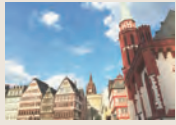




► Newsletter from our FRANKFURT OFFICE (Tokyo - Frankfurt): *Atsumi Sakai Janssen Rechtsanwalts-gesellschaft mbH*



Atsumi & Sakai is a multi-award-winning, independent Tokyo law firm with offices in London and Frankfurt. Expanding from its highly-regarded finance practice, the firm now acts for a wide range of international and domestic companies, banks, financial institutions and other businesses. The firm operates as a foreign law joint venture, combining a comprehensive Japanese-law and German-law practice consisting of a team of highly experienced Japanese, German and other foreign lawyers. The Frankfurt office advises its clients in Japanese, English or German both in German and European law.

‘Brexit’ Impact on Financial Institutions Relocating to Germany, Part 2: Corporate & Licensing Considerations

In the first of this series of notes on the possible effects of Brexit on financial institutions in the UK and how they can relocate operations to Germany, we considered the EU financial passport and reactions of the market; in this note we look at the choice of an entity and the need to obtain a license^[1].

Choice of Entity

If a bank or financial institution established wishes to establish an operating presence in Germany to conduct a banking^[2], financial services^[3] or payments services^[4] business (together below, “banking, etc. business”), it may only do so through a subsidiary incorporated in Germany or a branch office.

A. Subsidiary

Almost all German companies are limited liability companies (*Gesellschaft mit beschränkter Haftung* – GmbH) or stock companies (*Aktiengesellschaft* – AG):

- The AG is a publicly held company comparable to the Public Limited Company (plc) in the United Kingdom. The legal bodies of the AG are the shareholders’ meeting, the supervisory board and the executive board. An AG must have a paid-up capital of at least EUR 50,000 and at least one director heading its executive board, though an AG with a share capital of more than EUR 3 million must have at least two directors if an exemption from the requirement has not been included in its constitution. There are, in principle, no restrictions on the nationality or place of residence for members of the executive board. The shares of an AG may be publicly traded on a stock exchange.
- The GmbH is a privately held company comparable to the Limited Company (Ltd) in the United Kingdom. A GmbH must have a paid-up capital of at least EUR 25,000, and at least one managing director and one shareholder. The managing director does not have to be a German citizen nor reside in Germany. A GmbH has shareholders’ meetings, and may choose to have a supervisory board. Shares in a GmbH cannot be traded on a stock exchange.

The main difference between these two forms of company is that the shares in an AG can be publicly traded, whilst those of a GmbH cannot be. A GmbH is also simpler to establish and manage than an AG, and is therefore the most common and appropriate legal form used by EU/EEA-based financial institutions when establishing operations in Germany; a GmbH can later change its form to an AG.

B. Branch

Sect. 53 of the German Banking Act (*Kreditwesengesetz* – KWG)^[5] lays out the requirements for the establishment of a branch office in Germany. At least two natural persons residing in Germany have to be appointed as managers of the branch office. The branch is obliged to keep separate books and render separate accounts to the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) and the Deutsche Bundesbank in respect of the business it conducts and its assets used in its business.

Under the EU Banking Directive 2006/48/EC, establishment of a branch office for financial institutions of EEA member states is easier than for those from non-EEA member states. They will, in principle, not require a BaFin license (see 2. Below) since supervision of their activities is the responsibility of the home state’s authorities. They will, however, be required to comply with local (i.e. German in this case) regulatory reporting and liquidity requirements of the member state where the branch is established.



Licensed Required for Banks & Financial Institutions

A. Types of Licenses

Sect. 32 (1) KWG requires that anyone wishing to conduct a banking business or to provide financial services in Germany commercially or on a scale which requires commercially organized business operations needs written authorization from the BaFin.

- Banking Business**
Banking business is defined in Sect. 1 (1) KWG; it includes the acceptance of funds (deposit-taking activities), the granting of loans (lending activities), and the purchase and sale of financial instruments (prime brokerage services).
- Financial Services**
Financial services are defined in Sect. 1 (1a) KWG, and include investment brokerage, the purchase and sale of financial instruments for others (contract brokerage), and portfolio management.
- Commercially Organized Business**
The commercial conduct of a banking or financial services business requires a license. Conduct qualifies as commercial if the activity is to be undertaken for a certain length of time and with a view to a profit. Business volume, however, does not influence the license requirement, so even ‘small’ banks need a license.

Normally, the BaFin will issue a single license covering the commercial conduct of a banking or financial services business. However, under Sect. 32 (2) KWG, the BaFin may issue a license with limited scope covering only specific forms of banking and/or financial services, and with specific requirements or restrictions.

A BaFin license is also required under the Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz – ZAG*)^[6] for the commercial provision of payment services (Sect. 10 KWG) or electronic money issuance (Sect. 11 KWG).

B. Licensing Procedures

The authorization procedure for a banking business, etc. license is laid out in Sect. 32-38 KWG. The application to the BaFin requires a significant amount of information, such as suitable evidence of sufficient resources for business operations, names of senior managers, and information sufficient to assess their trustworthiness, etc. (Sect. 32 (1) KWG). The application and accompanying documents usually have to be submitted in German or with an officially certified translation. However, if the application and documents can be provided in English, BaFin may waive this requirement in individual cases.

The initial minimum capital requirement of the applicant company is laid out in Sect. 33 KWG and depends on the nature of the planned business activity (for example EUR 50,000 for a banking license for investment advice (Sect. 33 I.a. KWG) and EUR 730,000 for securities trading banks).

At least two professional and reliable managing directors have to be appointed to the applicant company, and its management needs to be deemed trustworthy and professionally qualified to run the institution.

- A manager is deemed trustworthy unless any facts to the contrary are found. Such facts may include a criminal record or known prior breaches of rules or regulations.
- A manager is deemed professionally qualified if they can prove they have significant relevant theoretical and practical knowledge, as well as Bas experience in managing a similar business. Each manager has to submit a curriculum vitae laying out his experience to the BaFin. In the manager has a track record of at least three years of managerial experience at a comparable licensed institution (at least one year of which must be in Germany), such relevant experience will be assumed.
- At least one of the managers has to be fluent in German.

The application has to include a sustainable business plan, laying out the:

- Type of business
- Budget, including profit and loss calculations for the first three business years
- Organizational structure
- Internal control mechanisms

The newly set-up institution must also join an organization set up by German banking groups in order to provide security for investors in the event of a member institution's insolvency (*Einlagensicherungsfonds*)^[7]. It takes between 6 months and one year for the application to be processed, the fees charged by BaFin usually varying between EUR 2,000 and EUR 200,000; both depend mainly on the range of services the applicant intends to provide.

The application process, etc. for the grant of a payment services license is similar to that under Sect. 32 KWG for a banking/financial services license, and that for the grant of either type of license to a branch is similar to that for a company.

[1] The next note will address labour law matters.

[2] See 2.A.i. below

[3] See 2.A.ii. below

[4] The provision of payment services or electronic money issuance (Sect. 10 & 11, respectively, Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz*))

[5] English Translation available:
https://www.bafin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl_kwg_en.pdf?sessionId=E8DF59D9B4B30BCAEA028EFA888869BD.1_cid290?__blob=publicationFile&v=3

[6] English Translation available:
https://www.bafin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl_zag_en.pdf?__blob=publicationFile&v=3

[7] Sect. 32 (3, 3a) KWG in conjunction with Sect. 2 of the Deposit Guarantee and Investor Compensation Act (*Einlagensicherungs- und Anlegerentschädigungsgesetz*)



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Before opening the Frankfurt office, Frank Becker was one of the founding partners of the Munich office of a major US law firm and an associate in a Magic Circle firm.

He leads the Frankfurt office and has extensive experience in M&A transactions and joint ventures.

He studied law in Japan for a year and advises Japanese clients in connection with German law related matters, with a focus on transactional, corporate and compliance matters.

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After serving as Assistant Professor at Niigata University for a term of 3 years, Pascal Soepper joined Atsumi Sakai Janssen in 2016 and recently relocated to Frankfurt.

He works in the field of general contract and corporate law, as well as IT Law and FinTech, with a particular emphasis on crowdfunding.

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* A German legal professional corporation

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