – that the accumulation of an excessive number of management and supervisory mandates would preclude a member of such a body from spending adequate time on the performance of his or her duties – BaFin interprets the scope of this exemption restrictively.

Due to the significance of the proper functioning, stability and integrity of the financial sector for the overall economy and for consistent fulfilment of the supervisory tasks assigned to BaFin, as a rule BaFin does not consider the scope of this exemption to apply to the undertakings under its supervision. For credit institutions, this already follows from the fact that an assessment to different effect would appear contradictory in the context of the definition of a credit institution provided in section 1 (1) of the KWG ("undertakings which conduct banking business commercially or on a scale which requires commercially organised business operations").

Important cases to which the derogating provisions apply comprise, on the one hand, recognised charitable organisations and undertakings within the meaning of sections 51 et seqq. of the German Fiscal Code (*Abgabenordnung* – AO) and, on the other, undertakings which provide public services. For the purposes of section 25d (3) sentence 4 of the KWG, irrespective of its legal form an undertaking which provides public services for is an undertaking which

- does not exclusively or primarily aim to realise a profit,
- primarily and directly fulfils a public purpose through its service, but not indirectly through its profits and income, and in which
- the local authority operating this undertaking or participating in this undertaking - while ensuring an appropriate level of influence –holds a majority stake.

A case-by-case assessment is necessary to establish whether these preconditions are fulfilled.

Outside the indicated areas of application, an assessment as to whether an undertaking may be considered to be predominantly non-commercial in nature may only be made in view of the specific circumstances of the individual case and the overall picture for the activity requiring assessment. The lack of a profit-making intention is not a suitable sole distinguishing criterion even if, conversely, these exemptions cannot as a rule be applied for undertakings which exclusively or primarily aim to realise a profit. Nor are tax exemptions – in particular, corporation income tax or trade tax exemptions – as such a sufficient criterion for the applicability of section 25d (3) sentence 4 of the KWG, due to the fundamentally different purposes of tax law and banking supervisory law.

BaFin will exclusively make a determination that an undertaking is not primarily commercial in nature for the purposes of the Banking Act. This is not relevant for other authorities, e.g. for a decision as to an undertaking's tax liability.

(3) Mandates of heads of the administration of a local authority, a district or a city which is administrated as an independent district (*kommunale Hauptverwaltungsbeamte*)

Mandates in administrative and supervisory bodies in a municipal undertaking or a municipal special-purpose association, which a head of the administration of a local authority, a district

Legal basis:

Section 25d (3) sentence 6 of the KWG

or a city which is administrated as an independent district (*kommunaler Hauptverwaltungsbeamter*) is obliged to hold by municipal statutes or statutory provisions, are exempted from the limitations of mandates. This applies to the heads of administration, who, despite the limitations imposed by the Banking Act, should be able to exercise their tasks as required by municipal statutes or statutory provisions within an unlimited number of mandates at municipal undertakings whose majority stakes are owned by one or more municipalities, cities or districts as well as in municipal special purpose associations.

This is provided that the statutes of the municipal company, the municipal special purpose association or the statutory provisions assign the mandate in the administrative or supervisory body exclusively to the head of the administration – this fact must be proven to.

If a head of administration holds additional mandates in administrative and supervisory bodies at undertakings that are neither municipal undertakings nor municipal special purpose association or at other institutions, these mandates do fall under the mandate limitations pursuant to section 25d (3) sentence 1 no. 4 of the KWG, except when they need not be counted for other reasons. A mandate on an administrative board of a savings bank in which the head of administration represents his or her municipality, district or a city which is administrated as an independent district counts towards the maximum allowable number of supervisory mandates.

The law stipulates that the exemption may only be applied to the mandates of a head of administration. The exemption does not apply if other persons, e.g. as holders of a political office, are born members of the administrative or supervisory body pursuant to an institution's articles of association.

(4) Mandates as representatives of the Federal or State Governments

Mandates in administrative and supervisory bodies in which the member represents the Federal Republic of Germany or one of the Federal States are exempted from the caps on mandates held.

Legal basis:

Section 25d (3) sentence of the KWG

This is provided that the statutory provisions or articles of association assign the mandate to the member or his or her political office – this fact must be proven to BaFin by means of supporting documentation. The following are examples of the provisions in articles of association establishing the exemption:

The Supervisory Board shall consist of:

1. *the relevant competent member of Federal State government of states A and B,*
2. *..., 3. ...,*
4. *five members of Federal State A...*

The supervisory board shall consist of

1. *the Federal Minister of Finance,*
2. *the Minister of Finance of Federal State A,*
3. *...*

If the member holds additional mandates in administrative and supervisory bodies of undertakings or institutions where he or she does not represent the Federal Government or any of the Federal States, these mandates are subject to the limitations of mandates under section 25d (3) sentence 1 no. 4 of the KWG, except when they need not be counted for other reasons.

d. Approval of an additional mandate

Taking into account the specific circumstances and the nature, scope and complexity of the activities of the institution, group of institutions or a financial holding group, financial holding company or a mixed financial holding company, the supervisory authority may permit a member of the administrative or supervisory body to hold an additional mandate in an administrative or supervisory body provided that this does not prevent the member from devoting sufficient time to performing his or her functions in the undertaking in question.

Legal basis:

Section 25d (3) sentence 5 of the KWG

This approval will require an application which the individual must submit personally. This application is to be informally submitted to the supervisory authority. This means that the application is to be submitted to both the European Central Bank and to BaFin in the case of a mandate with the administrative or supervisory body of a significant institution supervised directly by the ECB, and in all other cases to BaFin. The application has to indicate in detail the amount of time which the mandate for which approval is sought will require. If this involves a mandate with an undertaking which is not supervised by the supervisory authority, the business purpose, the size and the structure of the undertaking need to be described. Moreover, the amount of time required for the mandates which this person already holds has to be described in detail.

This approval may be granted either before or after the appointment of this person to the administrative or supervisory body. If the acceptance of a mandate is planned or foreseeable, BaFin recommends that an application already be submitted prior to this appointment.

BaFin must be notified if, after the supervisory authority has issued its approval for a mandate, the appointment to the administrative or supervisory body is not made.

The supervisory authority may only permit a person to hold a single further mandate in an administrative or supervisory body. This means that, together with the approved, further mandate, no additional mandates may be jointly counted as a single mandate. The privileges stipulated in section 25d (3) sentence 3 of the KWG will not apply to this further mandate.

e. "Pre-existing mandates"

If an person held more than the maximum number of mandates permitted as a management board member or as a member of administrative and supervisory bodies after the German CRD IV Implementation Act (*CRD IV-Umsetzungsgesetz*) came into force, he or she may continue to hold these mandates if

- none of these mandates is held with an institution which may pose a systemic risk, and
- this mandate already existed on 31 December 2013.

- **1 August 2009:** the maximum number of mandates permitted is limited for the first time by the German Act Strengthening Supervision of the Financial Market and Insurance Sector (*Gesetz zur Stärkung der Finanzmarkt- und der Versicherungsaufsicht – FMVAStärkG*)

- **1 January 2014:** amendment and expansion of the limitations of mandates due to the CRD IV Implementation Act

- **19 July 2014:** amendment of the limitations of mandates by the German Act Amending Laws Relating to the Financial Market (*Gesetz zur Anpassung von Gesetzen auf dem Gebiet des Finanzmarktes – FiMaAnpG*)

The so-called "protection of pre-existing mandates" applies subject to the above-mentioned preconditions for mandates held with any undertakings, irrespective of whether they are supervised by BaFin. No subsequent notification requirement applies.

Legal basis:
Section 64r (14) sentence 1 of the KWG

Mandates which exceed the maximum number of mandates permitted and which are covered by the protection rule for pre-existing mandates may be extended through re-election or reappointment. However, additional mandates may not be accepted. This also applies in the event that the new mandate might be counted as a single mandate together with an existing mandate which is covered by the protection rule for pre-existing mandates.

The protection rule for pre-existing mandates also applies if an "Other Institution" becomes a significant CRR institution, e.g. because it is categorized as having the potential to pose a systemic risk within the meaning of section 20 (1) sentence 3 of the SAG.

If a person holds more than the maximum number of mandates permitted as a management board member or as a member of administrative and supervisory bodies following classification of the institution as a significant CRR institution, he or she may continue to hold these mandates if

- this mandate was already held as of the date of the institution's classification as a significant CRR institution.

"Protection of pre-existing mandates" applies subject to the above-mentioned preconditions to mandates held with any undertakings, irrespective of whether they are supervised by BaFin. No subsequent notification requirement applies.

Members of administrative and supervisory bodies of institutions posing a systemic risk are not eligible for protection for pre-existing mandates. Following promulgation of the CRD IV Implementation Act on 28 August 2013, in the period up to 30 June 2014 this group of persons had time to adjust the structure of their mandates in line with the rules subsequently applicable for these mandates.

Legal basis:

Section 64r (14) sentence 2 of the KWG

Credit institution posing a systemic risk:

Section 67 (2) of the SAG (old version): a systemic risk will apply in case of a concern that in the concrete market situation of the credit institution's existence will have a significant negative impact on other undertakings in the financial sector, on the financial markets, on the general confidence of depositors and other market participants regarding the functional capacity of the financial system or the real economy. ...

The reference to section 67 (2) of the SAG as applicable until 05 November 2015 (old version) in the transitional provision does not include any material reference to the "resolution power, preconditions and further powers" stipulated in sections 62 to 88 of the Act – in transposition of Directive 2013/36/EU, this provision was intended to define a clearly distinguishable group of institutions for which the legislator was able to permit the amended limitations of mandates to come into force as of a later date, but for which the legislator was unable to grant any protection for pre-existing mandates. In accordance with the definition provided in section 67 (2) of the SAG, a systemic risk does not require the undertaking's existence to have been actually jeopardised in accordance with section 63 (1) of the SAG.

A member of the administrative or supervisory body of an institution which may be assumed to pose a systemic risk may not claim protection for pre-existing mandates for any of his or her mandates as a management board member or as a member of administrative and supervisory bodies, even if he or she does not hold these mandates with institutions which may be assumed to pose a systemic risk or if he or she already held them prior to 1 August 2009.

8. Limitations of mandates (Banking Act "Other Institutions", financial holding companies)

This section outlines the limitations of mandates for members of administrative and supervisory bodies of institutions which are not significant CRR institutions ("**Other Institutions**").

Legal basis:

Section 25d (3a) of the KWG

"Other Institutions" are CRR institutions which do not fulfil any of the criteria for a significant institution as well as institutions which do not fall under the scope of Regulation (EU) No 575/2013 (CRR) (non-CRR institutions). The limitations of mandates described in this section also apply to financial holding companies that do not fulfil the conditions listed in section 7.

The limitations of mandates included in this section only apply when a person holds mandates exclusively at "**Other Institutions**". As soon as the person is or becomes member of the administrative or supervisory body in a CRR institution that is or becomes significant, the limitations of mandates outlined in section 7 apply to all of his or her mandates (both as a management board member and as a member of administrative and supervisory bodies). This applies equally to a person holding or accepting a mandate in a financial holding company which has been designated a superordinated undertaking and to which a CRR institution belongs.

The limitations of mandates stipulated in the **Banking Act** do not replace the limitations of mandates provided for in other laws, such as the AktG and the VAG. These limitations also have to be complied with. BaFin wishes to point out that in case of mandates held with foreign undertakings which are supervised by foreign financial supervisory authorities, possibly divergent limitations of mandates under the applicable supervisory law also have to be complied with.

a. Prohibition of simultaneous management and monitoring

Persons holding a mandate as a member of an administrative or supervisory body are not allowed simultaneously to be management board member of that institution, financial holding company or mixed financial holding. This eliminates, at the outset, the conflict of interest arising where a person manages an institution while simultaneously monitoring his or her own management.

Legal basis:

Section 25d (3a) sentence 1 no. 1 of the KWG

b. Former management board members in administrative and supervisory bodies

In order to prevent former management board members from exerting too much influence over the current management body, a maximum of two former management board members are allowed to be members of an administrative or supervisory body. Under the

Legal basis:

Section 25d (3a) sentence 1 no. 2 of the KWG

Banking Act, appointing any more former management board members to the administrative or supervisory body is not permissible. In this context it is irrelevant how much time has passed since the person left the management board; on the other hand,

the Banking Act does not require any cooling-off period when a management board member switches to the administrative or supervisory body.

c. Further management and supervisory mandates

Save for the exceptions described below, a member of an administrative or supervisory body may hold no more than five posts in administrative and supervisory bodies simultaneously. Supervisory mandates in all undertakings supervised by BaFin are counted towards the maximum allowable number.

Legal basis:

Section 25d (3a) sentence 1 no. 3 of the KWG

(1) Counting of multiple mandates as a single mandate

On account of the so-called privileged counting, as a rule an unlimited number of mandates shall count as one when the mandates are held in undertakings that belong to the same

Legal basis:

Section 25d (3a) sentence 1 no. 3 of the KWG

institutional protection scheme, so that a member of the administrative or supervisory body may in practice hold more than the five permissible mandates. However, the member must still devote sufficient time to each individual mandate, irrespective of whether or not this person has already exhausted the maximum number of mandates permitted.

In Germany, the member institutions of the National Association of German Cooperative Banks (*Bundesverband der Volksbanken und Raiffeisenbanken e. V.*) constitute an institutional protection scheme. The member institutions are cooperative banks, savings and loans banks, PSD banks, Sparda banks, church credit cooperatives, cooperative central banks and mortgage banks as well as other specialist institutions belonging to this financial group such as the Bausparkasse Schwäbisch Hall.

The cross-guarantee scheme of the Savings Banks Financial Group (*Sparkassen-Finanzgruppe*) is another institutional protection scheme in Germany. Its members are the savings banks, Landesbanks, DekaBank and regional building societies.

(2) Exemptions for mandates provided for under the Banking Act and the Insurance Supervision Act may not be reciprocally applied.

Persons who are members of the administrative or supervisory body of an **"Other Institution"** or a financial holding company and of an undertaking which is subject to the **Insurance Supervision Act** have to comply with the limitations of mandates laid down both in the **Banking Act** and the **Insurance Supervision Act**. Exemptions for multiple mandates and privileged counting options provided for under the **Banking Act** and the **Insurance Supervision Act** may not be reciprocally applied.

Section 24 (4) sentence 2 of the VAG

Requirements for persons who actually manage the undertaking or who perform other key duties:

"A person who already holds five supervisory mandates with undertakings supervised by BaFin may not be appointed a member of the administrative or supervisory body; mandates held with undertakings in the same insurance or corporate group will not be included."

The exemption stipulated in section 24 (4) sentence 2 half-sentence 2 of the VAG will not apply in terms of the assessment of the permissibility of mandates covered by the **Banking Act**. In each case, only the relevant legal exemption may be claimed for each appointment. Even if a corporate group or a group of undertakings includes undertakings covered by the **Insurance Supervision Act** and undertakings covered by the **Banking Act**, the maximum number of supervisory mandates will always be separately assessed under the **Banking Act** and the **Insurance Supervision Act**. This must be noted, in particular, because a situation may arise – in view of the different exemptions provided by the **Insurance Supervision Act** and the **Banking Act** – where a mandate is permissible under the **Banking Act** but not under the **Insurance Supervision Act**, or vice versa.

d. Pre-existing mandates

If, even allowing for the privileged counting, rules an individual held more mandates than the maximum allowable number at the time when the statutory provisions regarding limitations of mandates came into force for the first time, he or she may continue to hold these mandates. No subsequent notification requirement applies. The conditions are that the person already held the mandate as at 31 July 2009 and the institution was supervised by BaFin as at 31 July 2009.

Mandates which exceed the maximum number of mandates permitted and which are covered by the protection rule for pre-existing mandates may be extended through re-election or reappointment. However, no further mandates may be accepted. This also applies in the event that the new mandate might be counted as a single mandate together with an existing mandate which is covered by the protection rule for pre-existing mandates.

- **1 August 2009:** the maximum number of mandates permitted is limited for the first time by the German Act Strengthening Supervision of the Financial Market and Insurance Sector (*Gesetz zur Stärkung der Finanzmarkt- und der Versicherungsaufsicht* – FMVASTärkG)

- **1 January 2014:** amendment and expansion of the limitations of mandates due to the CRD IV Implementation Act

- **19 July 2014:** re-introduction of the limitations of mandates applicable until 31 December 2013 for other institutions and financial holding companies by the German Act Amending Laws Relating to the Financial Market (*Gesetz zur Anpassung von Gesetzen auf dem Gebiet des Finanzmarktes*)

9. Mandate limitations (Capital Investment Code)

Setting up a supervisory board is obligatory for external capital management companies in the legal form of a limited liability company (GmbH). Setting up an advisory council is obligatory for external capital management companies with a legal form of partnership with a limited liability company as a general partner (GmbH & Co. KG). The Capital Investment Code at this point mandatorily refers to the limitations of mandates set forth by the Stock Corporation Act. These limitations must be complied with by the external capital management companies in the legal form of a limited liability company and in the legal form of a partnership with a limited liability company as a general partner (GmbH & Co. KG).

Legal basis:

Section 18 (2) of the KAGB

Section 100 (2) of the AktG

In accordance with section 100 (2) sentence 1 no. 1 of the AktG, a person may not be a member of the supervisory board who is already a member of the supervisory board in ten commercial enterprises which are required by law to form a supervisory board. The external capital management company in the legal form of a limited liability company is a commercial enterprise required by law to form a supervisory board. Section 100 (2) sentence 1 no. 1 of the AktG also applies to the mandatory advisory council of an external capital management company in the legal form of a partnership with a limited liability company as a general partner pursuant to section 18 (2) sentence 2 of the KAGB.

In accordance with section 100 (2) sentence 2 of the AktG, the legal representatives of the controlling enterprise of a group may hold another five mandates on supervisory boards required by law with group companies, in addition to the mandates allowed pursuant to section 100 (2) sentence 1 of the AktG. This provision is an exception to the principle enshrined in section 100 (2) sentence 1 no. 1 of the AktG and its purpose is to take account of the fact that holding mandates with group companies typically belongs to the tasks of the controlling enterprise's representative body. In the case of a multi-level group, the provision only applies in favour of the legal representative of the top level of the group. Section 100 (2) sentence 3 of the AktG provides for a further exception to section 100 (2) sentence 1 no. 1 of the AktG. However, unlike in the case of section 100 (2) sentence 2 of the AktG, no exemption is granted. Instead, in accordance with this provision, the mandates on supervisory boards where the member is also the chairperson are counted double. This is supposed to take account of the fact that the mandate of a chairperson of a supervisory board is time-consuming and must be exercised in a professional manner.

Group exemption pursuant to section 100 (2) sentence 2 of the AktG takes priority over section 100 (2) sentence 3 of the AktG to the effect that mandates as supervisory board chairs within the group are not counted double as their mandates are left out of the equation to start with.

III. Obligations of administrative and supervisory bodies, committees (Banking Act)

1. Obligations of administrative and supervisory bodies

The duties of administrative and supervisory bodies and the members of administrative and supervisory bodies are stipulated in the relevant provisions under company law and, to the extent available, in articles of association and rules of procedure. In addition, the **Banking Act** requires the administrative or supervisory body to oversee the management board also with regard to its adherence to prudential supervisory requirements. It shall devote sufficient time to the discussion of strategies, risks and remuneration systems for management board members and employees.

Legal basis:

Section 25d (6) of the KWG

The **Banking Act** requires institutions to have in place a proper business organisation which ensures compliance with the legal provisions to be observed by the institution as well as business requirements. The responsibility lies with management board members. Monitoring and oversight of compliance with this requirement for members of the management board lie with the administrative or supervisory body. For the purposes of performing this duty, the **Minimum Requirements for Risk Management** published by BaFin specify the way management board members should cooperate with the administrative and supervisory body and describe what disclosures and reports must be submitted to the administrative or supervisory body.

Legal basis:

Section 25a (1) of the KWG

Minimum Requirements for Risk Management (*Mindestanforderungen an das Risikomanagement – MaRisk*) – circular 10/2012 (BA) of 14 December 2012; norm-interpreting administrative regulation (*norminterpretierende Verwaltungsvorschrift*) of section 25a of the KWG;

Provisions for the administrative/supervisory board:

AT 4.2, item 5 – discussion of strategies,
 AT 4.3.2, item 6 – information regarding risk situation,
 AT 4.4.1, item 5 – information regarding the replacing of the head of the risk control function,
 AT 4.4.2, item 7 – information regarding the replacing of the compliance function,
 AT 4.4.3, items 2,6 – information regarding the replacing of the head of the internal audit function, obtaining of information from the internal audit department,
 BT 2 items 5,6 – reporting obligations]

Members of administrative and supervisory bodies must meet their obligations at all times. Specifically, this requires them to monitor and form a judgement about the undertaking's business strategy and risk situation. It follows that apart from attending and preparing for meetings, mandate holders must oversee the undertaking also between meetings, particularly in the case of significant changes in its risk situation.

Mandate holders must meet the requirements for each individual task and perform their function thoroughly and personally. This not only requires devoting sufficient time to their function, but also that the supervisory body actively requests information from the management board on an *ad hoc* basis if required. Members of administrative and supervisory bodies must exercise their monitoring and control function with due diligence

in order to identify and eliminate serious infringements by management board members of the principles of proper management.

In order to be able to make appropriate decisions, members of administrative and supervisory bodies have to prepare for meetings by reviewing relevant documents prior to the meeting. Preparation requires not only a reasonable time frame and locality, but also documents that are appropriate both in terms of their content and volume. To this extent the members of administrative and supervisory bodies need the support of the undertaking they supervise; the institutions are required to offer their support by the **Banking**

Legal basis:

Section 25d (4) of the KWG

Act. Meeting papers should always be distributed prior to the meeting itself except in justified exceptional cases. It is not sufficient for meeting documents to be reviewed and responded to only by the mandate holder's staff.

2. Creation of committees

The administrative or supervisory body of a significant CRR institution shall from among its members form a **risk committee**, an **audit committee**, a **nomination committee** and a **remuneration committee**. This also applies to the administrative and supervisory bodies of financial holding companies or a mixed financial holding company when it has been designated as the superordinated undertaking and a CRR institution is subordinated to it. In accordance with the Banking Act, the creation of committees may not be waived in any case. However, the risk and audit committees may be combined. BaFin shall be informed in writing if a joint risk and audit committee is created.

Legal basis:

Section 25d (7)-(12) of the KWG

Risk committee (section 25d (8) of the KWG)

Audit committee (section 25d (9) of the KWG)

Nomination committee (section 25d (11) of the KWG)

Remuneration committee (section 25d (12) of the KWG, section 15 of the German Remuneration Ordinance for Institutions (*Instituts-Vergütungsverordnung - InstitutsVergV*))

Legal basis

Section 25d (10) of the KWG

The information provided in this section applies exclusively to the committees required by the Banking Act.

The administrative or supervisory body

- of a non-significant CRR institution,
- a non-CRR institution,
- a financial holding company or a mixed financial holding company to which the criteria set forth in the last paragraph do not apply,

may, according to size, internal organisation and the nature, scope, complexity and riskiness of the undertaking's activities, form from among its members a **risk committee**, **audit committee**, **nomination committee** and **remuneration committee**.

The administrative or supervisory body itself is responsible for assessing whether committees need to be formed in an administrative or supervisory body that per se is not required to form committees, as well as for the modalities of the decision-making process and its documentation; BaFin does not issue any provisions in these matters. Decisions to either create or not create committees are not subject to approval from BaFin. BaFin expects the administrative and supervisory body to make a transparent decision whether or not to create committees, based on the above-mentioned criteria, and to document the decision-making process in an appropriate manner. Where a body decides against creating committees, this decision should be reviewed at appropriate intervals. BaFin may nevertheless require that one or more committees be created where it seems necessary to enable the administrative or supervisory body to properly exercise its monitoring duties.

The nomination committee and the remuneration committee are to be created separately; BaFin rules out a combination. It is, however, permissible to form a joint risk and audit committee, which requires a written notice to be submitted to BaFin.

Legal basis

Section 25d (10) of the KWG

A committee should be formed of at least three members, one of whom should be elected as chair. Attention has to be paid to ensuring that the members assigned to a committee have the knowledge, skills and experience necessary for the performance of the committee's duties. In this context, BaFin wishes to point out that the chair of the audit committee shall have expertise in the areas of accounting and statutory audits of accounts. This expertise does not necessarily have to have been acquired through professional experience as an auditor.

At least one member of every committee should also belong to another committee in order to ensure cooperation and professional exchange. This does not mean that every member must belong to more than one committee.

Every committee must be assigned its tasks in accordance with the **Banking Act**; person tasks may not be transferred between committees. This is to be taken into account in particular when an institution had already created committees prior to the provisions' entry into force – in such cases, the committees' tasks are to be adjusted to the allocation of tasks as set forth in the **Banking Act**. However, it is not ruled out that a committee formed in accordance with the **Banking Act** is assigned additional tasks.

Where the **Banking Act** has set a committee tasks which are not covered by the competence of the administrative or supervisory body in accordance with the relevant company law, these tasks do not apply to the committee in question. In this respect, the **Banking Act** does not interfere with company law. This concerns, e.g.

- the appointment of an official auditor, as far as it is not carried out by the administrative or supervisory body, e.g. in credit cooperatives,
- the appointment of a management board member, which in some institutions is carried out not by the administrative or supervisory body, but by the meeting of representatives.

The committees' tasks set forth in the Banking Act do not constitute an exhaustive list for the proper performance of the administrative or supervisory body's monitoring and advisory tasks. Their statutory regulation highlights the special importance of the undertakings in the financial sector and the special role played by their monitoring bodies. This is why the legislator assigns the same tasks to the administrative and supervisory bodies of all institutions, financial holding companies and mixed financial holding companies, regardless of their size. The frequency, intensity and depth with which a committee is to engage with the tasks assigned to it do nevertheless depend on size, internal organisation and the nature, scope, complexity and riskiness of the undertaking's activities. In accordance with the principle of proportionality, smaller institutions are subject to correspondingly lower requirements. The fact of meeting the requirements is to be adequately documented.

Where a decision is made not to form committees, the control functions assigned to the committees in accordance with section 25d (8)-(12) of the KWG are the general responsibility of the entire body. Consequently, only the requirement to form committees depends on the above-mentioned criteria of size, internal organisation and thenature, scope, complexity and riskiness of the undertaking's activities; the requirement to supervise the management body in a proper manner, on the other hand, exists in all undertakings. In accordance with the principle of proportionality, the administrative or supervisory bodies of smaller institutions are generally required to fulfil the same control functions - the requirements regarding frequency, intensity and depth, however, are lower.

IV. Measures against members of administrative and supervisory bodies (Banking Act)

If a member of an administrative or supervisory body

Legal basis:

Section 36 (3) sentence 1 of the KWG

- is not or no longer reliable,
- does not possess or no longer possesses the necessary expertise,
- does not devote sufficient time to carrying out his or her tasks, or
- contravenes the provisions regarding irreconcilability or exceeds the maximum number of mandates held,

BaFin can demand the removal of this person and prohibit him or her from carrying out his or her activities. These measures may be taken separately or, if necessary, simultaneously.

A demand for removal or a prohibition of carrying out the activities may also be considered,

- if the person was kept unaware of serious violations of the principles of proper management by his or her institution due to careless exercise of his or her oversight and control function and such behaviour persists despite due warning by BaFin, or
- the person did not do everything needed to counter detected infringements and continues to refrain from doing so despite due warning by BaFin.

This applies equally to members of a non-mandatory supervisory body and for members of advisory councils, as long as the advisory councils fulfil the relevant conditions.

BaFin may also carry out measures against "born" members of an administrative or supervisory body. These are persons who belong to a supervisory body of an institution typically structured under public law (in the case of savings banks e.g. the head of the administration of a local authority, a district or a city which is administrated as an independent district, in the case of Landesbanks the minister responsible under law or the president of the savings banks association). The measure does not require the person to be dismissed from his or her principle office. Measures taken by BaFin may also target members belonging to an administrative or supervisory body as representatives of employees.

BaFin addresses its demands for removal to the undertaking, which is represented by the authorised representative body, typically the management board. The undertaking needs to ensure that the measure is implemented by taking the appropriate steps, e.g. calling a general meeting that can take the necessary decisions. This needs to occur in accordance with the relevant provisions of company and co-determination law. It is usually the nominating body responsible for appointing the members of supervisory bodies that is also responsible for their removal. In the case of supervisory board members on the shareholder side (shareholders, partners or members of a cooperative), this is the general meeting, shareholder meeting or meeting of representatives; for employees and trade union representatives, meanwhile, the employee meeting or its elected delegates.

The prohibition of carrying out the activities of a member of an administrative or supervisory body is imposed on the individual member of the administrative or supervisory body.

If a member of an administrative or supervisory body contravenes the provisions regarding irreconcilability or exceeds the maximum number of mandates held, BaFin will initially give him or her the opportunity to reach a situation of legal compliance by resigning from one or more mandates. If the person decides not to take that opportunity, BaFin sends its demands for removal simultaneously to all undertakings within the scope of the **Banking Act** at which the person holds a mandate.

If a person holds multiple mandates in administrative or supervisory bodies within the scope of the **Banking Act**, a supervisory measure taken against that person may suffice to demand a removal of that person or a prohibition of carrying out activities at other undertakings too.

Under the same conditions as in cases of a demand for removal or a prohibition of carrying out activities, BaFin may appoint a special representative to take over the

activities and powers of one or more members of the administrative or supervisory body or of the whole administrative or supervisory body. The powers of the body or the member which the special representative takes over entirely shall be suspended for the duration of the special representative's assignment. As long as it appears sufficient for the purposes of reaching the objectives, BaFin may decide to transfer to the special representative only some of the powers of the member or the administrative or supervisory body.

Legal basis:

Section 45c (2) no. 3 of the KWG