

For many foreign investors acquiring a **Banking License** is a crucial step on their way into the German market.

Banking License Requirement

The conduct of certain banking and financial services related activities within Germany requires a banking license pursuant to Section 32 of the German Banking Act (*Gesetz über das Kreditwesen*, “**KWG**”).



Dr. Simon G. Grieser
Partner, Frankfurt
T: +49 69 79 41 1301
sgrieser@mayerbrown.com



Dr. Manfred Heemann
Partner, Frankfurt
T: +49 69 79 41 1781
mheemann@mayerbrown.com



Dr. Ralf Hesdahl
Partner, Frankfurt
T: +49 69 79 41 1341
rhesdahl@mayerbrown.com



Dr. Jörg Wulfken
Partner, Frankfurt
T: +49 69 79 41 1077
jwulfken@mayerbrown.com

Banking License Requirement

The KWG provides three categories of institutions, i.e. credit institutions, financial services institutions and financial enterprises for which different license requirements apply.

CREDIT INSTITUTIONS

Credit institutions are enterprises, which conduct banking business commercially, or on a scale, which requires a commercially organized business undertaking.

(a) Banking Business

Banking business is defined conclusively in Section 1, para. 1 KWG by a list of twelve types of businesses that are deemed to constitute banking businesses. These include the acceptance of funds (deposit business), granting loans (lending business), and the purchase and sale of financial instruments (principal broking services). For a list of banking business services as listed in Section 1, para. 1 KWG, please see Annex A on page eight.

The commercial conduct of banking business requires a written license. The conduct qualifies as commercial if the banking business is aimed to be conducted for a certain length of time and for profit realization. The business volume, however, does not influence the license requirement, so that even “small” banks need a license.

Section 2 KWG lists certain entities, which do not fall within the scope of the credit institution definition; for example, enterprises, which conduct banking business solely with their parent or with their subsidiaries or affiliated enterprises. These entities do not require a bank license in order to conduct a banking business.

(b) Full Scale License and Limited License

Applying for a bank license may be limited to certain types of banking businesses. Such limited licenses can be granted in cases of specialized credit institutions. If a credit institution does not intend to conduct any deposit or lending business it may limit its application accordingly. A bank license granted upon such a limited application is a limited license as opposed to an unlimited, full scale license. In cases where deposit or lending business is not covered by the license, the initial capital requirement falls below the EUR 5 million limit required for a full scale license. The responsible supervisory body may also limit the bank license due to (partial) refusal as listed in Section 33, para. 1 KWG.

Additionally, there are specialized banking institutions, which are subject to specific laws and which require specific licenses such as mortgage banks (*Pfandbriefbanken*) and building and saving societies (*Bausparkassen*). However, the rules applicable to these specialized institutions are beyond the scope of this update.

FINANCIAL SERVICE INSTITUTIONS

Financial service institutions are enterprises that provide financial services commercially or on a scale, which requires a commercially organized business undertaking; however, these are not credit institutions. Financial services are defined conclusively in Section 1, para. 1a KWG and comprise, for example, investment broking, the purchase and sale of financial instruments for others (contract broking) and portfolio management. For a list of the financial services please see Annex B on page nine.

The commercial conduct of financial services requires a written license. The license may be limited to certain financial services (see Section [b]).

Enterprises conducting banking business or providing financial services are referred to in this memorandum as “institutions”.

FINANCIAL ENTERPRISES

Financial enterprises are enterprises, which are not institutions but which conduct banking related business as listed in Section 1, para. 3 - 3e KWG, such as factoring, leasing and investment advice. For a complete list please see Annex C on page 10. As financial enterprises neither conduct banking business nor provide financial services, they do not require a license pursuant to Section 32 KWG.

Supervisory Body

The supervisory body responsible for granting bank licenses is the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, “**BaFin**”). The application for a bank license must be filed with the BaFin in writing and be accompanied by documentation, which demonstrates that the requirements for a license are fulfilled.

Conditions to Grant a License

Below we have laid out a summary of the conditions for granting a bank license pursuant to Sections 32 and 33 KWG. There are special rules for opening branch offices of foreign institutions, which are beyond the scope of this update.

LEGAL FORM OF ENTITY

A credit institution can be operated in any legal form available under German law, except for the form of a sole proprietorship (*Einzelkaufmann*), under Section 2a, para. 1 KWG. Financial service institutions can be operated in any legal form available under German Law.

Large commercial banks are usually run in the form of (publicly traded) corporations (*Aktiengesellschaft*, “**AG**”), smaller banks in the form of limited liability companies (*Gesellschaft mit beschränkter Haftung*, “**GmbH**”). Partnerships (*offene Handelsgesellschaft*, “**oHG**”), limited partnerships (*Kommanditgesellschaft*, “**KG**”) or limited partnerships with a GmbH as sole general partner (*GmbH & Co. KG*) would also be admissible. The forms AG, GmbH and GmbH & Co. KG have the advantage that the shareholders or limited partners, as the case may be, are generally not personally liable for the entity’s debt.

HOLDER OF THE LICENSE

Depending on the legal form of the entity, the license holder is either a legal entity or a natural person.

In the case of a partnership (*oHG*) or a limited partnership (*KG*), it is generally acknowledged that the license is held by the personally liable partners. This means that each personally liable partner requires a license. Every new personally liable partner entering the partnership has to obtain his/her own license. Partners who are not personally liable, such as limited partners or silent partners, do not require a license.

In the case of corporations (*AG, GmbH*) the license is held by the legal entity. A change in the shareholders, therefore, does not affect the license. In the case of a limited partnership with a GmbH as the sole general partner (*GmbH & Co. KG*), the license is held by the GmbH, being the sole liable partner.

Owing to its personal character, the license cannot be transferred by way of singular or universal succession. This implies that a new license is required in the event of a change in the legal form, for example in the case of a merger or transformation from a partnership into a corporation. A new license is also required for any other transfer of banking or financial services business to a legal entity or natural person that does not already have a license.

INITIAL CAPITAL

The initial capital requirement depends on the nature of the planned business.

NATURE OF BUSINESS	INITIAL CAPITAL REQUIREMENT
Deposit-taking credit institutions	EUR 1 million
Institutions conducting e-money business	EUR 5 million
Financial services providers and securities trading banks, which are involved in trading for their own accounts	EUR 730,000
Financial services providers, which are not involved in trading for their own accounts	EUR 125,000
Investment advisors, investment brokers, contract brokers, portfolio managers, operators of multilateral trading systems or enterprises, which perform placement businesses (without authorization to obtain ownership or possession of customers' funds or securities and which are not involved in trading for own accounts)	EUR 50,000
Investment advisors, investment brokers, contract brokers (without authorization to obtain ownership or possession of customers' funds or securities and who do not trade in financial instruments for their own account in the course of providing financial services), if they are also registered as insurance brokers pursuant to EC directive 2002/92 on insurance brokerage and if they fulfill the requirements of Article 4 para. 3 of the EC directive 2002/92	EUR 25,000
Financial enterprises	EUR 25,000

Independent of the initial capital requirement, credit institutions conducting deposit business or investment fund business, and financial service institutions providing financial services as listed in Section 1, para. 1 a, nos. 1-4 KWG (investment broking, contract broking, portfolio management or own-account trading) are obliged to secure the deposits. In fulfillment of this obligation such institutions must join one of the organizations set up by various groups of German banks in order to provide security for the investors in case of a member institution's insolvency (*Einlagensicherungsfonds*), pursuant to Section 32, para. 3 and para. 3a KWG and Section 2 of the law relating to securing deposits and the compensation of investors (*Einlagensicherungs- und Anlegerentschädigungsgesetz*). For private commercial banks the respective organization would be the *Entschädigungseinrichtung deutscher Banken GmbH* ("**EdB**").

MANAGEMENT

Generally speaking, each institution needs to appoint at least two senior managers (*Geschäftsleiter*). The members of the institution's future management have to be trustworthy and must prove their professional qualification.

Trustworthiness must be demonstrated not only in relation to the management but also with respect to holders of a qualified participating interest and furthermore, in the case of an incorporation, a legal representative or, in the case of a partnership, a general partner. For practical purposes, trustworthiness is assumed unless negative facts are established. The BaFin reviews submitted references, relies on its former experience with the person in question in its function as a manager of another institution and checks criminal records.

Professional qualification in this context means the theoretical and practical knowledge of the business concerned, as well as managerial experience. The extent of the professional qualification required, therefore, depends on the business for which the license is to be granted. A person is deemed to have the professional qualifications necessary for managing an institution if he/she can demonstrate three years of managerial experience at an institution of comparable size and type of business. The experience is considered to have been managerial if the person worked in the management or at an immediate sub-level to the management. As a general rule, senior managers are expected to have sufficient experience in particular in the lending business. Lastly, the professional qualification is assessed individually in every case and on the basis of the particularities of the respective institutions.

BUSINESS PLAN

Furthermore, the management has to submit a viable business plan showing the nature of the planned business, the organizational structure and the institution's planned internal monitoring procedures. The business plan and the organizational structure have to demonstrate that the institution is in the position to fulfill the requirements of Section 25a KWG, which are:

- Suitable arrangement for managing, monitoring and controlling risks;
- Proper business organization, an appropriate internal control system and adequate security precautions for the deployment of electronic data processing;
- Records of executed business transactions, enabling full and continuous supervision by BaFin; and
- Appropriate safeguards suitable for the respective business and customers against money laundering and against fraudulent activities to the detriment of the institution.

Reasons for Refusal

ENUMERATIVE LIST

The BaFin can only refuse to grant a license on one of the grounds set out in Section 33 KWG. For a complete list see Annex D on page 11. In addition to the applicant not being able to show fulfillment of the requirements described above, the following reasons for refusal relate to the ownership structure and the head office's location.

OWNERSHIP STRUCTURE; FOREIGN HEAD OFFICE

A license can be refused if the institution's head office is located abroad (Section 33(1), no. 6 KWG). Furthermore, the BaFin can refuse a license pursuant to Section 33(3) KWG if facts are known, which warrant the assumption that the effective supervision of an institution is impaired because of:

- Its association with individuals or enterprises in a corporate network with inadequate commercial transparency or a structure of cross-shareholding;
- Legal or administrative provisions of a state that is not member of the European Economic Area ("*EEA*"), which are applicable to such an institution; or
- The institution is a subsidiary of an institution domiciled in a non-EEA state and the head office is not effectively supervised in such a state or the supervisory bodies do not sufficiently co-operate with BaFin.

Annex A

BANKING BUSINESS

Credit institutions are enterprises, which conduct banking business commercially or on a scale that requires a commercially organized business undertaking.

Banking business, inter alia, comprises:

1. The acceptance of funds from others as deposits or of other unconditional repayable funds from the public unless the claim to repayment is securitized in the form of bearer debt certificates or negotiable bonds, irrespective of whether or not interest is paid (deposit business).
- 1a. The business mentioned under Section 1, para. 1, sentence 2 of the Pfandbrief Act (*Pfandbriefgesetz*) (Pfandbrief business).
2. The granting of money loans and acceptance credits (lending business).
3. The purchase of bills of exchange and checks (discount business).
4. The purchase and sale of financial instruments in the credit institution's own name for the account of others (principal broking services).
5. The safe custody and administration of securities for the account of others (safe custody business).
6. The incurrance of the obligation to acquire claims in respect of loans prior to their maturity.
7. The assumption of bonds, guarantees and other warranties on behalf of others (guarantee business).
8. The execution of cashless payment and clearing operations (giro business).
9. The purchase of financial instruments at the credit institution's own risk for placement in the market or the assumption of equivalent guarantees (underwriting business).
10. The issuance and administration of electronic money (e-money business).
11. The occupation as central counterparty pursuant to Section 1, para. 31 KWG.

Annex B

FINANCIAL SERVICES

Financial services institutions are enterprises, which provide financial services to others either commercially or on a scale that requires a commercially organized business undertaking, and which are not credit institutions. Financial services, inter alia, are:

1. The brokering of business involving the purchase and sale of financial instruments or their documentation (investment broking).
 - 1a. The personal recommendation referring to specific financial instruments, which encompasses gathering information about investment goals and the assessment of the particular client's financial situation (investment advisory).
 - 1b. The conduct of multilateral systems, which brings together the interests of a multitude of persons in the purchase and sale of financial instruments within the system. It does so pursuant to predetermined provisions and in such a manner that it leads to an agreement on the purchase of these financial instruments (conduct of a multilateral trading system).
 - 1c. The placing of financial instruments without an obligation of underwriting (placement business).
2. The purchase and sale of financial instruments in the name of and for the account of others (contract broking).
3. The administration of individual portfolios of financial instruments for others on a discriminatory basis (portfolio management).
4. The purchase and sale of financial instruments for one's own account as a service for others (own-account trading).
5. The brokering of deposit business with enterprises domiciled outside the European Economic Area (non-EEA deposit broking).
6. The execution of payment orders (money transmission services).
7. Dealing in foreign notes and coins (foreign currency dealing).
8. The issuance or administration of credit cards and travelers' checks (credit card business) unless the card issuer also provides the service underlying the payment transaction.
9. The ongoing purchase of claims on the basis of a framework agreement with or without regress (Factoring).

10. The closing of financial leasing contracts as lease provider and the administration of a special purpose entity within the meaning of Section 2, para. 6, sentence 1 no. 17 (Financial leasing).
11. The discretionary purchase and sale of financial instruments for a collective of individuals as investors provided that such purchase and sale is the main focus of the product in question. It also must be carried out bearing in mind the best interest of the investors participating in the performance of the acquired financial instruments (collective portfolio management).

Annex C

ACTIVITIES OF FINANCIAL ENTERPRISES

Financial enterprises are enterprises, which are not institutions and whose main activities comprise:

1. Acquiring and holding participating interests;
2. Acquiring money claims against payment;
3. Being a leasing-special purpose entity within the meaning of Section 2, para. 6, sentence 1, number 17;
4. [Rescinded]
5. Trading in financial instruments for one's own account;
6. Advising others on investing in financial instruments (investment advice);
7. Advising enterprises on their capital structure, their industrial strategy and associated issues and, in the event of corporate mergers and acquisitions, advising the enterprises or providing them with services; or
8. Arranging loans between credit institutions (money-broking business).

Annex D

REASONS FOR REFUSAL

(1) The license shall be refused if:

1. The resources needed for business operations, in particular adequate initial capital within the meaning of Section 10, para. 2a, sentence 1, numbers 1 to 6, are not available in Germany; the initial capital, which must be available is, inter alia, as follows:
 - (a) In the case of investment advisors, investment brokers, contract brokers, portfolio managers, operators of multilateral trading systems or enterprises, which perform the placement business without authorization to obtain ownership or possession of customers' funds or securities and who do not trade in financial instruments for their own account in the course of providing financial services: an amount equivalent to at least EUR 50,000.
 - (b) In the case of other financial services institutions, which do not trade in financial instruments for their own account: an amount equivalent to at least EUR 125,000.
 - (c) In the case of financial services institutions, which trade in financial instruments for their own account and in the case of securities trading banks: an amount equivalent to at least EUR 730,000.
 - (d) In the case of deposit-taking credit institutions and central counterparty within the meaning of Section 1, para. 31: an amount equivalent to at least EUR 5 million.
 - (e) In the case of institutions, which solely conduct e-money business: an amount equivalent to at least EUR 1 million.
 - (f) In the case of investment advisors, investment brokers, contract brokers (without authorization to obtain ownership or possession of customers' funds or securities and who do not trade in financial instruments for their own account in the course of providing financial services), if they are also registered as insurance brokers pursuant to EC directive 2002/92 on insurance brokerage and if they fulfill the requirements of Article 4 para. 3 of the EC directive 2002/92: an amount equivalent to EUR 25,000.
 - (g) Enterprises, which only conduct business for their own account, also on foreign derivatives markets and cash markets, in order to hedge these positions, the purchase and sale of financial instruments on an own-account basis for others or, which provide investment brokering only for other members of these markets or, which fix a price by way of business on an own-account as Market Maker within the meaning of Section 23 para. 4 German Securities Trading Act (*Wertpapierhandelsgesetz*) for other members of these markets, if clearing-members of the same markets or trading systems are liable for the performance of the contracts, into which these enterprises enter: an amount equivalent to EUR 25,000.

2. Facts are known, which suggest that an applicant or one of the persons specified in Section 1, para. 2, sentence 1 is not trustworthy.
3. Facts are known, which warrant the assumption that the holder of a qualified participating interest or, in the case of a legal person, a legal representative or representative according to the Articles of Association or, in the case of a partnership, a general partner is not trustworthy, or for other reasons fails to satisfy the requirements set in the interests of the sound and prudent management of the institution; Section 2c, para. 1a, sentence 1, number 1, clause 2 applies as appropriate.
4. Facts are known, which suggest that the proprietor or one of the persons specified in Section 1, para. 2, sentence 1 does not have the professional qualifications necessary to manage the institution, and no other person has been designated as manager in accordance with Section 1, para. 2 sentence 2 or 3.
- 4a. An institute which, in case of obtaining a license, becomes a subsidiary of a financial holding enterprise within the meaning of Section 1, para. 3a, sentence 1 or of a mixed financial holding enterprise within the meaning of Section 1, para. 3a, sentence 2; additionally, if facts are known, which suggest that a person within the meaning of Section 2d is not reliable or does not have the required expertise to manage the financial holding company or of the mixed financial holding company.
5. A credit institution or a financial services institution which, in the course of providing financial services, is authorized to obtain ownership or possession of customers' funds or securities, or which in accordance with a certificate from the Federal Financial Supervisory Authority pursuant to Section 4 (1), number 2 of the Act Governing the Certification of Contracts for Private Pension Plans (*Gesetz über die Zertifizierung von Altersvorsorgeverträgen*), is authorized to offer contracts for private pension plans, has at least two managers who do not work for the institution merely in an honorary capacity.
6. The institution has its head office located outside of Germany.
7. The institution is not prepared, or not in a position, to make the organizational arrangements necessary for the proper operation of the business for which it is seeking a license.
8. The applicant is a subsidiary of a foreign credit institution, and the competent foreign supervisory authority for this credit institution does not trade in financial instruments for its own account, it shall not be refused a license in accordance with Sentence 1(a) if, instead of the initial capital, it can demonstrate that it has taken out appropriate insurance for the protection of customers.

An investment advisor, investment broker or a contract broker who, in the course of providing financial services, is not authorized to obtain ownership or possession of customers' funds or securities, and who does not trade in financial instruments for his/her own account shall not be refused a license in accordance with sentence 1(a) if, instead of the initial capital, he/she can demonstrate that he/she has taken out an appropriate insurance for the protection of the customer. This insurance must allow for an insurance sum equivalent to at least EUR 1 million for each insured event and an insurance sum equivalent to at least EUR 1.5 million for all insured events of an insurance year. This sentence 2 applies to investment advisors and investment brokers, who are also registered as insurance brokers pursuant to EC directive 2002/92 and who fulfill the requirements of Article 4 para. 3 of the EC directive 2002/92, with the respective requirement that an insurance sum equivalent to at least EUR 500,000 for each insured event and an insurance sum equivalent to at least EUR 750,000 is envisaged.

- (2) A prerequisite of the professional qualifications for managing an institution needed by the persons specified in subsection (1), sentence 1, number 4 is that they have adequate theoretical and practical knowledge of the business concerned, as well as managerial experience. It shall normally be assumed a person has the professional qualifications necessary to manage an institution if he or she can demonstrate three years of managerial experience at an institution of comparable size and type of business.
- (3) The Federal Banking Supervisory Office may refuse to grant the license if facts are known, which warrant the assumption that effective supervision of the institution is impaired. In particular, this would be the case if:
 1. The institution is associated with other individuals or enterprises in a corporate network or is closely linked to such a network, which impairs effective supervision of the institution owing either to the structure of the cross-shareholdings or to inadequate commercial transparency.
 2. Effective supervision of the institution is impaired by the legal or administrative provisions of a non-EEA state applicable to such individuals or enterprises.
 3. The institution is a subsidiary of an institution domiciled in a non-EEA state that is not effectively supervised in the state in which it has its domicile or head office, or whose competent prudential agency is not prepared to cooperate satisfactorily with the Federal Financial Supervisory Authority.

The Federal Financial Supervisory Authority may also refuse to grant the license if, contrary to Section 32, para. 1, sentence 2, the application does not contain adequate information or documents.

(4) The license may not be refused for reasons other than those specified in subsections (1) and (3).

(5) The Federal Financial Supervisory Authority has to inform the applicant of whether or not the license has been granted within 6 months after submission of his/her complete application documents pursuant to Section 32, para. 1, sentence 2.

About Mayer Brown

Mayer Brown is a leading global law firm with offices in major cities across the Americas, Asia and Europe. We have approximately 1,000 lawyers in the Americas, 300 in Asia and 500 in Europe. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest investment banks. We provide legal services in areas such as Supreme Court and appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and insolvency; and environmental.

OFFICE LOCATIONS

AMERICAS

- Charlotte
- Chicago
- Houston
- Los Angeles
- New York
- Palo Alto
- São Paulo
- Washington

ASIA

- Bangkok
- Beijing
- Guangzhou
- Hanoi
- Ho Chi Minh City
- Hong Kong
- Shanghai

EUROPE

- Berlin
- Brussels
- Cologne
- Frankfurt
- London
- Paris

ALLIANCE LAW FIRMS

- Mexico, Jáuregui, Navarrete y Nader
- Spain, Ramón & Cajal
- Italy and Eastern Europe, Tonucci & Partners

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

