

GERMAN FUTURE FINANCING ACT MODERNISES GERMAN FINANCIAL MARKET

To modernise regulatory procedures, Germany removes language barriers and form requirements by strengthening digital and English language communication with BaFin. Standardised documentation for B2B banking, financial, investment and payment services is exempted from some mandatory content review. These and a variety of further measures aiming at modernising the German financial market, such as the segregation of crypto values or the implementation of the EU DLT Pilot Regime, are part of the Financing of the Future Act (*Zukunftsförderungsgesetz, ZuFinG* – Future Financing Act), which has, in large parts, just entered into force.

DIGITALISATION OF FINANCIAL SUPERVISION

The Future Financing Act aims at removing obstacles to digitalisation and improving communication in English with the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin).

English language

Although the official language in administrative proceedings with German authorities is German, BaFin regularly accepts English in prudential matters which involve the European Central Bank. In other cases, communication in English depends to a large extent on the discretion of the person in charge at BaFin.

The Future Financing Act enables communication with BaFin in English as well as applications and submissions in English in some relevant areas, such as for ownership control procedures. This reduces administrative burden significantly. BaFin may still request German translations of specific documents. In such case, the German language version will be binding. Translation requests can also have implications on statutory deadlines.

Digitalisation

The Future Financing Act intends to remove obstacles to digitalisation by reducing written form requirements and enhancing digital communication with BaFin.

KEY POINTS

- Communication with BaFin in English and electronic submission of documents (e.g., by email) is strengthened
- Entities permitted to operate as DLT MTF, DLT SS or DLT TSS under the EU DLT Pilot regime do not require a KWG or WpIG licence
- Crypto custodians must segregate crypto values and cryptographic keys of customers from their own crypto values and cryptographic keys
- Contracts between certain financial institutions are exempted from some mandatory content review

Pursuant to the Future Financing Act, certain notifications, applications and documents can be submitted to BaFin electronically. Whereas "electronic form" requirements in some other German laws require a qualified electronic signature, the requirement "electronically" as per the Future Financing Act covers all types of electronic communication such as simple email or communication via special authority mailboxes.

SEGREGATION OF CRYPTO VALUES

Anticipating requirements under Regulation (EU) 2023/1114 on markets in crypto-assets (MiCA), the Future Financing Act requires crypto custodians to segregate crypto values (*Kryptowerte*) and private cryptographic keys of their customers from their own crypto values and keys. Where crypto values of several clients are held in joint custody, the crypto custodian must ensure that each customer's share can be identified at any time. For further information on MiCA, please see our client briefing on [MiCA](#).

Crypto custodians must also ensure that a customer's crypto values and private cryptographic keys cannot be disposed of for account of the crypto custodian or third parties without the customer's explicit consent.

Crypto values held in custody for a customer when providing crypto custody services are deemed by law to belong to the customer, unless the customer has consented that the crypto values may be disposed of for account of the crypto custodian or third parties. The same applies to the share of a customer in crypto values held in joint custody and to private cryptographic keys in individual custody.

In an insolvency of the crypto custodian, the customer is entitled to segregation (*Aussonderung*). If, in insolvency proceedings over the assets of the crypto custodian, the customer does not agree to a segregation by way of transfer of the entire assets held in custody (or a significant part thereof) to another crypto custodian designated by the insolvency administrator, the customer bears the costs of the segregation. This does not apply, however, if the conditions for continuing the custody offered by such other crypto custodian are unacceptable for the customer.

On 23 October 2023, the German Ministry of Finance has also published a draft Act on the Digitalisation of the Financial Markets (*Finanzmarktdigitalisierungsgesetz – FinmadiG*). FinmadiG is intended to align the German financial regulation regime with key parts of the EU's new Digital Finance Package, including MiCA, Regulation (EU) 2022/2554 on digital operational resilience (DORA), Regulation (EU) 2023/1113 (Funds Transfer) and Directive (EU) 2022/2556 (DORA-Directive). It proposes a new Act on the Supervision of Crypto Markets (*Kryptomärkteaufsichtsgesetz – KMAG*) setting out a special regime for crypto assets and also proposes amending numerous German financial market laws including some of the above requirements. For more information, we refer to our client briefing on [FinmadiG](#).

DLT PILOT REGIME

The Future Financing Act connects the German regulatory regime to the EU DLT Pilot regime under Regulation (EU) 2022/858 which we have informed on in our client briefing on the [EU DLT Pilot regime](#).

The Future Financing Act designates BaFin as relevant German authority under the EU DLT Pilot regime. The Future Financing Act also exempts operators of DLT market infrastructures (Art. 2 No. 5 of Regulation (EU) 2022/858), which have been granted a special permission pursuant to Art. 8 to 10 of this Regulation to operate a DLT multilateral trading facility (DLT MTF), DLT settlement system (DLT SS) or DLT trading and settlement system (DLT TSS), from licence requirements under the German Banking Act (*Kreditwesengesetz* – KWG) and the German Investment Institutions Act (*Wertpapierinstitutsgesetz* – WpIG) to the extent that the service provided is covered by the specific permission under the EU DLT Pilot regime.

STANDARD TERMS AND CONDITIONS

Sections 305 *et seqq.* of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) stipulate rules for including unilaterally preformulated standard terms and conditions (*Allgemeine Geschäftsbedingungen* - AGB) into a contractual agreement. Broadly speaking, they protect the counterparty against disadvantageous clauses in those standard terms and conditions (AGB-Protection). The AGB-Protection may trigger invalidity of certain or all clauses in the standard terms and conditions. Those clauses would be substituted by the relevant provisions under statutory law. Sections 305 *et seqq.* BGB transpose Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Although consumer-oriented, AGB-Protection also applies to B2B transactions whereby the standard of protection is lower and commercial practice (*Handelsbräuche*) is to be considered in favour of the user of the standard terms and conditions (section 310 BGB).

The AGB-Protection is shaped by court decisions on consumer contracts, also initiated by consumer associations. This triggers legal risk where there are no relevant court decisions or where their application to B2B transactions in the financial or capital markets is unclear. This risk is higher where the market is shaped by highly standardised documentation or high-volume transactions.

The Future Financing Act seeks to eliminate this legal uncertainty by introducing an exemption from the AGB-Protection under section 307 BGB (content review), section 308 no. 1a BGB (payment periods) and section 308 no. 1b BGB (inspection- and approval periods). The exemption is subject to the following requirements being met:

- The subject of the contract are transactions which are banking activities or financial services licensable under the KWG, investment services and ancillary investment services licensable under the WpIG, payment services licensable under the German Payment Services Supervision Act (ZAG), transactions of external UCITS or AIF capital management companies under section 20 (2) and (3) of the German Capital Investment Code (KAGB) or transactions by exchanges under section 2 (1) of the German Exchange Act (BörsG).
- The service provider qualifies as entrepreneur which lawfully carries out the transaction that is the subject of the contract on a commercial basis (*i.e.*, the service provider must meet applicable licence requirements for that transaction).
- The counterparty (or recipient of the services) is an entrepreneur who may lawfully carry out such transactions commercially at the place of

its registered office or a branch office (again, the counterparty must meet applicable licence requirements for that transaction).

- Alternatively, the counterparty qualifies as large entrepreneur who may lawfully carry out licensable transactions as per the first bullet point above (but not necessarily the transaction that is the subject of the contract) at the location of its registered office or a branch office. Large entrepreneurs are undertakings which meet two of the following three thresholds for each of the two calendar years preceding the contract: (i) yearly average of at least 250 employees; (ii) turnover revenue of more than EUR 50 million; or (iii) balance sheet total of more than EUR 43 million.
- Specific public bodies and international institutions may always act as service provider or counterparty; these include public debt administration of EEA member states under certain conditions, the European Central Bank, the central banks of EEA member states and the UK and Northern Ireland, the World Bank, the International Monetary Fund or the European Investment Bank and similar international financial organisations.

Hence, for example, the AGB-Protection would not apply where a properly licensed bank enters into the relevant transaction with another properly licensed bank or with a large entrepreneur who may carry out licensable transactions as referred to in the first bullet point above, even if it is not licensed for the relevant transaction. Proposals made during the legislative proceedings to fully exempt relevant contracts from the AGB-Protection under sections 305 *et seqq.* BGB or to broaden the scope of application by including other market participants such as insurance companies and pension funds or professional clients under the MiFID 2 framework have not been adopted. Likewise, the proposal to explicitly clarify in the law itself (and not only in the legislative materials) that the exemption from the AGB-Protection applies to non-German companies has not been reflected.

The revised regime applies to in-scope contracts concluded on or after the date of the Future Financing Act entering into force (*i.e.*, on or after 15 December 2023). In-scope contracts concluded prior to the entry into force (*i.e.*, until 14 December 2023) remain subject to the previous rules. Hence, transactions concluded under a master agreement prior to the entry into force may be treated differently than transactions concluded under this master agreement after the entry into force. The legislative materials clarify the legislator's view that transactions and the underlying master agreement form a uniform contract and that the master agreement is agreed again as part of such contract at the time of the transaction. Hence, for transactions concluded after the entry into force of the Future Financing Act, a previously agreed master agreement is subject to the revised regime to the extent it forms part of such transaction. A proposal during the legislative proceedings for a provision which allows the parties to agree to extend the new regime to existing and continued contracts concluded before the entry into force of the Future Financing Act has not been adopted.

OTHER DEVELOPMENTS

The developments to German law described above are supplemented by a variety of other developments such as possibilities of stock corporations to issue electronic shares and shares with multiple voting rights, facilitations for capital

increases, a reduction of the minimum capital for an IPO, rules for listing Special Purpose Acquisition Companies (SPACs), a BaFin website on which conditions of payment accounts are compared, or a cooling-off period of at least one week for entering into residual debt insurances related to consumer loan agreements.

TIMELINE

The Future Financing Act, adopted by the German *Bundestag* on 17 November 2023 and approved by the German *Bundesrat* on 24 November 2023, has been published in the German Federal Gazette on 14 December 2023. Most of its provisions have, hence, entered into force 15 December 2023 with further provisions to follow on 1 January 2024 and in January and November 2025.

CONTACTS



Dr. Marc Benzler
Partner

T +49 69 7199 3304
E marc.benzler
@cliffordchance.com



Dr. Gregor Evenkamp
Partner

T +49 89 21632 8800
E gregor.evenkamp
@cliffordchance.com



Judith Kiefer
Associate

T +49 69 7199 1329
E judith.kiefer
@cliffordchance.com



Dr. Kai Krieger
Senior Associate

T +49 69 7199 3130
E kai.krieger
@cliffordchance.com



Dr. Oliver Kronat
Partner

T +49 69 7199 4575
E oliver.kronat
@cliffordchance.com



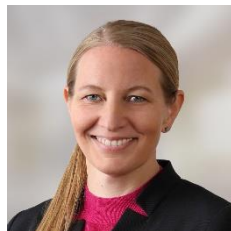
Radoslav Lolov
Counsel

T +49 69 7199 3111
E radoslav.lolov
@cliffordchance.com



Werner Radziwill
Senior Associate

T +49 69 7199 3161
E werner.radziwill
@cliffordchance.com



Kerstin Schaepersmann
Senior Counsel

T +49 69 7199 3270
E kerstin.schaepersmann
@cliffordchance.com



Dr. Helene Uffelmann
Senior Associate

T +49 69 7199 3186
E helene.uffelmann
@cliffordchance.com

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Clifford Chance, Junghofstraße 14, 60311 Frankfurt am Main

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