Private Banking & Wealth Management

Contributing editors
Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov

2018

GETTING THE DEAL THROUGH

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2016
Second edition
ISSN 2398-5860

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Germany

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Private banking and wealth management

1 What are the main sources of law and regulation relevant for private banking?

The main sources of law and regulation relevant for private banking are the German Banking Act, the German Securities Trading Act and the German Civil Code.

The German Banking Act is particularly concerned with the licence requirements for private banking activities. The German Securities Trading Act is particularly relevant to private banking due to its rules of good conduct towards clients. The German Civil Code is the basis for the contractual relationship between the banker and the client.

The aforementioned sources of law are supplemented by European Union law, such as the EU Capital Requirements Regulation and the MiFID II Regulations.

2 What are the main government, regulatory or self-regulatory bodies relevant for private banking and wealth management?

The main government bodies relevant for private banking and wealth management are the German Financial Supervisory Authority (BaFin) and the German Federal Bank (Deutsche Bundesbank). BaFin is responsible for the day-to-day supervision of banks and wealth managers. The Deutsche Bundesbank is in particular concerned with reporting and data gathering from private banks and other financial institutions. The supervisory function is shared with regard to larger credit institutions with the European Central Bank.

3 How are private wealth services commonly provided in your jurisdiction?

Private wealth services are typically provided by private banks or by banks with a private client department. Single- or multi-family offices are also a significant player in the area of providing services to high net worth individuals (HNWIs).

4 What is the definition of private banking or similar business in your jurisdiction?

There is no specific definition of private banking. Rather, private banking is understood as banking or wealth management services tailored to the financial needs of wealthier individuals.

5 What are the main licensing requirements?

The main licensing requirements for private banking services depend on the type of services. If the private bank also offers deposit-taking services, the main licence requirements are:

- initial capital of €5 million;
- at least two managing directors;
- sufficient good repute, sufficient knowledge, skills and experience as well as availability of the managing directors;
- sufficient suitability of shareholders holding 10 per cent or more in the institution;
- a head office in Germany; and
- a sufficient business plan providing information on the intended organisational structure, compliance measures and projected business development.

6 What are the main ongoing conditions of a licence?

The requirements for granting the licence must be maintained on an ongoing basis. This applies in particular to the required capital and the sufficient compliance structures. As additional ongoing requirements, banks are subject to several regular and ad hoc reporting obligations to their supervisory authorities. Furthermore, banks are required to finance a deposit guarantee scheme.

7 What are the most common forms of organisation of a private bank?

The most common form of organisation of a private bank is an entity, either as a subsidiary of a German bank or of a foreign bank. The entity is typically a German limited liability company or a German stock corporation. There are also some branches of foreign banks.

8 How long does it take to obtain a licence for a private bank?

It should take at least six to eight months to obtain a licence for a private bank.

9 What are the processes and conditions for closure or withdrawal of licences?

As a general rule, BaFin may withdraw a licence if the institute no longer meets the licence requirements or if the institute violates the German Banking Act or related laws on a sustained basis. BaFin may also withdraw the licence if there is a risk that the institute will no longer be able to meet its obligations.

The withdrawal of a licence is a last resort. BaFin may instead request the resignation of the managing directors or it may order for any organisational issues to be rectified. In addition, BaFin can take additional measures in special situations, such as closure of the institute if there is a risk that the institute can no longer meet its obligations.

In practice, issues between BaFin and institutes are typically solved on an informal basis between BaFin and the institute.

10 Is wealth management subject to supervision or licensing?

Wealth management is subject to both licensing and ongoing supervision. This applies to both discretionary management as well as to non-discretionary advice. Single-family offices, though, are typically exempt from a licence requirement and ongoing supervision.

11 What are the main licensing requirements for wealth management?

The main licensing requirements for wealth management depend on the type of services offered. If wealth management is restricted to financial advisory and discretionary individual portfolio management services without holding clients' monies or securities, the main licence requirements are:

- initial capital of €50,000;
- ongoing capital of at least one-quarter of projected overhead costs;
- sufficient good repute, sufficient knowledge, skills and experience as well as availability of the managing director or directors;
- sufficient suitability of shareholders holding 10 per cent or more in the institution;
- a head office in Germany; and

- a sufficient business plan providing information on the intended organisational structure, compliance measures and projected business development.

12 What are the main ongoing conditions of a wealth management licence?

The requirements for granting the licence must be maintained on an ongoing basis. This applies in particular to the required capital and sufficient compliance structures. As additional ongoing requirements, wealth managers are subject to several regular and ad hoc reporting obligations to BaFin or Deutsche Bundesbank, or both. Furthermore, wealth managers are required to finance an investor protection scheme.

Anti-money laundering and financial crime prevention

13 What are the main anti-money laundering and financial crime prevention requirements for private banking in your jurisdiction?

The main anti-money laundering and financial crime prevention requirements for private banks are twofold:

- banks and other financial institutions must have organisational procedures and functions in place to avoid money laundering and financial crimes. This includes the appointment of an anti-money laundering officer within the financial institution; and
- in addition, financial institutions must identify their customers and verify the customer's identity. This includes identifying beneficial owners. The law also requires an ongoing monitoring of the business relationship with the customer.

Since the last amendment dated 26 June 2017, the German anti-money laundering and financial prevention crime requirements are based on the Fourth Anti-Money Laundering Directive (EU Directive 2015/849).

14 What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

A PEP is basically an individual that is or has been entrusted with prominent public functions, such as heads of state, ministers, members of parliament, as well as certain relatives. The specifics of the definition follow the PEP definition in EU Directive 2015/849.

If there is a PEP involved, senior management needs to approve the business relationship with such customer. In addition, the institution must take adequate measures to establish the source of wealth and source of funds that are involved in the business relationship or transaction with the PEP. Furthermore, the relationship must be put under enhanced ongoing monitoring.

15 What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

Customer must be identified on the basis of official ID documents, such as an ID card or passport. In practice, institutes make a copy of the ID document for their records and check whether the likeness of the customer resembles the photograph on the ID document.

16 Are tax offences predicate offences for money laundering? What is the definition and scope of the main predicate offences?

Generally, tax evasion is not a basis for a money laundering offence. Bases for the money laundering offence are only crimes (ie, an illegal activity with a minimum sentence of one year's imprisonment, as well as certain enumerated offences, such as drug-related offences).

17 What is the minimum compliance verification required from financial intermediaries in connection to tax compliance of their clients?

There are no express verification requirements for financial intermediaries in connection with tax compliance of clients. However, a bank employee will be charged with abetment of tax evasion if the employee (i) incites the tax evasion of the client or (ii) encourages or assists the tax evasion of the client. In addition, the bank employee abetting tax evasion is liable for the non-payment of evaded taxes plus interest thereon. There is no clear line between acts by an employee that are still legal and acts that already abet tax evasion. The line to a criminal act will likely be crossed if it is obvious to the bank employee that the client wants to open the account to evade taxes.

18 What is the liability for failing to comply with money laundering or financial crime rules?

Non-compliance by an institution with money laundering crime rules can be fined up to €5 million or 10 per cent of its revenue in cases of serious, repeated or systematical infringements. In other cases, non-compliance by an institution can be fined up to €100,000. In addition, the employee can be charged with the criminal offence of money laundering. This can also lead to an additional fine against the financial institution of up to €1 million. The client itself may be charged with the criminal offence of money laundering (depending on the circumstances).

Client segmentation and protection

19 Does your jurisdiction's legal and regulatory framework distinguish between types of client for private banking purposes?

German regulatory law follows the client categorisation of MiFID (Directive 2004/39/EC) (ie, retail clients, professional clients and eligible counterparties). The definition of each client category is in accordance with MiFID and MiFID II (Directive 2014/65/EU). Germany will not use the option under MiFID II to introduce special criteria for municipalities and local public authorities.

HNWIs and sophisticated clients do in principle qualify as retail clients, unless they agree to be opted-up to a professional client. The opt-up procedure is similar to the opt-up procedure described in Annex II of MiFID II.

20 What are the consequences of client segmentation?

There are no specific carveouts for HNWIs. Private banks and financial managers must qualify a HNWI under one of the three client categories (retail client, professional client or eligible counterparty).

The qualification of a HNWI as a professional client means fewer duties from a regulatory perspective. In particular, when providing investment advice or other financial services, the financial institution can assume that the HNWI has the necessary knowledge and experience with regard to the service. This is in line with MiFID II. In addition, there is no need to hand out a key investor information document and a suitability protocol when providing investment advice to professional clients.

A qualification as a professional investor may also extend the product categories a financial institution can offer to the client. The prospectus rules of the EU Prospectus Directive do not apply if the financial product is offered only to professional clients (and other qualified investors). The marketing of non-EU investment funds in Germany is also easier if restricted to professional clients or professional investors. As a consequence, such products can be offered in the German market with more ease on part of the issuer or offeror than a full-blown retail product.

21 Is there consumer protection or similar legislation in your jurisdiction relevant to private banking?

The European consumer protection laws apply (in particular Directive 2011/83/EU). The consumer protection laws are difficult to navigate when providing investment products to clients. Even if HNWIs qualify as professional clients under MiFID, they might still qualify as consumers. Product offerings in Germany should take this into account.

Exchange controls and withdrawals

22 Describe any exchange controls or restrictions on the movement of funds.

In general, there are no restrictions on movements of funds. However, the payment service provider of the payer has to transmit the personal data of the payer to the payment service provider of the payee. Personal data means any information concerning personal or material circumstances of an identified or identifiable individual.

Furthermore, customers with residence or habitual abode within Germany have the obligation to inform the Deutsche Bundesbank if they remit an amount of more than €12,500 to a foreigner or receive such an amount from such person.

23 Are there restrictions on cash withdrawals imposed by law or regulation? Do banks customarily impose restrictions on account withdrawals?

There are no restrictions on cash withdrawals imposed by law or regulation and it does not matter in which currency the cash is withdrawn. However, banks customarily impose restrictions on account withdrawals so that the account holders are only allowed to withdraw a certain amount of money per day or per month, or both.

24 Are there any restrictions on other withdrawals from an account in your jurisdiction?

See question 23.

Cross-border services

25 What is the general framework dealing with cross-border private banking services into your jurisdiction?

Providing cross-border private banking services into Germany is within the regulatory reach of the German Banking Act and the Securities Trading Act.

The German Banking Act and Securities Trading Act apply if the foreign financial institution actively targets the German market (eg, sending letters to potential clients, making phone calls to clients, setting up meetings with clients, having a website targeted at a German audience). In contrast, approaches at the initiative of the client are not subject to the German Bank Act and the Securities Trading Act. This concept of market access will remain under MiFID II from 2018 onwards.

26 Are there any licensing requirements for cross-border private banking services into your jurisdiction?

Actively targeting the German market requires a licence under the German Banking Act or the use of a MiFID passport.

For non-EEA financial institutions (eg, in Switzerland or in the United States), the German regulator offers the possibility of an exemption from the German Banking Act if the financial institution complies with a set of requirements (such as sufficient supervisory oversight in its home country). This is in effect almost like a mini-MiFID passport for Germany. However, the exemption approval process is lengthy and the financial institution is restricted to offering its services only to institutional investors. Under MiFID II, this exemption will continue to exist on a German level for the foreseeable future.

27 What forms of cross-border services are regulated and how?

Wealth management, advisory and banking services are regulated if they are targeted at the German market.

28 May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

If there is an existing customer relationship, employees may meet up with such client in Germany. With regard to prospective clients, the situation is different: employees may only travel to meet prospective clients if the approach was set up at the initiative of the German client. Otherwise, the institution is required to have a licence.

29 May foreign private banking institutions send documents to clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Foreign private banking institutions and other financial institutions may send documents to existing clients. With regard to prospective clients it is again different: documents may only be sent if the approach was set up at the initiative of the German client. Otherwise, the institution is required to have a licence.

Tax disclosure and reporting

30 What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

The typical scenario is that a German bank must deduct and withhold German income tax on the German accounts. With such withholding, the income tax on the banking account is already accounted for. As a result, there are no further requirements on individual taxpayers to establish tax-compliant status with regard to such accounts to the tax authorities. If no German tax is deducted and withheld at source, the taxpayers will have to disclose their income in their yearly tax returns.

Branches of foreign banks are subject to the same withholding regime as German banks with regard to their German accounts. However, foreign banks without a German branch will in general not be subject to the withholding obligations of German banks. As result, the taxpayers have to disclose income on these foreign accounts in their German tax returns in order to establish tax-compliant status.

31 Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

In general, private banks or financial intermediaries have to communicate the name, identification number, date of birth and address of any creditor of capital gains to the Federal Central Tax Office.

If no tax is deducted and withheld due to a *Freistellungsauftrag* (exemption order for capital gains) or a *Nichtveranlagungsbescheinigung* (certificate confirming non-assessment) the banks also have to report the amount of capital income.

Furthermore, if their clients pass away the banks have the obligation to report the account balance to the tax authorities.

32 Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

In order to meet the reporting requirements as described above, no client consent is necessary. Furthermore, the banks' general terms and conditions typically specify that disclosures under the reporting obligations are not an infringement of bank secrecy.

Structures

33 What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

A common legal structure for holding private assets in a HNWI environment is a GmbH & Co KG. The GmbH & Co KG is a limited partnership with a general partner and with one or more limited partners. In general, the limited partners are only liable up to the registered amount of their liability contribution. Beyond that contribution amount, the liability of the limited partner ceases.

Since the GmbH & Co KG is tax transparent for German income tax purposes, the partners in general can offset losses of the GmbH & Co KG against their further income. Also, income tax at the level of the GmbH & Co KG is avoided (however, depending on the tax status, trade tax might accrue at the level of the GmbH & Co KG).

Furthermore, the limited partnership agreement of GmbH & Co KG is very flexible and can accommodate individual arrangements. Amendments to the limited partnership agreement can be easily made among the partners without having to obey formal requirements.

However, in comparison to other structures, the costs of a GmbH & Co KG are generally higher. In order to establish a GmbH & Co KG, a GmbH has to be set up first. This causes additional costs for the notarisation and the payment of the initial contribution of the GmbH. Also, the partnership expenses are higher since yearly tax returns have to be filed for both the GmbH & Co KG and for the GmbH. Furthermore, the financial statements for both the GmbH & Co KG and for the GmbH have to be published, which engenders further costs.

Another common legal structure for holding private assets is a GmbH. A GmbH is a limited liability company. Compared to the

Update and trends

The start of MiFID II in 2018 will be a major challenge for private banks. We also see some investment fund restructuring work going on in anticipation of the new 2018 taxation regime for investment funds. Fintech is another major development. Fintech is currently pushing into the entry level of the private clients market and will pose a challenge for the established players.

GmbH & Co KG, the GmbH is not tax transparent. Further, entering into the articles of association and amending such articles requires a higher degree of formalities (notarisation and registration). Unlike for the GmbH & Co KG, the articles of association of the GmbH are publicly accessible.

A family foundation is a rather rare structure for holding private assets. It is not tax transparent and is rather costly and cumbersome to establish.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

In order to establish a banking relationship with a structure, the following data and information are required:

- name of the structure;
- legal form;
- registration number (where available);
- tax ID;
- address of principal office;
- names of the members of the representative body;
- if a member of the representative body is a corporation, its firm, name or description, registration number (where available) and names of members of the representative body is also necessary; and
- the identity of beneficial owners.

In order to prove the identity, an extract of the register or a comparable evidential document is required.

35 What is the definition of controlling person in your jurisdiction?

According to the Money Laundering Act a controlling person or beneficial owner means the natural person who ultimately owns or controls the contracting party, or the natural person on whose behalf a transaction is ultimately carried out or a business relationship is ultimately established. A controlling person or a beneficial owner is in particular the following:

- in the case of entities or partnerships:
  - any natural person who directly or indirectly holds more than 25 per cent of the capital stock or controls more than 25 per cent of the voting rights or controls the entity or partnership in a comparable way; and
- in the case of foundations or trusts:
  - any natural person acting as settlor, trustee or protector (if available);
  - any natural person who is board member of the foundation;
  - any natural person who has been designated as the beneficiary;
  - where the natural person intended to be the beneficiary of the managed assets or property is yet to be designated, the group of natural persons for whose benefit the assets or property are primarily intended to be managed or distributed; or
  - any natural person who otherwise directly or indirectly exercises a controlling influence on the management of assets or property or the distribution of income.

In the case of a party acting on behalf of another, the other person is regarded as the controlling person.

36 Are there any regulatory or tax obstacles to the use of structures to hold private assets?

The use of structures to hold private assets is under regulatory law generally not problematic in a family members context. If the structure is used for pooling assets of non-family members, the structure might become an investment fund and might therefore be subject regulatory approval and oversight under the German implementation of the EU Directive on Alternative Investment Fund Managers (AIFMD).

From October 2017 onwards, Germany will have a transparency register and German structures will be required to notify to the transparency register the structure's controlling persons (as defined above).

The tax obstacles to the use of structures very much depend on the specific tax needs and can be difficult to navigate (eg, estate tax, need to avoid business income). For instance, a GmbH & Co KG can be considered to be in a trade or business due to its structure ('deemed business' concept) or due to its activities or investments. Depending on the relevant asset class, there are specific criteria developed by courts and in decrees of the German tax authorities to distinguish business activities from mere asset-management activities (eg, with respect to private equity funds, real estate and traded securities).

Contract provisions

37 Describe the various types of private banking contract and their main features.

There are several different types of private banking contract. The types prevalent for private banking are typically investment advisory agreements, bank account agreements and asset management agreements. The agreements are often accompanied by a general framework agreement (such as the general terms and conditions of private banks). The general framework agreement specifies general aspects of the banking relationship, in particular the duty to secrecy and the bank's security interests in bank accounts. The main features of the other types of contract are in line with their names (ie, investment advice for investment advisory agreements, etc).

The contracts are governed by the German Civil Code and, where relevant, supplemented by the German Securities Trading Act. Whether a client can ask for variations of the contracts is a matter of negotiation strength rather than mandatory law.

38 What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

The default liability standard provided for by law is liability for every negligent breach of contract. The default liability can be varied if individually negotiated. If the liability is not individually negotiated, banks may deviate from the default standard only to a very limited extent. For instance, the General Terms and Conditions of the Private Banks provide for the default liability standard, but exclude liability in the case of force majeure.

39 Are any mandatory provisions imposed by law or regulation in private banking contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

In general, there are no mandatory provisions or requirements imposed by law or regulation specifically with regard to the contents of private banking contracts.

However, private banking contracts are supplemented, where relevant, by the ancillary duties imposed by the German Securities Trading Act and the MiFID II Regulations. These duties require, for instance, a written framework agreement between the financial institution and its private client. The framework agreement must set out the main duties and rights of the parties. Furthermore, financial institutions are obliged to provide certain mandatory information to their clients when opening a business relationship (such as a general overview on the financial institution, types of financial instruments and costs associated with the offered financial services).

40 What is the applicable limitation period for claims under a private banking contract? Can the limitation period be varied contractually? How can the limitation period be tolled or waived?

The applicable limitation period for claims under a private banking contract is three years. The period can be varied in individual negotiations or waived.

Confidentiality

41 Describe the private banking confidentiality obligations.

Although bank secrecy is not regulated by law, the existence of bank secrecy is generally accepted by the courts. Banking secrecy provisions are an important part of the General Conditions and Terms of Private Banks. Furthermore, the banks have to fulfil the confidentiality obligation according to the Federal Data Protection Act.

42 What information and documents are within the scope of confidentiality?

Bank secrecy forbids the bank from disclosing customer-related facts, for instance, the existence of agreements between bank and customer or the assessment of the financial status of the customer by the bank.

The Federal Data Protection Act protects the personal data of customers. The collection, storage, modification or transfer of personal data or their use as a means of fulfilling one's own business purposes is possible only under the requirements of the Federal Data Protection Act.

43 What are the exceptions and limitations to the duty of confidentiality?

There are several exceptions and limitations to the duty of confidentiality, for instance:

- if a bank employee is questioned by a court as a witness in a criminal case in which the customer is the defendant, the employee cannot refuse to answer because of bank secrecy;
- under certain circumstances, the bank has to disclose account information such as the account number as well as the name and the date of birth of the account holder to the tax authorities, to BaFin or to other state authorities;
- if the client passes away, the asset manager has the obligation to report the account balance to the tax authorities; and
- there is no obligation of confidentiality in legal proceedings of the bank against the customer.

44 What is the liability for breach of confidentiality?

In case of an infringement of bank secrecy or the Federal Data Protection Act, the customer is generally entitled to damages. However, the customer will not typically be able to prove that the breach caused damage. This means that the breach of confidentiality is more a reputational risk for the bank.

In general, breach of bank secrecy by an employee of the bank is not an administrative or criminal offence. However, the employee of the bank can commit an administrative or criminal offence by breaching the obligations due to the Data Protection Act.

Disputes

45 What are the local competent authorities for dispute resolution in the private banking industry?

In general, the local competent authorities for dispute resolution are the ordinary courts. Under certain conditions, special departments of the regional courts with a special competence for commercial law may be in charge to resolve disputes between bank and customer.

However, private clients generally have the chance to lodge a complaint with a banking ombudsman, too. The ombudsman procedure is free of charge, but the customer has to pay his or her own expenditures. Up to a complaint in the amount of €10,000, the decision of the ombudsman is binding. However, in most cases the bank accepts the decision of the ombudsman even if the subject of the complaint increases the amount over €10,000 and the decision is not in favour of the bank.

46 Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

There is no general obligation to report private banking disputes to BaFin as the local regulator. However, a client can lodge a complaint with BaFin. BaFin will forward the complaint to the bank and request the bank's opinion on it. The bank must give a detailed answer and explain the reasons for its behaviour. On the basis of the complaint and the answer of the bank, BaFin will decide whether further action is necessary.

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Private Banking & Wealth Management
ISSN 2398-5860

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