

# Germany

Dr. Alexander Behrens, Dr. Stefan Henkelmann & Kai Schadtle  
Allen & Overy LLP

## Approaches and developments

### Approaches to FinTechs in German law and regulatory practice

The FinTech phenomenon is gathering considerable momentum both nationally and internationally. Regulators address this phenomenon in different ways, depending on the legal framework in which they operate and the scope of their respective mandates. German regulatory law follows a principle-based and technology-neutral approach to FinTechs. Whether and to what extent FinTechs are regulated depends on the business model they follow, based on the principle “same business, same risks, same rules”.<sup>1</sup> That means, once a FinTech has entered regulated territory, it will be supervised by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – “**BaFin**”) in the same way and according to the same rules as established institutions. However, BaFin also stresses that it applies “proportionate” supervision (i.e. small businesses with low-risk positions are supervised differently from large businesses with high-risk positions). BaFin has no mandate to promote innovation or stimulate economic development in certain financial sectors, unlike regulators in other jurisdictions may have. For example, the UK Financial Conduct Authority is committed to encouraging innovation in the financial sector, which has led to the launch of Project Innovate in 2014 to provide, among other things, support for innovative firms who are ready to test their propositions in the market using a customised regulatory environment (“regulatory sandbox”).

### The EU as a driving force for developments in the FinTech sector

Regulatory developments in the German FinTech sector are driven primarily by the European Union (“**EU**”), which has launched various FinTech-related initiatives in recent years. These are all part of the Digital Agenda for Europe, which in turn forms one of the seven pillars of the Europe 2020 Strategy.<sup>2</sup> In September 2017, following a public consultation phase,<sup>3</sup> the EU Commission presented a package of measures aimed at increasing the convergence of licensing requirements for FinTechs through numerous amendments to EU secondary legislation.<sup>4</sup> A far-reaching FinTech Action Plan followed in March 2018,<sup>5</sup> a core element of which is a proposal for a regulation on crowdfunding.<sup>6</sup> In addition, the main aim of the FinTech Action Plan is to monitor and support the further development of the FinTech sector; for example, by setting up a new expert group on regulatory obstacles to financial innovation and an “EU FinTech Lab” as a platform between regulators and market participants. Finally, the inclusion of virtual currencies in the fifth EU Money Laundering Directive (“**MLD5**”) also has an impact on FinTechs.<sup>7</sup> Except for regulating the provision of financial services in relation to crypto assets, the German legislator, on the other hand, has so far hardly reacted to innovations in the FinTech sector.

### Definition of FinTechs

As omnipresent as the acronym “FinTech” is in the general media and increasingly also in legal literature in Germany, it is difficult to define. Although it can be broken down relatively

easily into its two components “financial (services)” and “technology”, the insight gained from this is limited. It is not even clear whether the term refers to the actors involved or to specific services. Regulatory practice in Germany, however, has given rise to a definition of FinTech that refers to both actors and specific services. According to BaFin, FinTechs are:

*“young undertakings that provide specialised and in particular customer-oriented financial services using technology-based systems. As such, FinTechs follow the trend towards digitalisation and customisation, and encourage digital progress in the financial market at the same time. They rely in particular on customer-friendly, fast and convenient applications for the user. However, FinTechs are not just in competition with traditional financial services providers such as banks, insurers and investment firms, they also to some extent supplement the services that these offer.”<sup>8</sup>*

Services provided by FinTechs are generally based on innovative technologies, including Big Data, artificial intelligence or distributed ledger technologies (“**DLT**”) such as blockchain, the use of which is intended to revolutionise the conventional way of providing financial services.

### **FinTech offering in Germany**

In Germany, FinTechs cover a wide range of different business models. Many of these undertakings offer services that are similar to those provided by established institutions, such as loan brokerage (“crowdfunding”) and automated investment advice (“robo-advice”). Others supplement these traditional services with additional services, particularly in the area of payment solutions and crypto currencies. The following gives a rough overview of different business models that FinTechs are pursuing in Germany today.

#### Payment solutions

Technological trends in payment solutions started gathering pace in Germany at the beginning of the 21<sup>st</sup> century with the introduction of the first online payment methods. Today, providers of innovative payment solutions account for the largest share of the FinTech sector in Germany. With these new payment solutions, the use of smartphones for executing payment transactions is also becoming increasingly important (“mobile payment”). There are two types of mobile payment. Mobile “proximity” payments refer to the act of paying with a mobile device using a “proximity” technology (such as Near Field Communication (NFC), Quick Response (QR) codes, or Bluetooth) typically at the Point of Sale (POS); e.g. in a merchant store. In Germany, this type of mobile payment is offered, for example, by Apple Pay or AliPay, the latter of which is currently only available for users with a Chinese bank account. Mobile “remote” payments on the other hand are independent of the customer and merchant location and are used for online shopping from a mobile device (m-commerce), but may also be used for Person-to-Person (P2P) payments using a mobile telecommunication network (such as the Global System for Mobile Communications (GSM), or mobile internet). The underlying payment instrument of both mobile proximity payments and mobile remote payments may be a payment card, direct debit or credit transfer. As such, they do not differ significantly from established payment methods, but only make them accessible for the payer via his/her mobile device.

Innovative payment solutions also include those based on an e-wallet or digital wallet. An e-wallet is a virtual account that allows users to store and receive funds in the form of electronic money (“**e-money**”) in order to make payments. E-wallets may be used, for example, to purchase items online via a computer or in a shop using a smartphone. Typically, e-wallets are linked to a bank account or credit card via which fiat money can be exchanged for e-money and *vice versa*. The market leader in Germany for e-wallet payment solutions is

PayPal, which, with a market share of 20.5% of sales in German e-commerce, is the second most common payment method after invoices and before direct debits and credit cards. PayPal attracts users for, among other things, the customer protection associated with its payment service, according to which the buyer receives a refund from PayPal if the seller fails to meet its obligations, e.g. if the seller delivers a defective product.

### Crypto currencies

A separate form of payment solution is crypto currencies. Crypto currencies are virtual means of payment created and managed in a decentralised computer network, independent from the state or a payment service provider. Technically speaking, crypto currencies are encrypted data packages which are stored in a virtual wallet. The most well-known and oldest crypto currency is Bitcoin. The Bitcoin network is based on a database jointly managed by the network participants, the so-called “blockchain”. Bitcoins can either be purchased via online trading platforms in exchange for fiat money or created by “mining”, which requires the solution of complex computational maths problems in the Bitcoin network. Since the total amount of Bitcoins is limited to 21 million by the source code, mining is becoming increasingly difficult and can only be done lucratively by computers with enhanced performance. However, Bitcoin is not the only crypto currency. Since the white paper entitled “Bitcoin: A Peer-to-Peer Electronic Cash System” was published under the pseudonym Satoshi Nakamoto in November 2008, and the first 50 Bitcoins – the so-called genesis block – were mined on 3 January 2009, numerous alternative concepts have entered the crypto currency market. Nevertheless, Bitcoin, with a market capitalisation of around USD 177.3 billion, is currently leading by a considerable margin, ahead of Ethereum with around USD 22.1 billion and Ripple with around USD 8.9 billion.<sup>9</sup>

In Germany, the Stuttgart Stock Exchange is playing a pioneering role, offering investors easy access to trading in crypto currencies via its app Bison. This is planned to be followed shortly by a platform for initial coin offerings (ICOs) and a multilateral trading facility (“MTF”) for crypto currencies. Finally, the exchange provides solutions for the safe custody of digital assets. As an established market player, the aim of the Stuttgart Stock Exchange is also to set standards that contribute to the acceptance of crypto currencies as a new asset class. In addition, the Deutsche Börse Group, operator of the Frankfurt Stock Exchange, has partnered with the telecommunications provider Swisscom and Switzerland-based FinTechs Sygnum and Custodigit AG to set up a digital asset platform intended to provide a number of solutions in the digital assets space, including issuance, custody, liquidity provision and banking services, all using blockchain technology. The first securities transactions with DLT-based tokenised shares have successfully been settled via the platform in November 2019.

### Crowdfunding

The idea of crowdfunding draws directly on traditional banking business. It involves raising capital from multiple backers (the crowd) in order to provide financial support for a specific project. This often takes place via online platforms. The crowdfunding market in Germany can be divided into four sub-segments, namely:<sup>10</sup> (i) donation-based crowdfunding, in which the backer receives nothing in return but a sense of satisfaction; (ii) reward-based crowdfunding, in which there is a prospect of symbolic remuneration, e.g. by inclusion of the backer’s name in the credits of a movie financed by crowdfunding; (iii) crowdlending, which is characterised by the repayment of the amount provided, with or without interest; and (iv) crowdinvesting, where the backer’s objective is to obtain a financial return either by participating in the future profits of the project or by receiving equity or debt instruments of the financed company.

In particular, initiators of creative, cultural or social projects increasingly rely on donation-based or reward-based crowdfunding as an alternative or supplement to traditional forms of financing, such as loans, venture capital, business angels, or grants. For them crowdfunding is often an attractive option since there are practically no financial offerings tailored to their specific needs. One of the largest reward-based crowdfunding projects in Germany to date is the cinema adaptation of the television series *Stromberg*. In December 2011, the production company Brainpool launched a promotion website to raise funds for the movie. The intention was to raise EUR 1 million by March 2012, a goal which was achieved within a week. In contrast to the financing of creative, cultural and social projects, crowdlending and crowdinvesting are used as financing instruments by start-up companies, who are often unable to meet the requirements for conventional financial instruments, such as providing audited financial statements or collateral.

Donation- and reward-based crowdfunding represent the smallest crowdfunding sub-segment in Germany. With project financing totalling EUR 33.4 million and an average financing amount of EUR 5,137 in 2019,<sup>11</sup> the volume of donation- and reward-based crowdfunding is significantly lower than, for example, the financing of start-up companies through crowdinvesting. In 2019, a number of donation- and reward-based crowdfunding platforms were active on the German market carrying out a total of 6,500 funding campaigns. The world market leader in donation- and reward-based crowdfunding is Kickstarter, a US company that has been active in Germany since 2015.

With corporate financing totalling EUR 83.8 million in 2019, crowdinvesting is the second largest crowdfunding sub-segment in Germany. In 2019, crowdinvesting platforms carried out 300 campaigns with an average funding per campaign of EUR 246,607.<sup>12</sup> The market leader in crowdinvesting is Companisto, which entered the German market in 2012. The largest crowdfunding sub-segment in Germany, however, is crowdlending. In 2019, the total volume of the German crowdlending market amounted to EUR 228.4 million with a total number of 35,800 successfully funded loans of which 34,900 loans with a total value of EUR 192.5 million were granted to consumers.<sup>13</sup> The first two crowdlending platforms, eLolly and Smava, entered the German market in 2007; Auxmoney, today's market leader in crowdlending, followed soon afterwards. By 2019, a total of 13 crowdlending platforms were active on the German market.

### Robo advice

Robo advice is another business model pursued by FinTechs in Germany. The customer uses a program that provides support in financial investment decisions, i.e. without a human investment adviser. Online platforms are often used for this, whereby the potential investor enters personal data that is significant for the purposes of the investment decision. This includes, among other things, their risk appetite and the investment amount. An algorithm subsequently determines the appropriate financial instruments and the amount of their *pro rata* inclusion in the customer's investment portfolio. The composition of the portfolio and the market situation are regularly reviewed by the program. If it determines that the investment parameters envisaged for the customer are no longer being adhered to due to market developments, the program recommends (investment advice) or initiates (portfolio management) the purchase or sale of financial instruments in order to adjust the portfolio back to the specified investment parameters. Robo advisors may pursue active and passive investment and diversification strategies.

In Germany, this form of investment advice or portfolio management, respectively, was first offered in 2013 by Quirion and Cashboard. While the first company is still one of the market leaders in robo advice alongside Scalable Capital, the latter went insolvent in

2017. Today, about 30 companies providing robo advice are active in Germany. The assets under management by these companies amount to EUR 12,355 million, with an expected annual growth rate of 35% resulting in the total amount of EUR 30,382 million assets under management by 2023.<sup>14</sup>

## Regulatory and insurance technology

### Insurance technology

There are many different business models that FinTechs in the insurance industry (so-called “**InsurTechs**”) can adopt. They extend across all stages of the value chain of insurance products. A wide range of terminology is used in the descriptions of such business models (e.g. peer-to-peer insurance or comparison portal). However, the business models can roughly be divided into insurance undertakings and insurance intermediaries. While in Germany, InsurTechs were at first predominantly active in the areas of distribution and contract management, i.e. as insurance intermediaries, the number of InsurTechs that provide insurance services themselves is steadily increasing. The InsurTechs, which act as insurance undertakings, do not only cover the areas of indemnity/casualty insurance; for example, ottonova Krankenversicherung AG, the first digital insurance undertaking in Germany, is rather a health insurer. In the field of insurance intermediation, a variety of business models also exist. These range from comparison portals with the option of concluding insurance contracts to insurance agents who act as underwriters. In these cases, the inherent risk entailed in insurance contracts is not borne by the InsurTech, but rather by an established insurance undertaking cooperating with the InsurTech. Depending on the business model of the respective InsurTech, the activity may be subject to a licensing requirement. While InsurTechs that act as insurance undertakings usually require a licence pursuant to Sec. 8(1) of the Insurance Supervision Act (*Versicherungsaufsichtsgesetz*) from BaFin, insurance intermediaries may require a licence pursuant to Sec. 34d of the Industrial Code (*Gewerbeordnung* – “**GewO**”) from the local chamber of industry and commerce (*Industrie- und Handelskammer*).<sup>15</sup>

### Regulatory technology

Regulatory technology (“**RegTech**”) focuses on the more effective and efficient mapping, fulfilment and documentation of regulatory obligations supported by innovative technologies. As such, RegTech could be relevant for a multitude of economic sectors. However, definitions of institutions such as the Financial Stability Board, the European Banking Authority and the Bank for International Settlement all define RegTech as an application of innovative financial technology by supervised institutions to meet regulatory requirements. There is no generally accepted categorisation of RegTech applications. The known use cases are continuously extended by new application possibilities. The market currently offers applications that can be used in compliance management (e.g. automated evaluations of regulatory requirements, monitoring of compliance status and gap analyses, and technically supported disclosures of shareholder structures), risk management (e.g. automated alerts and countermeasures initiated based on quantitative analysis, data-driven and automated credit review procedures, and technically supported data generation and aggregation for *ad hoc* stress tests), customer verification (e.g. technically supported background checks using alternative data sources and the use of biometric identity verification techniques), fraud detection (e.g. automated money-laundering checks, activity and transaction monitoring using machine learning techniques) and many other areas.<sup>16</sup> In general, the use of RegTech applications does not require any special licence from BaFin. However, this use must not give rise to any unreasonable risks. In any case, BaFin closely monitors developments in the RegTech sector.

## Regulatory bodies

There is no special regulatory authority for FinTechs in Germany. Depending on the business model that a FinTech pursues, it is rather subject to supervision as a credit institution, investment firm, payment institution or insurance undertaking. Supervision of these types of institutions is generally carried out by BaFin together with Deutsche Bundesbank. While Deutsche Bundesbank focuses on fact-finding and data preparation (in particular on solvency, liquidity, statistics and risk management), BaFin is primarily responsible for licensing procedures as well as ongoing supervision of the institutions with the aim of enforcing compliance with the requirements laid down in the Banking Act (*Kreditwesengesetz* – “KWG”) and other laws.

Having said that, a special supervisory regime applies to credit institutions. Under the Single Supervisory Mechanism (“SSM”), credit institutions deemed “significant” are supervised directly by the European Central Bank (“ECB”), while smaller credit institutions continue to be directly monitored by BaFin. However, due to the high requirements that a credit institution must meet in order to be considered “significant”, no FinTech in Germany is subject to direct supervision by the ECB. Certain supervisory competences in this area – in particular, the granting and withdrawal of licences and the assessment of change of control notifications – have been fully transferred to the ECB under the SSM. Consequently, it is the ECB which ultimately decides whether or not a FinTech wishing to conduct banking business in Germany receives a licence.

## Key regulations and regulatory approaches

### Licensable activities

As set out above, whether and to what extent FinTechs are regulated depends on the business model they follow. If FinTechs wish to carry out licensable activities in Germany commercially or on a scale which requires commercially organised business operations, a written licence from BaFin is required. Licensable activities include in particular banking business, financial services, payment services and e-money business. While licensing requirements for conducting banking business and the provision of financial services are contained in Sec. 32 of the Banking Act (*Kreditwesengesetz* – “KWG”), licensing requirements for the provision of payment services and conducting e-money business are laid down in Sec. 10 and Sec. 11 of the Payment Services Supervisory Act (*Zahlungsdienstenaufsichtsgesetz* – “ZAG”).

The licensable banking businesses and financial services are listed in Sec. 1(1) Sent. 2 and Sec. 1(1a) Sent. 2 KWG, respectively. In general, it can be said that the investment services and activities listed in Sec. A of Annex I to the Markets in Financial Instruments Directive 2014/65/EU (MiFID II) and the activities subject to mutual recognition listed in Annex I to Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV) are licensable in Germany. The licensable payment services are listed in Sec. 1(1) Sent. 2 ZAG and comprise those activities listed in Annex I to Directive (EU) 2015/2366 on payment services in the internal market (PSD II). Finally, licensable e-money business is defined in Sec. 1(2) Sent. 2 ZAG as the issuance of e-money. In addition to licensing requirements, the aforementioned laws as well as the Securities Trading Act (*Wertpapierhandelsgesetz*) contain conduct and organisation rules for licensed entities, which are also to be complied with by FinTechs with a corresponding licence.

### Potential licensing requirements for FinTech business models

#### *Payment solutions*

Mobile payment solutions have in common the fact that they usually make use of established

payment instruments, such as payment cards, direct debits or credit transfers. Most mobile payment solutions are therefore not completely new payment methods, but merely offer users a new and mobile frontend for payment handling. Whether or not a mobile payment services provider requires a licence depends on how the payment handling is executed and which contracts it is based on. In general, the following applies: if the mobile payment service provider obtains possession of client money during the payment process, it will probably require a licence for money remittance business pursuant to Sec. 1(1) Sent. 2 No. 6 ZAG. If, on the other hand, the service provider simply provides the technology, without being itself involved in the execution of the payment process (which is usually performed by a credit institution or credit card company acting as cooperation partner), it may benefit from an exemption that exists for technical service providers. What is important is that the cooperating PSP must conclude contracts with the users in relation to the provision of the payment services. The users must be able to exercise their contractual rights with regard to the PSP. The contracts which the service provider concludes with the payment service users must be limited to technical services.

### *Crypto currencies*

For several years it has been BaFin's administrative practice to view Bitcoins and other crypto currencies as financial instruments in the form of "units of account" (*Rechnungseinheiten*) within the meaning of Sec. 1(11) Sent. 1 No. 7 KWG.<sup>17</sup> This view was, however, challenged in 2018 by the Berlin Regional Court (*Kammergericht*) in criminal proceedings. The German legislator then took the transposition of MLD 5 as an opportunity to introduce "crypto values" (*Kryptowerte*) as a new category of financial instruments in Sec. 1(11) Sent. 1 No. 10 KWG, these being defined as digital representations of a value which has not been issued or guaranteed by any central bank or public authority and which does not have the legal status of a currency or money but is accepted by natural or legal persons as means of exchange or payment or for investment purposes by virtue of an agreement or actual practice, or serving investment purposes and which can be transferred, stored and traded electronically. As a consequence, all activities which are licensable when performed with respect to financial instruments, including brokering and trading activities, are also subject to a licensing requirement if performed with respect to crypto values, including crypto currencies; just using crypto currencies as a substitute for cash or deposit money to participate in exchange transactions does not require a licence. A merchant may thus receive payment for his products or services in crypto currencies without carrying out licensable activities. The same applies to the customer. Equally, mining crypto currencies in and of itself does not trigger a licensing requirement as the "miner" does not issue or place the crypto currencies. The sale of crypto currencies, either self-mined or purchased, or their acquisition is generally not licensable. Only under additional circumstances may a commercial handling of crypto currencies trigger a licensing requirement under the KWG.

Commercial trading in crypto values is mostly done via crypto exchanges. These encompass a large number of different business models.<sup>18</sup> Those buying and selling crypto values in their own name for the account of others carry out licensable principal broking business pursuant to Sec. 1(1) Sent. 2 No. 4 KWG. The purchase and sale of crypto currencies are made for the account of others when the economic advantages and disadvantages of that business affect the principal. If no principal broking business is carried out by platforms, they may instead be operating a MTF pursuant to Sec. 1(1a) Sent. 2 No. 1b KWG. The existence of a MTF is likely in particular in case of platforms where sellers place crypto values and set a price threshold above which a trade should be executed, or where sellers secure their transactions by a deposit in the form of crypto values that are transferred to the platform

but only released after the seller has confirmed the payment. Finally, providers that act as “currency exchanges” offering to exchange legal tenders against crypto currencies, or crypto currencies against legal tenders, carry out dealing on their own account pursuant to Sec. 1(1a) Sent. 2 No. 4 KWG. This is the case when crypto currencies are not only mined, purchased or sold in order to participate in an existing market, but when a special contribution is made to create or maintain that market. Due to the additional service element, this then constitutes dealing on one’s own account, which requires a licence. In addition to commercial trading in crypto values, the custody, management, and safeguarding of crypto values or private cryptographic keys serving to hold, store, and transfer crypto values for the account of others also qualifies as a licensable financial service pursuant to Sec. 1(1a) Sent. 2 No. 6 KWG.

### *Crowdfunding*

As regards crowdfunding, the licensing requirements depend on the type of crowdfunding – donation- and reward-based crowdfunding, crowdinvesting or crowdlending. The granting of money loans in context of crowdlending may qualify as licensable lending business pursuant to Sec. 1(1) Sent. 2 No. 2 KWG. In order to avoid a licensing requirement, crowdlending platforms often cooperate with a credit institution (so-called “fronting bank”), which first grants the loan and then assigns the loan receivables either to the crowdlending platform, an intermediary or to the lenders. The ongoing purchase of loan receivables, in turn, can trigger a licensing requirement for factoring pursuant to Sec. 1(1a) Sent. 2 No. 9 KWG, but only if it is conducted on the basis of a framework agreement. If crowdlending platforms also accept funds from lenders upfront in order to hold them in safe custody until the loan agreement is concluded, this may qualify as licensable deposit business pursuant to Sec. 1(1) Sent. 2 No. 1 KWG.

The licensing requirements for crowdinvesting generally correspond to those of crowdlending. In addition, further potential licensing requirements arise for FinTechs as the operator of crowdinvesting platforms, in particular if debt instruments are issued by the company seeking capital. In this case, the crowdinvesting platform may provide licensable investment brokerage or investment advice pursuant to Sec. 1(1a) Sent. 2 Nos. 1 and 1a KWG.

Notwithstanding the above, crowdlending and crowdinvesting platforms do not require a licence under Sec. 32(1) KWG, if they benefit from an exemption pursuant to Sec. 2(6) No. 8(e) KWG. Accordingly, anyone whose financial services for others consist only of investment advice and/or investment brokerage between customers and providers or issuers of capital investments within the meaning of Sec. 1(2) of the Capital Investment Act (*Vermögensanlagegesetz* – “**VermAnlG**”) is exempted from the licence requirement if, in providing such financial services, he/she is not entitled to acquire ownership or possession of client money. This is generally the case with crowdlending and crowdinvesting platforms operating in Germany. Having said that, even if crowdlending and crowdinvesting platforms benefit from the exemption in accordance with Sec. 2(6) No. 8(e) KWG, they may nevertheless require a licence under Sec. 34c and/or Sec. 34f GewO, if they provide investment brokerage or investment advice on a commercial basis with regard to capital investments within the meaning of Sec. 1(2) VermAnlG.

In contrast, donation- and reward-based crowdfunding, in which the funds made available are generally non-repayable, is not subject to any licensing requirement.

### *Robo advice*

The rendering of robo advisory services with the model described above frequently presupposes that licensable financial services are performed. Such services may include investment advice or portfolio management pursuant to Sec. 1(1a) Sent. 2 No. 1a or No. 3



KWG and, where applicable, investment or contract broking pursuant to Sec. 1(1a) Sent. 2 No. 1 or No. 2 KWG. The latter applies to service providers that are also brokering transactions on the purchase and sale of financial instruments. For the licensing requirement, it is irrelevant whether or not the service provider makes use of automated processes and via which channel of distribution it approaches potential customers. However, there are many different ways to provide robo advice, which makes allocation to one licensable activity difficult. For this reason, BaFin stresses that the supervisory assessment depends very much on how a particular robo-advisory platform is structured and on what contractual arrangements are agreed with the users.<sup>19</sup>

### Restrictions

There are no types of FinTech businesses that are generally prohibited in Germany. As set out above, German law does not provide for a general “privilege” for FinTechs under financial regulatory laws either. If a FinTech’s business model includes a licensable activity, it must obtain the relevant licence. Necessary licences may include banking licences or licences for providing financial services pursuant to Sec. 32 KWG, payment services or e-money licences pursuant to Sec. 10 or Sec. 11 ZAG and insurance licences pursuant to Sec. 8 VAG.

### Cross-border business

BaFin assumes that licensable activities are carried out *in Germany* not only if the provider of the service has its registered office in Germany, but also if the provider of the service has its registered office outside of Germany and targets the German market in order to offer its services repeatedly and on a commercial basis to companies and/or persons having their registered office or ordinary residence in Germany.<sup>20</sup> Providers from non-EEA states that wish to market licensable services or products specifically in Germany must therefore establish a subsidiary (Sec. 33(1) Sent. 1 No. 6 KWG; Sec. 12 No. 8 ZAG) or a branch (Sec. 53 KWG; Sec. 42 ZAG) in Germany in order to obtain the required licence. Companies from EEA states may conduct business requiring a licence not only by establishing a branch but also on a cross-border basis – without having a presence in Germany – (Sec. 53b(1) KWG; Sec. 39(1) ZAG), subject to the requirements of Sec. 53b KWG or Sec. 39 ZAG (so-called notification procedure/EU Passport).

However, there is no restriction on the so-called freedom to provide requested services (*passive Dienstleistungsfreiheit*), i.e. the right of persons and entities domiciled in Germany to request the services of a foreign entity on their own initiative. Transactions requested on the client’s own initiative are therefore not subject to the licensing requirements under Sec. 32 KWG, Sec. 10 or Sec. 11 ZAG (so-called reverse solicitation exemption).

\* \* \*

### Endnotes

1. BaFin, FinTech companies, 2016 Annual Report, p. 65, available at: [https://www.bafin.de/SharedDocs/Downloads/EN/Jahresbericht/dl\\_jb\\_2016\\_en.pdf?\\_\\_blob=publicationFile&v=4](https://www.bafin.de/SharedDocs/Downloads/EN/Jahresbericht/dl_jb_2016_en.pdf?__blob=publicationFile&v=4).
2. COM(2010) 2020 final.
3. Responses available at [https://ec.europa.eu/info/consultations/finance-2017-fintech\\_en](https://ec.europa.eu/info/consultations/finance-2017-fintech_en).
4. COM(2017) 536 final.
5. COM(2018) 109 final.

6. COM(2018) 113 final.
7. Cf. Article 1(1)(c), (2)(d) of Directive (EU) 2018/843 (OJ L 156, 20.6.2018, p. 43).
8. BaFin, FinTechs: Young IT companies on the financial market, available at: [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2016/fa\\_bj\\_1601\\_fintechs\\_en.html;jsessionid=10392FF41C937C5DE43019F0B7F8380C.1\\_cid372?nn=8054672](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2016/fa_bj_1601_fintechs_en.html;jsessionid=10392FF41C937C5DE43019F0B7F8380C.1_cid372?nn=8054672).
9. Source: <https://coinmarketcap.com/> (as at 14.05.2020).
10. Cf. on the following BaFin, Crowdfunding: Supervisory requirements and investor responsibility, available at: [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2014/fa\\_bj\\_1406\\_crowdfunding\\_en.html;jsessionid=CE18CE783EEB9CF6769D366A0C8A745E.2\\_cid381?nn=8249098](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2014/fa_bj_1406_crowdfunding_en.html;jsessionid=CE18CE783EEB9CF6769D366A0C8A745E.2_cid381?nn=8249098).
11. Statista, Digital Market Outlook, Crowdfunding, Germany, available at: <https://www.statista.com/outlook/335/137/crowdfunding/germany?currency=eur>.
12. Statista, Digital Market Outlook, Crowdinvesting, Germany, available at: <https://www.statista.com/outlook/377/137/crowdinvesting/germany?currency=eur>.
13. Statista, Digital Market Outlook, Alternative Lending, Germany, available at: <https://www.statista.com/outlook/399/137/alternative-lending/germany?currency=eur>.
14. Statista, Digital Market Outlook, Robo-Advisors, Germany, available at: <https://www.statista.com/outlook/337/137/robo-advisors/germany?currency=eur>.
15. Cf. BaFin, Insurtech Companies, available at: [https://www.bafin.de/EN/Aufsicht/FinTech/Insurtech/insurtech\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/FinTech/Insurtech/insurtech_node_en.html).
16. The aforementioned examples are from BaFin, *Regtech auf dem Vormarsch*, available at: [https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Fachartikel/2019/fa\\_bj\\_1903\\_Regtech.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Fachartikel/2019/fa_bj_1903_Regtech.html).
17. Cf. BaFin, Guidance Notice on Financial Instruments pursuant to Sec. 1(11) Sent. 1 to 3 KWG (*Hinweise zu Finanzinstrumenten nach § 1 Abs. 11 Sätze 1 bis 3 KWG*), available at: [https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Merkblatt/mb\\_111220\\_finanzinstrumente.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Merkblatt/mb_111220_finanzinstrumente.html).
18. The following draws on BaFin, Virtual Currency, available at: [https://www.bafin.de/EN/Aufsicht/FinTech/VirtualCurrency/virtual\\_currency\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/FinTech/VirtualCurrency/virtual_currency_node_en.html).
19. BaFin, Robo-advice and auto-trading – platforms for automated investment advice and automatic trading, available at: [https://www.bafin.de/EN/Aufsicht/FinTech/Anlageberatung/anlageberatung\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/FinTech/Anlageberatung/anlageberatung_node_en.html).
20. Cf. BaFin, Notes regarding the licensing for conducting cross-border banking business and/or providing cross-border financial services, available at: [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Merkblatt/mb\\_050401\\_grenzueberschreitend\\_en.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Merkblatt/mb_050401_grenzueberschreitend_en.html).

**Dr. Alexander Behrens****Tel: +49 69 2648 5730 / Email: [Alexander.Behrens@AllenOvery.com](mailto:Alexander.Behrens@AllenOvery.com)**

Alexander advises banks and other financial service providers, including FinTech companies, as well as unregulated companies on all aspects of financial regulatory law. In addition to German and European banking regulatory law, he focuses on payment services law and capital markets regulation as well as issues related to the Banking Union. Furthermore, Alexander has broad experience in the areas of M&A of regulated entities, NPL transactions, civil banking law and in internal investigations in the finance sector.

**Dr. Stefan Henkelmann****Tel: +49 69 2648 5997 / Email: [Stefan.Henkelmann@AllenOvery.com](mailto:Stefan.Henkelmann@AllenOvery.com)**

Stefan is a Partner at Allen & Overy LLP, Frankfurt with broad expertise advising on German and international capital markets transactions. Stefan specialises in advising on securitisations and other structured finance transactions (covering true sale, secured loan and synthetic structures and alternative lending across a broad range of asset classes), derivatives and financial market infrastructure (such as clearing of securities and OTC derivatives), FinTech products as well as restructurings in the capital markets sector. Another focus of his practice is providing advice on bond transactions including *Pfandbriefe*, covered bonds, structured notes, hybrid and corporate bonds. Stefan has broad experience in advising on all related regulatory and insolvency law matters.

He is a lecturer for capital markets law at the Institute for Law and Finance of the Goethe University Frankfurt.

**Kai Schadtler****Tel: +49 69 2648 5768 / Email: [Kai.Schadtler@AllenOvery.com](mailto:Kai.Schadtler@AllenOvery.com)**

Kai advises banks and other financial services providers, including FinTech companies, as well as unregulated companies on all aspects of financial regulatory law, with a particular focus on payment services law, capital markets regulation and German and European banking supervisory law. In addition, Kai has broad experience in the areas of commercial and transactional banking law, anti-money laundering law as well as in M&A transactions of regulated entities.

## Allen & Overy LLP

Bockenheimer Landstraße 2, 60306 Frankfurt am Main, Germany

Tel: +49 69 2648 5000 / URL: [www.allenoverly.de](http://www.allenoverly.de)