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# Separation of Trading and Other High-risk Activities from Banks' Deposit-taking Business; Criminal Liability of Bank Managers for Deficient Risk Management

## – German Government Publishes Draft Bill –

On February 6, 2013, the German Government published a Draft Bill on the Separation of Risks and Recovery and Resolution Planning for Credit Institutions and Banking Groups (*Entwurf eines Gesetzes zur Abschirmung von Risiken und zur Planung der Sanierung und Abwicklung von Kreditinstituten und Finanzgruppen*) (the "Government Draft Bill"). The Government Draft Bill contains three distinct proposals:

- Banks and banking groups will be required to separate their proprietary trading and certain other activities involving increased risks from their deposit-taking business, provided that certain thresholds are exceeded (see section A.).
- Managers of banks, financial services institutions and holding companies will be subject to criminal liability if they violate certain risk management requirements defined in the Government Draft Bill, and thereby cause a threat to the continued existence of the bank, financial services institution or the group (see section B.).
- In addition, the Government Draft Bill contains provisions dealing with recovery and resolution planning for banks and banking groups, which to a large extent reflect the initial Draft Bill on Recovery and Resolution Planning for Credit Institutions and Banking Groups (*Entwurf eines Gesetzes zur Sanierungs- und Abwicklungsplanung von Kreditinstituten und Finanzgruppen*) published by the Federal Ministry of Finance in December 2012 (see section C.).

## A. Separation of Trading and Other High-risk Activities from Banks' Deposit-taking Business

In February 2012, the European Commission established an expert group chaired by Erkki Liikanen, Governor of the Bank of Finland, to assess the need for structural reforms to the EU banking sector. In its final report dated October 2, 2012 (the "Liikanen Report"), the Liikanen Group recommended, among other things, that banks be required to separate their proprietary trading and market making activities, as well as certain other activities involving increased risks for financial institutions, from their deposit-taking business. In January 2013, the German and the French Government expressed their support for this separation

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concept, and stated their willingness to take action at the European and national level to implement the respective recommendations of the Liikanen Report. With the Government Draft Bill, the German Government aims to implement the general principles of the separation concept into German law. However, the Government Draft Bill deviates from certain recommendations of the Liikanen Report, as explained in more detail below (see subsections 1. and 2.). The Government Draft Bill also raises certain issues with regard to the regulatory treatment of the separated businesses which require further clarification (see subsection 3.).

### *1. Separation of activities posing increased risks for financial institutions*

#### *a) The concept of the Liikanen Report*

The Liikanen Report recommends that all deposit-taking banks and banking groups shall assign their proprietary trading and any assets or derivative positions incurred in the process of market-making (other than certain exempted activities) to a separate trading entity. Such trading entity may be a member of the same group, provided that the deposit-taking bank is sufficiently insulated from the risks of the trading entity. Any loans to hedge funds, special investment vehicles and other entities of comparable nature, as well as private equity investments shall also be assigned to the trading entity. Exempted activities which may be continued within a deposit-taking bank shall include, for example, hedging services for non-banking clients (such as currency and interest rate options and swaps) within narrow position risk limits relative to a bank's own funds, and securities underwriting. An exemption shall also apply to derivatives transactions entered into for a bank's proprietary asset and liability management, as well as sales and purchases of assets to manage the assets in a bank's liquidity portfolio.

#### *b) The concept of the Government Draft Bill*

Similar to the concept of the Liikanen Report, the Government Draft Bill provides that deposit-taking banks and their affiliates shall be prohibited from engaging in certain activities involving increased risks for financial institutions, unless such activities are transferred to a "financial trading institution" (*Finanzhandelsinstitut*). Such financial trading institution shall be established as a separate legal entity which is economically and organizationally independent from the deposit-taking bank and its (other) affiliates. With regard to the activities subject to mandatory separation, the Government Draft Bill provides for a narrower scope than the Liikanen Report. Such activities are generally limited to:

- two specific forms of proprietary trading, *i.e.*, (i) proprietary trading that does not constitute a service for clients (*Eigengeschäft*), as well as (ii) high-frequency trading with the exception of market-making activities, and

- credit or guarantee transactions with hedge funds, funds of hedge funds, alternative investment funds (AIF) or their respective management companies. Based on the wording of the Government Draft Bill, transactions with subsidiaries of hedge funds or fund management companies (such as intermediate holding companies) are currently not subject to mandatory separation.

A deposit-taking bank may continue to engage in, among other things, trading activities on behalf of clients (such as fixed-price transactions, clearing and settlement activities), hedging transactions on behalf of clients, market-making activities, principal brokerage services (*Finanzkommissionsgeschäft*), underwriting or placement activities (*Emissions- oder Platzierungsgeschäft*), portfolio management (*Finanzportfolioverwaltung*), investment brokerage (*Anlagevermittlung*) and acting as central counterparty within the meaning of the German Banking Act (*Kreditwesengesetz*, "KWG"). Transactions for purposes of managing interest rate, currency or liquidity risks and transactions relating to the acquisition or disposal of long-term participations in other enterprises shall also be exempt from mandatory separation.

With regard to activities that may generally be continued by a deposit-taking bank (such as market-making activities referred to in the Liikanen Report, or the exempted activities described above), the Government Draft Bill authorizes the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "BaFin") to prohibit on a case-by-case basis that deposit-taking banks and their affiliates engage in any activities which may put at risk the solvency of the deposit-taking bank or any of its affiliates. In the event that the BaFin imposes such prohibition, the respective activities must be discontinued or transferred to the financial trading institution. An appeal against the prohibition order of the BaFin shall have no suspensive effect.

## 2. *Thresholds for a mandatory separation of certain business activities*

### *a) The concept of the Liikanen Report*

The Liikanen Report recommends a two-step test for requirement of a mandatory separation of certain business activities, which test takes into account (i) the volume of the overall trading activities of the deposit-taking bank or banking group (*i.e.*, including trading activities to which the separation requirement would not apply), and (ii) the volume of the activities subject to separation.

- Regarding the first element of the test, the Liikanen Report proposes that the assets qualifying as held for trading or available for sale pursuant to IFRS must exceed 15 to 25% of the total assets of the deposit-taking bank or banking group, or EUR 100 billion.

- With respect to the required minimum volume of the activities to which the separation requirement would apply, the Liikanen Report calls on the European Commission to calibrate an appropriate threshold ensuring that the separation requirement applies to all banks for which the activities to be separated are significant.

*b) The concept of the Government Draft Bill*

The Government Draft Bill deviates from the concept of the Liikanen Report insofar as the proposed thresholds for a mandatory separation do not include a separate threshold for the activities subject to separation. Rather, the mandatory separation requirement would apply irrespective of the volume of the activities subject to separation if a deposit-taking bank or banking group exceeds one of the following thresholds:

- as of the end of the previous financial year, the assets qualifying as held for trading or available for sale pursuant to IFRS (or the trading book and the liquidity reserve pursuant to German GAAP, as the case may be) amount to more than EUR 100 billion on a stand-alone or consolidated basis, or

- as of the end of each of the previous three financial years, the total assets amount to at least EUR 90 billion on a stand-alone or consolidated basis, and the assets held for trading or available for sale pursuant to IFRS (or the trading book and the liquidity reserve pursuant to German GAAP, as the case may be) amount to more than 20% of the total assets. The wording of the Government Draft Bill is not clear as to whether the 20% threshold must also be met as of the end of each of the three previous financial years, or whether it is sufficient that the 20% threshold is exceeded for the first time as of the end of the third financial year in which the bank (or banking group) meets the total asset test.

The authorization of the BaFin to prohibit that deposit-taking banks and their affiliates engage in activities which, depending on the circumstances, may put the solvency of the deposit-taking bank or any of its affiliates at risk, is not limited to banks or banking groups exceeding the thresholds above. Rather, the BaFin may issue a prohibition order to any deposit-taking bank and any of its affiliates if the BaFin concludes that, in light of the other business activities, results of operations or risk profile of the respective bank or affiliate, the prohibited activities may put at risk the solvency of the bank or affiliate.

The provisions of the Government Draft Bill imply that deposit-taking banks and banking groups with large trading books may be forced to discontinue certain activities or transfer them to a separate financial trading institution, even if such activities represent an insignificant share of their overall trading book or are completely unrelated to trading activities (such as exposures to hedge funds allocated to the banking book). Also, deposit-taking banks and banking groups with significant exposures to hedge funds may not be

subject to the mandatory separation requirement as long as their trading book does not meet one of the thresholds described above. These inconsistencies could be avoided if the thresholds triggering a separation requirement were aligned more closely with the activities to be separated, similar to what is recommended in the Liikanen Report.

### *3. Regulatory treatment of separated businesses*

In line with the Liikanen Report, the Government Draft Bill provides that a financial trading institution may be a member of the same banking group as the deposit-taking bank. However, the financial trading institution must secure "independent" (*eigenständig*) funding of its assets, and it may not rely on a waiver regarding compliance with regulatory requirements, in particular own funds requirements and large exposure limitations, on a stand-alone basis pursuant to § 2a of the KWG. Moreover, the Government Draft Bill provides that transactions between the deposit-taking bank and its affiliates, on the one hand, and the financial trading institution, on the other hand, shall be treated "as transactions with third parties".

#### *a) Independent funding*

Pursuant to the legislative materials accompanying the Government Draft Bill, the concept of "independent" funding implies that the financial trading institution must obtain funding on the same terms as companies that are unrelated to the deposit-taking bank and its banking group. In particular, the financial trading institution must obtain funding on arm's length terms, and it may not rely on the credit of other companies in order to obtain sufficient funding. Debt of a financial trading institution that is guaranteed by another group company would not meet the requirements for an "independent" funding.

The Government Draft Bill does not generally prohibit, however, that a deposit-taking bank and its affiliates hold equity in a financial trading institution. The financial trading institution and the deposit-taking bank may be members of the same banking group, which typically requires that the deposit-taking bank or another group company hold a significant equity stake in the financial trading institution (see §§ 10a(1), 1(7) KWG in conjunction with § 290(2) no. 1 and 2 of the German Commercial Code (*Handelsgesetzbuch*)). In addition, the German Government states in its reasoning for the Government Draft Bill that a recapitalization of the financial trading institution by way of a capital increase is generally permitted, as long as such recapitalization does not put the viability of the parent company or other group companies at risk. However, a group company may not commit in advance to recapitalize the financial trading institution, and the equity stake in the financial trading institution must not lead to a substantial economic, operational or reputational risk for a group company.

If equity financing of the financial trading institution is permitted, it should also be allowed for a deposit-taking bank and its affiliates to hold debt issued by the financial

trading institution, as debt generally ranks senior to equity and typically poses fewer risks for its holder than equity. In any event, the debt would have to be issued on arm's length terms.

The concept of "independent" funding seems to imply that a financial trading institution may not be fully refinanced with equity or debt held by an affiliated deposit-taking bank or other group companies. However, the Government Draft Bill does not provide for any thresholds or calculation mechanisms with regard thereto, nor does it clarify to what extent a financial trading institution may fulfill its obligation to maintain sufficient own funds pursuant to § 10 KWG with equity provided by an affiliated deposit-taking bank or other group companies. It would therefore be helpful for financial trading institutions if the final legislation were to include further details of the "independent funding" concept.

*b) Treatment as transactions with unrelated third parties*

The Government Draft Bill provides that transactions with an affiliated financial trading institution shall be treated as transactions with unrelated third parties. Pursuant to the legislative materials accompanying the Government Draft Bill, this implies that any such transaction shall (i) be entered into on arms' length terms, and (ii) be subject to the same regulatory requirements as transactions with an unrelated third party.

With regard to (ii), the legislative materials state that the applicable regulatory requirements shall in particular include limitations on large exposures, which seems to imply that the exemptions from the large exposure limits for certain exposures to parent companies or subsidiaries pursuant to § 9(2) Large Exposure Regulation (*Groß- und Millionenkreditverordnung*) shall not apply in the case of an affiliated financial trading institution. However, the Government Draft Bill does not deal generally with the extent to which other special regulatory provisions for intra-group transactions apply. For example, banks are generally required to deduct equity stakes in other banks, financial services institutions or financial enterprises from their regulatory banking capital if certain thresholds are exceeded. An exemption from this requirement applies if the shareholder (or its parent company) mandatorily or voluntarily consolidates the institution or financial enterprise in which it holds an equity stake pursuant to § 10a KWG. It is unclear whether this exemption would also be available for equity participations in an affiliated financial trading institution. Considering that consolidation pursuant to § 10a KWG is not limited to parent companies and subsidiaries, but may also extend to unaffiliated parties in which the banking group holds certain minority interests, there are valid arguments that the exemption should also be available for an equity participation in a financial trading institution that is consolidated with the participating bank.

An additional question is whether exposures of several group companies to an affiliated financial trading institution would be subject to large exposure limitations on a consolidated level. While intra-group exposures are generally exempt from large exposure limita-

tions on a consolidated level, the Government Draft Bill leaves it open whether intra-group exposures to an affiliated financial trading institution would have to be treated differently because these particular intra-group exposures would be subject to the regulatory requirements for exposures to a "third party". Assuming that the general exemptions also apply to an affiliated financial trading institution, exposures to the financial trading institution could generally be split-up among several group companies in order to avoid a violation of large exposure limitations by individual group companies on a stand-alone basis.

*c) Permitted activities of the financial trading institution*

The Liikanen Report recommends that a financial trading institution may engage in all banking activities other than those reserved for the deposit-taking bank, which means that the financial trading institution cannot fund itself with deposits and is not allowed to provide retail payment services. The Government Draft Bill takes a similar approach and prohibits that financial trading institutions engage in deposit-taking activities, payment services and e-money transactions within the meaning of the Act on the Supervision of Payment Services (*Zahlungsdiensteaufsichtsgesetz*), while it does not provide for any limitations on other banking activities.

Therefore, it would generally be conceivable for a banking group to "reversely" separate its deposit-taking activities instead of the activities prohibited pursuant to the Government Draft Bill, and transfer such deposit-taking activities to a separate legal entity that is economically and organizationally independent from the rest of the banking group. However, this approach would lead to regulatory disadvantages because the remainder of the banking group would then presumably qualify as a financial trading institution within the meaning of the Government Draft Bill. As a result thereof, the banking group would be subject to risk management requirements for financial trading institutions, and it would not be permitted to rely on a waiver regarding compliance with the regulatory requirements on a stand-alone basis pursuant to § 2a KWG. It therefore appears unlikely that financial institutions would actually conduct of a "reverse" separation.

## B. Criminal Liability for Deficient Risk Management

During the financial crisis, several German banks were at the brink of insolvency and required financial support by the government. Some of these banks had incurred risks that by far exceeded their risk-bearing capacity and, at least in hindsight, the risk management systems of some of these banks were arguably inadequate. Legal proceedings brought in the aftermath of these almost bank failures showed that the existing civil and criminal law regime was hardly suitable to deal with the consequences of the financial crisis, least to say to safeguard the stability of the financial system. Against this background, the Government Draft Bill proposes that a violation of certain minimum risk management requirements by

the top management of a bank[1] shall constitute a criminal offense, provided that the deficiencies of the risk management system pose a risk to the continued viability of the bank.

### *1. Proposed scope of criminal liability*

Pursuant to the KWG, banks and banking groups must maintain an adequate and effective risk management, including, in particular, the maintenance of appropriate strategies, processes, procedures, functions and concepts regarding their (i) business and risk strategy, (ii) risk-bearing capacity, (iii) internal control and audit systems, (iv) personnel and technical facilities, and (v) contingency planning and testing. The BaFin's Minimum Requirements for Risk Management ("MaRisk") provide further detail on these risk management principles.

The Government Draft Bill essentially proposes to include certain provisions of the MaRisk as minimum risk management requirements in the KWG, and make each member of a bank's management board or managing director, as the case may be (each board member or managing director a "Top Manager"), responsible for compliance by such bank and, in case of a parent bank, the banking group with these minimum requirements. In case of non-compliance, a Top Manager shall be subject to criminal liability if such non-compliance creates a risk for the continued viability of the bank or banking group, provided such Top Manager acted with criminal intent. The proposed criminal sanctions are imprisonment of up to five years or a monetary fine. If a Top Manager acted negligently regarding the creation of a risk for the continued viability of the bank or banking group, the applicable criminal sanctions are imprisonment of up to two years or a monetary fine.

### *2. Practical implications*

Pursuant to the legislative materials accompanying the Government Draft Bill, it is not intended to expand the scope of applicable risk management requirements beyond those currently set forth in the MaRisk. While this is generally correct, the fact that a violation of certain minimum risk management requirements now qualifies as a criminal offense makes the proposed rules problematic. Various elements of the respective provisions are phrased very broadly and contain many indefinite legal terms, so that it is doubtful whether these provisions fully comply with the constitutional principle of legal certainty (*Bestimmtheitsgrundsatz*) of criminal law provisions pursuant to Art. 103(2) of the German Constitution (*Grundgesetz*). For example, if a bank's continued viability is at risk, the criminal liability of its Top Managers may depend on the issue of whether the risk strategy of such bank "comprised at all times the risk management goals of its material business activities and the measures for their implementation", or whether the "quality" of the

[1] The Draft Bill contains similar provisions for the management of insurance companies, which are disregarded for the purposes of this Alert Memo.

personnel and technical facilities was "appropriate" with respect to the "internal requirements, business activities and the risk situation" of the bank.

It is not only the principle of legal certainty that raises doubts as to whether criminal sanctions are indeed an adequate remedy for insufficient risk management. The criminal liability of a Top Manager may also depend on the hypothetical development of the bank's capital and liquidity ratios, for example if a breach of regulatory capital or liquidity thresholds is avoided or cured otherwise than through a government bail-out (*e.g.*, through a "pre-emptive" takeover by another bank). In such a case, the competent court would have to determine whether there was a "risk for the continued viability of the bank" within the meaning of the KWG. Depending on the circumstances, it may be difficult for a court to assess such hypothetical developments, and prove that the Top Managers of the bank concerned acted with criminal intent or negligence.

## C. Recovery and Resolution Planning

The third set of proposals contained in the Government Draft Bill deals with recovery and resolution planning for banks and banking groups. It reflects to a large extent the initial Draft Bill on Recovery and Resolution Planning for Credit Institutions and Banking Groups (*Entwurf eines Gesetzes zur Sanierungs- und Abwicklungsplanung von Kreditinstituten und Finanzgruppen*) that the Federal Ministry of Finance published in December 2012 (the "Ministry Draft Bill"). It is modeled on the requirements applicable to recovery plans and resolution planning set forth in the "Key Attributes of Effective Resolution Regimes for Financial Institutions" published by the Financial Stability Board on November 4, 2011, and preempts in part the implementation into German law of the European directive establishing a framework for the recovery and resolution of credit institutions and investment firms, a draft of which was published by the European Commission on June 6, 2012.

The Government Draft Bill introduces the requirement that banks and banking groups prepare and update at least annually recovery plans if they are of systemic importance in Germany or globally. A recovery plan would set out measures which enable a bank to take early action to restore its long-term viability in a situation of financial distress, which is intended to strengthen the bank's resilience in the case of crisis. In addition, the Government Draft Bill provides for the establishment of a special unit within BaFin (the "Resolution Unit"), which will be responsible for resolution planning. "Resolution planning" comprises the preparation and annual update by the Resolution Unit (rather than the relevant banks) of resolution plans for banks and banking groups concerned. In addition, the Resolution Unit must assess continuously, but at least annually, whether it will be possible to resolve such banks or banking groups in insolvency proceedings or by ordering the transfer of a distressed bank's viable business to another bank including a bridge bank for the purpose of dissolving the failing bank. Finally, the Resolution Unit may request the timely removal of impediments to a bank's or banking group's resolution. While the

Government Draft Bill contains numerous technical and minor substantive amendments to the Ministry Draft Bill, which do not warrant further discussion, it contains few material changes,[2] the following of which are noteworthy.

The Government Draft Bill clarifies that BaFin will be responsible for determining, in consultation with Deutsche Bundesbank, which banks and banking groups are of systemic importance in Germany. For purposes of such determination, BaFin must take into account the bank's size, the scope of its domestic and cross-border activities, its internal and external interdependencies, and whether the bank's services (including financial infrastructure services) can be replaced. A bank or banking group, as the case may be, is deemed to be of systemic importance if the bank's or a group member's imminent risk of failure for insolvency reasons (*Bestandsgefährdung*) would pose risks to the stability of other enterprises active in the financial sector, the financial market at large, or the general trust of depositors and other market participants in the functioning of the financial system (*Systemgefährdung*).

Furthermore, the Government Draft Bill now provides that for purposes of their recovery plan banks may assume that shareholders or deposit protection schemes (*öffentliche oder private Sicherungssysteme*) will carry out recovery measures, provided that the relevant shareholders or the scheme, as the case may be, have committed to do so or the relevant recovery measures are in line with customary practice in comparable circumstances. However, as a practical matter, as far as capital measures are concerned, banks may often not have the necessary commitment from their shareholders or may not be able to demonstrate that a proposed capital measure is in line with customary practice in a crisis scenario. Public savings banks and cooperative banks may face similar difficulties with respect to stabilization measures of their respective deposit protection schemes.

Certain obligations of the Resolution Unit to consult with the German Federal Agency for Financial Market Stabilization (*Bundesanstalt für Finanzmarktstabilisierung*) on certain of its resolution planning activities has been eliminated (*e.g.*, in connection with assessing whether a bank or banking group, as the case may be, can be resolved, or before requesting that a bank or banking group remove impediments to resolution). The Resolution Unit, however, must keep the German Federal Agency for Financial Market Stabilization informed about its resolution planning activities. The Government Draft Bill also further clarifies under what circumstances the Resolution Unit may request the elimination of impediments (i) to the implementation of recovery measures proposed in a bank's or banking group's recovery plan or (ii) to a bank's or banking group's resolution.

In addition, the Resolution Unit must now include in the resolution plan, *inter alia*, any material contractual arrangements of the relevant bank or banking group, as the case

[2] For a summary of the Ministry Draft Bill, please refer to our Alert Memo "Recovery and Resolution of Banks – German Legislative Developments" of January 23, 2013, which is available at www.clearygottlieb.com.

may be, that would or could be terminated upon the insolvency of the relevant entity. Given that, according to German law, most contracts are subject to the receiver's right to elect or reject performance, the banks and banking groups concerned will be required to furnish to the Resolution Unit comprehensive information on its contractual arrangements in order to enable the Resolution Unit to include such information in the resolution plan. Furthermore, according to the Government Draft Bill, banks and banking groups must furnish to the Resolution Unit such assessments, reports or evaluations which the Resolution Unit considers necessary for resolution planning. Under the Ministry Draft Bill, such obligation also included information which the Resolution Unit viewed as merely helpful. Finally, and maybe most notably, the Government Draft Bill proposes that any decision of the competent higher administrative court on contested measures of the Resolution Unit can be appealed in accordance with generally applicable principles.

## D. Outlook

The Government Draft Bill is intended as a further step towards a more comprehensive regulation of banks and other financial institutions in the aftermath of the financial crisis. To that end, it forms part of a series of regulatory measures intended to reduce the risk that in the event of a crisis systemically important financial institutions have to be bailed out by the government using taxpayers' money, thus addressing the "too big to fail" problem. The new rules proposed by the Government Draft Bill will put further administrative burdens on the banks concerned, and the new powers of BaFin as well as the separation requirement could have a significant impact on the business of banks. On the other hand, the proposed measures may facilitate the break-up of a bank by way of transfer order, the continuation of the bank's systemically important or viable business and the liquidation of the bank's remaining assets. It remains to be seen how the proposed rules will be shaped in the further legislative process.

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