

# Banking / Finance & Capital Markets

July 2016

## Brexit advice: Doing cross-border Banking Business in Germany without EU-Passport

We have been asked to provide some thoughts on the licence issues regarding cross-border banking and financial services from the UK into Germany which may arise if the UK should neither be a member state of the European Union anymore nor a member state of the European Economic Area.

In particular, the cross-border regime applicable on Swiss institutions which provide services into Germany since 2015 may be relevant here.

### 1. General cross-border licence requirements

Pursuant to section 32 of the German Banking Act (*Kreditwesengesetz* – "**KWG**"), anyone wishing to conduct banking business or to provide financial services in Germany in a commercial manner or on a scale which requires a commercially organised business undertaking requires a written licence from the German Federal Financial Services Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – "**BaFin**"). This generally applies to both, domestic and foreign enterprises.

However, if a foreign enterprise intends to offer banking or financial services to customers in Germany from abroad, the question arises whether or not such business would be deemed to be run "*in Germany*". Here the following applies:

- If the foreign enterprise maintains a howsoever natured physical presence (e.g. a branch) in Germany, its business would generally be deemed to be run "*in Germany*".
- If the foreign enterprise would provide its services on a pure cross-border basis, i.e. exclusively from abroad without any physical presence in Germany, it may benefit from the so-called **passive freedom to provide services** (*Passive Dienstleistungsfreiheit*).

Pursuant to the administrative practice of BaFin, this requires that the foreign enterprise does not actively target the German market but provides services only when it is approached by customers in Germany on such customers' unsolicited initiative. In such a case the services would not be deemed to be provided "*in Germany*" with the effect that the relevant foreign enterprise would not require a banking or financial services licence in Germany whatsoever.

In the event of a Brexit, this general rule might become of interest as it can, in fact, form some sort of grandfathering: For example, if a foreign bank intends to grant a loan to a German corporate borrower who is already a customer of such bank, BaFin usually assumes that such lending would be a case of the passive freedom to provide services. The same applies to syndicated lending, even where the borrower is not an already existing customer as BaFin assumes that syndicated lending normally takes place after a beauty contest which was initiated by the borrower on its own initiative (for further details and examples cf. BaFin, "*Notes regarding the licensing requirements for conducting cross-border banking business and/or providing cross-border financial services*", 5 April 2005 – the "[Notes](#)").

### 2. Exemptions from licence requirements

Where licence requirements are applicable, they do not apply without exemptions. Such exemptions exist, roughly speaking, in two different forms:

- for certain activities which are, by statutory law, exempted from licence requirements; and
- for activities to which BaFin has granted an exemption upon application.

#### 1. Statutory exemptions

In section 2, KWG lists some specific statutory exemptions which, where applicable, fully exempt the described sorts of banking business/financial services from the licence requirements of the KWG. For example, exemptions apply to intra-group business: According to section 2 para. 1 no. 7 and para. 6 no. 5 of the KWG, entities providing their services only to their parent entity or to subsidiaries or to affiliated entities do not require a licence.

#### 2. Exemption upon application

Pursuant to section 2 para. 4 of the KWG, an enterprise might be granted an exemption from banking and financial services licence requirements (and from other supervisory provisions) if the enterprise's business, taken as a whole, does not, in light of the nature of the business, require supervision in Germany.

#### Requirements

Pursuant to BaFin, an exemption requires that (i) the foreign enterprise is effectively supervised in its home country by the competent authority/authorities in accordance with internationally recognised standards, and (ii) the competent home country authority/authorities cooperate(s) satisfactorily with BaFin. The applying foreign enterprise must submit a certificate from the competent authority/authorities of its home country confirming to BaFin that:

- the foreign enterprise has been granted a license for the banking operations and/or financial services that it intends to provide on a cross-border basis in Germany;
- the commencement of the intended cross-border services in Germany raises no supervisory concerns; and
- if such concerns should arise in the future, these will be reported to BaFin.

Generally, all banking business and financial services with institutional investors/customers and with banks in Germany are eligible for exemption. In this regard, BaFin deems the following to constitute institutional investors:

- the federal government, federal states, local authorities and their institutions;
- credit and financial services institutions and investment companies;
- private and public insurance companies;
- medium-sized and large enterprises (i.e. enterprises within the meaning of section 267 para. 2 and 3 of the German Commercial Code (*Handelsgesetzbuch*)).

In contrast, banking business and financial services with private clients are eligible for the exemption only if the transactions are bro-

kered through a credit institution or an EU-passported institution within Germany.

### Application process

The foreign enterprise has to apply for the exception to BaFin in writing. The application is to be accompanied by a set of documents and information, inter alia,

- partnership agreement/articles of association;
- proof of company registration;
- most recent annual financial statements;
- information about the applicant and its managers;
- detailed description of the intended business activities;
- (sample) contract forms and (sample) agreements to be used for the intended business activities;
- appointment of a German receiving agent;
- certification from the competent authority/authorities of the home country fulfilling the requirements mentioned above.

BaFin has to decide in accordance with the general rules of German administrative law on the proper exercise of discretion by authorities. This means, inter alia, that BaFin has to comply with the general principle of equal treatment and may not base its decision on irrelevant considerations.

BaFin may make the granting of the exemption be subject to certain conditions. For example, it may require the third country enterprise to submit its audited financial statements on an annual basis.

### Effect

The exemption pursuant to section 2 para. 4 of the KWG means in practice that the enterprise will not require a licence and will not be subject to the majority of the provisions of the KWG. However, some provisions of the KWG remain applicable such as for instance BaFin's information and audit rights. Such provisions would therefore also apply to a foreign enterprise which has successfully applied for an exemption for its cross-border business.

As a result, even an exempted enterprise remains subject to some supervision by BaFin. This also means that BaFin will remain able to take administrative action against such enterprise if it deems such action appropriate or necessary.

### Simplified Exemption Process in case of Swiss Institutions

As part of an ongoing process between Germany and Switzerland in order to intensify cooperation in the financial sector, BaFin and its Swiss counterpart, the Swiss Federal Banking Commission (Eidgenössische Bankenkommision – EBK), have entered into an agreement in 2015 pursuant to which the aforementioned rules have been amended. One of the objectives of such agreement was to provide Swiss institutions with a simplified market entry into Germany, similar to the one under the EU-Passport. This includes, inter alia, that

- when applying, Swiss companies under the supervision of EBK are not required to submit company documents (i.e. copy of the articles of association/partnership agreement, proof of registration, annual financial statements, etc.) to BaFin;
- when doing business with individuals in Germany, Swiss institutions do not need to involve a German / EU-passported institution as an intermediary.

In our view it is not unlikely that, should a Brexit indeed take place and the UK not become a member state of the EEA, such a cooperation process would be initiated between Germany and the UK as well.



Dr. Christoph Schmitt  
Lawyer  
BEITEN BURKHARDT  
Rechtsanwaltsgesellschaft mbH,  
Frankfurt am Main



Rainer Süßmann  
Lawyer  
BEITEN BURKHARDT  
Rechtsanwaltsgesellschaft mbH,  
Frankfurt am Main

### Please note

This publication cannot replace consultation with a trained legal professional.

If you no longer wish to receive this newsletter, you can unsubscribe at any time by e-mail (please send an e-mail with the heading "Unsubscribe" to [bcm@bblaw.com](mailto:bcm@bblaw.com)) or any other declaration made to BEITEN BURKHARDT.

© BEITEN BURKHARDT Rechtsanwaltsgesellschaft mbH.  
All rights reserved 2016.

### Imprint

This publication is issued by  
BEITEN BURKHARDT Rechtsanwaltsgesellschaft mbH  
Ganghoferstrasse 33, D-80339 Munich  
Registered under HR B 155350 at the Regional Court Munich /  
VAT Reg. No.: DE811218811

For more information see:  
[www.beitenburkhardt.com/imprint](http://www.beitenburkhardt.com/imprint)

### Editor in charge

Dr. Christoph Schmitt

### Your Contacts

**Frankfurt am Main** • Westhafen Tower • Westhafenplatz 1  
60327 Frankfurt am Main  
Tel.: +49 69 756095-0 • Fax: +49 69 756095-512  
Heinrich Meyer • [Heinrich.Meyer@bblaw.com](mailto:Heinrich.Meyer@bblaw.com)  
Dr. Christoph Schmitt • [Christoph.Schmitt@bblaw.com](mailto:Christoph.Schmitt@bblaw.com)

**Munich** • Ganghoferstraße 33 • 80339 Munich  
Tel.: +49 89 35065-0 • Fax: +49 89 35065-123  
Dr. Dirk Tuttlies • [Dirk.Tuttli@bblaw.com](mailto:Dirk.Tuttli@bblaw.com)



You will find further interesting topics and information about Banking & Finance on our website.