

# Private Banking & Wealth Management 2022

Contributing editor  
Shelby R du Pasquier



**Publisher**

Tom Barnes  
tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall  
claire.bagnall@lbresearch.com

**Senior business development manager**

Adam Sargent  
adam.sargent@gettingthedealthrough.com

**Published by**

Law Business Research Ltd  
Meridian House, 34-35 Farringdon Street  
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between May and July 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021  
No photocopying without a CLA licence.  
First published 2016  
Sixth edition  
ISBN 978-1-83862-699-0

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



---

# Private Banking & Wealth Management 2022

**Contributing editor****Shelby R du Pasquier**Lenz & Staehelin

---

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Private Banking & Wealth Management*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Brazil.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Shelby R du Pasquier of Lenz & Staehelin, for his continued assistance with this volume.



London  
July 2021

---

Reproduced with permission from Law Business Research Ltd  
This article was first published in July 2021  
For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

# Contents

<b>Introduction</b>	<b>3</b>	<b>Liechtenstein</b>	<b>28</b>
Shelby R du Pasquier Lenz & Staehelin		Hannes Arnold and Christina Preiner Gasser Partner	
<b>Brazil</b>	<b>5</b>	<b>Monaco</b>	<b>35</b>
Fernando J Prado Ferreira, João Pedro Ribeiro Taveira and Leonardo Duarte Moreira Pinheiro Neto Advogados		Olivier Marquet and Michaël Dearden CMS Pasquier Ciulla Marquet Pastor Svara & Gazo	
<b>France</b>	<b>12</b>	<b>Switzerland</b>	<b>45</b>
Jérôme Barré Barré & Associés		Fedor Poskriakov and Coraline Jenny Lenz & Staehelin	
<b>Germany</b>	<b>21</b>	<b>United Kingdom</b>	<b>57</b>
Andreas Richter and Sebastian Käßplinger POELLATH		Nicola Higgs, Jonathan Ritson-Candler and Katy Sanders Latham & Watkins LLP	

# Germany

Andreas Richter and Sebastian Käßplinger

POELLATH

## PRIVATE BANKING AND WEALTH MANAGEMENT

### Regulation

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 Investment Firm Act, the German Securities Trading Act and the German Civil Code.

The German Banking Act and the Investment Firm Act are particularly concerned with the licence requirements for private banking activities. The German Securities Trading Act is particularly relevant to private banking owing 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 EU law, such as the EU Capital Requirements Rules, Directive 2014/65/EU (MiFID II) Rules and the Investment Firm Regulation ((EU) 2019/2033).

### Regulatory bodies

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 particularly 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.

### Private wealth services

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.

### Definition of private banking

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.

### Licensing requirements

5 | What are the main licensing requirements for a private bank?

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 €75,000;
- 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.

### Licensing conditions

6 | What are the main ongoing conditions of a licence for a private bank?

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.

Each year, these also define key topics for their supervision, which currently concern consequences of the covid-19 pandemic, IT and cyber risks and collective consumer protection. Insights from tax and tax prosecution investigations – eg, with regard to 'cum ex transactions' – are also taken into account, especially for the auditing of the professional qualification of managers and supervisory board members.

Furthermore, wealth managers are required to finance an investor protection scheme.

### Organisational forms

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, often 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.

## LICENCES

### Obtaining a licence

#### 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.

### Licence withdrawal

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

As a general rule, the German Financial Supervisory Authority (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 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.

### Wealth management licensing

#### 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 and non-discretionary advice. Single-family offices, though, are typically exempt from a licence requirement and from ongoing supervision.

### Requirements

#### 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 the German Federal Bank, or both.

Furthermore, wealth managers are required to finance an investor protection scheme.

## ANTI-MONEY LAUNDERING AND FINANCIAL CRIME PREVENTION

### Requirements

#### 13 | What are the main anti-money laundering and financial crime prevention requirements for private banking and wealth management 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 verify the customer's identity. This includes identifying beneficial owners. The law also requires an ongoing monitoring of the business relationship with the customer.

### Politically exposed persons

#### 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 an individual who is or has been entrusted with prominent public functions, such as heads of state, ministers and members of parliament, as well as certain relatives. The specifics of the definition essentially follow the PEP definition in Directive 2015/849/EU. The obligation of the EU member states to provide lists of relevant political functions in force since 01/01/2020 provides further orientation.

If a PEP is involved, senior management needs to approve the business relationship with the 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.

### Documentation requirements

#### 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.

Customers must be identified on the basis of official identification (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.

### Tax offence

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

Only recently, the legislator rewrote the criminal offence of money laundering. Since 17 March 2021, there is no longer any restriction to certain predicate offences. This means that in the future all earnings from all criminal acts can be the object of money laundering.

## Compliance verification

### 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:

- incites the tax evasion of the client; or
- 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.

## Liability

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

Non-compliance with money laundering crime rules by an institution can lead it to being fined up to €5 million or 10 per cent of its revenue in cases of serious, repeated or systematic infringements. In other cases, non-compliance by an institution can lead it to being fined up to €150,000. 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 CATEGORISATION AND PROTECTION

### Types of client

#### 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 the Markets in Financial Instruments Directive (MiFID II) (ie, retail clients, professional clients and eligible counterparties). The definition of each client category is in accordance with MiFID II. Germany did not use the option under MiFID II to introduce special criteria for municipalities and local public authorities.

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

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. Professional clients may agree to be classified as a retail client.

### Client categorisation

#### 20 | What are the consequences of client categorisation?

The qualification of an 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 Prospectus Directive (Directive 2003/71/EC) 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 the part of the issuer or offeror than a full-blown retail product.

## Consumer protection

### 21 | Is there consumer protection or similar legislation in your jurisdiction relevant to private banking and wealth management?

EU 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. In addition, the Small Investor Protection Act imposes certain requirements on providers and intermediaries of investments to meet: They must publish full, comprehensible and up-to-date information in their prospectuses. In extreme cases, anyone who fails to comply with these information requirements may be banned from selling the investment in question.

## EXCHANGE CONTROLS AND WITHDRAWALS

### Exchange controls and restrictions

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

In general, there are no restrictions on the movement 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 German Federal Bank if they remit an amount of more than €12,500 to a foreigner or receive such an amount from such a person.

### Withdrawal restrictions

#### 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 account holders are only allowed to withdraw a certain amount of money per day, per week or per month.

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

No, there are no restrictions imposed by law or regulation.

**CONFIDENTIALITY****Obligations**

25 | 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 Terms and Conditions of Private Banks. Furthermore, the banks must fulfil the confidentiality obligation according to the Federal Data Protection Act and the General Data Protection Regulation (GDPR) (Regulation (EU) No. 2016/679).

**Scope**

26 | 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 and General Data Protection Regulation (GDPR) protect 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 and GDPR.

**Expectations and limitations**

27 | 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 German Financial Supervisory Authority or to other state authorities;
- if the client dies, 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.

**Breach**

28 | What is the liability for breach of confidentiality?

In case of an infringement of bank secrecy, the Federal Data Protection Act or the GDPR, 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 may commit an administrative or criminal offence by breaching the obligations owing to the Data Protection Act or GDPR.

**CROSS-BORDER SERVICES****Framework**

29 | 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, the Investment Firm Act and the Securities Trading Act.

The German Banking Act, the Investment Firm 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 Banking Act, the Investment Firm Act and the Securities Trading Act. This concept of market access was retained even after the implementation of Markets in Financial Instruments Directive II in Germany.

**Licensing requirements**

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

Actively targeting the German market requires a licence under the Investment Firm Act, German Banking Act or the use of a Markets in Financial Instruments Directive (MiFID) or Capital Requirements Directives (Directive 2013/36/EU) passport. Therefore, non-EU financial institutions (eg, in Switzerland or in the United States) need in principle a licensed subsidiary or branch office in Germany.

The German regulator also 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.

**Regulation**

31 | 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.

**Employee travel**

32 | 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 such a client in Germany (but new categories of products can only be introduced at the sole initiative of the existing client). 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 sole initiative of the German client. Otherwise, the institution is required to have a licence.

## Exchanging documents

- 33 | 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 (but new categories of products can only be introduced at the sole initiative of the existing client). With regard to prospective clients, it is again different: documents may only be sent if the approach was set up at the sole initiative of the German client. Otherwise, the institution is required to have a licence.

## TAX DISCLOSURE AND REPORTING

### Taxpayer requirements

- 34 | 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 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 must disclose income on these foreign accounts in their German tax returns to establish tax-compliant status.

### Reporting requirements

- 35 | 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 must 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 owing to an exemption order for capital gains or a certificate confirming non-assessment, the banks must also report the amount of capital income.

Furthermore, if their clients die, the banks are obliged to report the account balance to the tax authorities.

### Client consent on reporting

- 36 | 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?

To meet the reporting requirements, 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

### Asset-holding structures

- 37 | 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 high net worth individual environment is a limited partnership with a general partner and one or more limited partners (GmbH & Co KG). 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 a GmbH & Co KG is 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. To establish a GmbH & Co KG, a GmbH must first be set up. 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 the GmbH must be prepared and published, accruing further costs.

Another common legal structure for holding private assets is a limited liability company (GmbH). Compared to the 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 somewhat rare structure for holding private assets. It is not tax transparent and is rather costly and cumbersome to establish.

### Know-your-customer

- 38 | What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship where assets are held in the name of a legal structure?

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.

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

To verify the details of the beneficial owners, banks can now use a special transparency register that was established following the Fourth



Money Laundering Directive. However, banks cannot solely rely on the entries contained in this register, but must check the information provided therein by additional risk-appropriate measures.

### Controlling person

#### 39 | 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;
  - any natural person who otherwise directly or indirectly exercises a controlling influence on the management of assets or property or the distribution of income; or
  - any natural person who directly or indirectly exercises a controlling influence on an association, who is a member of the board of the foundation or who has been designated as a beneficiary of the foundation.

In the case of a party acting on behalf of another, the other person is regarded as the controlling person. Insofar as the party to the contract is a nominee, it is also considered acting on behalf of another person.

### Obstacles

#### 40 | 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 member context. If the structure is used for pooling the assets of non-family members, the structure might become an investment fund and might, therefore, be subject to regulatory approval and oversight under the German implementation of the EU Directive on Alternative Investment Fund Managers (Directive 2011/61/EU).

German structures are also required to notify the structure's controlling persons to the new transparency register.

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 and the need to avoid business income). For instance, a GmbH & Co KG can be considered to be in a trade or business owing to its structure ('deemed business' concept) or owing to its activities or investments. Depending on the relevant asset class, there are specific criteria developed by the 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

### Types of contract

#### 41 | Describe the various types of private banking and wealth management contracts and their main features.

There are several different types of private banking contracts. 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).

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.

### Liability standard

#### 42 | 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.

### Mandatory legal provisions

#### 43 | Are any mandatory provisions imposed by law or regulation in private banking or wealth management 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 Markets in Financial Instruments Directive (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).

### Limitation period

- 44 | What is the applicable limitation period for claims under a private banking or wealth management 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.

## DISPUTES

### Competent authorities

- 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 must pay his or her own expenses. Ombudsman decisions on complaints up to €10,000 are binding. However, in most cases, the bank accepts an ombudsman's decision even if the subject of the complaint increases the amount to more than €10,000 and the decision goes against the bank.

### Disclosure

- 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 the German Financial Supervisory Authority (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.

## UPDATE AND TRENDS

### Recent developments

- 47 | Describe the most relevant recent developments affecting private banking in your jurisdiction. What are the trends in this industry for the coming years? How is fintech affecting private banking and wealth management services in your jurisdictions?

As a result of legal amendments to the Money Laundering Act and the German Banking Act, crypto values and their trading have come under even closer scrutiny by the supervisory authorities.

Legislators at European level are currently preparing to take measures to encourage private investment in sustainable technologies and activities in order to achieve the goals of the European Green Deal. The concrete consequences for private investors, such as high net worth individuals are not yet foreseeable.

# POELLATH +

#### Andreas Richter

andreas.richter@pplaw.com

#### Sebastian Käpplinger

sebastian.kaepplinger@pplaw.com

An der Welle 3  
60322 Frankfurt am Main  
Germany  
Tel: +49 69 247 0470  
Fax: +49 69 247 04730

Potsdamer Platz 5  
10785 Berlin  
Germany  
Tel: +49 30 253 530  
Fax: +49 30 253 53999

www.pplaw.com

## Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)