die öffentlichen Banken

Current positions on the regulation of banks and the financial markets

JULY 2022

Exit from the crisis – supporting the economic rebound

VÖB in Europe

BERLIN

- Main lobbying office, with close to 80 staff members
- Professional support for member institutions
- Positioning and exchange of views in expert committees and working groups
- Contact with the German Federal government, and with both chambers of the German parliament (Bundestag/Bundesrat)

BONN

- Regular exchange of views with the German Federal Financial Supervisory Authority (BaFin)
- Registered office of VÖB-Service GmbH subsidiary

BRUSSELS

- Eight local employees
- Regular contact with the European Commission, the European Parliament, the Permanent Representations of the Member States and other banking industry associations
- Member of the European Association of Public Banks (EAPB)

FRANKFURT

- Regular exchange of views with BaFin, the Bundesbank and the European Central Bank (ECB)
- Five press conferences per year
- Eight local member institutions

PARIS

- Liaison office
- Regular contact with the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA)

Current VÖB positions on the regulation of banks and the financial markets

JULY 2022

IRIS BETHGE-KRAUSS | EXECUTIVE MANAGING DIRECTOR

Dear readers,

The German economy has been in crisis mode for three years now. We have stood together against the effects of the COVID-19 pandemic. Not least thanks to the public banks that quickly provided support in form of subsidies, loans and loan moratoria, our economy weathered the crisis comparatively well.

Almost four months ago, Russia invaded Ukraine. This war is a humanitarian disaster. The images of death and destruction in the media are hard to bear, and they push other issues into the background. We can already clearly feel the economic impact of the conflict.

And just as during the COVID-19 pandemic, the public-sector banks are once again a strong partner at your side. They ensure the extension of loans to companies and municipalities, and advise their clients with experience and expertise. In these uncertain and volatile times – also on the financial markets –, they are therefore making a decisive contribution to the stability of the economy and the financial system.

However, the tasks of the Federal government's and federal states' promotional banks – as well as of the Landesbanken – are not limited to their function as helpers in times of crisis. They are also called upon to drive forward the necessary transformation of the economy and society towards digitalisation and sustainability. In this process, they make a key contribution by financing projects which range from energy generation and savings to modernising IT infrastructures and residential construction. This is especially important since we will be dealing with the aftermath of the crises for a long time.

For the public banks to be able to play their role of supporting in a crisis environment and also as drivers of transformation, our member institutions require a change in framework conditions. We are striving to help shape these by using sound skilled work and a transparent exchange of information. In this context, our "Current positions on the regulation of banks and the financial markets" serve as an important instrument to inform policymakers, regulators, member institutions and other stakeholders concerning our take on key legislative initiatives and regulatory requirements.

I hope this publication makes interesting reading. Together with my colleagues, I will be happy to answer any questions you may have.

Yours sincerely,

OUR TOPICS

Exit from the crisis – supporting the economic rebound

In times of crises and great change, public banks have a role of the utmost importance to play. We advocate measures and framework conditions aimed at mitigating the impact of the COVID-19 pandemic and the Ukraine war, and at supporting a transformative new start combined with sustainable economic change.

Even though the German economy experienced overall growth in 2021, the past year ended on a subdued note in terms of economic development. The economic environment at the start of 2022 was more volatile in general.

Since February 2022, German companies have once again been facing major challenges, as the Ukraine war has led, among other things, to supply bottlenecks, rising commodity prices and geopolitical instability. It is now particularly important to finally overcome the COVID-19 pandemic, and to push the modernisation of society and the economy.

During the past three years, public banks have contributed significantly to overcoming the economic shock provoked by the COVID-19 crisis. Now they are needed for supporting the economic recovery.

Public banks will support the transformation to a more climate-neutral and digitalised economy via financing and funding solutions. These following tasks and demends should be given immediate priority along the way.

OUR POSITION

SUPPORT BY THE PUBLIC SECTOR

- **We** call for the existing reliable network of promotional banks at federal and state level to be drawn on for all future tasks in relation to funding policies – be it the disbursement of national funds or EU resources.

- **We** ask that promotional banks be adequately equipped by their owners (promotional funding budgets, digital infrastructure) in order to be able to support the social, economic and ecological transformation with an appropriate range of promotional/development offers.

- **We** are committed to ensuring that more sustainable investments and projects can be realised. There must be a stronger funding focus on innovative and social business models. The federal government and the federal states must also increasingly consider the promotion of social infrastructures and affordable housing.

- **We** remain advocates for EU provisions on state aid to remain relaxed in order to enable German promotional banks to continue to contribute to stabilising and transforming the economy with their development programmes, even after the pandemic.

- **We** appeal to the EU Commission and the EIB Group to accelerate the processes for the conclusion of guarantee agreements within InvestEU, so that promotional banks (intermediaries and implementing partners) can implement the corresponding InvestEU guarantees into their regional and national range of promotional services.

- **We** advocate the structural development of the Hermes cover for small tickets as part of the efforts to promote small and medium-sized exporters. Especially in view of the current distortions on the markets caused by the Russia-Ukraine conflict and the effects of the ongoing COVID-19 pandemic, medium-sized exporters find themselves challenged to tap new sales markets.

- **We** call for greater leeway for sales financing and pre-financing of exports to preserve order opportunities of medium-sized exporters – indeed, the public banks are ready to offer tailor-made financing solutions for SME export business.

BANKING REGULATION AND SUPERVISION

- **We** argue that the support and participation of institutions in governmental development measures should be treated as non-contributory in terms of the EU bank levy, and we see urgent need for improvement in the process of passing through trustee loans, or development and promotional loans to end-customers, which should be excluded from the basis for calculating the EU bank levy. Moreover, we consider the intention of the Single Resolution Board (SRB) to levy further contributions after the target contribution of the Single Resolution Fund (SRF) is reached by the end of 2023 to be contrary to the legal basis for the collection of contributions.

- **We** are in favour of a cautious exit from the relief granted during the crises, for example with regard to the use of liquidity and capital buffers, so as to avoid potential cliff effects and ensure that the economic recovery is not jeopardised.

- **We** welcome the fact that the supervisory authorities intend to maintain certain relief measures that have proven successful during the pandemic. This includes the conclusion of trading transactions from the home office, which is to be enabled under certain conditions in the transition to new working practices.

CAPITAL MARKETS

- **We** are committed to ensuring that, as in the past, the upcoming reviews of capital markets regulation (MiFID/MiFIR, PRIIPs-VO, SSR, MAR) are used to seriously examine rules impeding efficient capital markets, in a quest to support rapid market recovery following the COVID-19 crisis.

- **We** welcome the relief as to information requirements in the securities business adopted in the MiFID Quick Fix as an important first step. This path should also be pursued further in the wake of the Capital Markets Union and the MiFID II review in order to yield effective improvements and facilitate investors' access to capital markets. In particular, the regime revision must not create new bureaucratic burdens.

LABOUR LAW

- **We** advocate that the Federal Staff Representation Act and all state staff representation laws throughout Germany incorporate a co-determination right of the staff council on short-time working as soon as possible, since this would allow departments to save jobs by independently and temporarily introducing short-time working with their staff representatives.

TAX LAW

- Regarding the impact of the COVID-19 pandemic, **we** call upon the German Federal Ministry of Finance to provide clarification regarding partial write-offs as soon as possible: as far as the annual financial statements for 2020 and 2021 are concerned, the impairments that need to be recognised under commercial law also have to be recognised, most likely permanently, in the tax balance sheet without the need for additional proof.

1 Sustainable finance

Integrate market-based solutions in a European context – implement a pragmatic taxonomy for green finance products, embedding this into risk management using a measured approach.

The aim of sustainable financial management is to further channel capital flows into social and environmental investments, to better manage sustainability risks and to integrate environmental, social and governance (ESG) aspects more effectively into decision-making processes. The European Commission (EU COM) confirmed this with its renewed sustainable finance strategy published in July 2021, which focuses on a EU-wide sustainability classification system – the Taxonomy. The Delegated Act on the first two climate-related environmental objectives was published in December 2021, and is legally binding. A draft Delegated Act on the most controversial economic activities, in which fossil gas and nuclear energy are classified as sustainable under certain conditions, was adopted by the EU COM in March 2022. The EU member states and the European Parliament are consulting on the topic within their four-month scrutiny period ending on 11 July 2022.. The EU COM also published the Article 8 Delegated Act on the disclosure of taxonomy KPIs in December 2021, followed by two interpretation documents. Credit institutions currently publish their Taxonomy Eligibility Ratio and will be disclosing their Green Asset Ratio for the first time as at 31 December 2023.

The EU Platform on Sustainable Finance (PSF) further published final reports on the Taxonomy extension, a social Taxonomy, and the specification of the four remaining environmental objectives (Taxo 4) in the first quarter of 2022. Whilst a draft Delegated Act on Taxo 4 is scheduled to be published by the end of 2022, the EU COM is anticipated not to take up the social Taxonomy before the next legislative term; a voluntary guideline on the Taxonomy extension is expected by the end of this year.

Requirements for disclosure of ESG factors, including their integration into the investment process, have been applicable since March 2021; however, numerous details are still pending. Due to the interdependencies of the thirteen published regulatory technical standards (RTS) under the Sustainable Finance Disclosure Regulation (SFDR), the EU Commission bundled them in one Delegated Regulation in April 2022. Application of the RTS has been postponed until January 2023. In addition, the Delegated Regulation on MiFID II was published in August 2021; ESMA launched a

OUR POSITION

- **We** are in favour of taking sustainability considerations into account in long-term economic stimulus programmes launched to reinforce Germany's position as an economic hub, against the background of the current COVID-19 pandemic and the war in Ukraine. This applies especially to strengthening healthcare, as well as the establishment of climate-friendly infrastructures and key industries.
- **We** believe that sector-specific transition periods, together with economic, environmental and fiscal policy support, are necessary to boost the transformation of the economy.
- **We** are convinced that common, science-based standards for sustainable financial products will increase transparency for investors, reduce uncertainty among issuers, and contribute to market growth in the long term. We find the proposal for a voluntary EU Green Bond Standard to be generally very positive. However, adjustments are necessary, especially regarding the grandfathering provisions for financial instruments already issued.
- **We** advocate consideration of the special characteristics of the credit market in the context of developing transparency obligations that banks will have to fulfil under the Taxonomy. Due to methodological weaknesses, the mandatory Taxonomy ratios currently offer only very limited informational value. We therefore believe a timely revision to be necessary.
- **We** welcome a further development of the Taxonomy, especially by including social aspects. We are confident that a broad sustainability approach is necessary, rather than restricting the emphasis on environmental and climate issues. Before that, however, the methodological weaknesses of the Green Asset Ratio should be remedied.
- **We** welcome the EBA's position of gradually approaching the topic of ESG risks; we particularly advocate longer

consultation on details in the first half of 2022. To harmonise the green bond market, the EU COM is debating a proposed Regulation for an EU Green Bond Standard with co-legislators.

How to define ESG risks – and their inclusion within the capital adequacy regime and the Supervisory Review and Evaluation Process (SREP) – is the subject of intensive discussion. In the CRD VI/CRR III banking package currently under review, the European legislator is defining ESG risks for the first time. The ECB is further concentrating on climate-related and environmental risks in this year's thematic review. Its climate risk stress test (CST) was launched in January, within the scope of which all large EU banks (significant institutions – SIs) are assessing potential climate change-related financial impacts. Aggregate results are to be published in July 2022.

The European Banking Authority (EBA) announced the final draft implementing technical standards (ITS) concerning Pillar 3 disclosures with regard to ESG risks at the beginning of 2022, according to which large capital markets-oriented CRR credit institutions have to disclose information on ESG risks in 2022 for the first time.

A political agreement in the trilogue on amending the Non-Financial Reporting Directive (NFRD; to be replaced by the Corporate Sustainability Reporting Directive – CSRD) is expected to be reached in the first half of 2022. The new provisions extend contents and scope of application, and introduce mandatory external auditing. The European Financial Reporting Advisory Group (EFRAG) has been mandated to consult on detailed reporting standards (level 2) specifying said provisions. The International Sustainability Standards Board (ISSB) is also currently consulting on the first sustainability reporting standards.

ESG-related financial instruments are increasingly gaining importance within financial reporting. Based on the current requirements stipulated in the International Financial Reporting Standard IFRS 9, a large part of these financial instruments runs the risk of no longer being able to be measured at amortised cost. This would require fair value measurement, with corresponding earnings volatility.

Last but not least, the European Commission also published the draft EU Corporate Sustainability Due Diligence Directive (CSDDD) at the end of February 2022 (cf. also page 21).

implementation periods. We would also like to point out that appropriate procedures and methods are still being developed, and market standards have to be established. The extent of supervisory ESG disclosure should follow risk management. Capital relief for green loans must be granted solely on the basis of measurably low risks. We support a Federal Government guarantee framework for sustainable financing.

- **We** advocate that the very granular EFRAG proposals on CSRD-pursuant non-disclosure need to be reduced to a reasonable level. Taking into account the level of detail and needs for adjustment of internal processes, the timeline for CSRD implementation is overly ambitious. In addition, a stronger alignment with international initiatives should be sought.
- **We** demand harmonisation of the requirements for sustainable products under the SFDR and the Delegated Regulation on MiFID II. The varying structures are complicating uniform disclosure and product design, and the differing application dates for the regimes mentioned should be changed and harmonised, particularly since currently not all relevant ESG data will be available in time.
- **We** call for a separate International Accounting Standards Board (IASB) project to take up ESG topics for financial instruments as soon as possible. We propose applicable accounting provisions to be amended to the extent that recognition at amortised cost is also permissible for ESG-related financial instruments under certain criteria yet to be defined.

2 Promotional business in the midst of crisis management and transformation

Funding by the promotional banks at national and European level is still being dominated by efforts to manage crises: first the COVID-19 pandemic, which has lasted for three years now, and then, since February 2022, the war in Ukraine. Until now, the German promotional banks have implemented more than 200 different COVID-19 aid programmes offered by the Federal government and states, gearing all processes and capacities accordingly. In this context, they have to allocate public subsidies in a fast and competent manner.

> The Federal government and states and their promotional banks have to pave the way for the promotion of topics for the future.

The extraordinary volume of financial support – and the large number of such support measures during the pandemic – will have a long-lasting effect on the promotional banks. Most importantly, management of the COVID-19 grants adopted by the Federal government requires a coordinated and uniform approach from the promotional banks involved. Due to the Ukraine war, they have also been mandated to take on further promotional duties to mitigate the impact, especially for municipalities and businesses – from the accommodation of refugees right through to the transition to renewable energy sources.

On a European level, the EU Commission amended the EU Structural Funds Regulations right from the outset of the Ukraine war, in order to allocate funds remaining from the funding period 2014 to 2020 to alleviate the migration-related challenges resulting from the war (“CARE”). This way, up to €17 billion could become available EU-wide.

We welcome the fact that the European Union wants to send out a signal to support the member states in crisis management in the tense budget situation following the pandemic. In this context, however, there should not be any new regulatory hurdles or lengthy approval processes.

In addition, the European Commission has not yet approved all operational programmes in Germany within the framework of the Structural Fund aid for the funding period 2021 to 2027. To ensure a rapid start to the funding, new requirements for the submission and review of applications – as well as for the project execution – should only be implemented with a sense of proportion. After all, establishing new cross-sectional objectives in the EU

OUR POSITION

- **We** appeal to all political players to strengthen and to make use of the German promotional banking system with its existing structures. These banks should always be the first point of contact when it comes to new promotional missions.
- **We** ask that promotional banks be adequately equipped by their owners (funding budgets, digital infrastructure) in order to be able to support the social, economic and ecological transformation with an appropriate range of promotional services.
- **We** advocate for “post-crisis recovery programmes” to enable companies to reboot towards transformative and resilient business models and processes, and that both individual investments and projects can be realised. There has to be a stronger funding focus on innovative as well as social business models and infrastructure projects of great importance for society.
- **We** are advocating that the conditions be created so that promotional banks can fulfil the tasks assigned to them in the best possible way. The multitude of support programmes and the necessary administrative requirements for their implementation need optimisation.
- **We** appeal to the EU Commission and the EIB Group to accelerate the processes for the conclusion of guarantee agreements within InvestEU, so that promotional banks acting as intermediaries and implementing partners can incorporate InvestEU guarantees into their regional and national range of promotional services, and enhance the volume of promotional loans.

Structural Fund aid, such as the “do no significant harm” principle or the in-depth review of the financial circumstances of a supported enterprise, will most likely lead to increased expenses for the promotional banks.

Promotional banks haven proven to be a appropriate partner for the Federal government and states – and not only in times of crisis. They must therefore play a key role when it comes to supporting the socio-ecological transformation of society and enterprises. These banks can use suitable instruments to create the required incentives to support economic, ecological and infrastructure policy objectives in an effective and resource-saving manner. In particular the use of loans and equity (or equity-like) instruments as well as risk assumptions leads to an effective use of funding.

At present, promotional banks can apply for guarantees for loan or equity products under the European InvestEU programme, and act as financial intermediaries of the EIB Group. By sharing the default risks with the EIB Group resulting from regional and national promotional products, these banks can expand their volume of promotional loans in particular to finance small and medium-sized companies, sustainable infrastructures, research, innovation and digitalisation projects, as well as competences and investments in the social area.

It is therefore also logical to involve promotional banks in the project planning and allocation of resources from the European Just Transition Fund. The fund complements the established EU Structural Fund aid in Germany with €2.5 billion for 2021–2027 and is set to support the transformation processes in those regions where the economy is particularly dependent upon fossil fuels.

In future, as part of their funding activity, the promotional banks must more intensively reflect the transition of enterprises to transformative and resilient (and thus future-proof) business models and processes. Both sustainable investments (also in individual measures) and sustainable projects of companies and municipalities should be eligible for funding.

In the support of start-ups, the funding focus on innovative and social business models should be increased. In the years ahead, the Federal government and states must also enhance their commitment in the areas of social infrastructure and affordable housing through their promotional banks.

- **We** argue that no new regulatory hurdles and verification obligations should be added to the EU Structural Fund aid, and that the hitherto very successful use of both grants and financial instruments should not be counteracted.
- **We** remain to plead for simplification in the EU state aid rules, in order to enable German promotional banks to continue their contribution towards stabilising and transforming the economy with their promotional programmes even after the pandemic.
- **We** are working to ensure that the processes in promotional banks linked to the awarding and processing of the Federal government’s COVID-19 grants are accelerated and simplified through a uniform nationwide procedure.

3 Implementation of Basel III in the EU

On 27 October 2021, the EU Commission adopted its legislative proposal on the implementation of Basel III. The new rules will enter into force on 1 January 2025.

Ensuring that European specifics are taken into account when implementing Basel III.

The Commission's proposal is recognisably marked by the intention to limit negative implications of the new rules upon institutions – and thus on the real economy. Specifically, it is intended to mitigate the negative implications from the proposed implementation of the output floor under the so-called single-stack approach by allowing model banks to make use of certain relief measures when calculating capital requirements according to the regulatory standardised approaches. The Commission plans to retain many existing specifics in place from the implementation of earlier Basel standards in the EU. Capital buffers which, according to the Basel Committee, do not have to be included in the output floor, are not set to increase as a matter of principle. Last but not least, the Commission wants to grant institutions more time to implement regulations which impose a burden upon them.

According to Deutsche Bundesbank's calculations, the new regulations would still increase capital requirements for German banks by around 10%. This is likely to disproportionally hit banks that use internal models for calculating their capital requirements. Abolition of the 'country of origin' principle may pose a significant threat to receivables of promotional banks to credit institutions which are passing through loans. This could negatively impact the promotional business in Germany.

OVERVIEW OF BASEL III

Credit risk	▪ Revision of the Credit Risk Standardised Approach (CRSA) ▪ Revision of the Internal Ratings-Based Approach (IRBA)
Operational risk	▪ Introduction of a newly developed standardised approach ▪ Abolition of all alternative approaches
CVA risk	▪ Revision of the standardised approach ▪ Introduction of a basic approach ▪ Abolition of the internal model approach (IMA-CVA)
Market risk	▪ Revision of the standardised approach ▪ Revision of the internal model approach
Output floor	▪ Under the standardised approaches, model banks must observe the 72.5% output floor for their RWAs ▪ Gradual introduction over a five-year period
Leverage Ratio	▪ Introduction of an add-on for global systemically important banks (G-SIBs) ▪ Revision of the framework

Source: Bundesverband Öffentlicher Banken Deutschlands, VÖB

OUR POSITION

- **We** welcome the EU Commission's proposed package of measures, which significantly reduces the increase in capital requirements compared to a non-modified implementation of Basel III. To avoid burdens for the real economy and banks, it is crucial not to dilute the proposed relief measures in the forthcoming legislative process.
- **We** advocate that provisions on the permanent exemption of risk-free receivables from the internal ratings-based approach (IRBA) be kept. This applies in particular to exposures to institutions that are members of an institutional protection scheme. Exposures to the Federal Republic of Germany, the German Federal States, municipalities,and promotional banks may also be subject to higher capital requirements – with associated consequences for their funding terms.
- **We** believe that receivables from regional, local or other public authorities, which are treated as exposures to central governments under the standardised approach, may still be assigned to this asset class under the IRBA as well.
- **We** advocate that the new regulations concerning treatment of exposures to banks should not impede the promotional business. This is why, in the case of pass-through loans, final borrower receivables assigned to promotional banks as collateral should be considered risk-mitigating.

4 Capital Markets Union

Following publication of the first legislative proposals by the EU Commission on 25 November 2021, which included the revision of the EU Markets in Financial Instruments Regulation (MiFIR) and the introduction of a European Single Access Point (ESAP), other topics related to the Capital Markets Union (CMU) are now gaining momentum. With the Retail Investment Strategy – one of its central projects – the EU Commission wants to promote retail investor participation in the capital markets as well as associated investments, and to achieve this in particular by ensuring more consistent regulation. The underlying reason is that current investor protection provisions partly deviate in their content, making investment decisions for retail investors more difficult. Another goal is to further reduce the information overload that stems from securities regulatory requirements.

On 29 April 2022, ESMA published its technical advice to the Commission, recommending, amongst others, to make machine-readability of mandatory information a requirement so that search engines can find it more easily, to address the information overload issue by defining "important information" amongst other factors; to develop a uniform EU format with regard to cost transparency under MiFID II and PRIIPs, and to counter aggressive marketing messages or misleading representations and incentives via social media.

On a general note, the EU Commission continues to advance the Capital Markets Union to broaden and deepen the capital markets – and to open up new sources of financing in particular. However, the different requirements in relation to tax law and – above all – insolvency law in the EU member states, for example, have been viewed up to now as major obstacles to a real Capital Markets Union. Further publications on the Capital Markets Union are expected over the coming months.

> The Capital Markets Union can open up new sources of financing through capital markets that are further integrated in the EU. However, it is key that securing funding via banks will continue to retain equal status.

OUR POSITION

- **We** welcome the EU Commission's general measures under its 2020 Action Plan to deepen the capital markets union. But we will also scrutinise all further developments. We would like to point out that the COVID-19 crisis in Germany has shown how important it remains to secure funding via banks. In this respect, a balance should also be struck between different forms of financing within the scope of the CMU.
- **We** support the reduction of the information overload for investors stemming from securities regulatory requirements, and regard the plans for a Retail Investment Strategy as useful. But here again, we advocate consistent regulation, and would like to see contradictory or multiple regulations avoided and, where existing, eliminated. It is important to consistently remain on the chosen path of reducing red tape in regulation, and not to introduce new obligations elsewhere (e.g. governing commissions). At the same time, tried-and-tested approaches, such as the appropriateness/adequacy testing in sales, should not be called into question.
- **We** view the specific implementation plans for the European Single Access Point very critically. Whilst the fundamental concept of one database for all relevant mandatory information makes sense, since we expect an enormous amount of information to be reported, we fear that the collection of data will be too complex and not very useful for market participants and investors. It is crucial, however, to avoid implementing dual channels of reporting or publication, and to use existing systems.

5 MiFID II

> The MiFID II review is an important issue for investors and the financial industry alike. Now that the first bureaucratic hurdles have been removed, it is time to resolutely follow the path that has been mapped out.

The Markets in Financial Instruments Directive ("MiFID II") is being further revised in 2022. A specific legislative proposal is expected at the latest by the end of the year, whereas the individual issues – such as a possible prohibition of commissions – have been the subject of discussions for some time now.

In practice, some of the provisions of MiFID II have repeatedly motivated private and institutional clients to lodge a complaint regarding the abundance and redundancy of information that have led to overly complex processes in the securities business overall. In order to mitigate the consequences of the COVID-19 crisis, the "MiFID Quick Fix" has removed first red tape requirements, particularly for the product governance area and securities transactions executed with professional clients and eligible counterparties. The comprehensive MiFID II review might lead to further relief, but there is also the risk that it results in new requirements if the Commission identifies inadequacies. For instance, the Commission has announced that it will again review the requirements governing commissions, and is considering the introduction of a new client category.

In addition, some MiFID provisions have already been supplemented in advance against the background of ESG regulation, and the details are currently the subject of controversial discussion. For example, the provisions governing investment advice and asset management were enhanced to the extent that banks will have to enquire their client's sustainability preferences. Specifically, this means that the clients must specify the extent to which financial instruments with sustainability features are to be taken into account in their investment. The degree of sustainability in financial instruments is determined by other regulations, such as the EU Taxonomy Regulation or the Sustainable Finance Disclosure Regulation. This fact on its own already creates enormous complexity, especially in view of the differences in content and times of application. Moreover, the product governance provisions, which are highly relevant for issuers, will also be adapted so that in future they will identify sustainability factors in their processes and also assign corresponding information on their products to a target market, which must then be communicated to the sales units.

OUR POSITION

- **We** advocate further pursuit of the path chosen by the MiFID Quick Fix, and to stipulate further relief in the securities business in the wake of the MiFID review.
- **We** caution against the introduction of new, comprehensive rules. This includes, for instance, the introduction of a new client category or the tightening of regulations governing commissions. A new client category would further complicate the securities business and the related processes. Commissions allow a vast range of investment services, e.g. investment advice, to be offered to retail clients – i.e. also to people on low and middle incomes – across the board. The rules currently in place ensure very high levels of transparency and avoid conflicts of interest.
- **We** demand a harmonisation of the requirements for sustainable products under the SFDR and the applicable requirements within the scope of advisory services in accordance with the Delegated Regulation on MiFID II. The varying structures are complicating uniform disclosure and product design, and are also difficult for clients to understand. In addition, the different application dates of these rules should be postponed and reconciled, especially since not all relevant ESG data will be available in time.
- With a view to the ESG provisions, **we** oppose a high depth of detail on the secondary legislation level regarding the product governance provisions and the provisions in advisory services. At present, clients are already obliged to gather a plethora of information and make a lot of decisions. Further requirements would increase the risk of leaving clients behind.

6 Settlement fails – CSDR review

The Central Securities Depositories Regulation (the "CSDR") comprises rules aimed at enhancing settlement discipline. These rules stipulate in a detailed manner how to proceed – in the context of securities settlement – in the event of settlement fails. The defaulting party is forced to pay penalties as long as the settlement fails. The CSDR further obliges the buyer of securities to execute a buy-in.

The obligation to pay cash penalties has been in force since 1 February 2022. Many questions regarding mandatory buy-in were still pending until recently; the application of this provision was therefore postponed. The EU Commission submitted its proposal on the CSDR review on 17 March 2022, which comprises, in particular, significant adjustments to the rules on the mandatory buy-in. For example, with regard to scope it was clarified that a mandatory buy-in shall no longer apply to "settlement fails that occurred for reasons not attributable to the participants" or "for transactions that do not involve two trading parties".

The rules on the mandatory buy-in shall only be reintroduced if it is deemed an appropriate measure to address deficiencies in securities settlement. In particular, one of the following conditions must be met:

(1) the application of the cash penalty mechanism has not resulted in a long-term, continuous reduction of settlement fails in the Union; or

(2) settlement efficiency in the Union has not reached appropriate levels considering the situation in third-country capital markets that are comparable in terms of size, liquidity as well as instruments traded and types of transactions executed on such markets; or

(3) the level of settlement fails in the Union has or is likely to have a negative effect on the financial stability of the Union.

> The EU Commission has submitted its proposal on the CSDR review, which includes amendments to the rules of settlement discipline, i.e. on cash penalties and, in particular, the mandatory buy-in.

While it is unclear what an appropriate level is – or in which instances a negative effect for financial stability could be assumed – all in all the proposal is to be applauded. It is possible that this legally and technically complex regime of the mandatory buy-in will never be applied. This would in turn mean, that the associated fixed costs for a connection to a buy-in agent would no longer apply.

OUR POSITION

- We welcome the EU Commission's proposal on the CSRD review, particularly regarding the adjusted rules on settlement discipline (cash penalties and mandatory buy-in).
- We believe that in contrast to the cash penalties, the mandatory buy-in to be initiated by the buyer of the securities is not an instrument to enhance a faster securities settlement. The buy-in is not always appropriate. In particular with regard to bilateral securities transactions , the parties should be allowed to enter into other agreements. Ideally, mandatory buy-in should be eliminated completely from the CSDR.
- We therefore welcome the fact that, with its proposal, the EU Commission has indicated that mandatory buy-in should be (re-)introduced if other measures to improve settlement discipline do not yield adequate results, or if the introduction is necessary for reasons of financial stability.
- We also welcome the fact that the EU Commission has defined a closer scope of application for transactions subject to buy-in, since this removes a great deal of uncertainty.

7 European Green Bond Standard

By establishing a prime standard for green bonds, the EU wants to make sustainable investments more attractive.

While green bonds have become increasingly attractive in recent years, they only account for a fraction of the total volume of issued bonds. In the European Union (EU), for example, their share was only 4% in 2020. According to the EU Commission, the main reasons for this were a lack of uniform definitions and standards for green and sustainable investments, as well as fragmentation in terms of accountability and external review.

Therefore, the EU Commission launched the proposal of a EU Green Bond Standard (EuGBS) on 16 July 2021, to provide an ultimate quality label for green bonds. As a voluntary standard, the EuGBS is intended to co-exist next to existing market standards, such as ICMA's Green Bond Principles. A central requirement of the EuGBS is alignment with the EU taxonomy – bond issuers will only be entitled to use the EU label if they comply with the taxonomy's criteria for green economic activities. In addition, the EuGBS goes along with comprehensive reporting and external audit requirements.

On 14 April 2022, the EU Council published its EuGBS draft, which – compared to the Commission's proposal – contains hands-on solutions, including a grandfathering rule for existing green bonds and provisions regarding the external review of the allocation of proceeds at promotional banks.

About one month later, on 16 May 2022, an agreement was also reached by the European Parliament's Economic and Monetary Affairs Committee (ECON), the body chiefly responsible in this issue. As expected, the European Parliament has toughened some requirements. The adoption of the ECON's resolution finally paved the way for trilogue negotiations.

OUR POSITION

- **We** generally find the EU Commission's proposal for the establishment of a EU Green Bond Standard (EuGBS) very positive. At the same time, we would welcome a timely start and swift completion of the trilogue negotiations.
- **We** support the voluntary nature of the standard. We believe that the introduction of a mandatory EuGBS would trigger a flight into other bond formats with less stringent quality criteria (e.g. ESG-linked bonds), which would undermine the objective of a greater standardisation of green bonds.
- **We** advocate full grandfathering: investors must be able to count on the promise that bonds which have been issued as "green bonds" continue to be "green" for their entire term – regardless of any subsequent adjustments to the taxonomy. This will support confidence in sustainable investments and prevent market distortions.
- **We** consider 100% compliance with the EU taxonomy right after the EuGBS's introduction to be an unrealistic goal. Especially in the first years, we advocate an 80% threshold and a transitional period of five years, in order to make the EuGBS more attractive for investors.

NEW

8 Combating money laundering in the EU

On 20 July 2021, the EU Commission presented a package of measures to harmonise and strengthen the fight against money laundering at the EU level. The package includes four legislative measures, including the creation of a new European supervisory authority to combat money laundering and the financing of terrorism, to be known as the Anti-Money Laundering Authority (AMLA). AMLA is intended to directly supervise credit institutions with significant cross-border activities. For example, the draft regulation stipulates that institutions to be supervised by AMLA have branch offices in at least seven member states. The criteria, however, are still being discussed. In these cases, European supervision would replace national supervision. Aside from that, AMLA is intended to provide indirect supervision by coordinating and monitoring the activities of the national authorities. Another task will be the provision of regulatory standards and guidelines. A Regulation on Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT Regulation) is intended to tighten up the rules, especially regarding customer due diligence, and make them directly applicable in all member states. However, Level-2 measures are pending in many regulatory areas, which need to be designed by AMLA. The sixth Anti-Money Laundering and Countering the Financing of Terrorism Directive will primarily include rules on national supervisory authorities and Financial Intelligence Units (FIUs). Finally, the existing Transfer of Funds Regulation will be amended and provisions on crypto transfers added. The legislative initiatives have progressed to different extents. The first legal act will likely be the adoption of the Transfer of Funds Regulation. All other drafts are still being discussed by the Council and the European Parliament. Swift adoption of the AMLA Regulation is crucial for the authority to become operational.

EU package of measures to harmonise and strengthen the fight against money laundering and the financing of terrorism.

OUR POSITION

- **We** generally consider the creation of a European Anti-Money Laundering Authority and the associated harmonisation of standards as positive, as long as responsibilities are clearly defined and double payment obligations are avoided. National authorities must remain capable to act. From our point of view, it is important that credit institutions which operate primarily at the national level are supervised by national authorities.
- **We** advocate an urgent efficiency review of the new requirements. Several stricter requirements would entail markedly higher efforts, without significantly contributing to the fight against money laundering and the financing of terrorism.
- **We** caution against a comprehensive restriction of outsourcing: especially smaller institutions would no longer be able to use the services of specialised third parties.
- **We** criticise the fact that the identification of beneficial owners with an interest of 25% plus one share or voting right is planned on every level of ownership, since control of a corporate entity can regularly only be exercised with a 50% ownership interest on the first level. Where the proposals are critical of bearer instruments, we note that there is no risk of money laundering when it comes to securities held at a depositary or admitted to trading on a regulated market.
- **We** caution against waiting for AMLA to further specify the AML/CMF Regulation's provisions through regulatory standards, as this would counter a swift implementation of the new rules.

9 Strengthening German export financing

COVID-19 has placed considerable pressure on German exports. Due to the economy's strong global interdependence, exporting companies are also feeling the effects of the pandemic in other parts of the world. Especially for export-oriented SMEs, uncertainty has persisted since 2021, fuelled by COVID-19-related effects such as border closures, travel bans and national lockdowns, but also by shortages of materials and logistical bottlenecks. Financing conditions have also worsened.

Structural changes to Hermes coverage could open up new sales markets after the COVID-19 pandemic and in the light of the sanctions against Russia.

Therefore, SMEs producing capital goods, in particular, need support in the form of government export guarantees in the post-COVID-19 period. Guarantees protect exporters and financing banks in the event of foreign buyers' non-payment, particularly those from emerging markets and developing economies. Despite the protection offered by the Federal government, there are still many SMEs that avoid promising markets in Africa or Latin America, for instance, or dread financing requests – thus missing out on numerous opportunities.

The pandemic has been a major catalyst for discussions on how the state Hermes export credit guarantee scheme needs refining to meet current needs. This Hermes guarantee is used where private insurers cannot provide sufficient cover. As partners to the German SME capital goods industry, public banks want to offer tailor-made Hermes-covered financing solutions to foreign buyers from the German SME sector. The key aim is therefore to intensify cooperation between banks and exporters on the use of export guarantees.

To protect companies and employees in the export sector, the Federal government took steps back in July 2020, in the form of a five-point package of measures to mitigate the effects of the pandemic. As a result, further improvements have been made to financing conditions for Germany's export industry. These include the Federal government reducing down payments, and delaying repayments for certain export transactions. It also relaxed the fees for Hermes guarantees and created new financing options for credit institutions. The government's package of measures has been extended several times, but has expired on 30 June 2022.

OUR POSITION

- We view the temporary support by the Federal government as a step in the right direction. However, it will not suffice over the medium term, and for small tickets it yields no benefits that translate into concrete earnings. Firstly, the COVID-19 pandemic will continue to shape the global sales markets for a long time. Secondly, traditional export sales markets are being lost by the ongoing distortions caused by the Russia-Ukraine war.
- We advocate structurally improving Hermes coverage, adapting it to the needs of the SME sector, in order to open up new sales markets. Whether SMEs will in the future be able to seize opportunities for new orders will largely depend on the leeway in sales financing.
- We are calling for a structural improvement of Hermes guarantees in order to mitigate the effects of the COVID-19 pandemic. In order to generate additional export business, it is more important than ever to make the framework for financing German exports more flexible, and to generate more liquidity inflows.
- We advocate the introduction of a carefully designed forfaiting facility by the Federal government for the purchase of Hermes-covered receivables by credit institutions, which would allow them to purchase receivables from export transactions on a larger scale. This would make it easier for medium-sized exporters to take out supplier credit guarantees, and exporting companies would be able to deleverage their balance sheets more quickly.
- We would also like to see the Federal government's participation in the export guarantee temporarily increased to 95 per cent, in order to give small and medium-sized exporters – whose credit lines with their principal banks have been largely exhausted – greater scope for new business.

NEW

10 Seventh amendment to the Minimum Requirements for Risk Management in Banks (MaRisk)

Immediately following completion of the sixth MaRisk amendment on 16 August 2021, the German supervisory authorities started work on the seventh MaRisk amendment. The German Banking Industry Committee (GBIC) has been informed in advance about the main contents by the Federal Financial Supervisory Authority (BaFin) and Deutsche Bundesbank throughout numerous meetings of the MaRisk expert panel. The last meeting of the MaRisk expert panel (the sixth one since 2 September 2021) took place on 24 June 2022.

The main purpose of the MaRisk amendment is implementation of the very detailed EBA Guidelines on loan origination and monitoring. According to EBA's compliance table, significant institutions have had to comply with these guidelines since 30 August 2021 when extending new loans. For the institutions supervised on a national level, they will become mandatory upon completion of this amendment. The central point of discussion within the GBIC is the way the EBA Guidelines are implemented. The German supervisory authorities make intense use of referencing, whilst integrating additional clauses to take the principle of proportionality into account. In the past, the requirements set out in relevant EBA Guidelines were always adopted by MaRisk, to make it easier for institutions to comply with them.

Aside from that, new requirements are planned for areas where the German supervisory authorities suspect regulatory loopholes. This concerns institutions' own-account real estate transactions for revenue generation (letting and leasing) or resale (property development), the business model analysis for implementation of the related module from the EBA guidelines on the Supervisory Review and Evaluation Process (SREP), as well as the treatment of sustainability risks. A major point here is the harmonisation with the BaFin Guidance Notice of the same name. Another topic under consideration concerns special requirements for the treatment of special funds.

The German supervisory authorities have been informing the German Banking Industry Committee (GBIC) about the planned contents of the seventh MaRisk amendment since September 2021. We advocate a practice-oriented design.

As things stand, the official draft is expected to be published in September, followed by a consultation period of about four weeks. Despite this, the German supervisory authorities are looking to complete the seventh MaRisk amendment this year. We regard this schedule as being very ambitious indeed.

OUR POSITION

- We advocate rendering the principle of proportionality, which is often only roughly outlined in numerous EBA guidelines, into clear requirements in the MaRisk amendment. This should allow smaller and less complex institutions with comparatively low-risk business activities to implement MaRisk at reasonable expense.
- We expect the German supervisory authorities to take sufficient account of the particularities of the development and promotional business when implementing the EBA Guidelines on loan origination and monitoring. In this context, we have already submitted a proposal which would facilitate transactions initiated by third parties. We are still checking if further clarifications are necessary.
- We welcome the clarifications made by the German supervisory authorities following adoption of the sixth MaRisk amendment. According to these, trades for banking book purposes can be entered into at short notice, even if no limit has been granted for the issuer yet. In addition, there is no auditing obligation for non-material outsourcings.
- We also appreciate the general willingness to continue to accept trading from home, even after the pandemic. Concerning this possibility, we had intensive discussions with the German supervisory authorities, supported by treasury experts from the institutions. However, we deem it necessary to make the prerequisites discussed so far even more practice-oriented.
- In our view, new requirements should always be limited to areas where regulation is indispensable. Additional requirements for the treatment of special funds, however, were regarded as dispensable in view of the existing regulations.

NEW

11 Revision of the macroprudential framework

Banking regulators dispose of numerous macroprudential instruments to prevent potential stability risks in the financial system: first and foremost, including capital buffers such as the capital conservation buffer, the countercyclical capital buffer, and the systemic risk buffer, which strengthen banks' capital base.

The revision of provisions should be made on a capital-neutral basis; it should not be accompanied by increased capital buffer requirements.

The macroprudential framework was introduced in 2013 as a reaction to the financial markets crisis, and is now being revised for the first time. The EU Commission has been asked to review, by June 2022, if the applicable selection of instruments is effective and sufficient, or if further instruments are required. Other aspects to be examined include the interaction of capital buffers with other regulatory requirements, such as the leverage ratio, and the question of how to make better use of buffers, and associated challenges.

Last but not least, the EU Commission is to review whether the macroprudential instruments would be suitable to address further risks such as climate or cyber risks. The Commission will discuss matters with the European Banking Authority (EBA), the European Systemic Risk Board (ESRB), and the European Central Bank (ECB). Based on current information, the report is scheduled to be submitted together with the legislative proposal n the first quarter 2023.

OUR POSITION

- **We** support the current review of the applicable macroprudential framework. In our view, it is important that the focus lies on the instruments' methodological weaknesses, instead of the imposition of higher capital requirements for banks.
- **We** advocate that the revision of provisions be capital-neutral overall. A more flexible buffer release or potential cover of further risks must not be associated with higher capital buffer requirements.
- **We** advocate a simpler and more flexible macroprudential framework. In our opinion, the number of capital buffers should be reduced; for example, the capital conservation buffer should be combined with the countercyclical capital buffer to form a new releasable capital buffer.
- **We** furthermore call for elimination of European special requirements such as the systemic risk buffer, and for application of uniform provisions for determining the buffer rate for other systemically important institutions in the EU.

NEW

12 Corporate Sustainability Due Diligence Directive

The European Commission published the draft EU Corporate Sustainability Due Diligence Directive (CSDDD) at the end of February 2022. The Directive is intended to compel companies to assess, and respond to, actual and potential adverse impacts of their own activities, their subsidiaries' activities, and activities of established business partners along the value creation chain, on human rights and the environment.

The proposed Directive goes beyond national due diligence obligations already agreed upon within the Act on Corporate Due Diligence in Supply Chains and is set to apply for companies with more than 500 employees and an annual turnover of more than 150 million euros – with lower thresholds planned for companies in so-called at-risk sectors. Credit institutions are set to explicitly fall within the scope of application.

The value creation chain of companies in the financial sector is also intended to comprise activities of clients receiving loans or other means of financing. Small and medium-sized enterprises, however, are to be excluded. Violations of these due diligence obligations will incur sanctions and liability.

The EU Commission is creating a framework for the consideration of corporate due diligence and the assessment of business activities along the value creation chain, and for measures to minimise adverse impacts on humans and the environment.

OUR POSITION

- We welcome the EU Commission's initiative to regulate companies' obligations towards humans and the environment along their value creation chain. Environmental and climate protection issues as well as social compensation, safeguarding human rights, and sustainable corporate governance, are important steps towards more macroeconomic sustainability for the banking sector.
- During the legislative process and vis-à-vis the trilogue partners, we advocate taking account of the idiosyncrasies of the banking sector as regards corporate due diligence. Reporting requirements should be part of CSRD reporting. Furthermore, reporting obligations already covered by the institutions' regulatory ESG reporting should not be duplicated.

NEW

13 Act on Corporate Due Diligence in Supply Chains

The Act on Corporate Due Diligence in Supply Chains was announced in the German Federal Gazette on 22 July 2021. Companies that employ more than 3,000 people must implement the Act by 1 January 2023. As of 1 January 2024, the scope of application will be extended to companies with more than 1,000 employees.

Requirements for credit institutions.

The Act on Corporate Due Diligence in Supply Chains obliges companies to comply with their human rights-related due diligence duties along the entire supply chain. The German Federal Office for Economic Affairs and Export Control (BAFA) acts as the controlling authority and is authorised to impose fines in the event of violations.

Unfortunately, the possible requirements for credit institutions can only be derived from the imprecise wording of the explanatory memorandum. However, in its FAQ on the Act on Corporate Due Diligence in Supply Chains, the Federal Ministry of Labour and Social Affairs has now clarified that end-customers are not part of the supply chain, which means that they fall outside the scope of the due diligence obligations. This is set to apply regardless of transaction size. According to our understanding, credit institutions are therefore generally not obliged to include their borrowers in their due diligence process.

OUR POSITION

- **We** welcome the fact that the legislator has now clarified that due diligence obligations for credit institutions do not extend to borrowers.
- **We** urgently call for guidance for a legally secure implementation of the statutory requirements to be made available, as numerous banking industry-specific questions persist regarding the interpretation of the Act on Corporate Due Diligence in Supply Chains.
- **We** ask for a postponement of the practical application of the law – or a temporary suspension of any sanctions, as it would hardly be possible for the banking industry to implement the legal requirements on time by 1 January 2023, given the existing legal uncertainty.

NEW

14 T&Cs in permanent debt obligations

In its judgement of 27 April 2021 (ref. XI ZR 26/20), the German Federal Court of Justice (BGH) stated that the change mechanism for general terms and conditions (T&Cs), comprising a fictitious approval by account holders regarding changes of T&Cs and special conditions – common in the banking industry – is not legally valid.

The defendant bank had used clauses stipulating that account holders would be offered the amendments to the general terms and conditions in writing (*text form*) at least two months prior the proposed point in time when said amendments were intended to enter into effect. The account holder's consent shall be deemed to have been given if they do not object to such amendments and additions prior to the proposed point in time when said amendments are intended to enter into effect; the account holder is furthermore offered the chance to terminate the business relationship.

The BGH ruling complicates amendments to permanent debt obligations to such an extent that the requirements of a modern and increasingly digital world are no longer met. The BGH ruling will significantly increase bureaucratic efforts for clients and businesses with permanent debt obligations, since bilateral agreements will have to be entered rather more frequently.

New T&C-related provisions for contracts in the mass business.

OUR POSITION

- **We** thus advocate a readjustment of the applicable (T&Cs-related) legal framework in order to make Germany future-proof as a business location (especially in competition with other European jurisdictions), to mitigate the competitive disadvantage of German companies, and thus to increase their international competitive edge.
- **We** are particularly in favour of provisions that will preserve the possibility to manage and adjust contracts in the retail business, simply and with legal certainty.
- In coordination with the German Federal Ministry of Justice, **we** have therefore mandated Prof. Dr Matthias Casper (University of Munster/Westphalia) to write an expert opinion, including specific proposals for new statutory provisions. In this expert opinion, Prof. Casper proposes the following potential options: a cross-sector T&Cs-related provision in section 308 no. 5 of the German Civil Code (BGB); clarification of the legal model in section 675g of the BGB; and precedence of section 675g of the BGB vis-à-vis the T&Cs-related test of reasonableness of contents in section 307 (3) of the BGB.

NEW

15 The digital money ecosystem

The European Central Bank (ECB) is looking into the design and implementation of digital central bank money. An in-depth analysis of the disruptive effects is required for Europe to be economically successful and to pioneer digital business models.

The ECB has been examining the design and potential implementation of a digital euro since the end of 2021 a two-year project, and is currently tending towards account-based central bank money for consumers and businesses. Discussions are focused on payment at the point of sale and in e-commerce.

A digital euro also poses risks. The ECB is mainly addressing questions and issues such as confidentiality, programmability, offline use, or the possibility of utilising the digital euro outside of Europe. An implementation or even results of the absolutely necessary analysis of the possible effects on the two-tier monetary and banking system are still not visible.

A digital euro may have a material negative economic impact, especially if credit institutions are restricted in their lending business as a result of existing customer deposits being shifted into digital central bank money. A timely and comprehensive analysis of the potential impact of disruptive effects on the banking sector is thus indispensable.

In addition, the financial sector is specifically asking about digital or token-based payment options which can be fully integrated into their existing DLT infrastructures and processes. It remains broadly unclear to which extent the ECB's digital euro can meet these requirements.

The European Commission proposed a regulation for markets in crypto-assets as part of its "Digital Finance Package" unveiled in 2020. It aims to create a clearly defined legal framework for harmonising the regulation of crypto-assets across the EU from 2023 onwards. The draft contains regulations for what are so far unregulated areas. It follows the "same risk, same rules" approach and defines requirements on the issuance of "stablecoins" in the European Union.

OUR POSITION

- **We** are concerned that the ECB's intended digital euro model poses risks that are currently insufficiently analysed.
- **We** advocate maintaining the two-tier monetary and banking system of central bank money and cash – a cornerstone of Europe's economic success. Direct access to central bank money must thus be restricted to central and commercial banks. A digital euro can boost a "bank run" in which consumers and businesses transfer liquidity from commercial bank money to central bank money during a crisis. This would restrict the credit supply and, as a result, lead to less favourable refinancing conditions for borrowers.
- **We** believe it is imperative for the ECB to comprehensively analyse the disruptive effects of a digital euro. Therefore, we demand that the ECB commence this analysis without undue delay, involving the banking industry in the process. Particular attention must be paid to risks with potential negative implications for the European economy.

16 Digital payments and Open Banking

Nearly all banks and savings banks in Germany offer their clients SEPA instant payments (SEPA Instant Credit Transfer – SCT Inst), which puts Germany at the top spot in Europe – in contrast to most other EU states where the number of institutions supporting the SCT Inst scheme is far lower. The European Commission wants to change this situation by introducing new legislation. A draft law is due to be published in the second half of 2022.

Whether users execute Instant payments or standard transfers depends on their requirements. Companies, for example, execute mass standard transfers every day. Instant execution of a payment and validation of the amount are often not necessary to meet market requirements. They are neither necessary for every transaction from a commercial point of view, nor do they make technical sense.

The Eurosystem charges banks for each instant payment (via the TIPS obligation), even if such payments are exchanged via private-sector systems. Banks, however, have to offer services with instant payments free of charge pursuant to the PSD2. EU initiatives further promote this unfair competition by potentially allowing less-regulated firms to access the central payments infrastructures. As a result, competition is distorted and European legislation penalises European banks compared to their international competitors.

> Successful digitalisation will determine how Germany and Europe position themselves among their global competitors in future. In this, the regulatory environment and successful market initiatives are paramount.

Instant payments are core to Open Banking, for example for in-store and online retail purchases. With giroAPI initiative, the German Banking Industry Committee is a European pioneer, developing value-added services beyond PSD2. Value-added services (limited to payment transactions) are also set to be established on a European level. The European Berlin Group creates the technical specifications for giroAPI which is supported by all German and most European institutions. These value-added services form the basis for a European ecosystem of the financial industry as part of the digital single market, including sovereign payment solutions such as EPI which bundle payment channels.

OUR POSITION

- **We** call for promotional banks to be exempt from a mandatory support for instant payments. Payments traffic must not be regulated, and must be developed based on market needs. Instant payments complement standard credit transfers and should not be replaced as a result of an regulative initiative.
- **We** caution against less regulated market participants receiving access to major, critical payments infrastructures. This is because the planned access of non-banks to infrastructures such as TARGET, which are subject to the EU Finality Directive, must not jeopardise stability or pose liability risks.
- **We** call for the European Union’s planned Open Finance Framework not to lead to any restriction of functioning free market initiatives such as the European Berlin Group or the premium APIs. Service providers must be allowed to charge market-based fees to companies that gain an own economic advantage from those services. This is the only way to ensure fair competition and investments in innovative Open Finance and Open Data infrastructures.
- **We** support payment systems offered by the banking sector bundling an uniform offering across all channels. Policymakers and competition authorities must support such European initiatives, for example by removing regulatory hurdles. This is the only way to achieve a long lasting and viable business model.
- **We** advocate less regulatory restrictions so that European payment systems and other vendors are not placed at a disadvantage when competing with global providers and platforms. This is the only way for European banks to successfully compete on a global scale.

17 Requirements for banks' IT systems

The Digital Operational Resilience Act (DORA) is scheduled for adoption in 2022. Institutions and third-party providers must prepare for the new requirements.

High levels of cyber resilience and information security are central supervisory and legal requirements for ICT infrastructures in the financial sector. The EU Commission and European supervisory authorities are continuously focusing on harmonising future-proof legal and regulatory frameworks.

The legislative proposal "DORA" concerning the improvement of digital operational resilience of the financial sector, was presented in autumn of 2020; in mid-May 2022 a preliminary political agreement was reached via a trilogue.

The Act is scheduled to enter into force as a "lex specialis" before the end of 2022 (following clarification of pending implementation issues) and to apply directly to nearly all financial institutions following a transitional period of 24 months. The proposed regulation comprises a number of new and specified provisions, particularly on ICT security risk management, cyber security tests, and security incident reporting.

It also stipulates a supervisory framework for critical ICT service providers, such as major cloud providers. Following resolution on the regulation, the European supervisory authorities are set to issue regulatory technical standards (RTS) for some of the requirements; these RTS will also be an important prerequisite for the implementation at banks and service providers.

OUR POSITION

- **We** would like to highlight the fundamental importance of comprehensively and consistently embedding the principle of proportionality in the proposed "DORA" regulation and all resulting supervisory regulations. In the absence of such an action, planned regulations would apply to all banks – and without sufficient consideration of individual circumstances – thus incurring disproportionate additional burdens.
- **We** count on DORA as a "lex specialis" for the financial sector so that market participants can cease to be burdened by dual and multiple regulation. This will be achieved when reports, e.g. on material security incidents, only have to be submitted to one supervisory authority.
- **We** are in favour of clearly-worded requirements providing simplification for the handling of ICT security risks and IT outsourcing, in line with the principle of proportionality. We recognise potential for the absolutely necessary relief for the banking sector by way of optional certification of selected IT products or services (for example, cloud services in the case of outsourcing).
- **We** support the European Commission's plan to establish a supervisory framework for critical ICT service providers, especially for major international cloud service providers. This framework should definitely be accompanied by supervisory relief for financial institutions, e.g. by the service providers' obligation to provide proof that in rendering their services they are complying with all requirements.

Promotional banks in Germany

1 Landesförderinstitut Mecklenburg-Vorpommern – Division of NORD/LB
Total assets: €1.1 billion (2020)
→ www.lfi-mv.de

2 Investitionsbank des Landes Brandenburg
Total assets: €14.3 billion (2020)
→ www.ilb.de

3 Sächsische Aufbaubank – Förderbank
Total assets: €8.2 billion (2020)
→ www.sab.sachsen.de

4 Investitionsbank Schleswig-Holstein (IB.SH)
Total assets: €21.3 billion (2020)
→ www.ib-sh.de

5 Hamburgische Investitions- und Förderbank
Total assets: €6.0 billion (2020)
→ www.ifbhh.de

6 Bremer Aufbau-Bank GmbH
Total assets: €1.0 billion (2020)
→ www.bab-bremen.de

7 Investitions- und Förderbank Niedersachsen – NBank
Total assets: €4.9 billion (2020)
→ www.nbank.de

8 Investitionsbank Berlin
Total assets: €19.5 billion (2020)
→ www.ibb.de

9 Investitionsbank Sachsen-Anhalt – Anstalt der NORD/LB
Total assets: €1.7 billion (2020)
→ www.ib-sachsen-anhalt.de

10 LfA Förderbank Bayern
Total assets: €23.1 billion (2020)
→ www.lfa.de

11 Bayerische Landesbodenkreditanstalt
Total assets: €21.1 billion (2020)
→ www.bayernlabo.de

12 NRW.BANK
Total assets: €155.8 billion (2020)
→ www.nrwbank.de

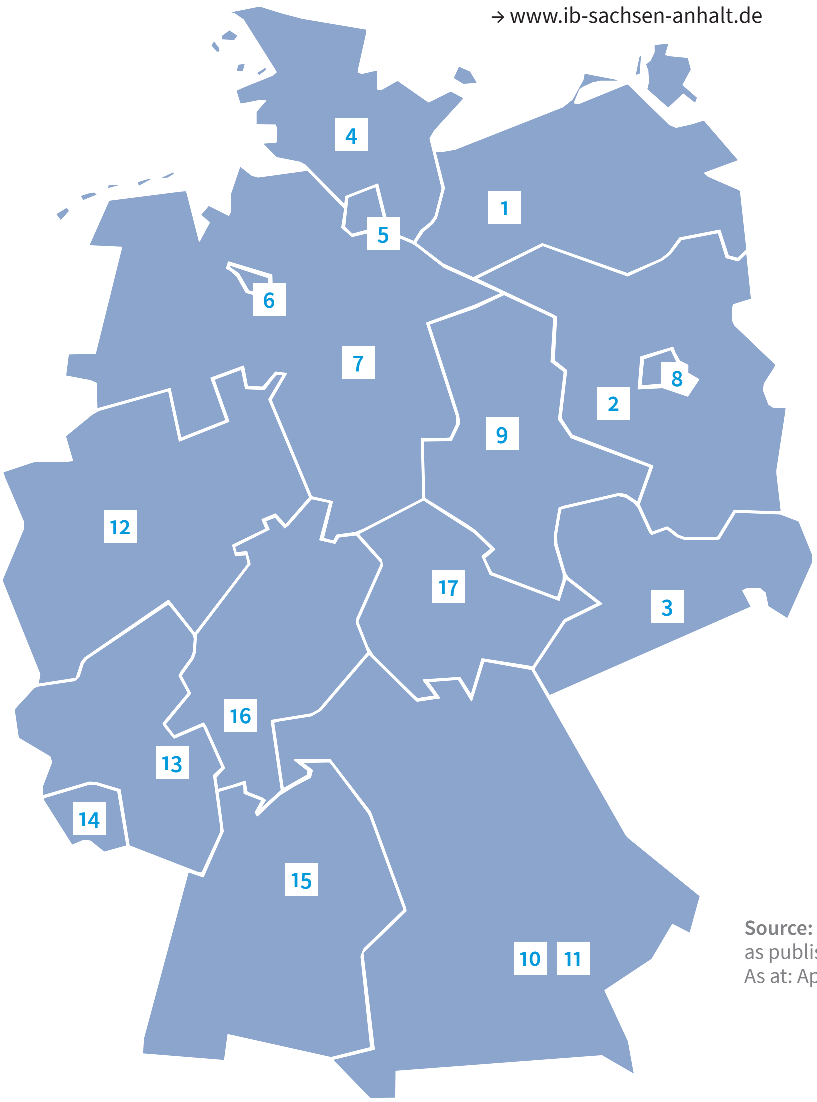
13 Investitions- und Strukturbank Rheinland-Pfalz (ISB)
Total assets: €9.3 billion (2020)
→ www.isb.rlp.de

14 SIKB Saarländische Investitionskreditbank AG
Total assets: €1.8 billion (2020)
→ www.sikb.de

15 L-Bank, Staatsbank für Baden-Württemberg
Total assets: €86.8 billion (2020)
→ www.l-bank.de

16 Wirtschafts- und Infrastrukturbank Hessen – legally-dependent institution within Landesbank Hessen-Thüringen Girozentrale
Total assets: €25.9 billion (2020)
→ www.wibank.de

17 Thüringer Aufbaubank
Total assets: €3.5 billion (2020)
→ www.aufbaubank.de



Public-sector promotional banks at Federal level

KfW Banking Group
Total assets: €546.4 billion (2020)
→ www.kfw.de

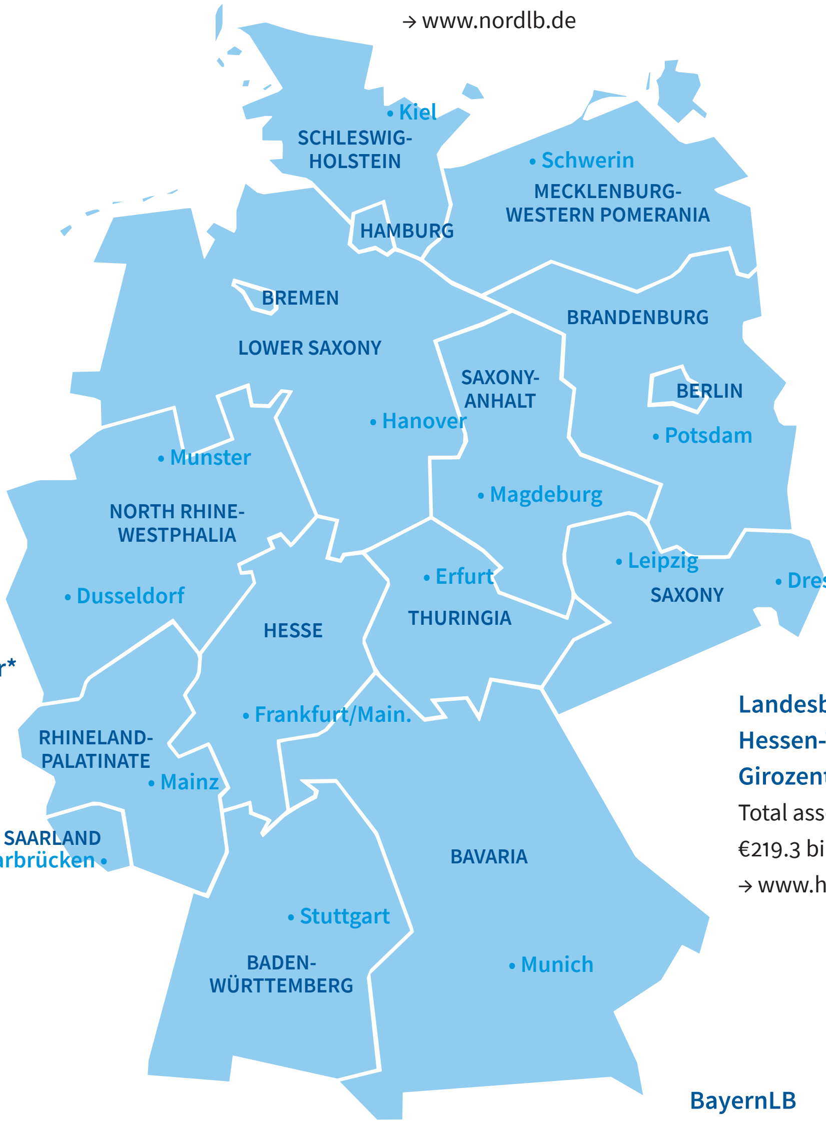
Landwirtschaftliche Rentenbank
Total assets: €95.3 billion (2020)
→ www.rentenbank.de

Source: Annual reports of the promotional banks, as published on the respective websites.
As at: April 2021

Landesbanken and DekaBank

NORD/LB Norddeutsche Landesbank Girozentrale
Total assets:
€126.5 billion
→ www.nordlb.de

DekaBank Deutsche Girozentrale
Total assets:
€85.5 billion
→ www.deka.de



SaarLB Landesbank Saar*
Total assets:
€15.2 billion
→ www.saarlb.de

Landesbank Hessen-Thüringen Girozentrale
Total assets:
€219.3 billion
→ www.helaba.de

BayernLB
Total assets:
€256.3 billion
→ www.bayernlb.de

Landesbank Baden-Württemberg
Total assets:
€276.4 billion
→ www.lbbw.de

* Consolidated financial statements in accordance with the German Commercial Code (local GAAP – "HGB").
Source: own representations
S&P Global Market Intelligence database: Consolidated financial statements (in accordance with IFRS) as at 31 December 2020;
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