FINTECH

Germany

LEXOLOGY
Getting The Deal Through

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Quick reference guide enabling side-by-side comparison of local insights into fintech innovation and government / regulatory support; regulatory bodies and regulated activities; cross-border regulation; regulation of sales and marketing and of changes of control; financial crime; peer-to-peer and marketplace lending; artificial intelligence, distributed ledger technology and crypto-assets; data protection and cybersecurity; outsourcing and cloud computing; intellectual property, competition, tax and corporate immigration considerations; and recent trends.

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FINTECH LANDSCAPE AND INITIATIVES

General innovation climate

What is the general state of fintech innovation in your jurisdiction?

According to latest statistics, the fintech market has reached a level of saturation. Recent statistics show that after a peak of new companies in 2017 the number of new fintech start-ups in Germany reduced to eight in 2019. As a result of strong competition with non-German fintech companies, several big tech companies and long-established market participants, a substantial increase in new fintech companies in the German market is not expected. There is a trend towards established business models that have proven to be reliable. Established companies benefit from higher funding compared to smaller or new companies for whom access to funding seems to have become more difficult.

Law stated - 28 May 2021

Government and regulatory support

Do government bodies or regulators provide any support specific to financial innovation? If so, what are the key benefits of such support?

The German government and municipalities support fintech companies in various ways. The Federal Financial Supervisory Authority (BaFin) is the financial regulatory authority in Germany. BaFin set up a dedicated team to support fintech companies in relation to their market entry, and it also organises events (eg, the annual BaFin-Tech conference) to discuss regulatory developments with market participants. Although fintech companies do not benefit from special treatment, BaFin supports fintech companies in relation to evaluating licensing requirements and clarifying ongoing regulatory aspects. The German FinTechRat includes experts appointed by the German Ministry of Finance who support the legislature in developing a suitable regulatory framework. All German cities that are hubs for fintech (Berlin, Frankfurt, Munich and Hamburg) offer additional support through fintech centres. In addition, universities in or around fintech centres tend support and dedicate resources to the development of an effective fintech ecosystem.

Law stated - 28 May 2021

FINANCIAL REGULATION

Regulatory bodies

Which bodies regulate the provision of fintech products and services?

The Federal Financial Supervisory Authority (BaFin) is responsible for regulating fintech products and services in Germany if they fall under the scope of regulated activities or products. A fintech company may be subject to reduced requirements provided it limits its activities to, broadly:

- the distribution of open or closed-end funds registered for public distribution in Germany; or
- the distribution of participation rights, subordinated loans or profit participation rights.

In these cases, the local trade office would be the competent supervisory authority.

Law stated - 28 May 2021

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Regulated activities

Which activities trigger a licensing requirement in your jurisdiction?

Pursuant to section 32(1), sentence 1 of the German Banking Act (KWG), anyone wishing to conduct banking business or to provide financial services in Germany commercially or on a scale that requires a commercially organised business undertaking requires a written licence from BaFin. What constitutes banking business or financial services is set out in section 1(1) and (1a) KWG and includes, among other things:

- the acceptance of monies from the public (deposit business);
- the provision of money loans (lending business);
- the brokering of business involving the purchase and sale of financial instruments (investment broking);
- providing customers or their representatives with personal recommendations in respect of transactions relating to certain financial instruments where the recommendation is based on an evaluation of the investor's personal circumstances or is presented as being suitable for the investor and is not provided exclusively via information distribution channels or for the general public (investment advice);
- the purchase and sale of financial instruments on behalf of and for the account of others (contract broking);
- the management of individual portfolios of financial instruments for others on a discretionary basis (portfolio management);
- dealing in foreign notes and coins (foreign currency dealing);
- the ongoing purchase of receivables on the basis of standard agreements, with or without recourse (factoring);
- the conclusion of financial lease agreements in the capacity of the lessor and the management of asset-leasing special purpose vehicles (financial leasing); and
- the purchase and sale of financial instruments separately from the management of a collective investment scheme for a community of investors, who are natural persons, on a discretionary basis with regard to the choice of financial instruments (asset management).

Since the beginning of 2020, crypto-custody business has been added to the list of licensable activities. Crypto-custody business is defined as the safekeeping, administration and storage of crypto-assets or private cryptographic keys used to hold, store and transfer crypto-assets for others (crypto assets custody services).

In general, a licence is required for any investment services and activities listed in section A of Annex I of the Directive 2014/65/EU on markets in financial instruments or Annex I of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms. The provision of payment services is licensable based on the provisions of the German Act on the Supervision of Payment Services (ZAG).

The trading of claims deriving from fully drawn loan agreements does not trigger a licence requirement, provided that the claim is not amended. However, amendments requiring a new credit decision (eg, prolongation) can constitute licensable lending business.

Law stated - 28 May 2021

Consumer lending

Is consumer lending regulated in your jurisdiction?

The contractual basis for consumer lending contracts can be found in the German Civil Law Code. The civil law provisions contain an elaborate protection regime and require the borrower to comply with, among other things, certain

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disclosure obligations and walk-away rights for the borrowers. In particular, the licence requirement is triggered if the repayment obligation is in cash. Where the repayment obligation takes the form of financial instruments or other goods or rights, other licensing requirements may apply (eg, investment services).

Law stated - 28 May 2021

Secondary market loan trading

Are there restrictions on trading loans in the secondary market in your jurisdiction?

In general, the trading of fully drawn loans does not trigger a licensing requirement in Germany. Restrictions on the trading of loans may apply under the terms of the respective contract or as a result of data protection rules.

Law stated - 28 May 2021

Collective investment schemes

Describe the regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would fall within its scope.

The German Capital Investment Code (KAGB) provides the licensing and supervision regime for investment management companies and investment funds in Germany. In addition, the marketing of investment funds to investors in Germany is also regulated under the KAGB. The KAGB takes a holistic approach and provides the legal regime for all collective investment schemes (eg, alternative investment funds and undertakings for collective investments in transferable securities). The aim of the KAGB is to ensure an adequate supervision of collective investments, including the administration, marketing and compliance with investment rules. However, crowdfunding platforms and peer-to-peer (P2P) lending platforms are generally not viewed as collective investment schemes by BaFin. BaFin focuses on the lending aspect and indicates in several guidance notes that, depending on the actual nature of the services provided, licensable lending business may be conducted. Further, the brokerage of loans requires a licence under the German Industrial Code (GewO) and, therefore, the operation of a P2P lending platform could trigger the requirement for a loan broker licence.

Law stated - 28 May 2021

Alternative investment funds

Are managers of alternative investment funds regulated?

Managers of alternative investment funds located in Germany are regulated under the KAGB. The same also applies to a certain extent to German branches of non-German managers of alternative investment funds. Alternative investment funds may only be marketed in Germany once they are registered or passported for distribution to investors in Germany. Germany has implemented the Alternative Investment Fund Managers Directive 2011/61/EU.

Depending on the nature of their actual activities, fintech companies could fall outside the scope of the KAGB if their activities do not constitute an investment fund. An investment fund is, pursuant to section 1(1), sentence 1 of the KAGB, any collective investment scheme that raises capital from a number of investors, with a view to investing in accordance with a defined investment policy for the benefit of those investors and that does not constitute an undertaking operating outside of the financial sector. Such a number of investors will be deemed to exist if the fund rules or the articles of association of the collective investment fund do not limit the number of potential investors to a single investor.

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Peer-to-peer and marketplace lending

Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Lenders and borrowers

BaFin has published guidance on the question of when the participants of a P2P marketplace typically conduct lending or deposit business on a scale that triggers a licensing requirement. According to this guidance, BaFin assesses potential licence requirements on a case-by-case basis, taking into account the activities of each single investor. It is particularly important that investors do not invest on a commercial scale or in a manner that would require a commercially organised business undertaking, because otherwise a banking licence requirement is triggered. BaFin suggests that a commercially organised business undertaking is required if more than €500,000 is invested or more than 100 loans are granted. An investor invests on a commercial scale if he or she undertakes the investments for a certain time and with a view to making a profit. In addition, under certain circumstances crowd-lending models are subject to the Act on Capital Investments, so that several investor protection rules apply, such as the requirement to produce a sales prospectus, which must be approved by BaFin. However, exemptions may apply.

Peer-to-peer or platform operators

Whether the operation of a crowd-lending platform requires a licence (and which kind of licence) depends on the actual services that are provided. Generally, it depends on the way the contracting is designed on the platform. In cases where the operator of the platform merely provides the infrastructure, the licensable activities are more likely to be conducted by the users of the platform. If, on the other hand, the operator of the platform steps into each transaction and takes on its own credit risk, it is likely that the licensable activity will be conducted by the platform operator. However, the pure brokerage of loans would generally not be considered as banking, financial or payment services, so 'only' an authorisation under the GewO may be required.

Law stated - 28 May 2021

Crowdfunding

Describe any specific regulation of crowdfunding in your jurisdiction.

There are several different kinds of crowdfunding platforms available in Germany. In a guidance note, BaFin sets out four main crowdfunding models:

- donation-based and rewards-based crowdfunding, which is also referred to as crowd sponsoring;
- loan-based crowdfunding (crowd lending); and
- crowd investing.

In the latter two types, the aim is to generate a financial return. BaFin does not apply specific regulatory regimes to different business models per se. BaFin instead focuses on the nature of the activities undertaken by the users and the operators of the crowdfunding platforms and decides on a case-by-case basis whether licensable activities are being conducted and by whom.

Law stated - 28 May 2021

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Invoice trading

Describe any specific regulation of invoice trading in your jurisdiction.

Invoice trading is generally not a regulated activity. However, if the actual activities constitute a financial service (eg, factoring, which means the ongoing purchase of receivables on the basis of standard agreements, with or without recourse) this activity is regulated and requires a financial services licence.

Law stated - 28 May 2021

Payment services

Are payment services regulated in your jurisdiction?

Germany has implemented the Payment Services Directive and, thus, anyone wishing to conduct payment services as a payment institution commercially or on a scale that requires commercially organised business operations needs written authorisation from BaFin. What constitutes payment services is set out in ZAG and comprises the same activities set out in the Payment Services Directive.

Law stated - 28 May 2021

Open banking

Are there any laws or regulations introduced to promote competition that require financial institutions to make customer or product data available to third parties?

No, we are not aware of any such laws or regulations.

Law stated - 28 May 2021

Robo-advice

Describe any specific regulation of robo-advisers or other companies that provide retail customers with automated access to investment products in your jurisdiction.

Robo-advice is any form of customer support on investment decisions by making use of partially or fully automated IT systems. There are several different kinds of automated investment advice platforms that are active in Germany. BaFin has issued guidance on robo-advice, indicating that these services can be qualified as (and regulated as) investment advice, financial portfolio management, acquisition brokerage and investment brokerage (each depending on its individual features), and, thus, offering respective services regularly requires licensing under German banking (eg, KWG and the German Securities Trading Act) and commercial law (eg, GewO). Most offerings currently available on the German market constitute investment advice or financial portfolio management.

In terms of their supervision and regulation, robo-advising businesses are generally subject to the same rules as if such services were rendered 'manually'. Thus, automated investment advice will need to comply with the applicable licensing requirements and conduct of business rules. BaFin's guidance sets out that the provision of robo-advice could fall under a number of regulated services, including investment advice and contract broking. Additionally, providers often offer portfolio management services under the label of robo-advice. Depending on the actual structure of the business, additional conduct of business rules may apply. For example, where the provider uses an advisory model and gives personalised recommendations to its investors, certain documentation obligations apply. In addition, the provider

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may need to determine the suitability and appropriateness of the financial products that it recommends.

Law stated - 28 May 2021

Insurance products

Do fintech companies that sell or market insurance products in your jurisdiction need to be regulated?

Fintech companies selling or marketing insurance products in Germany are likely to be regulated by BaFin if they conduct insurance business in Germany and by the local chamber of industry and commerce if they act as insurance brokers in Germany.

Law stated - 28 May 2021

Credit references

Are there any restrictions on providing credit references or credit information services in your jurisdiction?

Should a credit information service qualify as a credit-rating agency, the rules of the EU Credit Rating Agency Regulation apply.

Law stated - 28 May 2021

CROSS-BORDER REGULATION

Passporting

Can regulated activities be passported into your jurisdiction?

As Germany is a member of the European Union, institutions holding a licence to conduct regulated activities in any EEA country can apply for a 'passport'. The passport is a notification procedure to the home state regulator. Such a passport would enable the licence holder to establish a physical presence in the form of a branch in the host country or to provide services on a cross-border basis without a physical presence. The passport avoids a complete authorisation procedure if a party intends to carry out a regulated activity in another EU country. Not all services can be passported. Crypto-assets custody services and asset management services are, for example, services that are not harmonised and will trigger a licence requirement when carried out in Germany.

Law stated - 28 May 2021

Requirement for a local presence

Can fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

A German financial services licence will only be granted to a fintech company that has established a physical presence in Germany. However, a fintech company with a financial services licence in another EEA country can apply for a passport to Germany and, thus, would be able to provide financial services in Germany through a branch or without a physical presence on a purely cross-border basis.

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Law stated - 28 May 2021

SALES AND MARKETING

Restrictions

What restrictions apply to the sales and marketing of financial services and products in your jurisdiction?

There are various restrictions regarding the sales and marketing of financial services and products in Germany. The marketing of a regulated activity in Germany constitutes a licensable activity and providing those services without the necessary licence constitutes a criminal offence. The marketing of financial instruments is subject to a detailed regulatory framework set out in Directive 2014/65/EU on markets in financial instruments. Providing false or misleading information is generally prohibited. Further rules apply for specific types of financial instruments like investment funds.

Law stated - 28 May 2021

CHANGE OF CONTROL

Notification and consent

Describe any rules relating to notification or consent requirements if a regulated business changes control.

Investors that intend to acquire 10 per cent or more of the capital or the voting rights of a regulated entity are required to file a disclosure as holders of a significant holding. These investors must provide detailed information regarding their background, the origin of their funding, the CVs of relevant persons and the details of their group structure. The Federal Financial Supervisory Authority then generally has 60 days to approve or oppose the acquisition and may make approval subject to certain actions being taken.

In addition, notification requirements under securities trading or stock corporation laws may apply, depending on the legal nature of the target.

Law stated - 28 May 2021

FINANCIAL CRIME

Anti-bribery and anti-money laundering procedures

Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Firstly, a distinction must be made between anti-corruption and bribery (ABC) regulations and rules for combating money laundering (AML).

As taking and giving bribes are criminal offences under the German Criminal Code , only individuals can be held criminally liable. Corporations and legal entities as such can solely be subject to regulatory investigations and sanctions. However, if the individual acts on behalf of a corporate body, the corporation may be subject to additional fines and confiscation of assets gained because of the criminal conduct or forfeiture of other assets. All relevant administrative offences committed in Germany are mainly covered under the provisions of the Act on Regulatory Offences .

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Thus, German regulatory offences law allows legal entities to be fined for bribery offences that have been committed by their legal representatives or by any other senior management employee, the conduct of whom can be associated to the legal entity. Fines of up to €600 million have been imposed for bribery offences in the past.

In contrast to this, all companies in Germany must generally comply with national AML regulations. In addition, where an institution is an obliged entity under the German Money Laundering Act (see section 2), it is under numerous additional obligations (eg, to set up a specific AML compliance system). This means that it is not – as with the ABC regulations – a matter of breach of criminal provisions by natural persons (eg, employees), but that the entity itself may violate the rules under the Money Laundering Act. For this reason, the corresponding sanctions also result directly from the law itself.

There have been some important changes to the Money Laundering Act in the past: on 1 January 2020, the Act was amended to implement the requirements of EU's Fifth Anti-money Laundering Directive. The changes imposed additional obligations, especially for regulated financial services businesses, including fintech companies. Since this date, institutions in the field of crypto-assets (eg, virtual currency exchange platforms and custodian wallet providers) are explicitly included in the group of obliged entities.

Generally, entities subject to German AML laws are, or will be required to, among other things:

- implement preventive policies, controls and procedures;
- identify and assess the firm's exposure to money laundering risk by, for example, undertaking a risk assessment;
- perform customer due diligence to an adequate standard depending on the risk profile of that client;
- keep appropriate records;
- monitor compliance with the anti-money laundering regulations, including internal communication of policies and procedures; and
- report suspicious transactions.

Furthermore, the abovementioned amendment of the Money Laundering Act includes unified, enhanced due diligence requirements for transactions with high-risk countries and extended data access competencies for the Federal Financial Intelligence Unit and law enforcement agencies. In addition, digital companies will be required to provide payment service providers with access to infrastructure services. These include, for example, interfaces for near field communication, which is required for cashless payments by mobile phone at physical points of sale.

Violations of anti-money laundering regulations are administrative offences and will result in fines of up to €5 million or 10 per cent of the institution's total revenue.

According to recent federal jurisdiction plans, fines of up to 10 per cent of a corporation's annual turnover for regulatory offences may be imposed. Furthermore, corporations are to be excluded from public tenders for a term of five years if they have been fined for bribery or if a member of the executive board has been convicted for bribery. At a state level, some German federal states already have adopted an act that allows their authorities to exclude companies from public tenders if the company or its employees are associated with ABC-related behaviour.

In addition, Germany has been debating for years whether companies should be held liable under a kind of criminal law (ie, corporate sanctions law) if its responsible persons commit crimes or regulatory offences. The current federal government is working on such an act and has recently published a first draft. However, this draft will likely be revised a few times before it enters into force.

In summary, despite some differences in the material scope, it is important for fintech companies to adhere to the legal requirements of ABC and AML regulations and to create a corresponding compliance structure. After all, the risk for the company is always the same in the event of infringement as very high fines are threatened.

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Guidance

Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no specific anti-financial crime guidance for fintech companies apart from the general advice that companies should always be compliant with relevant regulations. Therefore, it is essential to have an adequate compliance system in place.

The design of the compliance system and the compliance organisation is fundamentally subject to the business judgement rule as an entrepreneurial decision. The management has to make decisions based on appropriate information, acting for the benefit of the entity. Above all, in terms of compliance, this means analysing the risks to which the company is exposed as part of its business activities and to repeat that continuously and regularly. Based on the risk analysis, the management must make appropriate organisational arrangements for compliance in the company, such as:

- use of increased compliance resources in countries with a high risk of corruption;
- stricter compliance checks on public contracts;
- ongoing due diligence and monitoring;
- ongoing internal training;
- separate rules for dealing with certain occupational groups;
- clear rules; and
- where appropriate, controls for contacts with competitors.

However, institutions that are regulated by the Federal Financial Supervisory Authority, in addition, should comply with all applicable anti-financial crime guidance for the financial sector.

Law stated - 28 May 2021

PEER-TO-PEER AND MARKETPLACE LENDING

Execution and enforceability of loan agreements

What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

There is no special legislation applicable in Germany in relation to peer-to-peer (P2P) lending (ie, the general regulatory and civil law provisions are applicable). A distinction needs to be made between direct and indirect P2P lending.

- In relation to direct P2P lending, the agreement is concluded directly between the investor and the borrower. However, owing to regulatory limitations (ie, licence requirements for lending activity), this structure is not popular in Germany.
- In relation to indirect P2P lending (which is more common in Germany), a cooperating licensed bank is involved. The licensed bank enters into a loan agreement with the borrower. Once the loan agreement between the bank and the borrower has been entered into, the bank assigns under a purchase and assignment agreement its claims under the loan agreement pro rata to the respective investor whereby often an affiliated company (intermediary) of the platform provider is interposed. Thus, there is no direct agreement between the borrower and the investor. The bank cooperates with the platform provider under a cooperation agreement and the platform provider serves

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as loan broker under a loan brokerage agreement with the borrower. For the loan brokerage, the platform provider needs permission according to the German Industrial Code. Further, the platform provider must not receive monies that are determined to have been forwarded, otherwise a payment services licence could be required. Generally, care should be taken in the documentation that the purchase of claims does not qualify as factoring, that the money laundering requirements have been complied with and that the borrower consents to the transfer of the borrower's personal data to the investors.

With regard to loan agreements with consumers, consumer protection laws need to be taken into account (ie, special information and form requirements as well as revocation rights are applicable). If consumer information undertakings are not complied with, this can give rise to damage claims by the borrower; if the form requirements are not complied with, the loan agreement can be void; or if the consumer has not been instructed correctly on his or her revocation rights, the loan can become revocable for an indefinite period. With regard to formal requirements for the execution of the loan and security agreements, written form is required; electronic form is permitted as well, except for in the case of certain security documents where a notarisation by a German notary is required (eg, land charge deeds, which include an immediate enforcement clause or share pledge agreements, which relate to the pledge of shares in a German limited liability company).

Law stated - 28 May 2021

Assignment of loans

What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected? Is it possible to assign these loans without informing the borrower?

An assignment agreement would need to be concluded in relation to the assignment of the loan claims; there are no further perfection requirements and the borrower's consent is not required. The assignment is also valid if it is not being disclosed to the borrowers. In the case of a transfer of rights and obligations under a loan agreement (ie, transfer of the whole contractual relationship) to a new lender of record, the borrower (as both debtor and creditor of the transferred rights and obligations) would need to consent to the transfer. Usually, the loan documentation would include provisions requiring the prior consent of the borrower to such a transfer. In the case of an assignment of rights under a loan agreement, an assignment is generally possible without the consent of the borrower. If an assignment of the rights under a loan agreement was explicitly excluded by a borrower in the loan documentation, the assignment would be void. However, in the case of the indirect P2P lending structure, the loan documentation should already include the prior consent of the borrower to transfer the rights and obligations under the loan agreement to the investor (or intermediary, as the case may be).

Law stated - 28 May 2021

Securitisation risk retention requirements

Are securitisation transactions subject to risk retention requirements?

Regulation (EU) 2017/2402 provides for the general securitisation framework, including rules regarding risk retention. Under this framework, the originator, sponsor or original lender of a securitisation must retain a material net economic interest in the securitisation of not less than 5 per cent. However, if securitisation is achieved via an intermediary single purpose company, this entity will no longer be allowed to retain risk as the originator. Rather, this may only be done by an originator with a broader business purpose, the sponsor or the original lender. The required entity must possess

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sufficient substance to hold the assets for a minimum period of time before they are securitised. Furthermore, assets to be securitised must not be selected with the aim of rendering the losses on such assets higher than the losses on comparable assets remaining on the balance sheet of the originator without disclosing this accordingly to investors.

Law stated - 28 May 2021

Securitisation confidentiality and data protection requirements

Is a special purpose company used to purchase and securitise peer-to-peer or marketplace loans subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Yes, the special purpose company would be subject to data protection laws regarding information relating to the borrowers. However, in the case of the indirect P2P lending structure, the loan documentation should already include the consent of the borrower to share its information with the special purpose company.

Law stated - 28 May 2021

ARTIFICIAL INTELLIGENCE, DISTRIBUTED LEDGER TECHNOLOGY AND CRYPTO-ASSETS

Artificial intelligence

Are there rules or regulations governing the use of artificial intelligence, including in relation to robo-advice?

In Germany, the Federal Financial Supervisory Authority (BaFin) has actively addressed these regulatory aspects in the past; however, currently this is an ongoing process. Starting in 2018, BaFin conducted a comprehensive study on the challenges and implications for supervision and regulation of AI-based and big data-based services, concluding that proliferation of these technologies will increasingly challenge current regulatory frameworks. Besides ascertaining the need to adapt the supervisory framework accordingly, regulated companies remain accountable for regulatory compliance in AI-based and big data-based products. While management boards remain fully accountable for any results automatically produced or used within their company (section 25a German Banking Act (KWG)), these results must also remain transparent and explainable to ensure persisting human control. Thus, BaFin considers the use of 'black-box' algorithms an indicator of dysfunctional (unlawful) business organisation. In addition, the accurateness and reliability of AI-based and big data-based products must be ensured. This, again, requires robust data quality, thorough testing and continuous supervision of algorithmic decision models, as well as technical safeguards against maldevelopment (eg, automated shutdown procedures).

Since late 2019, there has been increasing demand by various stakeholders in the German financial market for BaFin to engage in authorising the use of algorithms for automated decision-making. To date, this request remains unheard. BaFin announced that, apart from existing authorisation of individual scenarios (eg, article 142 et seqq and 362 et seqq EU Capital Requirements Regulation; high-frequency trading), there is no legal basis for requiring or granting such authorisation on a general basis.

Robo-advice is any form of customer support on investment decisions by making use of partially or fully automated IT systems. There are several different kinds of automated investment advice platforms that are active in Germany. BaFin has issued guidance on robo-advice, indicating that these services can be qualified as (and regulated as) investment advice, financial portfolio management, acquisition brokerage and investment brokerage (each depending on its individual features), and, thus, offering respective services regularly requires licensing under German banking (eg, KWG and the German Securities Trading Act) and commercial law (eg, the German Industrial Code). Most offerings currently available on the German market constitute investment advice or financial portfolio management.

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In terms of their supervision and regulation, robo-advising businesses are generally subject to the same rules as if such service was rendered 'manually'. Thus, automated investment advice will need to comply with the applicable licensing requirements and conduct of business rules. BaFin's guidance sets out that the provision of robo-advice could fall under a number of regulated services, including investment advice and contract broking. Additionally, providers often offer portfolio management services under the label of robo-advice. Depending on the actual structure of the business, additional conduct of business rules may apply. For example, where the provider uses an advisory model and gives personalised recommendations to its investors, certain documentation obligations apply. In addition, the provider may need to determine the suitability and appropriateness of the financial products that it recommends.

Law stated - 28 May 2021

Distributed ledger technology

Are there rules or regulations governing the use of distributed ledger technology or blockchains?

No, there is no single regulation specifically addressing distributed ledger technology (DLT). However, use cases deploying DLT or blockchain technology in regulated markets (eg, securities markets) must comply with the existing legal framework applicable to the specific service and its providers. European requirements such as the European Market Infrastructure Regulation (EU) No 648/2012 (EMIR), the Markets in Financial Instruments Regulation (EU) No 600/2014 (MiFIR), the Central Securities Depositaries Regulation (EU) No 909/2014, the Markets in Financial Instruments Directive II 2014/65/ EU, the Alternative Investment Fund Managers Directive 2011/61/EU and the Securities Financing Transactions Regulation (EU) 2015/2365 as well as the national implementation thereto must be regarded. For instance, a use case involving the clearing of assets by deploying DLT would have to fulfil the requirements of EMIR and MiFIR regarding authorisation and regulated entities. BaFin has the power to prohibit unauthorised businesses. In addition, smart contracts and initial coin offerings (ICOs) are currently under close scrutiny by the supervisory authorities.

BaFin issued a consumer warning with regards to risks associated with ICOs on 15 November 2017. Specific risks identified by BaFin include the significant price fluctuations of tokens and, in many cases, a lack of information regarding ICO providers making ICO businesses prone to the risk of fraud, money laundering and the financing of terrorism. BaFin also published an advisory letter to the classification of tokens on 20 February 2018. The key aspect of this letter is that BaFin will assess on a case-by-case basis whether a token constitutes a financial instrument, a security or a capital investment. The supervisory classification of a token determines the applicability of the existing legal framework, the services and products associated with the tokens. Depending on the classification of tokens, several legislative acts apply including, among others, the WpHG, the German Securities Prospectus Act, the German Capital Investment Act, the German Capital Investment Code and the KWG. Further, at the beginning of 2020 crypto-custody business was added to the list of licensable activities.

Law stated - 28 May 2021

Crypto-assets

Are there rules or regulations governing the use of crypto-assets, including digital currencies, digital wallets and e-money?

Yes. BaFin treats bitcoin and other crypto-tokens as a financial instrument in the form of 'units of account'. These units of account are similar to foreign currencies and are not legal tender. Bitcoin is neither central bank money nor e-money under German law: it is not central money because it is not issued by the central bank, and it is not e-money because it is not issued by an issuer against whom a claim can be established. The distribution of bitcoin requires authorisation by BaFin if the distribution is performed on a commercial basis or requires a commercially organised business

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operation. If virtual currencies are bought and sold for third parties, this could be classified as 'proprietary trading' under the German Banking Act, depending on the specific arrangements deployed, which requires a BaFin authorisation as well. In addition, e-money institutions must be authorised and subject to supervision by BaFin. Offering digital wallets online may require BaFin authorisation depending on the tokens and the wallet services being provided. BaFin has the power to prohibit any unauthorised business activities with immediate effect.

At the beginning of 2020, crypto-custody business was added to the list of licensable activities. Crypto-custody business is defined as the safekeeping, administration and storage of crypto-assets or private cryptographic keys used to hold, store and transfer crypto-assets for others (crypto-assets custody services).

Law stated - 28 May 2021

Digital currency exchanges

Are there rules or regulations governing the operation of digital currency exchanges or brokerages?

There is no special legal regime for digital currency exchanges or brokerages in Germany. The German regulator assesses activities in the context of cryptocurrencies or tokens on a case-by-case basis. It has been BaFin's administrative practice for several years now to view bitcoin and similar cryptocurrencies as financial instruments in the form of units of account. Consequently, the rules for dealings with financial instruments apply. In a guidance note dated 20 February 2018, BaFin states that the mining of cryptocurrencies and the sale of the mined tokens are, in principle, licence-free in Germany. However, persons who, for example, buy and sell cryptocurrencies in their own name and for the account of others on a commercial scale are likely to conduct the licensable business of financial brokerage. Further, operating a digital currency exchange could qualify as operating a multilateral trading facility. Additionally, operators of mining pools may be carrying on licensable activities.

Law stated - 28 May 2021

Initial coin offerings

Are there rules or regulations governing initial coin offerings (ICOs) or token generation events?

BaFin is of the view that each initial coin offering has to be judged on a case-by-case basis, applying the existing legal framework. First, BaFin categorises the token to be issued and then, depending on the legal nature of the token (security token, utility token, payment token, etc), applies the applicable legal framework. The consequence of this approach is that, for example, a securities prospectus would be required for the issuance of securities tokens and a payment services licence would be required for the issuance of payment tokens.

There is, however, no special legal regime for token-generating events yet. Discussions between the legislature and the respective stakeholders, including the Federal Ministry of Finance and BaFin, are ongoing with a view to evaluating the need for special legislation and its potential scope.

Law stated - 28 May 2021

DATA PROTECTION AND CYBERSECURITY

Data protection

What rules and regulations govern the processing and transfer (domestic and cross-border) of data relating to fintech products and services?

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On 25 May 2018, the EU General Data Regulation (GDPR) came into force with direct effect across the EU. The GDPR governs the storage, viewing, use of, manipulation and other processing by businesses of data that relates to a living individual. In summary, the GDPR requires that businesses only process personal data where that processing is done in a lawful, fair and transparent manner, as further described in the GDPR.

The GDPR requires that any processing of personal data be done pursuant to one of six lawful bases for processing. The most commonly used lawful basis for processing is to obtain the consent of the data subject to that processing – in relying on this lawful basis, the business must ensure that the consent is freely given, specific, informed and unambiguous, and capable of being withdrawn as easily as it is given. This places a significant burden on businesses to ensure that their customers are fully informed as to what their personal data is being used for, which is a crucial change to the previous regime under which disclosure did not need to be so transparent. Other lawful bases for processing data include where that processing is necessary for the business to perform a contract it has with the data subject, or where required to comply with an obligation the business has at law (not a contractual obligation).

The GDPR further differs from the previous regime in that it places a significantly increased compliance burden on businesses, including, for example, mandatory requirements to notify regulators of data breaches, obligations to keep detailed records on processing, and requirements for most entities to appoint a data protection officer.

The GDPR does not apply to personal data that has been truly anonymised – as anonymised data cannot, by definition, be personal data. However, to ensure that GDPR does not apply to a certain data set, that data set must be truly anonymised. The GDPR itself gives limited guidance on anonymisation in Recital 26, requiring data controllers to consider a number of factors in deciding if personal data has been truly anonymised, including the costs and time required to de-anonymise, the technology available at the time to attempt de-anonymisation and further developments in technology.

When it comes to international data transfers, a two-step test must be carried out. First, the legitimacy of an international data transfer has the same requirements as a national data transfer. An international data transfer can only be legitimate if an analogous transfer within Germany was legitimate. Second, an international data transfer is only legitimate if the country to which data is to be transferred provides for reasonable data protection legislation. The transfer of data to other members of the EEA is permitted because those countries provide for an adequate level of data protection. In the case of a data transfer to a country outside the EEA, it must be ensured that the country of destination also provides for an adequate level of protection. With regard to certain jurisdictions, the European Commission has provided decisions on the adequacy of data protection. Another way of ensuring that adequate safeguards are provided is the use of one of the model contracts approved by the European Commission (standard contractual clauses (SCCs)). To date, the European Commission has already approved different types of model contracts. In addition, there is theoretically another solution that renders an assessment of the second step (legality of a data transfer to an entity in a country without an adequate level of data protection) unnecessary, namely corporate binding rules (CBRs). CBRs are codes of conduct and a set of rules a company can draft to allow data transfer outside the EEA and to overcome some practical problems with SCCs. From an EU perspective, the United States does not provide for adequate protection of personal data. For this reason, the European Commission has adopted a special decision in respect of the US: an adequate level of protection will be deemed to apply for those organisations that have registered under the EU–US Privacy Shield. However, financial institutions cannot register under the Privacy Shield.

Businesses that infringe the GDPR may be subject to administrative fines of an amount up to €20 million or 4 per cent of global turnover, whichever is higher.

In Germany, a new Federal Data Protection Act (BDSG) came into force at the same time as the GDPR. The BDSG makes use of opening clauses, such as for the processing of personal data in the context of employment and for the appointment of data protection officers. The oversight of GDPR, including compliance and enforcement, is carried out in Germany by 16 data protection supervisory authorities (one supervisory authority based in each federal state).

German data protection authorities have not issued any specific guidance for fintech companies.

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Cybersecurity

What cybersecurity regulations or standards apply to fintech businesses?

'Fintech' here is understood as technology-enabled innovation in financial services often resulting in new business models, applications, processes or products each materially affecting the traditional provision of financial services. Owing to the technology-neutral regulation of financial markets in Germany, there are no cybersecurity standards specifically addressing fintech companies.

The Federal Financial Supervisory Authority's (BaFin) standards on cybersecurity reflect the traditional demarcations of regulatory frameworks in Germany: the German Banking Act (ie, BaFin Circular 10/2017 on Banking Supervisory Requirements for IT), the Insurance Supervision Act (ie, BaFin Circular 10/2018 on Insurance Supervisory Requirements for IT) and German Capital Investment Code (ie, BaFin Circular 11/2019 on Capital Management Supervisory Requirements for IT).

According to BaFin, compliance with its sector-specific standards on IT security and cybersecurity does not relieve any regulated entity from complying with other (general) standards in this field. For Germany, this namely refers to standards issued by the Federal Office for Information Security (BSI), including the IT-Basic Protection Compendium , the Standards 200-1 to 200-3 (security and risk management), the Technical Guidelines and, particularly relevant, the standards on certain aspects of cybersecurity. Fintech businesses must also comply with IT and data security requirements stipulated in other applicable laws (such as the GDPR).

Certain stakeholders on the financial markets are, thus, also regulated as operators of a critical infrastructure or digital service, or both, under the German IT Security Act (IT-SiG). Briefly, any facility or installation (or parts thereof) in the finance and insurance sectors is considered a critical infrastructure if their failure or impairment would lead to considerable supply bottlenecks or threats to public safety. Digital services are electronically provided services relating to online marketplaces, search engines and cloud-computing applications; these are likewise regulated if they qualify as 'critical' in the aforesaid meaning and provide the public with finance or insurance products. Specific guidance on identifying critical infrastructure and services in practice is provided in form of legislative decrees of the German Federal Ministry of the Interior. Operators of critical infrastructure are, inter alia, obliged to take appropriate organisational and technical precautions to avoid disruptions to the availability, integrity, authenticity and confidentiality of their IT systems, components or processes, as far as these are essential for the functionality of their critical infrastructure (see section 8a, paragraph 1 BSI Act). The same accounts for critical service providers in terms of IT security and network security (see section 8c BSI Act). As detailed by the BSI, both obligations require regulated entities to implement various measures to ensure network security.

BaFin is conducting regular checks relating to the IT infrastructure of regulated entities. These aspects are likewise covered in audits performed by data protection supervisory authorities. Resulting from latest amendments of the IT-SiG, BSI is furnished with information and audit rights. Furthermore, fintech businesses must comply with the IT security requirements that are stipulated in any other applicable law, such as the GDPR.

Law stated - 28 May 2021

OUTSOURCING AND CLOUD COMPUTING

Outsourcing

Are there legal requirements or regulatory guidance with respect to the outsourcing by a financial services company of a material aspect of its business?

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There is a legal regime for outsourcing by financial services companies. Section 25b of the German Banking Act (KWG) sets the framework and the Federal Financial Supervisory Authority's (BaFin) publication 'Minimum Requirements for Risk Management' (MaRisk) further details the requirements for outsourcing in chapter AT9. Further, BaFin indicates that the 'Guidelines on Outsourcing' published by the Committee of European Banking Supervisors and European Banking Authority are also relevant for BaFin's administrative practice.

In broad terms, it can be said that the outsourcer needs to ensure that its risk profile does not change owing to the outsourcing and that the outsourced services must be in compliance with the applicable legal requirements. The outsourcing of services must not lead to outsourcing of the management's responsibilities and the regulator must not be hindered in its supervisory activities owing to the outsourcing. Further, the outsourcing agreement must meet certain criteria, if material parts of the business are outsourced. Controlling and audit functions may only be outsourced to an extent that it does not bias the capability of the outsourcing entity to monitor, understand and manage the risks it incurs during its business operations.

Law stated - 28 May 2021

Cloud computing

Are there legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

Sections 25a paragraph 1 and 25b KWG stipulate specific legal requirements relating to IT outsourcing and, as such, cloud computing in the financial services industry. Regulatory guidance is given in this context by MaRisk. According to MaRisk, any material outsourcing requires an outsourcing agreement in writing that fulfils minimum requirements, such as stipulating audit rights (in favour of the financial services provider as well as the supervisory authority), data protection and exit management. New guidance on the 'Bank regulatory requirements relating to IT' was published by BaFin. This guidance specifies MaRisk requirements relating to IT risk and information security management as well as the concrete IT operation, and, therefore, is also relevant to cloud computing in the financial services industry.

Law stated - 28 May 2021

INTELLECTUAL PROPERTY RIGHTS

IP protection for software

Which intellectual property rights are available to protect software, and how do you obtain those rights?

According to German copyright law, computer programs shall be protected if they represent individual works in the sense that they are the result of the author's own intellectual creation. No other criteria, especially qualitative or aesthetic criteria, shall be applied. The protection granted shall apply to the expression in any form of a computer program. Ideas and principles underlying any element of a computer program, including the ideas and principles underlying its interfaces, shall not be protected. A copyrightable work is protected as of the moment of creation, so no further administrative measures are needed. The German Act on Copyright and Related Rights comprises specific stipulations concerning various uses of software, including decompilation and rearrangement of software. While software as such is not patent-protectable, computer-implemented inventions may be if they show a technical effect.

Business methods and software as such are not patent-eligible; both the German Patent Act and the European Patent Convention say so explicitly. However, for practical purposes the patent eligibility of software very much depends on the claim drafting: if the invention can be presented as having a technical effect, patent protection may be available. The case law of both the Federal Court of Justice and the EPO Boards of Appeal provide useful guidance in this respect.

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IP developed by employees and contractors

Who owns new intellectual property developed by an employee during the course of employment? Do the same rules apply to new intellectual property developed by contractors or consultants?

In Germany, intellectual property generated by an employee will, generally, not automatically become the gratuitous property of the employer as in most other jurisdictions. Rather, the German Act on Employees' Inventions provides a complex system according to which the employer merely has a right to claim an employee invention. In this case, the employer must pay a certain amount, which is calculated in a complex manner based on a number of factors and parameters.

These rules do not apply to independent contractors or consultants. If the intellectual property is based on true cooperation, this can lead to complex legal situations, including the factual foundation of a private partnership. Accordingly, any such potential issues should be dealt with in a contract, clearly allocating the rights and obligations of all parties arising under such a cooperation or R&D project.

With respect to software developed by an employee, the German Act on Copyright and Related Rights contains a different set of rules. Generally, the employer will automatically gain the exclusive usage rights on software developed during employment. Only the German equivalent to moral rights will remain with the creator of such software.

Law stated - 28 May 2021

Joint ownership

Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Subject to contractual stipulations, co-ownership of inventions and patents as well as other intellectual property rights is considered a simple company-like structure (Gemeinschaft). This legal form is dealt with in the German Civil Code , though only in rudimentary form. Each owner may use the invention (as a rule, without having to pay a licence fee to the others) or may sell its share in the invention. However, a licence may only be granted with the consent of all co-owners. Each co-owner can request that the Gemeinschaft be dissolved, which typically happens by way of selling the intellectual property asset. This is one reason why co-owners should devise a contract early on rather than relying on statutory rights.

In addition, the German trade secret law, unlike patent and copyright law, does not regulate the legal relationship between joint owners and can, therefore, cause difficulties if no contractual provisions are established.

Law stated - 28 May 2021

Trade secrets

How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Germany implemented the Trade Secrets Directive (EU) 2016/943 on 26 April 2019 with the civil law on the protection of trade secrets (ie, the German Trade Secrets Act), which first and foremost protects trade secrets. Trade secrets are also protected under criminal law as well as through general civil law , civil procedure law and unfair competition law (against general passing-off). Contracting parties are also free to protect individually defined trade secrets.

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The German Trade Secrets Act protects information that meets all the following requirements:

- it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- it has commercial value because it is secret; and
- it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

The most debated requirement is the trade secret measures implemented by the trade secret owner. The adequacy of the measures depends on the company and the usual confidentiality measures, the value and nature of the trade secret in detail as well as the specific circumstances of its use. Physical access restrictions and precautions as well as contractual security mechanisms should be considered.

The law protects trade secrets against direct unlawful attainment, use and disclosure, as well as against indirect infringement, but generally not against reverse engineering. In the event of an unlawful action, the owner of a trade secret generally has the same legal remedies available to him or her as would be the case for other intellectual property (ie, cease and desist, destruction, disclosure, damages). A special feature of the German Trade Secrets Act is a specific right to information about infringing products. Thus, it can prove a powerful tool to protect confidential information when other intellectual property rights might not be applicable.

However, the German Trade Secrets Act does not provide protection against reverse engineering. Rather, it is generally permitted if the product or article has been made publicly available or if it is in the lawful possession of the party who observes, tests, examines or dismantles it and is not subject to any (contractual) prohibition from obtaining the trade secret.

The German Trade Secrets Act does not contain any provision as regards former employees in relation to the protection of trade secrets. Therefore, contractual provisions are advisable. Nevertheless, they must be carefully worded in order to be effective and not unduly limit employees' basic rights under the German Constitution.

As for the protection of trade secrets in court proceedings, the German Trade Secrets Act stipulates special regulations that apply to trade secret litigation proceedings only and prevails through execution proceedings. At the request of a party, contentious information can be fully or partly classified as a trade secret. Parties to the proceedings and individuals with access to procedural documents can neither use nor disclose trade secrets. There is no in-camera proceeding, but the number of individuals gaining access to procedural documents can be limited to one natural person from each party and their respective litigant or legal representative. In such a case the public would be excluded from the hearing when and as long as such information is discussed. The court may, at the request of one of the parties, impose a fine of up to €100,000 or imprisonment for up to six months for failure to comply with the obligations. The German Courts Constitution Act can also be applied as it contains, inter alia, a confidentiality obligation subject to criminal prosecution for the hearing itself.

After the proceedings it is relevant to know that the prevailing party can request to (partly) publish the decision when it is legally binding and cannot be subject to appeals anymore.

As it is at the discretion of the court to decide which orders are necessary for adequate protection during legal proceedings, it remains to be seen how the still relatively new German Trade Secrets Act is enforced in practice. In any event, care must be taken to ensure that trade secrets are, firstly, categorised and documented as such and, secondly, kept secret by adequate trade secret measures so that confidential treatment is ensured and accidental disclosure is avoided.

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Branding

What intellectual property rights are available to protect branding and how do you obtain those rights? How can fintech businesses ensure they do not infringe existing brands?

The most obvious way to protect branding under German law would be to register either a German trademark or a European trademark. Furthermore, some similar rights also exist, for example, for designs, as well as to some extent usage rights and name rights specifically for a company's trade name.

Before entering a market with a designation (importantly including a trade or company name), each new market entrant should conduct due diligence on its brand. As a first step, this would include an internet search for identical designations. In a second step, the trademark registers and possibly commercial registers should be reviewed with regard to the designation, at the very least as far as identical applications are concerned. This can be done in-house but also via experienced search companies and law firms.

Law stated - 28 May 2021

Remedies for infringement of IP

What remedies are available to individuals or companies whose intellectual property rights have been infringed?

There are various measures against infringements of intellectual property rights. The main goal of any action, including by way of preliminary injunction, is to stop the infringer from continuing to infringe. An injunction or preliminary injunction will achieve this aim. Apart from this, all the established intellectual property remedies are available, including claims for damages (computed by lost profits, infringer's profits or licence analogy) and for rendering account.

Law stated - 28 May 2021

COMPETITION

Sector-specific issues

Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction?

Fintech companies and the fintech sector are subject to the general competition law rules in Germany. There are no specific rules in competition law targeting the fintech sector. This means that the provisions prohibiting cartels, abuse of dominance and the merger control rules, and the general principles developed in other industries, are applied.

In January 2021, the German Act against Restraints of Competition saw a major overhaul that introduced new tools to apply competition law in digital markets. The amendment focuses on rules for Big Tech companies, and therefore amends rules for abusive behaviour of strong market players primarily directed at the 'GAFAs' (Google, Amazon, Facebook, Apple). However, depending on the market definition, this also applies to niche markets. The German Federal Cartel Office (FCO) has the ability to intervene at an early stage and can introduce preventive measures against strong companies in strategic positions, such as the operation of platforms, including the prohibition of self-preference of own services or impeding third companies from entering the market by processing data relevant for competition. There are additional rules for relative or superior market power where a 'dependent' company can claim access to data from a company in a strong market position, which must be granted in return for adequate compensation even if such data is not otherwise marketed.

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Together with the new rules on abuse of a dominant market position, the rules on merger control were updated and the national filing thresholds have been increased. Transactions are now subject to merger control if:

- the parties to the transaction achieved a combined worldwide turnover of more than €500 million;
- one of the companies concerned achieved an annual turnover of at least €50 million (previously €25 million) in Germany; and
- if another company achieved an annual turnover amounting to at least €17.5 million (previously €5 million) in Germany.

Germany has an additional merger control threshold based on the value of the consideration, which remains in place. Transactions must be notified in Germany if the parties to the transaction achieved a combined worldwide turnover of more than €500 million; one company concerned had turnover of more than €50 million in Germany but one of the other companies concerned, including the target, did not achieve a turnover of more than €17.5 million in Germany and the consideration is more than €400 million and the target has been active in Germany to a significant extent. This threshold is intended to also catch highly valued start-up fintech companies if the target company did not have high turnover levels. However, the overall increase of the thresholds will mean that fewer transactions are subject to merger control proceedings.

The financial sector has also seen enforcement actions. The FCO used its competition law powers in relation to payment services. The FCO found provisions in general banking terms and conditions introduced by the banking association that prevented customers from using their personal identification numbers and account number in independent online payment procedures to infringe competition law in order to cause revisions to these general terms and also enhance new (technological) developments. This decision was upheld by the Federal Supreme Court in 2020, ruling that the restrictions on third-party payment providers were an unlawful restriction on competition. The immediate effect of the judgment is limited as the revised Payment Services Directive (Directive (EU) 2015/2366) (PSD2) requires banks to grant online financial service providers (fintech companies) access to payment and account information if the customer allows it. However, some commentators think that the judgment heralds a broader payment service liberalisation as its reasoning can be applied to other services such as savings, investment and insurance accounts.

The FCO reviewed plans of Deutsche Kreditwirtschaft to set up a joint payment system for all payment channels and decided not to raise objections for the first stage of implementation. The project, named 'Xpay' or 'DK' shall combine the current e-commerce payment methods 'paydirekt' and 'giropay' as well as the customer-to-customer payment system Kwitt into one system. The aim of the initiative is to offer a standard product covering various payment channels in brick-and-mortar retail (point of sale), online sales (e-commerce) and payments between private persons via apps (P2P payments). Despite concerning a highly contested market, the FCO indicated that the project will continue to be under review and more details need to be submitted for future implementation steps regarding the framework conditions for the cooperation under corporate law, the structure of price negotiations or general terms and conditions on the use of the system.

One issue that has arisen across sectors is the assessment of digital pricing tools, especially in the form of pricing algorithms, which are able to observe and evaluate a large amount of market-relevant information from competitors, customers and suppliers as well as other market conditions, thus enabling their users to react quickly with solutions adapted to each individual case to these observations (dynamic algorithm pricing). A potential competition concern that has been voiced is that pricing software may help to implement and increase the reliability of cartel agreements or that pricing software can implement hub-and-spoke practices. This topic remains on the agenda of the FCO as well as other authorities. For example, the FCO is currently investigating Amazon to what extent Amazon is influencing the pricing of sellers on Amazon Marketplace by means of price control mechanisms and algorithms.

In the merger space, the FCO cleared the acquisition of ControlExpert by Allianz after an in-depth review. ControlExpert

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provides vehicle insurance providers, leasing companies and fleet operators with automated IT-based services to settle motor vehicle damages. In light of ControlExpert's strong market position, the FCO nevertheless examined whether its range of services would become indispensable for other vehicle insurance providers as a result of the transaction and whether, as a consequence, ControlExpert's competitors would have to expect a significant loss of customers. The FCO found that a number of competitors with strong innovative power will remain in the market and are able to offer comparable services even after the Allianz has entered the market. Competitors are also increasingly using artificial intelligence to automate the process of settling car insurance claims. In such a market environment, sufficient competition is ensured also in the future and the transaction could be cleared.

The value of the consideration test has been applied to the acquisition of Honey Science Corporation by PayPal Inc. The FCO found that the transaction was notifiable as Honey Science Corporation had a significant local activity owing to its active user base despite not having turnover in excess of the then applicable threshold of €5 million. Ultimately, the transaction was cleared as the FCO found no competition concern. In particular, in relation to online payment services, various operators such as Klarna, Google Pay and Apple Pay are active on the market.

Section 57 of the Act on the Supervision of Payment Services , which is based on section 35 of PSD2, provides for a specific legal instrument similar to competition law that requires payment systems not to impose on payment service providers, payment service users or other payment systems any of the following: restrictive rules on the effective participation in other payment systems; rules that discriminate between authorised payment service providers or between registered payment service providers in relation to the rights, obligations and entitlements of participants; or restrictions on the basis of institutional status.

Lastly, the German Federal Government revised its foreign direct investment regime several times in reaction to the covid-19 outbreak. However the overall investment regime has been amended, which applies to a variety of sectors. One particular issue is that the acquisition of companies operating a 'critical infrastructure' or a 'critical technology' is subject to a notification requirement. Acquisitions of fintech companies may become subject to a notification requirement and foreign investment if they have certain artificial intelligence capabilities or if they meet the thresholds laid down in the regulation on critical infrastructure as regards payment systems.

Law stated - 28 May 2021

TAX

Incentives

Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

Since 1 January 2020, research and development activities are supported by a tax-exempt research and development allowance that will be available for all companies regardless of their size and business purposes, provided they are subject to German income tax. According to this law, in general, research and development projects are supported to the extent they can be assigned to the categories:

- basic research;
- industrial research; or
- experimental development.

According to the official reasoning of this law, the administrative practices of the European Commission regarding the European General Block Exemption Regulation as well as the Frascati Manual of the Organisation for Economic

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Cooperation and Development have to be considered when describing these terms.

The assessment basis for the allowance is the eligible expenses. Eligible expenses are labour costs for employees and the employer's expenditure to secure the employee's future who is entrusted with this research and development projects, including expenses for services rendered by a shareholder on the basis of an employment agreement that are subject to wage withholding tax. Furthermore, eligible expenses are also personal contributions of an individual entrepreneur regarding these research and development projects. In this case, each labour hour is valued at €40 up to a maximum of 40 hours per week.

The assessment basis for the allowance are the eligible expenses. However, the assessment basis for the allowance is capped at €2 million. The research and development allowance would be 25 per cent of this assessment basis (ie, the maximum allowance is capped at €500,000 per annum). For contract research for contractors established in the EU or an EEA State, 60 per cent of the remuneration paid to the contractor is taken into account. The amount of state aid granted for a research and development project, including research allowances under this law, must not exceed €15 million per enterprise and research and development project. The allowance shall be granted on application. The application must be accompanied by an official certificate stating that research and development projects are eligible in the meaning of this law. The research and development allowance is not paid out immediately after it has been determined, but is taken into account in the next income or corporate income tax assessment by offsetting it against the determined income or corporate income tax. If the research allowance exceeds the established income or corporate income tax, the excess amount will be paid out.

Apart from this, there has, until now, been no specific tax incentives available regarding the fintech environment. However, the following should be noted.

- The German Income Tax Act allows small and medium-sized businesses (ie, taxpayers with profits of not more than €200,000 (before considering an investment deduction amount according to section 7g (1) sentence 1 German Income Tax Act) to deduct up to 50 per cent of the anticipated costs for future acquisitions or productions of depreciable movable fixed assets from their taxable income up to three fiscal periods before the capital asset is actually purchased. The maximum investment deduction amount is €200,000.
- Furthermore, the German Corporate Income Tax Act, in principle, foresees that the transfer of more than 50 per cent of the shares in a German company results in an entire forfeiture of tax loss carry forwards. However, tax loss carry forwards (as well as interest carry forwards) will not be forfeited in the event of a transfer of shares beyond these thresholds if the business operation is maintained unchanged by the seller since the establishment of the company (or at least from the beginning of the third fiscal period preceding the year of the transfer) and also by the acquirer until the end of the transfer year. Even though companies in all industries are entitled to benefit from such rule according to the official reasoning of the law, this rule should serve in particular to increase the chances of IT start-ups attracting capital.

Law stated - 28 May 2021

Increased tax burden

Are there any new or proposed tax laws or guidance that could significantly increase tax or administrative costs for fintech companies in your jurisdiction?

No.

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IMMIGRATION

Sector-specific schemes

What immigration schemes are available for fintech businesses to recruit skilled staff from abroad? Are there any special regimes specific to the technology or financial sectors?

Citizens of the European Union and the European Economic Area have unrestricted access to the German labour market. Swiss nationals also enjoy free movement within the EU but must apply for a special declaratory Swiss residence permit.

Third-country nationals who wish to work in Germany need a residence permit that includes a work permit. There are no specific immigration schemes for fintech businesses.

However, special regulations for highly qualified employees and job positions in 'shortage occupations' apply.

A privileged residence permit exists for highly qualified persons: the EU Blue Card. The EU Blue Card is limited to a maximum term of four years when issued for the first time. Third-country nationals who are entitled to hold an EU Blue Card can obtain a national visa for an entry in advance at the relevant German diplomatic mission. This visa will be replaced by an EU Blue Card after entry by the relevant immigration authority.

To obtain an EU Blue Card, no priority examination (no preferential workers available for the job) and no examination of working conditions are necessary (which would normally be required). The applicant needs to provide evidence of his or her qualifications, meet the labour market requirements in Germany and provide a German employment agreement with a German employer. In general, a university degree from a German university, a recognised degree from a foreign university or at least a foreign university degree comparable to a German university degree is required. A minimum salary of €56,800 gross per year (for 2021; the threshold differs annually) is required. For shortage occupations, the minimum annual gross salary is €44,304 (for 2021). Shortage occupations are, inter alia, natural scientists, mathematicians, architects, engineers, engineering scientists and academic specialists in information and communication technology. If those requirements are met, no approval of the employment agency is necessary.

In all other cases, the approval of the Federal Employment Agency is required, which will examine if any German employee of equal status is available for employment. If this is the case, the job position must be offered to a German employee and the residence permit is denied.

After a residence of 33 months in Germany, holders of a EU Blue Card can apply for an indefinite settlement permit. If sufficient knowledge of the German language can be proven (at least level B1), an indefinite settlement permit can already be applied for after 21 months of residence in Germany.

On 1 March 2020, a new law concerning the immigration of skilled workers came into force. This law aims to provide easier access to the German labour market for qualified workers from non-EU countries. By definition of the law, skilled workers are university graduates as well as qualified workers from non-member-countries outside of the EU. IT professionals who can demonstrate at least three years of professional experience do not need a formal vocational qualification. As of 1 March, all skilled workers are on equal footing with university graduates. It is now also irrelevant whether Germans or EU citizens are available for the vacant position. This was only applicable for 'shortage professions' in the past.

In comparison to the EU blue card, the new law specifies that an employment contract does not have to be issued upon arrival. Instead, one can apply for a visa for up to six months to seek a job according to one's qualifications, provided that one's foreign qualifications have been recognised.

For applicants without a university degree who have completed professional training, a temporary residence permit can be applied for if the applicant gets a job in a shortage occupation. This applies for job positions as an expert in IT system analysis, IT sales and an expert in software development and programming. The applicant must provide a

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specific job offer, which corresponds to his or her completed training, a German qualification or a qualification recognised as equivalent, a completed professional training (of at least two years) and a labour market examination that is less comprehensive than the Federal Employment Agency. A priority examination is not required.

After five years of holding a preliminary residence permit, it is possible to obtain an indefinite residence permit. Proof is required that the living costs can be covered without using statutory benefits; that at least 60 months of compulsory contributions to the statutory pension insurance have been made; that the applicant has sufficient German language skills; that he or she has basic knowledge of the legal and social order as well as living conditions in Germany; that a permit for employment is available; that no reasons of public safety and order speak against the residence; and that sufficient housing space is available for the applicant and, as the case may be, for family members.

Law stated - 28 May 2021

UPDATE AND TRENDS

Current developments

Are there any other current developments or emerging trends to note?

The legislature and the regulatory authorities have taken unprecedented measures to address the risks deriving from the covid-19 pandemic. These measures include, inter alia, those that are specifically targeted at start-up companies and the fintech sector.

Law stated - 28 May 2021

Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Extended deadlines for annual general meetings and general meetings in 2020

The German legislature enacted the Act on Measures in Company, Cooperative, Association, Foundation and Home Ownership Law to Combat the Effects of Covid-19 to provide temporary relief. In particular, for stock corporations (AGs), partnerships limited by shares (KGaAs) and cooperatives, some relief applies with regard to the form and deadline for holding annual general meetings in 2020. For European companies (SEs) and European cooperative societies (SCE), this relief by the German legislature does not fully apply owing to the lack of legislative competence. The European Parliament has taken action in this regard and has resolved a temporary deviation from the SE and SCE Regulation.

Support measures for start-ups in the covid-19 pandemic

The German Ministries of Finance and Economy have prepared a €2 billion package of measures for start-ups. Private investors, not the start-ups themselves, are entitled to apply. A prerequisite for the use of the Corona Matching Facility is the successful completion of a due diligence by the private investor. The start-up in question must have experienced financial difficulties owing to the effects of covid-19. It is not yet clear what defines covid-19-related economic difficulties.

More time for conversions

The legislature has granted companies four months more to complete conversions. In terms of taxation, however, the

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regulation does not apply in all cases.

Late financial reports are not sanctioned for a short period

For now, listed companies are not threatened with penalties if they report their financial results too late as a result of the covid-19 pandemic.

The economic uncertainties associated with the novel coronavirus also affect the financial reporting of listed companies. The European Securities and Markets Authority, the supervisory authority for the European securities markets, therefore, has now issued a public statement on the impact of the covid-19 pandemic on the deadlines for publishing financial reports, which apply to all issuers of securities.

Relief for annual general meetings

The German legislature has decided to simplify the holding of general meetings and passed the Law to mitigate the consequences of the covid-19 pandemic in civil, insolvency and criminal proceedings. The aim of the regulation is to give companies the ability to act despite the covid-19 crisis.

In addition to regulations under civil, insolvency and criminal procedural law, the draft provides for facilitations for the holding of annual general meetings of, among others, AGs, KGaAs and SEs. Therefore, these companies should be able to pass all necessary resolutions and remain capable of acting even if holding in-person meetings is still restricted. Even without authorisation in the articles of association or the rules of procedure, the management board can order the shareholders to participate and vote; order the members of the supervisory board to participate via electronic communication; and the meeting can be held online by video and audio transmission.

Economic stabilisation fund

To reduce the negative effects of the covid-19 pandemic on the German economy, the German federal government set up a multibillion euro economic stabilisation fund. This fund, which is to be managed by the Finance Agency, is intended to serve to stabilise companies by overcoming liquidity bottlenecks and by creating the framework conditions for strengthening the capital base of companies whose existence would be threatened by significant impacts on the economy, technological sovereignty, supply security, critical infrastructure or the labour market. As can be seen from the underlying Economic Stabilisation Fund Act, which went through the legislative process within only one week, these companies must have:

- a balance sheet total of more than €43 million;
- a turnover of more than €50 million; and
- an average number of employees that is more than 249.

Where it is sufficient that two of these three criteria are met, financial sector enterprises and credit institutions are excluded from these measures.

Suspension of the obligation to file for insolvency

Under normal circumstances, in the event of insolvency or over-indebtedness, the CEO or board of directors of a limited liability company, stock corporation or cooperative must take action at the latest after three weeks before the insolvency court if the reason for the insolvency cannot be eliminated out-of-court by then. In the covid-19 crisis, this is different. As part of the Covid-19 Insolvency Act, the obligation to file for insolvency will be suspended at least until 30 September 2020, possibly even until 31 March 2021, but only for those cases in which the insolvency maturity is a direct consequence of the covid-19 pandemic and if, in the event of insolvency, there is at least a chance of its elimination.

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Jurisdictions

Australia	Piper Alderman
Belgium	Simmons & Simmons
Brazil	Machado Meyer Advogados
Canada	Stikeman Elliott LLP
China	Simmons & Simmons
Denmark	Plesner Advokatpartnerselskab
Egypt	Soliman, Hashish & Partners
France	Kramer Levin Naftalis & Frankel LLP
Germany	Simmons & Simmons
Gibraltar	Ince
Hong Kong	Simmons & Simmons
India	Kochhar & Co
Indonesia	SSEK Legal Consultants
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