

DEUTSCHE BUNDESBANK

Notice on the granting of authorisation to provide financial services pursuant to section 32 (1) of the German Banking Act

(December 2008)

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1 Financial services requiring authorisation

Anyone wishing to provide financial services in Germany – the jurisdictional reach of the German Banking Act (*Kreditwesengesetz*) – commercially or on a scale which requires a commercially organised business undertaking, generally needs **written authorisation** from the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, or BaFin) (section 32 (1) of the Banking Act). Exceptions apply to enterprises domiciled in another state of the European Economic Area (EEA) (section 53b of the Banking Act). Authorisation must be obtained before commencing business operations; entries in public registers (eg the Commercial Register (*Handelsregister*)) may be made only if the court of registration has been furnished with proof of such authorisation (section 43 (1) of the Banking Act). The Federal Financial Supervisory Authority – hereinafter referred to as BaFin – may grant authorisation subject to conditions; moreover, it may limit the authorisation to specific types of financial services (section 32 (2) of the Banking Act). If financial services are provided without the authorisation required, BaFin, pursuant to section 37 of the Banking Act, can order the enterprise and the members of its governing bodies to cease business operations immediately and to settle this business promptly. Compulsory measures can also be imposed on enterprises and members of their governing bodies involved in the initiation, conclusion or settlement of the unauthorised business. It is a punishable offence to provide financial services without authorisation (section 54 of the Banking Act).

1.1 Pursuant to section 1 (1a) sentence 1 of the Banking Act, **financial services institutions** are enterprises which provide financial services to others **commercially** or on a scale which requires a **commercially organised business undertaking**.

Business is performed commercially if the operation is intended to continue for a **certain length of time** and is conducted with the **intention of making a profit**. Alternatively, the criterion which requires a commercially organised business undertaking applies. This criterion does not hinge on whether a commercially organised business undertaking exists, but solely on whether the scale of the business **objectively requires a commercially organised business undertaking**.

1.2 The definition of **financial services** is laid down conclusively in section 1 (1a) sentence 2 numbers 1 to 10 and section 1 (1a) sentence 3 of the Banking Act. Accordingly, financial services comprise:

1. the brokering of business involving the purchase and sale of financial instruments **(investment broking)**,
 - 1a. providing customers or their representatives with personal recommendations relating to transactions in certain financial instruments insofar as 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)**,
 - 1b. operating a multilateral system, which brings together a large number of persons' interests in the purchase and sale of financial instruments within the system according to set rules in a way that leads to a purchase agreement for these financial instruments **(operation of a multilateral trading system)**,
 - 1c. the placing of financial instruments without a firm underwriting commitment **(placement business)**,
2. the purchase and sale of financial instruments in the name of and for the account of others **(contract broking)**,
3. the management of individual portfolios of financial instruments for others on a discretionary basis **(portfolio management)**,
4. the purchase and sale of financial instruments on an own-account basis as a service for others **(proprietary trading)**,
5. the brokering of deposit business with enterprises domiciled in a non-EEA state **(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 travellers' cheques **(credit card business)** unless the card issuer also provides the service underlying the payment transaction,
9. the ongoing purchase of receivables on the basis of standard agreements, with or without recourse **(factoring)**,
10. the conclusion of finance lease agreements in the capacity of the lessor **(finance leasing)** and the management of asset-leasing vehicles within the meaning of section 2 (6) sentence 1 number 17.

Pursuant to section 1 (1a) sentence 3 of the Banking Act, the purchase or sale of financial instruments on an own-account basis which does not constitute a service for others within the meaning of proprietary trading (section 1 (1a) sentence 2 number 4) is also deemed to be a financial service **(proprietary business)**.

The above-mentioned financial services are described in more detail below.

Investment broking (number 1)

The activities of an investment broker consist in receiving and transmitting investors' orders insofar as they relate to financial instruments pursuant to section 1 (11) of the Banking Act.¹

Investment advice (number 1a)²

Investment advice is deemed to constitute recommending to an investor that a particular action is in his/her interests; it does not constitute merely informing a customer. The recommendation must involve advice tailored to the customer with regard to a specific financial instrument or the advice must at least give the impression of taking the customer's personal circumstances into account. A mere recommendation to a non-individually determinable group of persons, for example in a newspaper or the like, is not sufficient.

Operation of a multilateral trading system (number 1b)

A multilateral trading system exists where individual persons' interests in the purchase or sale of financial instruments pursuant to section 1 (11) of the Banking Act are brought together without any discretionary scope with respect to the final conclusion of a transaction with a particular contracting party. This requires a firm set of rules; a platform in a technical sense is not necessary. Bilateral systems, in which the counterparty to a purchase or sale is always one and the same bidder, are not deemed to be multilateral trading systems. The same is true of advertising systems that function like electronic noticeboards on which interested parties can post their trading requests.

Placement business (number 1c)

Placement business is a special kind of contract broking whereby the institution acts in the name and for the account of a disclosed customer vis-à-vis investors in the placement of financial instruments.

¹ See section 1.3 of this Notice.

² See also the Joint information sheet issued by BaFin and the Deutsche Bundesbank on the new statutory definition of investment advice, which can be downloaded from <http://www.bafin.de>.

Contract broking (number 2)

Contract broking denotes the purchase and sale of financial instruments in disclosed agency, ie in the name and for the account of the customer. It corresponds to the activities of a contract broker (section 34c of the German Industrial Code (*Gewerbeordnung*)) if the broker acts on behalf of a party when concluding the transaction.

Portfolio management (number 3)

A key criterion for classifying a portfolio manager is that he/she must have some measure of discretionary leeway regarding the investment decisions to be made. Discretionary leeway exists if specific investment decisions are made at the manager's discretion.

The portfolio manager must have securities placed in a safe custody account of the customer at a credit institution; otherwise he/she would require authorisation to conduct safe custody business and would thus be a credit institution.

Proprietary trading (number 4)

When trading as a proprietary trader on behalf of a third party, the institution acts as a purchaser or seller rather than as a commission agent vis-à-vis its customer. Even if the trade is a contract of sale under civil law, it is classified as a service within the meaning of the Markets in Financial Instruments Directive.

Trading in financial instruments must always be assigned to one of the following five categories.

- Trading in the name of and for the account of others (disclosed agency) is a financial service within the meaning of section 1 (1a) sentence 2 number 2 of the Banking Act (contract broking).
- Trading in the name of and for the account of others (disclosed agency) as part of placement business is a financial service within the meaning of section 1 (1a) sentence 2 number 1c of the Banking Act (placement business).

- Trading in the credit institution's own name for the account of others (undisclosed agency) is banking business within the meaning of section 1 (1) sentence 2 number 4 of the Banking Act (principal broking services).³
- Trading in the credit institution's own name for its own account is a financial service within the meaning of section 1 (1a) sentence 2 number 4 of the Banking Act if it constitutes a service for others (proprietary trading).
- Trading in the credit institution's own name for its own account is also deemed to be a financial service within the meaning of section 1 (1a) of the Banking Act if it **does not** constitute a service for third parties.

Non-EEA deposit broking (number 5)

This provision covers brokering the conclusion of deposit contracts for counterparties in non-EEA states as well as receiving deposits in Germany and forwarding them immediately to the aforementioned counterparties. A "trustee" who officially collects funds on the instructions of a foreign enterprise is deemed to be a branch of that foreign enterprise requiring authorisation pursuant to section 53 of the Banking Act.

Money transmission services (number 6)

Money transmission services encompass commercial – particularly non-account-related – money transfers as a service for others. It should be noted that money transmission services are closely related to giro business, which is classified as banking business (section 1 (1) sentence 2 number 9 of the Banking Act).

Foreign currency dealing (number 7)

Foreign currency dealing comprises exchanging banknotes and coins that constitute legal tender as well as purchasing and selling travellers' cheques. Foreign exchange bureaux are thus classified as financial services institutions.

³ See section 1.4 of this Notice.

Credit card business (number 8)

This covers only “tripartite systems”. In these systems, the card issuer, the card holder and the service provider (acceptor of the card) are different persons.

Factoring (number 9)

Owing to the financing function of factoring, it is conclusively deemed to be a financial service irrespective of whether the del credere agency is also assumed (“true factoring”) or not (“quasi-factoring”). This categorisation also holds irrespective of the civil-law classification of quasi-factoring as a loan within the meaning of section 488 of the German Civil Code (*Bürgerliches Gesetzbuch*). Purchases of receivables through special purpose vehicles in the context of revolving ABS transactions are not subject to the provision under section 1 (1a) sentence 2 number 9 of the Banking Act. Maturity factoring entailing the complete absence of the financing function is likewise not classified as a financial service.

Finance leasing (number 10)

Finance leasing comprises the conclusion of finance lease agreements in the capacity of the lessor and the management of asset-leasing vehicles. A distinction must be made between finance leasing and activities not requiring authorisation characterised chiefly – but not exclusively – by the paid temporary loaning-out of an object (operating leasing/atypical leasing agreements). The authorisation requirement applies only to agreements under which the financing function is predominant.

1.3 Four types of financial products are consolidated under the heading of **financial instruments** in section 1 (11) of the Banking Act:

- tradable **securities**,
- **money market instruments**,
- **foreign exchange or units of account**, and
- **derivatives**.

The following legal definitions of securities, money market instruments and derivatives are laid down in section 1 (11) sentences 2 to 4 of the Banking Act.

Securities – even if they are not evidenced by certificates – are all types of negotiable securities, with the exception of payment instruments, which by their nature are tradable in the capital markets, in particular:

1. shares and other stakes in German or foreign legal persons, partnerships and any other enterprises if these stakes are comparable to shares, as well as certificates representing shares;
2. debt instruments, in particular, participation certificates, bearer bonds, order bonds and certificates representing these debt instruments;
3. any other securities which provide a right to acquire or sell securities in accordance with numbers 1 and 2 or lead to a cash payment that is determined in connection with securities, with currencies, interest rates or other income streams, or with commodities indices or indicators;
4. exposures in the form of collective investment undertakings issued by an investment company or a foreign collective investment undertaking.

Money market instruments are claims which are usually traded in the money market, for example short-term loans against borrowers' notes, deposit notes or financial swaps. This does not include payment instruments.

Derivatives are future or option contracts in the form of a purchase, exchange or similar transaction, which are to be settled with a time lag and whose value is derived directly or indirectly from the price or measure of an underlying. Underlyings in this respect are securities, money market instruments, foreign exchange, units of account, interest rates or other income streams, indices of the aforementioned underlyings as well as other indices or financial indicators and derivatives. Derivatives can also be forward transactions in relation to commodities, freight rates, emission allowances, climatic or other physical variables, inflation rates or other economic variables or any other assets, indices or measures as underlyings if they must either be settled by means of cash settlement or give a contracting party the right to demand cash settlement without this right arising as a result of default or another termination event. Even if these forward transactions are conducted on an organised market or in a multilateral trading system, or if they have the characteristics of other derivative financial instruments and are not for commercial purposes pursuant to Article 38 (1) of Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive, and the

conditions under Article 38 (4) of this Regulation are not met, and provided that they are not spot contracts within the meaning of Article 38 (2) of Commission Regulation (EC) No 1287/2006, they are deemed to be derivatives. Derivatives also include financial contracts for differences, and future or option contracts in the form of a purchase, exchange or similar transaction, which are to be settled with a time lag and serve to transfer credit risk, as well as forward transactions in relation to the underlyings listed in Article 39 of Commission Regulation (EC) No 1287/2006 if they meet the conditions laid down in section 1 (11) sentence 4 number 2 of the Banking Act.

1.4 **Securities trading firms** (synonym for the term "investment firms" used in the Markets in Financial Instruments Directive) as defined in section 1 (3d) sentence 2 of the Banking Act may also be classified as financial services institutions. With what is known as the "European passport", it is possible for them, subject to certain conditions, to establish branches or to provide cross-border financial services in other EEA countries in a simplified procedure and under the supervision of their home country authorities.

Securities trading firms are institutions which are not classified as deposit-taking credit institutions and engage in principal broking services or underwriting business (banking business within the meaning of section 1 (1) sentence 2 numbers 4 and 10 of the Banking Act) or provide a financial service within the meaning of section 1 (1a) sentence 2 numbers 1 to 4 of the Banking Act, ie they act for others as investment advisers, investment or contract brokers, operators of multilateral trading systems, experts in placement business, portfolio managers or proprietary traders. **This does not apply** if the aforementioned activities are confined to foreign exchange or units of account.

Principal broking services pursuant to section 1 (1) sentence 2 number 4 of the Banking Act are defined as the purchase and sale of financial instruments in the credit institution's own name for the account of others.

Underwriting business pursuant to section 1 (1) sentence 2 number 10 of the Banking Act is defined as the underwriting of financial instruments at the credit institution's own risk for placing in the market ("underwriting syndicate") or the assumption of equivalent guarantees.

Hence, securities trading firms may be both financial services institutions and credit institutions depending on the scope of the authorisation granted. Securities trading firms must comply not only with the Banking Act but also with the Securities Trading Act (*Gesetz*

über den Wertpapierhandel). The prerequisites and formalities for the granting of authorisation to credit institutions are separately available on request.

2 Exceptions

Section 2 (6) sentence 1 numbers 1 to 17 and section 2 (10) of the Banking Act stipulate which enterprises are not deemed to be financial services institutions and thus **do not require authorisation** from BaFin.⁴

In line with section 2 (6) sentence 1 of the Banking Act, these enterprises include in particular:

- enterprises which provide financial services solely within a corporate group (**number 5**).
- enterprises whose financial service consists solely in the administration of a system of employee participations in themselves or their affiliated enterprises (**number 6**).
- enterprises which provide financial services that consist solely of investment advice, investment broking and contract broking between customers and
 - a credit institution or financial services institution,
 - an enterprise operating in accordance with section 53b (1) sentence 1 or section 53b (7) of the Banking Act,
 - an enterprise that is treated as an enterprise domiciled in the EEA or that is granted exemption from the provisions by way of a statutory order pursuant to section 53c of the Banking Act, or
 - a foreign collective investment undertaking,

as long as these financial services are confined to exposures in the form of collective investment undertakings which are issued by an investment company or an investment stock corporation within the meaning of sections 96 to 111 of the Investment Act (*Investmentgesetz*) or to foreign exposures in the form of collective investment undertakings which may be sold publicly pursuant to the Investment Act, and the

⁴ These exceptions do not prejudice section 34c of the Industrial Code.

enterprises **are not authorised** to obtain ownership or possession of funds or shares of customers in providing such financial services (**number 8**). This does not include shares in special investment funds with additional risks pursuant to section 112 of the Investment Act.

This exception also applies to brokering for several of the above-mentioned suppliers.

- enterprises which, without being involved in cross-border activities, conduct proprietary business on derivatives markets and trade on spot markets only for the purpose of hedging these positions, which engage in proprietary trading or contract broking only for other members of these derivatives markets or which determine prices for other members of these derivatives markets through proprietary trading as a market maker within the meaning of the Securities Trading Act, if clearing members of these markets or trading systems are liable for the fulfilment of the contracts which the aforementioned enterprises conclude (**number 9**).
- members of independent professions who provide financial services only occasionally within their client relationships as self-employed professionals and who belong to a professional chamber having the legal form of a public-law corporation whose professional rules do not exclude the provision of financial services (**number 10**).
- enterprises which conduct proprietary business or provide financial services within the meaning of section 1 (1a) numbers 1 to 4 of the Banking Act only in relation to derivatives provided that they are not part of a group whose principal activity consists in investment advice, investment broking and contract broking, operation of a multilateral trading system, placement business, proprietary trading for others, deposit business, lending business, guarantee business or e-money business, and that the financial services provided by the enterprise are of secondary significance to the principal activity at a group level. Moreover, the financial services must be provided only for the group's principal activity customers and in objective connection with principal activity operations (**number 11**).
- enterprises whose sole financial service is dealing in foreign notes and coins unless their principal activity is foreign currency dealing (**number 12**).

This includes hotels, travel agencies, department stores and other enterprises for which dealing in foreign notes and coins is only a secondary activity.

- enterprises whose principal activity involves conducting proprietary business and proprietary trading in commodities or derivatives relating to commodities, provided that these enterprises do not belong to a group whose principal activity consists in investment advice, investment broking and contract broking, operation of a multilateral trading system, placement business, proprietary trading for others, deposit business, lending business, guarantee business or e-money business (**number 13**).
- enterprises whose sole financial service comprises conducting proprietary business or proprietary trading, provided that they do not continuously offer to buy or sell financial instruments at prices which they themselves have determined on an organised market or in a multilateral trading system, or undertake dealing, often for their own account, in an organised and systematic manner outside an organised market or a multilateral trading system by providing a system accessible to third parties in order to transact business with these third parties (**number 14**).
- enterprises whose sole financial service comprises providing investment advice as part of another occupational activity and which are not remunerated separately for providing this investment advice (**number 15**).
- operators of organised markets which, apart from operating a multilateral trading system, do not provide any other financial services (**number 16**).

This includes, for example, stock exchanges, which do not provide any other financial services.

- enterprises whose sole financial service within the meaning of section 1 (1a) sentence 2 comprises carrying out finance leasing activities, if they act only as an asset-leasing vehicle for a single leased asset, do not make their own business policy decisions and are managed by an institution domiciled in an EEA state which is authorised to conduct finance leasing operations under the laws of the home state (**number 17**).

Section 2 (10) sentence 1 of the Banking Act lays down another **exception** from the authorisation requirement.⁵

- enterprises are also deemed **not** to be financial services institutions if

⁵ For the requirements regarding the contents of the report, see also Circular 8/98 of the Federal Banking Supervisory Office (BaFin since 1 May 2002).

- they engage in investment broking or contract broking, placement business or investment advice solely for the account and under the liability of a deposit-taking credit institution (section 1 (3d) sentence 1 of the Banking Act) or securities trading firm (section 1 (3d) sentence 2 of the Banking Act) domiciled in Germany, or of an enterprise operating in accordance with section 53b (1) sentence 1 or section 53b (7) of the Banking Act, without providing any other financial services, and
- this is reported to BaFin by the liable institution or enterprise.

3 Conditions for the granting of authorisation

Pursuant to section 33 (1) sentence 1 of the Banking Act, which lays down the criteria for refusing authorisation, BaFin may grant authorisation only if the following mandatory **conditions** are met.

- The **resources needed** for business operations, in particular sufficient **initial capital**, must be available in Germany (section 33 (1) sentence 1 number 1) of the Banking Act).
- For enterprises which intend to engage in investment advice, investment broking, contract broking, portfolio management, operation of a multilateral trading system or placement business, and which, in providing financial services, are **not authorised to obtain ownership or possession** of funds or securities of customers and which do not trade in financial instruments **for their own account**, this is an amount equivalent to at least **€50,000**.
- For enterprises which engage in investment advice, investment broking and contract broking, and which, in providing financial services, are not authorised to obtain ownership or possession of funds or securities of customers and which do not trade in financial instruments for their own account, the amount of **€25,000** is required if they are also entered in a register as an insurance intermediary pursuant to Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation and fulfil the requirements of Article 4 (3) of Directive 2002/92/EC.

Pursuant to section 33 (1) sentence 2 of the Banking Act, investment advisers, investment brokers or contract brokers who, in providing financial services, are not authorised to obtain ownership or possession of funds or securities of customers and

who do not trade in financial instruments for their own account may – in lieu of sufficient initial capital – take out and demonstrate the existence of appropriate insurance for the protection of customers. This insurance must provide an indemnity of €1,000,000 for each insured loss and at least €1,500,000 for all insured losses in an insurance year.

The amounts are lower for investment advisers and investment brokers who are also entered in a register as insurance intermediaries pursuant to Directive 2002/92/EC and fulfil the requirements of Article 4 (3) of this Directive, namely €500,000 for each insured loss and at least €750,000 for all insured losses in an insurance year.

Appropriate insurance must cover, in particular, losses arising from incorrect advice. In principle, in each individual case, it must be examined whether the insurance contract submitted by an investment broker or contract broker meets the requirements of section 33 (1) sentence 2 of the Banking Act.

- For enterprises which conduct proprietary business also on foreign derivatives markets and on spot markets only for the purpose of hedging these positions, which engage in investment broking only for other members of these markets or which determine prices for other members of these markets through proprietary trading as a market maker within the meaning of the Securities Trading Act, the amount of **€25,000** is required if clearing members of these markets or trading systems are liable for the fulfilment of the contracts which the aforementioned enterprises conclude on the said markets or in the said trading systems.
- Financial services institutions which do not trade in financial instruments for their own account but do not fall into the aforementioned categories must provide proof of an amount equivalent to at least **€125,000**.
- In the case of financial services institutions which trade in financial instruments for their own account, an amount equivalent to at least **€730,000** is stipulated.

The initial capital is calculated in accordance with section 10 (2a) sentence 1 numbers 1 to 6 of the Banking Act (mainly paid-up capital and reserves, less withdrawals and partners' loans (if applicable) or less the total nominal amount of the cumulative preferential shares).

The capital must be freely available and may not be derived from borrowing. However, BaFin reserves the right to decide on a case-by-case basis whether the initial capital in the amounts specified above is really sufficient and meets the actual requirements of the new institution. This may apply in particular if and where the institution reports an assumption of liability to BaFin pursuant to section 2 (10) of the Banking Act.

Exception

The provisions concerning the initial capital are not applicable to financial services institutions which provide no financial services apart from non-EEA deposit broking, money transmission services, foreign currency dealing, credit card business, factoring and finance leasing (section 2 (7) of the Banking Act. BaFin can, in individual cases, exempt financial services institutions whose financial services consist solely of credit card business or money transmission services from further provisions of the Banking Act as long as the manner of performing the business conducted does not require supervision).

The following should also be noted.

*A **portfolio manager**⁶ must demonstrate own funds amounting to at least one-quarter of his/her costs shown in the profit and loss account of the last set of annual accounts under general administrative expenses, depreciation and value adjustments of tangible and intangible fixed assets. If a set of annual accounts has not yet been drawn up for the first full financial year, the corresponding estimates for these items contained in the business plan for the current year shall be provided as proof. BaFin reserves the right to raise the own funds requirements if this appears appropriate in view of an expansion of business activity (section 10 (9) of the Banking Act).*

*In the case of **securities trading firms** in the legal form of a sole proprietorship or partnership, the risk assets of the proprietor or general partners shall be included in the assessment of the institution's solvency; however, the personal assets of the proprietor or partners shall be excluded when calculating the institution's own funds (section 2b (2) sentence 1 of the Banking Act).*

- The institution must have trustworthy **senior managers** who have the necessary professional qualifications and work for it not merely in an honorary capacity (section 33 (1) sentence 1 numbers 2, 4 and 5 of the Banking Act).

⁶ Portfolio managers who do not trade in financial instruments for their own account and are not authorised to obtain ownership or possession of funds or securities of customers.

A financial services institution which, in providing financial services, is **authorised to obtain ownership or possession** of funds or securities of customers must have at least two senior managers (section 33 (1) sentence 1 number 5 of the Banking Act). In all other cases, one senior manager is sufficient.

No facts may be known which cast doubt on the personal **trustworthiness** of the senior managers (section 33 (1) sentence 1 number 2 of the Banking Act). A person of doubtful trustworthiness is, for example, someone who has committed offences against property, violated statutory regulations concerning the running of an enterprise or demonstrated through his/her private or business conduct that sound management cannot be expected of him/her.

Pursuant to section 33 (2) sentence 1 of the Banking Act, a prerequisite for the **professional qualifications** of senior managers is that they have adequate theoretical and practical knowledge of the business concerned, as well as managerial experience. A person shall normally be assumed to have the professional qualifications necessary for managing a financial services institution if he/she can demonstrate three years' managerial experience at an institution of comparable size and type of business (section 33 (2) sentence 2 of the Banking Act). A person with managerial experience is someone who has held a position in the senior management of an institution or immediately below the senior management level. The criterion of professional qualifications is subject to a case-by-case evaluation, which takes account of all the circumstances and the particular features of the respective institution.

- The proprietors or legal representatives or general partners of an enterprise which holds a **qualified participating interest** in a financial services institution (section 1 (9) of the Banking Act) must satisfy the requirements to be set in the interests of the sound and prudent management of the institution. This requires, in particular, that they are trustworthy (section 33 (1) sentence 1 number 3 of the Banking Act).
- The financial services institution's **head office** must be domiciled **in Germany** (section 33 (1) sentence 1 number 6 of the Banking Act).
- The institution must be prepared or in a position to make the **organisational arrangements** necessary for the proper operation of the business for which it is seeking authorisation (section 33 (1) sentence 1 number 7 of the Banking Act).

4 Refusal of authorisation

Pursuant to section 33 (3) of the Banking Act, BaFin may also **refuse** to grant authorisation if

- the financial services institution is associated with the holder of a **qualified participating interest** and these corporate ties, or the structure of the corporate ties of the holder of the qualified participating interest with other enterprises, make effective supervision of the institution impossible (section 33 (3) sentence 2 number 1 of the Banking Act);
- the institution is a subsidiary of another enterprise **domiciled outside Germany** that is not effectively supervised in the state where it is domiciled or has its head office or whose competent supervisory body is not prepared to cooperate satisfactorily with BaFin (section 33 (3) sentence 2 number 3 of the Banking Act); and
- the application for authorisation contains insufficient **information or documentation** (section 33 (3) sentence 3 of the Banking Act).

5 Contents of the application for authorisation

The prospective authorisation holder must apply for authorisation⁷ informally in writing. In the case of corporations, this is done by the executive board or senior management on behalf of the company; in the case of partnerships, by each general partner; and in the case of institutions in the legal form of a sole proprietorship, by the proprietor. The application and all the necessary documentation must be submitted to BaFin in triplicate.

The application must stipulate the name of the firm, its legal form, registered office, business purpose, governing bodies and their composition, as well as the date on which business operations are likely to commence. In addition, it must indicate for which of the financial services specified in section 1 (1a) sentence 2 of the Banking Act authorisation is being sought. Furthermore it must be stated explicitly whether the institution will be authorised to obtain ownership or possession of funds or securities of customers and whether it will be trading in financial instruments for its own account.

⁷ For information on the reports and documentation to be submitted with the application, see in particular section 14 of the Regulation Concerning Reports and the Submission of Documentation under the Banking Act (Reports Regulation) (*Anzeigenverordnung*) of 10 January 2007 (Federal Law Gazette G 5702, page 10, of 10 January 2007).

The application must be accompanied by a certified photocopy of the formation records, the partnership agreement, the articles of association or the articles of incorporation, as well as the rules of procedure envisaged for the senior managers.

The following information and documentation must also be included with the application.

- Suitable evidence of having the **resources needed** for business operations (section 32 (1) sentence 2 number 1 of the Banking Act in conjunction with section 14 (3) of the Reports Regulation).

Evidence of the formation of an enterprise consists of confirmation from a deposit-taking credit institution (section 1 (3d) sentence 1 of the Banking Act) domiciled in an EEA state stating that the initial capital has been paid up and is freely available to the managers, unencumbered by rights of third parties. In the case of existing enterprises which wish to commence business operations requiring authorisation, up-to-date confirmation from an external auditor or a certified public accountant regarding the existence of the required initial capital is to be presented instead.

- The names of the **senior managers** (section 32 (1) sentence 2 number 2 of the Banking Act in conjunction with section 14 (2) of the Reports Regulation).
- The information which is required to assess the **trustworthiness** of the applicants and the senior managers (section 1 (2) sentence 1 of the Banking Act; section 32 (1) sentence 2 number 3 of the Banking Act).

This information is to be supplied in the form of a **statement** by each applicant and senior manager as to whether criminal proceedings are pending against them, whether criminal proceedings have been instituted against them on account of a crime or other offence, or whether they or an enterprise managed by them has been or is involved as a debtor in insolvency proceedings, or in proceedings for making a statutory declaration, or in any comparable proceedings. This statement can be downloaded from BaFin's website (<http://www.bafin.de>).

- The information which is required to assess the **professional qualifications** of the proprietors and the senior managers (section 32 (1) sentence 2 number 4 of the Banking Act).

Each proprietor and senior manager must submit – along with at least the references from any employment relationship which has ended within the last three years – a complete, signed *curriculum vitae* containing all of his/her first names, name at birth, date and place of birth, the names at birth of his/her parents, his/her home address and nationality as well as a detailed description of his/her professional training, the names of all the enterprises for which he/she has worked and information on the nature and duration (in months and years) of the functions performed there, especially with relevance to the business for which authorisation is being sought, including any secondary activities except for those performed in an honorary capacity. When describing the nature of the functions performed, he/she must, in particular, specify his/her powers of representation, his/her internal decision-making authority and the business areas under his/her control within the enterprise.

- A viable **business plan** (section 32 (1) sentence 2 number 5 of the Banking Act), which must contain the following information.
 - The nature of the planned business with a substantiated indication of its future course; for this purpose, projected balance sheets and projected profit and loss accounts for the first three full financial years after the commencement of business operations must be submitted.
 - A detailed description of the planned business operations.
 - Drafts of planned customer contracts, contracts for management services, powers of attorney to operate an account/safe custody account and general terms and conditions – if they have already been drawn up.
 - A description of the organisational structure of the institution, accompanied by an organisation chart indicating, in particular, the responsibilities of the senior managers; it must be indicated whether, and if so, where, branches are to be established and whether the intention is to provide financial services in another EEA state by way of cross-border services; in addition, it should be stated whether the intention is to outsource operational units to other enterprises.
 - A description of the planned internal monitoring procedures detailing, in particular, how compliance with the obligations pursuant to the Banking Act and the Securities Trading Act is to be ensured.

- If **qualified participating interests** are held in the institution (section 32 (1) sentence 2 number 6 of the Banking Act), the application for authorisation must also include the following.
 - The names of the holders of the qualified participating interests.
 - The amount of these participating interests.
 - The data needed to assess the trustworthiness of the holders or legal representatives or general partners.⁸
- If an applicant or holder of a qualified participating interest belongs to a group, the structure of the group must be described, accompanied by an organisation chart of the group.
- Any facts indicating a **close relationship** (section 1 (10) of the Banking Act) between the financial services institution and other natural persons or other enterprises (section 32 (1) sentence 2 number 7 of the Banking Act).
- In the case of **securities trading firms** in the legal form of a sole proprietorship, the proprietor must set forth the extent to which he/she has taken appropriate measures to protect his/her customers in the event that the institution discontinues its business operations owing to the proprietor's death or legal incapacity or for other reasons (section 2b (2) sentence 2 of the Banking Act). Any evidence of the measures taken must contain, in particular, the consent of the representative named therein; if he/she is a natural person, a declaration by the representative must be added for the purpose of assessing his/her trustworthiness.⁹

6 Approval of enterprises domiciled outside Germany

6.1 The authorisation requirement and the aforementioned prerequisites and formalities for the granting of authorisation apply as appropriate to enterprises domiciled in a **non-EEA state** which intend to provide financial services via a branch to be established in Germany; for this purpose, this branch is deemed to be a financial services institution (section 53 (1) of the Banking Act).

⁸ See the statement pursuant to page 16.

⁹ See footnote 8.

In addition to the prerequisites and formalities for the granting of authorisation specified in section 3 of this Notice, the following provisions should be **noted**.

- In order to commence business operations, the branch needs sufficient **initial capital**. This working capital must be made freely available to the branch by the enterprise which maintains this branch.

The provisions on initial capital do not apply to institutions engaged solely in non-EEA deposit broking, money transmission services, foreign currency dealing, credit card business, factoring or finance leasing (section 2 (7) of the Banking Act).

- The enterprise must appoint at least two natural persons residing in Germany as **senior managers** if the institution, in providing financial services, is authorised to obtain ownership or possession of funds or securities of customers (section 53 (2) number 1 of the Banking Act). Otherwise, the appointment of one senior manager shall be deemed sufficient. As set out in detail in section 3 of this Notice, these senior managers must have the necessary professional qualifications and be trustworthy.

As a rule, BaFin assumes that senior managers who have hitherto worked mainly outside the jurisdictional reach of the Banking Act have the necessary professional qualifications if they can demonstrate that they have gained three years' worth of managerial experience at an institution of comparable size and type of business – which may also be domiciled in another state –, if they speak German or an internationally used language (English) to a sufficient degree commensurate with their position as senior managers, if they have one year's experience of practice-related work within the jurisdictional reach of the Banking Act and if at least one of the senior managers has three years' managerial experience at institutions in Germany. If there are two senior managers, at least one of them must have a good command of German.

- Apart from the particulars required pursuant to section 32 (1) sentence 2 of the Banking Act, the enterprise's application for authorisation must contain at least the following information.
 - The name, legal form, registered office and address of the enterprise and the envisaged branch as well as the enterprise's governing bodies and its business purpose according to its articles of association.

- The nature of the business operations actually conducted by the enterprise in its country of domicile and, if different, in the country in which its head office is located.
- The name and address of the authority responsible for supervising the enterprise in its country of domicile and, if different, in the country in which its head office is located.
- The date on which business operations are likely to commence.
- The name of a registered agent in the Federal Republic of Germany empowered to accept service during the authorisation procedure.

Furthermore, it must indicate for which of the financial services specified in section 1 (1a) of the Banking Act authorisation is being sought.

The articles of association, articles of incorporation or partnership agreement of the enterprise, confirmation that the enterprise has been entered in a public register, the enterprise's most recent annual accounts (annual balance sheet together with the profit and loss account) and a management report (annual report) must be enclosed with the application for authorisation.

The following additional information and documentation must also be included with the application.

- Written confirmation in accordance with section 5 of this Notice regarding the capital freely available to the branch (except in the case of the financial services institutions listed in section 2 (7) of the Banking Act).
- A statement by each senior manager as described in section 5 of this Notice.
- A complete, signed *curriculum vitae* of each senior manager in accordance with section 5 of this Notice.
- Evidence that the enterprise has been granted authorisation to provide financial services by the competent supervisory authority for the enterprise outside Germany (section 53 (2) number 5 of the Banking Act).

- A statement by the enterprise, signed with legally binding effect, that it has decided to establish the branch and has appointed as senior managers the persons named in the application for authorisation.
- Evidence of the power of representation of the person(s) filing the application for authorisation.

The documentation must be submitted to BaFin in German or with a German translation.

6.2 A **securities trading firm** domiciled in another **EEA** state may engage in principal broking services or underwriting business, act as an investment adviser, investment or contract broker, portfolio manager or proprietary trader, or engage in placement business, the operation of a multilateral trading system or proprietary business in Germany either through a branch or by providing cross-border services **without authorisation** provided that the following **conditions** are met (section 53b (1) of the Banking Act).

- The enterprise has been granted authorisation by the competent authorities of the home state and is supervised by them in accordance with the Directives issued by the European Communities.
- The business is covered by the authorisation granted.

6.3 An enterprise domiciled in another **EEA** state which engages in **foreign currency dealing, factoring or finance leasing** (financial services within the meaning of section 1 (1a) sentence 2 numbers 7, 9 and 10 of the Banking Act) may conduct these operations in Germany either through a branch or by providing cross-border services **without authorisation** provided that the following **conditions** are met (section 53b (7) of the Banking Act).

- The enterprise is a subsidiary of one or more deposit-taking credit institutions (section 1 (3d) sentence 1 of the Banking Act).
- The parent enterprise(s) is (are) authorised to operate as a deposit-taking credit institution in the state in which the enterprise is domiciled.
- The operations performed by the enterprise are – according to its articles of association – likewise conducted in the home state.

- The parent enterprise(s) hold(s) at least 90 per cent of the voting rights in the subsidiary.
- The parent enterprise(s) has (have) submitted convincing evidence of the prudent management of the subsidiary to the competent authorities of the subsidiary's home state and, with the approval of these home state authorities, has (have) jointly and severally guaranteed the obligations incurred by the subsidiary, if appropriate.
- The subsidiary is included in the supervision of the parent enterprise on a consolidated basis.

7 Fees and charges

Pursuant to section 14 of the Act concerning the Federal Financial Supervisory Authority (*Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht*), the authorisation procedure is subject to a fee. The amount charged depends on the processing time required in each individual case and on the business volume of the enterprise concerned. As a rule, the minimum amount charged is €2,000. A fee may also be charged if the applicant withdraws the application for authorisation or if BaFin refuses to grant authorisation.

Furthermore, institutions must refund the costs incurred by BaFin for ongoing supervision pursuant to section 13 of the Act concerning the Federal Financial Supervisory Authority; the costs are apportioned among the individual institutions on a *pro rata* basis. Detailed provisions on the charges and their collection are laid down by way of a statutory order.

8 Compensation scheme for securities trading firms

All securities trading firms (see section 1.4 of this Notice) must cover their liabilities arising from securities transactions through membership of the compensation scheme for securities trading firms, the "*Entschädigungseinrichtung der Wertpapierhandelsunternehmen*" or EdW. The contributions to be paid depend on the scale of a firm's business activities; detailed provisions are laid down by way of a statutory order. For more information on this matter as well as on the documentation to be submitted to EdW, please contact:

Entschädigungseinrichtung der Wertpapierhandelsunternehmen

Postfach 04 03 47

10062 Berlin, Germany

Tel: +49 30 2036990

Fax: +49 30 203699 5630

E-mail: mail@e-d-w.de

Internet: <http://www.e-d-w.de>

9 Addresses

Applications for authorisation to provide financial services must be submitted to BaFin:

Bundesanstalt für Finanzdienstleistungsaufsicht

Lurgiallee 12
60439 Frankfurt am Main, Germany
or
Graurheindorfer Str. 108
53117 Bonn, Germany

Tel: +49 228 41080
Fax: +49 228 4108 1550
E-mail: poststelle@bafin.de
Internet: <http://www.bafin.de>

Before applying for authorisation, please contact the **Regional Office of the Deutsche Bundesbank** (*Hauptverwaltung*) responsible for the area in which your registered office is located. If you have any questions regarding this Notice, please also contact the appropriate Regional Office. If necessary, the Regional Office concerned will pass on your enquiry to BaFin along with its comments.

DEUTSCHE BUNDESBANK Hauptverwaltung Berlin

Leibnizstr. 10
10625 Berlin, Germany

Tel: +49 30 34750
Fax: +49 30 3475 1290
E-mail: laufende-aufsicht.hv-berlin@bundesbank.de

DEUTSCHE BUNDESBANK Hauptverwaltung Düsseldorf

Berliner Allee 14
40212 Düsseldorf, Germany

Tel: +49 211 8740
Fax: +49 211 8743635
E-mail: banken.hv-duesseldorf@bundesbank.de

DEUTSCHE BUNDESBANK Hauptverwaltung Frankfurt

Taunusanlage 5
60329 Frankfurt am Main, Germany

Tel: +49 69 23880
Fax: +49 69 2388 1111
E-mail: hv-frankfurt@bundesbank.de

DEUTSCHE BUNDESBANK Hauptverwaltung Hamburg

Willy-Brandt-Str. 73
20459 Hamburg, Germany

Tel: +49 40 37070
Fax: +49 40 3707 4172
E-mail: bankenaufsicht.hv-hamburg@bundesbank.de

**DEUTSCHE BUNDESBANK
Hauptverwaltung Hannover**

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Fax: +49 511 3033 2796
E-mail: bankenaufsicht.hv-hannover@bundesbank.de

**DEUTSCHE BUNDESBANK
Hauptverwaltung Leipzig**

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Fax: +49 341 8602599
E-mail: bankenaufsicht.hv-leipzig@bundesbank.de

**DEUTSCHE BUNDESBANK
Hauptverwaltung Mainz**

Hegelstr. 65
55122 Mainz, Germany

Tel: +49 6131 3770
Fax: +49 6131 3773333
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**DEUTSCHE BUNDESBANK
Hauptverwaltung München**

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80539 München, Germany

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Fax: +49 89 2889 3630
E-mail: institutsaufsicht.hv-muenchen@bundesbank.de

**DEUTSCHE BUNDESBANK
Hauptverwaltung Stuttgart**

Marshallstr. 3
70173 Stuttgart, Germany

Tel: +49 711 9440
Fax: +49 711 9441921
E-mail: laufende-aufsicht.hv-stuttgart@bundesbank.de

Further information is also available on the Deutsche Bundesbank's website at <http://www.bundesbank.de/index.en.php>.