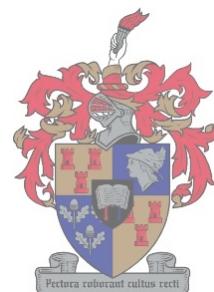


**The Law relating to the
Supervision of Banks:
A Comparison between
the Federal Republic of Germany and
the Republic of South Africa**

Thesis
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Student: Andreas Krammig
 96 1757 4

Supervisor: Prof. C F Hugo
Co-supervisor: Mr. J de Waal

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I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any other university for a degree

Summary

Banks are one of the most important elements in the economic cycle of modern society. As money replaced bartering banks have gradually moved into the pivotal point of the relations between participants in the economic cycle. No project can be realized without money today. On the one hand, there are the investors who, irrespective of the amount, entrust their assets to the banks. On the other hand, there are those whose financial needs require the granting of some form of credit. Banks operating in these contexts clearly bear important responsibilities towards the different parties. A third party, the state, is also interested in a well-functioning banking establishment. Economic stability, without which there can be no political stability, cannot otherwise be ensured. The state is accordingly keenly interested in maintaining the operability of this system. To this end, various laws are made in the respective countries aimed at supervising the banking industry. This work deals with some of the legislation relating to bank supervision in the Federal Republic of Germany and the Republic of South Africa.

In the various chapters certain aspects of bank supervision in the two countries are identified, juxtaposed and compared. The reasons for any differences are sought, discussed and where possible explained.

From a historical point of view, the two countries developed differently. Nevertheless, the need to regulate this sector through legislative means arose at an early stage in both. Unfortunately, the catalyst for legislative development was mostly some or other financial crisis.

Any measures for supervising banks must, to be binding, be constitutional. In this regard much must still be done in South Africa due to the fact that the New Constitution has only been in force since 1996. Thus certain regulations stemming from the Banks Act 90 of 1994 need to be reconsidered in the light of the constitution.

Bank supervisory activity is performed by a national institution in both countries. Germany avails itself of an independent authority. However, in South Africa it is one of the tasks of the

central bank which has established a specific office for this purpose. Legal and natural persons alike are subject to such supervision. Diverse other government institutions provide support for such supervisory work in both countries.

The scope of banking supervision, that is the persons and transactions affected, is broad and also finely meshed. Both systems list a number of banking transactions that are subject to their supervision. This affects all domestic banks and all foreign banks that are domestically active.

Access to the banking business is only permitted in both countries after an appropriate license has been granted. The license can be conditional. Moreover, both systems make provision for the revocation of the license in appropriate circumstances. The conducting of banking business without the necessary permission is forbidden in both countries under the threat of legal punishment.

It is well recognized in modern society that legal subjects should be protected against the decisions of those who wield state power. The possible remedies of those affected by the decisions of the public authorities responsible for banking supervision in the different countries are investigated in conclusion.

Opsomming

Banke is een van die belangrikste elemente in die ekonomiese sfeer van die moderne gemeenskap. Namate geld die ruilhandel verplaas het, het banke geleidelik die spilpunt geword van die verhoudinge in die ekonomiese sfeer. Vandag kan geen projek sonder geld realiseer nie. Aan die een kant staan die beleggers wat hul bates aan die banke toevertrou. Aan die ander kant is daar diegene wie se finansiële behoeftes die een of ander vorm van krediet genoodsaak. Banke wat binne hierdie konteks opereer dra duidelik groot verantwoordelikhede teenoor die onderskeie partye. 'n Derde party, die staat, het ook belang by 'n goed-werkende bankstelsel. Dit is 'n voorvereiste vir ekonomiese stabiliteit waarsonder daar ook geen politieke stabiliteit kan wees nie. Die staat is gevolelik sterk gerig op die handhawing van 'n goed-werkende banksisteem. Met hierdie oogmerk het verskeie stukke wetgewing gerig op banktoesighouding in die onderskeie lande die lig gesien. Hierdie tesis neem sekere van die wette wat in die Federale Republiek van Duitsland en in die Republiek van Suid-Afrika aanvaar is, in oënskou.

- In die verskillende hoofstukke word sekere aspekte van banktoesighouding in die verskillende lande identifiseer, teenoor mekaar gestel en vergelyk. Die redes vir enige verskille word gesoek, bespreek en waar moontlik verduidelik.

Vanuit 'n geskiedkundige perspektief het die twee lande verskillend ontwikkel. Nietemin het die behoefte om hierdie sektor deur middel van wetgewing te reguleer in beide lande vroeg ontstaan. Ongelukkig was die katalisator van ontwikkeling van die wetgewing dikwels die een of ander finansiële katastrofe.

Enige maatreëls vir banktoesighouding moet, teneinde afdwingbaar te wees, grondwetlik wees. In hierdie verband moet daar nog veel gedoen word in Suid-Afrika, en wel omdat die Nuwe Grondwet slegs vanaf 1996 reeds in werking is. Gevolglik is dit nodig dat sommige van die bepalings van die Bankwet 90 van 1994 heroorweeg moet word.

Banktoesighouding word in beide lande deur 'n nasionale instelling behartig. In Duitsland word van 'n onafhanklike liggaam gebruikgemaak. In Suid-Afrika, aan die ander kant, vorm

dit een van die take van die sentrale bank wat 'n spesifieke kantoor vir hierdie doel opgerig het. Natuurlike en regspersone is onderworpe aan die toesighoudende maatreëls. Verskeie verbandhoudende staatsinstellings staan die toesighoudende kantoor in altwee lande by.

Die terrein waarin die toesighoudende liggaam werk is wyd en fyn ineen gevleg in beide lande. In altwee regstelsel word 'n aantal transaksies wat onderwerp word aan toesighouing spesifiek gelys. Sowel plaaslike banke as buitelandse banke wat plaaslik aktief is, word geraak.

Toegang tot bankbesigheid word in beide lande beperk tot diegene wat die nodige toestemming (lisensie) het. Die toestemming kan voorwaardelik wees. Boonop maak beide stelsels voorsiening vir herroeping van die toestemming in gepaste omstandighede. Die bedryf van bankbesigheid sonder die nodige toestemming word verbied en is 'n misdryf in beide lande.

In die moderne gemeenskap word die beginsel dat regsubjekte beskerm moet word teen owerheidsbesluite algemeen erken. Die moontlike remedies van persone wat geraak word deur toesighoudende maatreëls in beide lande word gevolglik ten slotte ondersoek.

Anna und Karl Krammig

in

Liebe, Dankbarkeit und Verehrung

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Abbreviations

A/AD	Appellate Division
a.	auch/also
a.A.	anderer Ansicht/other opinion
a.a.O.	am angegebenen Ort/ibid.
AbI.	Amtsblatt
ABLU	Annual Banking Law Update
Abs.	Absatz/paragraph
AC	Law Reports, Appeal Cases
ACJ	Acting Chief Justice
AcP	Archiv für die civilistische Praxis (Journal)
a.E.	am Ende/at the end
a.F.	alte Fassung/old version
AG	Die Aktiengesellschaft (Journal)
AGB	Allgemeine Geschäftsbedingungen
AK	Alternativkommentar
AktG	Aktiengesetz
ALJR	Australian Law Journal Reports
AllER	All England Law Reports
Amtl.	Amtlich/official
ANC	African National Congress
Anm.	Anmerkung/remark
AO	Abgabenordnung
AöR	Archiv des öffentlichen Rechts (Journal)
Art.	Artikel/article
Aufl.	Auflage/edition
AZ	Aktenzeichen/file number
BAK	Bundesaufsichtsamt für das Kreditwesen/Federal Banking Supervisory Office
BankG	Bankgesetz /Banks Act
Bay	Bayerisch/bavarian
Banz.	Bundesanzeiger
BauSpG	Bausparkassengesetz
BayOLG	Bayerisches Oberstes Landgericht
BayVerwBl.	Bayerische Verwaltungsblätter
BB	Betriebsberater (Journal)
Bbank	Bundesbank
BbankG	Bundesbankgesetz/Bundesbank Act
BCLC	Butterworth's Company Law Cases
Bd.	Band/volume
BdL	Bank deutscher Länder
BDSG	Bundesdatenschutzgesetz
Beschl.	Beschluß/decision by Verwaltungsgericht
BFH	Bundesfinanzhof
BGB	Bürgerliches Gesetzbuch/civil code
BGBI.	Bundesgesetzblatt (Federal Gazette)
BGH	Bundesgerichtshof/Federal Supreme Court
BGHZ	Entscheidungen des BGH in Zivilsachen, amtliche Sammlung/decisions of the BGH, civil cases, official compilation
BI	Bank Information (Journal)
BIS	Bank for International Settlements
BM	Bank und Markt (Journal)
BMF	Bundesminister der Finanzen
BMWi	Bundesminister der Wirtschaft

BR-Drs.	Bundesratsdrucksache
Bpk	Beperk/Limited
Bt-Dr	Bundestagsdrucksache (Bundestag hansards)
BVerfG	Bundesverfassungsgericht/Federal Constitutional Court
BVerfGE	Entscheidungen des BVerfG, amtliche Sammlung (decisions of the BVerfG, official compilation)
BVerfGG	Bundesverfassungsgesetz/Federal Constitutional Court Act
BVerwG	Bundesverwaltungsgericht
BVerwGE	Entscheidungen des BVerwG, amtliche Sammlung (decisions of the BVerwG, official compilation)
C	Cape Provincial Division
CA	Court of Appeal
ca.	circa/approximate
Ch	Chancery Division
CILSA	The Comparative and International Law Journal in Southern Africa
CJ	Chief Justice
CODESA	Convention for a Democratic South Africa
D	Durban Provincial Division
DB	Der Betrieb (Journal)
DBW	Die Betriebswirtschaft (Journal)
ders.	derselbe/the same (author)
D&CLD	Durban and Coast Local Division
DLR	Dominion Law Report
DM	Deutsche Mark (Journal)
DÖV	Die öffentliche Verwaltung (Journal)
DVBl	Deutsches Verwaltungsblatt (Journal)
Edms	Eiendoms/Proprietary
EG	Europäische Gemeinschaft (European Community)
EMS	European Monetary System
et seq.	following pages/ f. or ff.
EuR	Europarecht (Journal)
EWG	Europäische Wirtschaftsgemeinschaft
EWR	Europäische Wirtschaftsraum
f.	folgende/et seq.
ff.	fortfolgende/et seq.
FAZ	Frankfurter Allgemeine Zeitung (Newspaper)
FN	Fußnote/Footnote
FS	Festschrift
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product/Bruttonsozialprodukt
GG	Grundgesetz/Basic Law (constitution)
Gemhlt.	Gemeindehaushalt (Journal)
GenG.	Genossenschaftsgesetz
GewArch.	Gewerbeamchiv (Journal)
GewO	Gewerbeordnung
GmbH	Gesellschaft mit beschränkter Haftung
GmbHG	Gesetz betreffend die GmbH
GWB	Gesetz gegen Wettbewerbsbeschränkung (Kartellgesetz)
HB	Handelsblatt (Newspaper)
HGB	Handelsgesetzbuch
HL	House of Lords
H.L.C.	House of Lords Cases (Clark)
Hrsg.	Herausgeber/editor

HS	Halbsatz
HypBG	Hypothekenbankgesetz
JA	Juristische Arbeitsblätter (Journal)
JIBL	Journal of International Banking Law
JR	Juristische Rundschau (Journal)
JSE	Johannesburg Stock Exchange
JuS	Juristische Schulung (Journal)
JZ	Juristen Zeitung (Journal)
KAGG	Gesetz über Kapitalanlagegesellschaften
KB	Kings Bench
KG	Kommanditgesellschaft
KWG	Kreditwesengesetz (Banks Act)
LCB	Länder Central Bank (Landeszentralbank)
LG	Landgericht
Ltd	Limited
MB	Modern Business Law (Journal)
MDR	Monatsschrift des Deutschen Recht (Journal)
MLR	Modern Law Review
MPNF	Multi-Party Negotiation Forum
Mrd.	Milliarde (1000.000.000, 00)
N	Natal Provincial Division
NJW	Neue Juristische Wochenschrift (Journal)
NJW-RR	Neue Juristische Wochenschrift, Rechtsprechungs-Report (Journal)
NmHC	High Court of Namibia
NmS	Supreme Court of Namibia
No.	Number
Nr.	Nummer
NP	National Party
NY	New York Court of Appeals
NwVZ	Neue Zeitschrift für das Verwaltungsrecht (Journal)
O	Orange Free State Provincial Division
OHG	Offene Handelsgesellschaft
OLG	Oberlandesgericht (Supreme State Court)
O.Y.B.	Official Yearbook of the Union of South Africa
OWiG	Gesetz über Ordnungswidrigkeiten
PC	Privy Council
Pty	Proprietary
R	Rand
R(HC)	Rhodesian High Court
RA	Rhodesian Appellate Division
RG	Reichsgericht (Imperial Court)
RGBl.	Reichsgesetzblatt (Imperial Gazette)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen, amtliche Sammlung (decisions of the RG, civil cases, official compilation)
RIW	Recht der Internationalen Wirtschaft (Journal)
RN	Randnummer (marginal number)
RVO	Rechtsverordnung (ordinance)
RSA	Republic of South Africa
QBD	Queen's Bench Division

s.	Section (Paragraph)
SA	South African Law Report
SAJE	South African Journal of Economics
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SAPL	South African Public Law
SARB	South African Reserve Bank
SchiffsBG	Gesetz über Schiffspfandbriefbanken
SC	Cape Supreme Court Reports
Sec.	Section
SMH-Bank	Bankhaus Schröder, Münchmeyer, Hengst &Co.
Sog.	sogenannter/so called
Spk	Sparkasse (Journal)
Stell LR	Stellenbosch Law Review (Journal)
StGB	Stafgesetzbuch (Criminal Code)
StWG	Stabilitäts- und Wachstumsgestz (Stability and Growth Act)
T	Transvaal Provincial Division
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TkSC	Transkei Supreme Court
TS	Reports of the Transvaal Supreme Court
TSAR	Tydskrif vir die Suid-Afrikaanse Reg (Journal of South African Law)
UNAM	University of Namibia
u.a.	unter anderem/inter alia
UK	United Kingdom
Urt.	Urteil/decision
VA	Verwaltungsakt/administrative act
VAG	Versicherungsaufsichtsgesetz
Verw.	Die Verwaltung (Journal)
VerwArch.	Verwaltungsarchiv (Journal)
VG	Verwaltungsgericht/Administrative Court
VGH	Verwaltungsgerichtshof/Appellate Administrative Court
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (Journal)
VW	Versicherungswirtschaft (Journal)
VwGO	Verwaltungsgerichtsordnung/Administrative Courts' Act
VwVfG	Verwaltungsverfahrensgesetz/Administrative Procedure Act
VwVG	Verwaltungsvollstreckungsgesetz
W	Witwatersrand Local Division
WestLB	Westdeutsche Landesbank
WiWo	Wirtschaftswoche (Journal)
WLD	Reports of the Witwatersrand Local Division
WLR	Weekly Law Reports
WM	Wertpapiermitteilungen
ZBB	Zeitschrift für Bankrecht und Bankwirtschaft (Journal)
ZgKW	Zeitschrift für das gesamte Kreditwesen (Journal)
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (Journal)
ZHC	Zimbabwe High Court
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis (Journal)
ZPO	Zivilprozeßordnung
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft (Journal)

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Introduction

A Formulation of the Problem

This thesis investigates the law regarding the supervision of banks in the Republic of South Africa and in the Federal Republic of Germany. The elements of each of the supervisory systems are described and compared comprehensively.

Banking supervision is indispensable for an economy to function effectively. The subject is therefore very topical. Banking supervision is not an aim in itself, but should rather be seen as a guarantee for the proper functioning of the financial system. The goals of controlling financial institutions are manifold, but the essential aim is to guarantee the functioning of the financial system. Although, in recent times, this subject has not been as controversial in Germany as in some other states, this does not render it any less topical. There is no certainty that the German financial system and institutions will not experience turbulence again in the event of unforeseen crises. The same applies to South Africa. The mechanisms for banking supervision have undergone drastic changes over the years. Nevertheless, every year sees the collapse of many banks over the world.¹

New financial mechanisms, such as euronotes, currency swaps and foreign exchange options, contribute to the problem. The same can be said for the globalisation of the financial markets and the ever-increasing internationalisation of banking business. The element of foreign risk is becoming more and more important. A bank that is active abroad is subjected to several risks. Apart from those caused by unexpected currency fluctuations, government intervention in the foreign market by means of nationalisation, restrictions on the transfer of foreign exchange and payment moratoria can also result in losses. These risks are in addition to those which usually exist in every financial market.

¹ Some of the better known examples are: the final collapse of the *Herstatt* banking house in Germany in 1974; the crisis of the Johnson Matthey Bankers of London in 1984; the general bank crisis in the USA in 1991; the collapse of the *Mondi* banking house in Hamburg in 1995; and, most recently, the collapse of the oldest English banking house (*Barings*) in 1996 (on which see *Der Spiegel*, No. 23 [1996] 205).

In view of these tendencies and the increasing integration and interdependence of the international financial markets, the banking supervision of an individual state, in order to be effective, needs to adapt to the trend of internationalisation. It is not only the element of foreign risk that is gaining more and more importance. The linking of internationally active financial institutions with other industrial enterprises carries incalculable risks for the continued existence of these institutions. Due to the network of liability within a group of institutions it can be necessary for the mother company to cover losses of its subsidiary banks abroad, which may far exceed the amount of the initial investment. Banking supervision must therefore also take these foreign links into consideration.

Banking supervision should accordingly take the global context into account. However, the possibilities of supervision and intervention by the respective supervisory institutions often end at their state's border. Cross-border co-operation is necessary for consistent, meaningful and effective supervision. The various amendments by the European Union aimed at the harmonisation of banking law, and the establishment of a European central bank in Frankfurt, can be cited as examples of what is required.

This thesis is intended as a contribution to the development of banking supervision in a global context. South Africa was chosen for its potential. This country, unlike others in the region, may be on the brink of becoming a strong industrial nation, provided the government succeeds in gaining control over the economic difficulties. The country has rich human and mineral resources which need to be managed cautiously. It is noteworthy that the involvement of German banks in South Africa has already intensified.²

² The three large German banks, *Deutsche Bank AG*, *Dresdner Bank AG* and *Commerzbank AG*, as well as a number of smaller German banks such as the *West LB* and the (*Bayerische*) *HypoVereinsbank AG* already have branches or representatives in South Africa.

B Outline of the discussion

The discussion is divided into six chapters each dealing with a particular topic relating to banking supervision. Each chapter starts with a discussion of the German law, is followed by a discussion of the South African law and ends with a summary and conclusion. As far as possible, the points investigated in the two systems are discussed in the same order to facilitate the comparison.

The following topics within the field of banking supervision are dealt with:

- 1 the historical development of the law relating to banking supervision;
- 2 the concept, objectives and constitutional legitimacy of banking supervision;
- 3 the organisation of banking supervision;
- 4 the sphere of application of banking supervision;
- 5 the permission to conduct business as a financial institution; and
- 6 the remedies of financial institutions against supervisory action.

Chapter 1

The Historical Development of the Law relating to Banking Supervision

A Federal Republic of Germany

1 The Period Prior to 1918

A modern system of banking developed later in Germany than in other European countries. The first instruments of state supervision were instituted in Prussia for the *Landschaften* and *Staatsbanken*³ which were founded at the end of the eighteenth century.⁴ Because Germany was fragmented into numerous small and economically insignificant states until the foundation of the *Reich* in 1871, and therefore did not play a noteworthy economic role in Europe, a functioning system of banking came into being considerably later than in some other countries. In England, for example, a uniform economic area had developed early due to England's unified state structure and its colonial expansion. The colonial trade which made England the richest European country of that time⁵ was absent in Germany. As a consequence, Germany experienced a deficiency of capital at the onset of the industrial revolution. Therefore, German entrepreneurs were largely dependent on the support of banks. This led to the development of a system of mixed banking business in Germany, whereas in England different types of banking business were identified and kept separate.⁶

³ Special state banks.

⁴ See Hagedorn, Fred, *Die Landschaften. Eine rechtsgeschichtliche Darstellung der preußischen Agrarinstitute* (1978).

⁵ The *per capita* wealth of the English population was estimated to be 2.860 RM in 1845 whereas that of Prussia was approximately 720 RM in 1848. See in this regard Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, (1988) Diss. Münster, 82.

⁶ The German term is *Trennbankensystem*. This system was causally connected to the wealth of the population. The tendency of every business sector to establish its own specific bank was typical of the development of the English system of banking. The English entrepreneurs accordingly did not rely on the support of deposit banks as heavily as their German counterparts. See in this regard Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, (1988), 83.

The promulgation of the *Bankgesetz* and the founding of the *Reichsbank* (the central bank of Germany) moulded the German legislation regarding the issuing of bank notes (the *Notenbankgesetzgebung*).⁷ For the first time, a single institution was charged with issuing bank notes for the entire area of the *Reich*.⁸

Although it had been built up with private capital, the *Reichsbank* was directed and supervised by the *Reich*.⁹ It was founded as a juristic person and its pecuniary position was independent of the *Reich*'s treasury.¹⁰ The supervision required by the *Reich* was executed by a board of trustees (*Reichsbankkuratorium*). It consisted of 4 members¹¹ chaired at first by the *Reichskanzler* (Chancellor), but from 1918 onwards by the *Reichspräsident* (President). The *Reichsbankkuratorium* received a quarterly report concerning the bank's affairs as well as a general account of all of the bank's activities and business structures. However, the possibilities of intervention were limited since the *Reichsbankkuratorium* did not have the right to inspect the bank's books or make

⁷ *Bankgesetz vom 14. März 1875*. See especially in this regard Döring W 'Die Reichsbank' in: *Die Deutsche Bankwirtschaft* Bd II Berlin (1935) 72.

⁸ The establishment of the *Reichsbank* coincided with the foundation of the German *Reich* (*Reichsgründung*) in 1871. The *Reichsländer* which had been independent until that time, had their own banks that issued notes. Thus, the establishment of the *Reichsbank* facilitated the standardisation of bank notes for the entire *Reich*. Although these individual *Ländernotenbanken* retained the right to issue bank notes, these notes were only valid in the specific *Reichsland* in question. There was also a restriction on the amount in circulation. As a consequence of the strict measures of the *Bankgesetz* most of these banks waived their right to issue bank notes. By 1905 only 4 of the original 32 *Ländernotenbanken* still existed in the *Reich*. In 1896 legislation was passed regarding the duties of businesspeople in possession of foreign bank notes. This legislation can be regarded as a first step in restricting the freedom of trade of banks. However, it was primarily aimed at securing the functional capacity of the securities business. It was supposed to counteract the deposit deficits that had been caused by the collapse of a series of banks since 1870. Legislation introducing state supervision over mortgage banking was implemented on 13 June 1899 (*RGBI* 375). See in general in this regard Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, (1988).

⁹ Hantelmann, Kurt von, *Die Aufsicht des Staates über die Banken nach deutschem Recht* (1936) Diss. Würzburg, 62.

¹⁰ From a juristic perspective, it was regarded as a private acquisitional institution with private capital in a form similar to that of a public limited company with an independent personality.

¹¹ Of the four members of the *Reichsbankkuratorium*, one was appointed by the Emperor (*Kaiser*) and the other three by the *Bundesrat*. (This was the body through which the *Reichsländer* participated in the government and administration of the *Reich*.)

decisions that were binding on the *Reichsbank*. In practice the *Reichskanzler* instructed the directors and the officials of the *Reichsbank*.¹²

The Reichsbank was governed, administered and represented by its directors, namely the president of the *Reichsbank*, his representative and up to eight additional members who were appointed for life by the *Reichskanzler*. Whilst shareholders had very few rights, the government of the German *Reich* exerted significant influence over the *Reichsbank*.¹³

2 The Period 1918 - 1945

The First World War (1914 - 1918) was an important period in the history of German banking. The German monarchy came to an end. Furthermore, the global economic system, predominantly characterised by liberalism, changed dramatically. The newly established and mostly still unstable democracies were soon threatened by the rise of dictatorships. These political developments had a marked influence on the financial affairs of the European states. This was also the case in Germany. The world-wide freedom of movement of persons, goods and capital came to an end.¹⁴ The preparation for war resulted in an increasing measure of state intervention in the country's economic affairs. This was achieved by the establishment and expansion of state-owned enterprises as well as by means of the government's economic policy, which included measures of control and intervention. The consequences of these measures are still evident today. Besides the principles of a market system, some of the state planning tendencies which date back to the First World War still remain in effect in Germany.¹⁵ This period also marked the beginning of state intervention, in the sense of general supervision, in the affairs of financial institutions. Although these measures were

¹² See § 26 of the *Bankgesetz* of 1875 and Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, (1988), 19.

¹³ This can be ascribed to the fact that the standardisation of bank notes was regarded as urgent. See Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, (1988) 20.

¹⁴ See in general Zunkel, Friedrich, *Industrie und Staatssozialismus - Der Kampf um die Wirtschaftsordnung - Deutschland 1914 - 1918* (1974).

¹⁵ Eg by means of the legislation concerning cartels and the social limitations on ownership (*Sozialpflichtigkeit des Eigentums*) under art 14 of the *Grundgesetz*.

actually a direct consequence of the war, they tended to remain in place also after the war.

The high reparation demands of the Allies left Germany with serious economic problems. A major problem was to meet these demands in the light of Germany's scant capital reserves. German industry also had to start afresh with virtually no operating capital after the war. The problem was exacerbated by the high inflation rate during the early twenties. An exodus of capital from Germany, and the simultaneous need for it in Germany, led to the introduction of several statutes by which the government attempted to gain control over the situation by restricting the free trade of capital.¹⁶ Although this legislation of the post-war period was primarily aimed at curbing the flight of capital, its indirect effect was akin to public supervision of banking. Thus, the protection of creditors was subordinated to the broader interest of ensuring that sufficient capital remained in the country. The *Kapitalfluchtgesetz* as amended on 26 January 1923¹⁷ provided for certain requirements that banks had to meet. On the basis of § 6 of the *Verordnung über Maßnahmen gegen die Kapitalflucht* of 24 October 1919¹⁸ inland revenue offices could subject deposit banks to comprehensive investigations. § 19 II of the *Kapitalfluchtgesetz*¹⁹ authorised the *Reichsfinanzminister* (Minister of Finance) to

¹⁶ See the *Verordnung über Maßnahmen gegen die Kapitalabwanderung in das Ausland*, vom 21. November 1918 (RGBl. S. 1325); *Verordnung zur Ergänzung der Verordnung über Maßnahmen gegen die Kapitalabwanderung in das Ausland*, vom 15. Januar 1919 (RGBl. S. 43); *Gesetz gegen die Kapitalflucht*, vom 8. August 1919 (RGBl. S. 1540); *Bekanntmachung zur Ausführung des Gesetzes gegen die Kapitalflucht*, vom 8. August 1919 (RGBl. S. 1615); 2. *Verordnung über Maßnahmen gegen die Kapitalflucht*, vom 14. Januar 1920, (RGBl. I, S. 50); *Verordnung über die Verlängerung der Geltungsdauer des Gesetzes gegen die Kapitalflucht*, vom 8. August 1919, vom 28. August 1920 (RGBl. S. 1688); *Verordnung über die Kapitalabwanderung in das Ausland durch Abschluß von Versicherungen*, vom 15. Januar 1919 (RGBl. S. 49); *Verordnung über Maßnahmen gegen die Kapitalflucht*, vom 24. Oktober 1919 (RGBl. S. 1820); *Gesetz gegen die Kapitalflucht*, vom 24. Dezember 1920 (RGBl. 1921, S. 23); *Gesetz, betreffend die Abänderung des Gesetzes über die Kapitalflucht*, vom 4. Juli 1921 (RGBl. S. 808); *Gesetz über die Geltungsdauer des Gesetzes über die Kapitalflucht*, vom 22. Dezember 1921 (RGBl. S. 1607); *Gesetz zur Änderung des Gesetzes über die Kapitalflucht*, vom 22. März 1922 (RGBl. S. 282); *Gesetz zur Ergänzung und Abänderung des Gesetzes über die Kapitalflucht*, vom 22. Dezember 1922 (RGBl. I, S. 986); *Bekanntmachung der Fassung des Gesetzes gegen die Kapitalflucht*, vom 26. Januar 1923 (RGBl. I, S. 91); *Notverordnung des Reichspräsidenten über die Aufrechterhaltung von Vorschriften des Kapitalfluchtgesetzes und des Weinsteuergesetzes*, vom 29. Dezember 1924 (RGBl. I, S. 967); and the *Gesetz über die Aufrechterhaltung von Vorschriften des Kapitalfluchtgesetzes*, vom 16. April 1925 (RGBl. I, S. 43).

¹⁷ See n 16 above.

¹⁸ RGBl. II, 1820.

¹⁹ RGBl. II, 1540.

issue regulations regarding banking business after consultation with the *Reichswirtschaftsminister* (Minister of Economic Affairs). A bank disregarding these ordinances could be prohibited from continuing to trade.

The *Autonomiegesetz* of 26 May 1922²⁰ left the *Reichsbank* with a great degree of independence. In accordance with this legislation the management of the *Reichsbank* was left exclusively to its directors. From this date the institution was supervised by the *Reich*. The *Reichsbankkuratorium*, which effectively no longer had any function, was dissolved.

After the period of inflation during the years 1923-1924 the situation in the capital market calmed down slightly. This led to the abolition of the *Kapitalfluchtgesetz* of 1919²¹ at the end of 1924. Between 1924 and 1930 approximately 14 million RM flowed into the country in the form of short-term foreign money. The threat of the world-wide economic crisis, however, reversed the tendency and a renewed outflow of capital took place. As a consequence gold reserves to the value of approximately eight billion RM were taken out of the country between 1928 and 1931.²²

The German banking business thus had extensive freedom of trade until its collapse in July 1931.²³ The only measures of state intervention in the business activities of banks had been temporary and were mainly designed to safeguard the currency and prevent the flight of capital.²⁴ These measures were, however, in a certain sense, a form of indirect

²⁰ *RGBl.* II, 135.

²¹ See n 16 above.

²² The Government used the gold reserves as security for credit. Gold was taken out of the country by the *Reichsbank*. See Born, Karl-Erich "Vom Beginn des Ersten Weltkriegs bis zum Ende der Weimarer Republik 1914-1933" in Aschoff G, *Deutsche Bankengeschichte*, Band 3, (1983), 105-123.

²³ In May 1931 the German economy showed a deficit of 1.25 billion RM. Several large banks in Berlin had to transfer 94 million RM of foreign exchange during April 1931. By July 1932 this amount had increased to 118 million RM. The total indebtedness of German banks towards foreign creditors amounted to 15 billion RM by the end of the crisis. See in this regard Walb, E., 'Neuzeitliche Entwicklungen in der Kreditwirtschaft' in: *Die Deutsche Bankwirtschaft*, Bd II, (1935); Born, K.-E., 'Auseinandersetzung um die Einführung der Bankenaufsicht (1931)', in: (1978) 3. Beilage, *Bankhistorischen Archiv*, Frankfurt, 14.

²⁴ Such as the *Devisenverordnung* of 20. 1. 1916 and the *Kapitalfluchtgesetz* of 8. August 1919 (on which see the text at n 16 above).

state supervision. Several attempts to introduce rules that would protect clients did not succeed.²⁵

A turning point in the development of supervision aimed at the protection of creditors was reached in 1931. This year marked the first efforts to establish a functioning system of general banking supervision. The world-wide economic crisis of 1931 led to a rush by creditors and clients on financial institutions. The liquidation of large amounts of money was demanded. The capital market of the time reached the upper limits of its performance level. Sufficient provision for the liquidation of debts on this scale had not been made. Certain institutions reacted by temporarily discontinuing payment. However, others were hit harder and eventually had no other choice but to terminate their business activities altogether. Amongst these was the *Darmstädter und Nationalbank (Danatbank)*.²⁶ For the first time, the German government tried to gain control by adopting emergency regulations. The effects of these measures amounted to general supervision. At the climax of the financial crisis banking holidays were decreed and the *Reichspräsident*, empowered thereto by Art. 48 II of the *Weimarer Reichsverfassung* (the Weimar Constitution) issued the *Notverordnung über Aktienrecht, Bankenaufsicht und Steueramnestie vom 19. September 1931*²⁷ which placed all²⁸ private financial institutions under state supervision. A *Reichsbankkuratorium* (board of trustees) was appointed once again. In addition a *Reichskommissariat*²⁹ for banking was founded. The *Reichskommissariat* acted as the

²⁵ Panowitz, Rudolf, *Kreditwesengesetz-Banking Act Kommentar*, (1988), introduction, XIII.

²⁶ In 1930 it became known that it had accumulated losses of 30 million RM. The *Reichsbank*'s attempts to obtain foreign supporting credit were fruitless. As a consequence, the *Danatbank* had to refuse further discount credit. After the combined efforts of other large banks also failed the *Danatbank* had to close its doors on 13 July 1931. See in this regard Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, (1988), 150.

²⁷ *RGBI*. I, 493: Emergency decree on company law, bank supervision and tax amnesty.

²⁸ Certain institutions, especially the *Hypothekenbanken*, were already subject to state supervision by virtue of special legislation. See the *Hypothekenbankgesetz* of 13. 7. 1899 (*RGBI*. S. 375). See also Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, (1988), 46 et seq.

²⁹ The head of this office was the *Reichskommissar für das Bankwesen* (a state officer whose main task was the supervision of banks).



direct subordinate to the *Reichswirtschaftsminister* and was based in Berlin.³⁰ It consisted of five members, under the chairmanship of the *Reichsbankpräsident*. The other members were the State Secretary of the *Wirtschaftsministerium*, the State Secretary of the *Finanzministerium*, a member of the directorate of the *Reichsbank* (appointed by the *Reichsbankpräsident*), and the *Reichskommissar* for banking.³¹ The *Reichsbankkuratorium* had to facilitate co-operation between the *Reichsbank* and the *Reichskommissar* for banking. Furthermore, it had the power to decide whether an enterprise qualified as a “bank” under the emergency regulations. Its decision bound both the courts and the administrative bodies. The *Kuratorium* also compiled principles of a general nature concerning the management of banks decreed by the *Reichskommissar*.³²

The *Reichskommissar* was responsible for the implementation of the practical side of the supervision. In the execution of his duties he was bound by the guidelines set up by the *Reichsbankkuratorium*.³³ He had the task of investigating the state of German banking and the entire credit business - with special reference to foreign relations, and was to report regularly to the *Reichsbankkuratorium*. In terms of the emergency regulations, he was also vested with comprehensive rights regarding information and audits.³⁴ To implement his authority, he could issue fines of up to 100 000 RM to the proprietors and managers of banks.³⁵

A clear feature of the emergency regulations was the close relationship between the *Reichsbank* and bank supervision. A similar relationship still exists in many other

³⁰ § 1 sub 2 1 of the *Notverordnung* of 19. 9. 1931.

³¹ *Verordnung v. 19. 9. 1931*, Second Part, Art. 1 §1.

³² See Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, (1988), 156 *et seq.* See also n 27 above.

³³ § 2 sub 1 of the *VO*. See also n 27 above.

³⁴ §§ 3 *et seq.* This included the right to inspect the books of banking institutions, the right to acquire information on demand and to initiate any supplementary audits he regarded as necessary. His findings were reported to the bank’s relevant statutory organs. See Möschel, Wernhard, *Das Wirtschaftsrecht der Banken*, (1972), 202 *et seq.*

³⁵ Sub I § 4 of the *Notverordnung* of 19.9.1931. See also n 27 above.

countries today.³⁶ Supervision was considered as a way in which the currency policy could be co-ordinated, and the right to supervision was vested in a central authority, the *Reichskommissar* for banking. While in force, the emergency regulations were amended several times.³⁷

The special emergency regulations of 1931 can be regarded as the basis of the eventual *Reichsgesetz für das Kreditwesen* in 1934.³⁸ Prior to this legislation the Reichstag, on 6 September 1933, founded the *Untersuchungsausschuß für das Bankwesen* which had the task of submitting suggestions for a comprehensive restructuring of the control of banking (in a sense a type of ‘banking inquest’).³⁹ Its investigations were concluded on 20 December 1933 and its findings were summarised in the *Bericht des Vorsitzenden des Untersuchungsausschusses für das Bankwesen an den Führer und Reichskanzler*.⁴⁰

It is important to view these developments in the light of the political developments of 1933, the year in which the National Socialist Party came to power. Although the development of the economy from 1930 was certainly an important reason for the implementation of banking supervision, the report of the fact-finding committee reveals the influence of the political situation of the time. In a sense the *Führerprinzip*⁴¹ was introduced to the domain of banking.

³⁶ *Inter alia* in South Africa. See Chapter 3, 76 *et seq.* below.

³⁷ See, *inter alia*, the *Zweite Durchführungsverordnung vom 20. Dezember 1932 (RGBl. I, 563); Verordnung zur Durchführung der Bankenaufsicht vom 21. April 1933 (RGBl. I, 228)*.

³⁸ *RGBl. I*, 1203, enacted on 1 January 1935.

³⁹ This fact-finding committee consisted of representatives from the fields of commerce as well as banking. Reports on 26 different topics were compiled. These were all published in: *Untersuchung des Bankwesens* (1933) Part 1 Vol I and II.

⁴⁰ English: ‘The report of the chairman of the commission to investigate the banking system presented to the leader and chancellor of the *Reich*.’ The report of the fact-finding committee listed 7 requirements:

- 1 supervision of all credit institutions;
- 2 the setting up of a supervisory board for the credit industry;
- 3 subjecting the establishment of all credit institutions to permission;
- 4 the securing of sufficient liquidity;
- 5 division of the money and the capital markets to secure the savings business;
- 6 securing an ordered system of payment; and
- 7 the guarding of the credit industry and extensive publicity.

⁴¹ English: ‘Principle of leadership (by Adolf Hitler)’.

On 5 December 1934 the *Reichsgesetz über das Kreditwesen* (KWG 1934)⁴² was enacted. It came into effect on 1 January 1935. This statute represents the first comprehensive codification of the public supervision of banking. The KWG 1934⁴³ defined the concept *Kreditinstitut* (bank) as an enterprise engaged in banking and savings bank transactions, and specified the nature of their business for the first time.

The KWG 1934 standardised the state supervision of all banks (with the exception of certain public banks). For this purpose the *Reichsbankkuratorium* was replaced by the *Aufsichtsamt für das Kreditwesen* (Federal Authority for the Supervision of Banks).⁴⁴ The *Reichskommissar* for banking was vested with further powers.⁴⁵ For the first time banks required the permission of the *Reichskommissar* to trade.⁴⁶ The KWG 1934 also made provision for a reserved right of admission.⁴⁷ One of the reasons for which permission could be denied was simply that there was no need for the opening of the particular credit business.⁴⁸ The material or financial requirements banks had to meet were based on established principles of banking regarding liquidity, equity capital, and loans.⁴⁹

Prior to the KWG 1934 the availability of remedies to a bank against state action was ill defined. Despite enacting protection against measures by the *Reichskommissar* in isolated instances, in substance the position was not much different under the KWG

⁴² *RGBI.* I, 1203.

⁴³ § 1.

⁴⁴ § 30 KWG 1934.

⁴⁵ *Inter alia:* to decide, in cases of doubt, whether an institution falls under this legislation; to revoke the permission to trade; to allow a bank to use a certain name; and, to appoint auditors. See §§ 34 *et seq.* KWG 1934.

⁴⁶ § 30 KWG 1934.

⁴⁷ §§ 11 *et seq.* KWG 1934.

⁴⁸ § 4 sub 1 b KWG 1934.

⁴⁹ Möschel, Wernhard, *Das Wirtschaftsrecht der Banken*, 216 *et seq.*

1934. In general the *Reichskommissar*'s decisions and orders were considered binding, and only in some cases were complaints lodged with the *Aufsichtsamt* accepted.⁵⁰

The main task of the *Aufsichtsamt*⁵¹ was to ensure that the statute was complied with. In addition it was to give effect to banking and economic policy. Its tasks further included: the setting up of guidelines for the activities of the *Reichskommissar*; the hearing of complaints regarding decisions of the *Reichskommissar*; the compilation of principles in accordance with which banks were to be managed; the requirements of the independent audits; and ensuring that appropriate steps were taken in the event of a credit institution running into financial difficulties.

In order to cope with these duties, the *Aufsichtsamt* was given certain powers.⁵² It could, *inter alia*, determine the ratio between total obligations and liable equity capital and decide to what extent the public guarantors (*öffentlich-rechtliche Gewährsträger*) could take the place of liable equity capital. It could also grant certain exemptions, issue regulations concerning non-cash payments, and determine the ratio between total obligations and ownership of shares. Furthermore, regulations were issued to control the acceptance of credit for the securities business by managers and employees of credit institutions, as well as by civil servants. Credit limits were set and the ratio between total obligations and liquid investments was determined. The rules also concerned savings deposits and the period of notice in savings transactions.

The position of the *Reichskommissar* for banking was also circumscribed in the *KWG* 1934. The post was still regarded as that of a *Reichsbehörde* (*Reichs-Authority*) subordinate to the *Reichswirtschaftsminister* with its seat in Berlin. He was nominated

⁵⁰ § 43 *KWG* 1934.

⁵¹ It consisted of the following 7 members: (i) the President of the *Reichsbank*'s directorate (the chairman); (ii) the Vice President of the directorate (the President's representative); (iii) a member who was appointed by the *Führer* and *Reichskanzler*; and (iv) and the State Secretaries of the *Wirtschaftsministerium*, the *Finanzministerium*, *Ministerium für Ernährung und Landwirtschaft* (Food and Agriculture), and the *Ministerium des Inneren* (Home Affairs). See Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, (1988), 182, 183.

⁵² See the *KWG* 1934 and Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, 183-185.

by the *Führer und Reichskanzler*⁵³ after consultation with the President of the *Reichsbank's* board of directors.⁵⁴ The *Reichskommissar* had the duty to implement the *KWG 1934* within the guidelines laid down by the *Aufsichtsamt*. His powers were extended considerably.⁵⁵ He could recognise an institution as a bank for the purposes of the *KWG 1934*. He could grant and revoke permission to conduct banking business, prevent a company from operating, decide on the permissibility of a company name, and determine exceptional limits for personal credit. The *Reichskommissar* could also limit the distribution of profits, provide temporary exemptions from particular stipulations in the legislation, order the submission of balance sheets or other information, demand banks to make their books available for an audit and give instructions for a general inspection. He further had the power to attend or call general meetings and meetings of other organs of the banking institutions governed by the *KWG 1934*, and was entitled to examine depots. Finally, he was empowered to delegate his authority to another (subject to permission of the *Aufsichtsamt*). His position was strengthened by the fact that he could impose fines of up to 100 000 RM.

Other matters regulated by the *KWG 1934* included the provision for liquidity, cash reserves and the size of single credits of liable equity capital. During the period 1935-1939 the *KWG 1934* was amended several times.⁵⁶ It must further be noted that in 1934 regulations were issued under the *KWG 1934* which prevented the establishment of further credit institutions until further notice.⁵⁷

In 1939 the *Aufsichtsamt* was eventually dissolved, on 19 September by regulation⁵⁸ and on 25 September by legislation in the form of a new *KWG* (the *KWG 1939*),⁵⁹ as a

⁵³ The full title of Adolf Hitler.

⁵⁴ See § 33 of the *KGW 1934*.

⁵⁵ See the examples mentioned in n 45 above and Ruland, Anselm *Zur Entwicklung des Bankenaufsichtsrechts bis 1945*, 185.

⁵⁶ See *inter alia* the *Gesetz zur Änderung des Reichsgesetzes über das Kreditwesen, vom 13. 12. 1935* (*RGBl. I, 1456*); *Gesetz zur Änderung des Reichsgesetzes über das Kreditwesen, vom 4. September 1938* (*RGBl. I, 1151*); *Verordnung zur Änderung des Reichsgesetzes über das Kreditwesen, vom 15. September 1939* (*RGBl. I, 1953*).

⁵⁷ *Verordnung über eine Gründungssperre für Kreditinstitute vom 4. September 1934* (*RGBl. I, 815*).

⁵⁸ *Verordnung zur Änderung des Reichsgesetzes über das Kreditwesen vom 19. September 1939* (*RGBl. I,*

consequence of the influence of the regime. The dark period of *Nazi* terror had found its way into German banking. The entire German credit industry was subordinated to and brought in line with Adolf Hitler's political goals. Many highly esteemed families of bankers - especially those of Jewish descent - were dispossessed, irrespective of whether or not they were willing to submit to the political goals of the regime in an attempt to salvage their property. The authority of the *Aufsichtsamt* was transferred to the *Reichswirtschaftsminister*.⁶⁰ The duties and powers of the *Reichskommissar* were assigned to the *Reichsaufsichtsamt für das Kreditwesen* which was immediately subordinate to the *Reichswirtschaftsminister*.

A further restructuring was implemented in 1944.⁶¹ The *Reichsaufsichtsamt* which had been created in 1939 was disbanded and its govermental powers (*hoheitliche Befugnisse*) were taken over by the *Reichswirtschaftsminister* whereas the board of directors of the *Reichsbank* took over the duties of control (*kontrollierenden Aufgaben*).

3 The Period 1945-1998

After the end of the Second World War in May 1945 the *KWG* of 25 September 1939 and the *Verordnung zur Änderung des Reichsgesetzes über das Kreditwesen* of 18 September 1944, which regulated the financial aspects remained in effect⁶² and became federal law when the Constitution came into force.⁶³

After the collapse of the German *Reich* and the restructuring of its territory in accordance with the demands of the Allies, the organisational and supervisory powers of

⁶⁰ 1953) English: 'Regulation to Amend the Legislation Governing Credit Institutes'.

⁶¹ *RGBl.* I, 1955.

⁶² By this stage the *Reichswirtschaftsminister* had also become the *Reichsbankspräsident*, in accordance with the instructions of Adolf Hitler.

⁶³ Verordnung zur Änderung des Reichsgesetzes über das Kreditwesen vom 18. September 1944. (*RGBl.* I, 211.)

⁶⁴ Möschel, Wernhard, *Das Wirtschaftsrecht der Banken* (1972) 219 *et seq.* See also BVerwGE 4, 271/273; BVerfGE 14, 197, 201.

⁶⁵ In accordance with art 123 Par 1, art 125 Sub 1, art 74 No 11.

the *Reichswirtschaftsminister* were transferred to the different *Bundesländer*.⁶⁴ The decentralisation of bank supervision necessitated co-ordination between the territories of the former *Reich* in which the *Reichsmark* was still valid. This led to the *Sonderausschuß Bankenaufsicht*, a committee for bank supervision which was permanently established by the *Länderaufsichtsbehörde* in 1948.⁶⁵ However, since this institution could not issue legally binding orders, and due to the fact that decentralisation had rendered a uniform application of the *KWG* 1939 difficult, disputes between the *Länder* often arose. Questions regarding the duties of the individual public authorities involved in bank supervision, and regarding the all too common deviations in the application of the *KWG* 1939, were especially controversial. These problems were exacerbated rather than solved by new legislation⁶⁶ and judgements of the *Bundesverwaltungsgericht* (Federal Administrative Court).⁶⁷

Discussions in the circles of the lawmakers which took place in an attempt to find a new legal structure brought to the fore an old area of conflict in Germany, namely the division of power between the *Bundestag* (Lower House of the Federal Parliament) and the *Bundesrat* (Senate of the Federal Parliament). The *Bundesrat* opposed the recentralisation of bank supervision by the creation of a new *Bundesaufsichtsamt* as intended by the *Bundestag* and Government.⁶⁸ On 28 June 1961 the *Bundestag* managed

⁶⁴ The place of the *Reichswirtschaftsminister* was initially taken by the *Bundesfinanzminister* and the Senators. The transfer of his powers was, however, handled in several different ways. In most instances his powers were taken over by the *Landeszentralbanken* (the central banks of the *Bundesländer*). See in this regard Möschel *Das Wirtschaftsrecht der Banken* (1972) 220; Beck, Heinz, *Gesetz über das Kreditwesen*, (1961), Einleitung 2, 11; Honold, Eduard, *Die Bankenaufsicht* (1956); Pandtke, Manfred, *Bankenaufsicht in der Marktwirtschaft. Insbesondere das Problem des Kreditwesengesetzes von 1934 im Internationalen Vergleich*, (1955).

⁶⁵ Beck, Heinz, *Gesetz über das Kreditwesen*, *Einleitung*, (1961) Einleitung E 2, 11 *et seq.*

⁶⁶ *Gesetz über die Deutsche Bundesbank vom 26. Juli 1957 (BGBl. I, 745)*. English: ‘Act Governing the German Central Bank of 26 July 1957’; *Gesetz gegen Wettbewerbsbeschränkungen vom 27. Juli 1954 (BGBl. I, 1081)*. English: ‘Restraint of Competition Act of 27 July 1954’.

⁶⁷ See BVerwGE 8,14 = NJW 1959, 592 (which refers to the “*Apothekenurteil des Bundesverfassungsgerichts*”, BVerwGE 7, 377); BVerwGE NJW 1959, 590. The latter case was concerned with the constitutionality of the compulsory audit of new credit institutions or their branches. Such audits were found to be unconstitutional (in violation of art 12 sub. 1 of the *Grundgesetz (GG)*), and could therefore no longer be required. See in this regard Sprengel, Hans-Erhard, *Keine Bedürfnisprüfung mehr bei bei der Neugründung von Kreditinstituten und der Errichtung von Zweigstellen*, (1959) Spk, 123.

⁶⁸ See, concerning the lawmaking process, Beck, Heinz, *Gesetz über das Kreditwesen*, *Einleitung*, (1961) Einleitung E 3, 7ff; Consbruch, Johannes, *Das neue Kreditwesengesetz*, (1961) BB, 837; Schreihage, N.,

to muster the majority necessary in terms of the *Grundgesetz (GG)*⁶⁹ to override the objections of the *Bundesrat*. This meant that the new legislation, the *KWG 1961*,⁷⁰ could come into force on 1 January 1962. An attempt by several *Bundesländer* to have the new *Bundesaufsichtsamt* declared unconstitutional was unsuccessful.⁷¹

The *KWG 1961* was very similar to that of 1934. The most noteworthy innovations were the *Bundesaufsichtsamt für das Kreditwesengesetz* as a central public supervisory authority⁷² and the close co-operation with the *Deutsche Bundesbank*.⁷³ This brought about a clear differentiation between the tasks of the *Bundesaufsichtsamt* and those of the *Deutsche Bundesbank*. The governmental functions (*hoheitliche Aufgaben*) relating to banking supervision were assigned exclusively to the *Bundesaufsichtsamt*.

The *KWG 1961* was amended several times. The amendments were predominantly aimed at liberalising the provisions regarding interest and the regulation of competition.⁷⁴ The process for a new statute was eventually set in motion in 1974 after the collapse of the *Herstatt* Banking House. Other banks also started experiencing liquidity problems during this period. It was clear that these events had damaged the confidence of the public in the German banking industry. The Government decided that

Das künftige Bankaufsichtsrecht, in: *Mayschösser Gespräche, Fachtagung für Leiter großer Kreditgenossenschaften*, Vol. 8, (1961), 131.

⁶⁹ Art. 77 sub 4.

⁷⁰ *BGBI. I*, 881.

⁷¹ The *Bundesländer* Bremen, Hessen, Nordrhein-Westfalen and Rheinland-Pfalz submitted a *Normenkontrollklage* to the Constitutional Court. In its decision of 24 July 1962 the Court held that the founding of the *Bundesaufsichtsamt für das Kreditwesen* as an independent Federal High Office was in accordance with art. 87 par. 3 1 GG.

⁷² See § 5 *KWG 1961*.

⁷³ See § 7 *KWG 1961*.

⁷⁴ See Schork, Ludwig, *Gesetz über das Kreditwesen mit Begründung, Durchführungsvorschriften und Anmerkungen*, (1988) 16. ed., Introduction III.

the work towards new legislation had to start immediately.⁷⁵ This led to the *Kreditwesengesetz of 1976 (KWG 1976)*.⁷⁶

During this period the *Ausschuß für Bankenaufsicht* (Committee for Bank Supervision) was also founded under the auspices of the Bank for International Settlements (BIS). This committee drew up the basic principles for the supervision of foreign branches which were taken up in the Basle Agreement (*Basler Konkordat*) of 1975. Germany was a signatory of this agreement from the very beginning.⁷⁷ The importance of this body has increased steadily. Today its main responsibility is the unification of the different banking supervision concepts which are steadily being revised.⁷⁸ The number of countries that have become members have grown steadily. They now represent most parts of the world.⁷⁹

The KWG 1976 increased the powers of both the *Bundesaufsichtsamt* and the *Deutsche Bundesbank* to acquire information from, and to intervene in, the business of banks. It also led to a more stringent approach in structuring large credits. In addition it introduced the *Vieraugenprinzip* (that is that all important decisions had to be signed by two directors) to the management of banks. The banking industry of its own accord introduced the voluntary securing of deposits.⁸⁰

⁷⁵ A comprehensive restructuring of the KWG had in any event been envisaged by that time. See BT-Drs. /3657, 9.

⁷⁶ *BGBI. I*, 725; *Bekanntmachung der Neufassung am 3.5.1976*, *BGBI. I*, 1121 E.

⁷⁷ Bieg, Hartmut, *Bankbilanzen und Bankenaufsicht*, (1983), 2 et seq.

⁷⁸ Zeitler, Isabella, *Internationales Bankgeschäft als Problem der Bankenaufsicht*, (1984), 193 et seq.

⁷⁹ Mayer, Helmut, *Das Bundesaufsichtsamt für das Kreditwesen*, (1981), 207 et seq.

⁸⁰ Günther, Hans, *Die künftige Einlagensicherung der privaten Banken*, (1975), *Bank-Betrieb*, 250; Schwark, Eberhard, *Einlagensicherung bei Banken*, (1974) *NJW* 1849; Ungnade, Dieter, *Verfassungsrechtliche Aspekte der Einlagensicherung*, (1974), *ZfgK*, 1072; Fischer, Reinfried, *Fragen der Einlagensicherung in der Kreditwirtschaft*, (1975), *GemHlt.* 99; Starke, Otto-Ernst, *Staatliche Bankenaufsicht und Einlagensicherung*, (1976), *VW*, 280; Ronge, Volker, "Solidarische" *Selbstorganisation der Wirtschaft*, *Der Einlagensicherungsfonds deutscher Banken*, (1978), *Leviathan* 176; Fritz, W., *Rechtsfragen der Einlagensicherung im Kreditgewerbe*, (1979); Scholl, Claus, *Einlagensicherung der privaten Kreditinstitute*, (1983); Grosjean, René Klaus, *Die Deutsche Kreditwirtschaft*, (1988), 2. ed., 26 et seq.

In 1979 a special commission (*Studienkommission*) appointed by the *Bundesfinanzminister* to make recommendations on, *inter alia*, bank supervision, handed in its report (*Grundsatzfragen der Kreditwirtschaft*).⁸¹ New legislation, the *Kreditwesengesetz 1984 (KWG 1984)*,⁸² eventually followed. The most important innovations related to the legal complications of banking supervision in the context of the increasing internationalisation of banking business.⁸³ The KWG 1984 had to be prepared under severe time pressure. To comply with an EC Directive of 13 June 1983⁸⁴ the legislation had to be in place by 1 July 1985. Events during 1983 in *Schröder, Münchmeyer, Hengst & Co (SMH-Bank)* also contributed to the pressure.⁸⁵

A further noteworthy change addressed a problem raised by a decision of the *Bundesgerichtshof* in 1979.⁸⁶ The Court found in favour of a creditor who had instituted an action against the *Bundesaufsichtsamt* for damages he suffered due to inadequate bank supervision. This led to the addition of the provision ‘*Das Bundesaufsichtsamt nimmt die ihm nach diesem Gesetz zugewiesenen Aufgaben nur im öffentlichen Interesse wahr*’ (English: ‘the *Bundesaufsichtsamt* discharges its duties under this Act solely in the public interest’) to subsection 3 of § 6 of the KWG 1984. The clear intention was to prevent actions of this nature from succeeding in the future.⁸⁷

⁸¹ Bundesministerium der Finanzen, *Grundsatzfragen der Kreditwirtschaft – Bericht des Studienkommission*, (1979).

⁸² *BGBI.* I, 1693.

⁸³ For detailed discussions of the KWG 1984 see: Die Bank, 1985, 27; Starke, Ernst-Otto, *Die Bankenaufsichtsnovelle ist in Kraft getreten*, (1985), VW, 185; Waldeck, Werner Michael, *Die Novellierung des Kreditwesengesetzes*, (1985), NJW, 888; Werner, Winfried, *Schwerpunkte der Novellierung des Kreditwesengesetzes*, ZHR 149 (185), 236; Eicke, Jürgen, *Vom Umgang mit dem neuen KWG*, (1985) ZfgK, 705 (I), 754 (II).

⁸⁴ Abl. EC No. L 193 of 18 July 1983 18.

⁸⁵ Geiger, Helmut, *KWG – Reform und Überlegungen zum SMH-Fall*, Spk 1984, 625.

⁸⁶ 15. Februar 1979, NJW 1979, 1353, BB 1979, 752.

⁸⁷ See BGH, NJW 1979, 1353 - *Wetterstein Case*; NJW 1979, 1879 - *Herstatt-Sparer-Case*; Kopf, Hans Christian / Bäumler, Helmut, *Die neue Rechtsprechung des BGH zur Amtshaftung im Bereich der Bankenaufsicht*, (1979) NJW, 1871; Haftke, Heinz Christian, *Wetterstein - Urteil und Bankenaufsicht*, (1979) ZfgK, 626, and by the same author, *Zum "Herstatt-Sparer" - Urteil des BGH*, (1979) ZfgK, 1000; Bleibaum, Ernst, *Zur Drittbezogenheit von Normen der Bankenaufsicht*, (1982) ZfgK 476; Püttner, Günter, *Von der Bankenaufsicht zur Staatsgarantie für Bankeinlagen*, (1982) JZ, 47; Meister, Gisela, *Drittbezogene Amtspflichten bei der staatlichen Aufsicht über Banken und Versicherungen* (1982); Schilling, Martin, *Zur Haftung des Bundesaufsichtsamtes für das Kreditwesen bei Aufsichtsverletzungen* (1982); Bleibaum, Ernst, *Die Rechtsprechung des BGH zur Staatshaftung im Bereich der Bankenaufsicht*

The *KWG* 1984 still sets the material requirements for the business activities of German banks today.⁸⁸ However, the increasing importance of the legislation of the European Union has necessitated further changes.⁸⁹ The establishment of a domestic European market on 1 January 1993 meant the start of a new phase in the European and German law of banking supervision. According to the Commission of the European Union, the creation of a uniform bank market would facilitate an unrestricted domestic market. An unrestricted offer of financial services irrespective of national borders is regarded as a prerequisite for a domestic market of this nature. The main tool for the harmonisation of the law within the European Community has been and remains Directives. Many such directives relating to banking supervision have been issued.⁹⁰ They have all been complied with in the legislation currently in force in Germany, that is the *KWG* 1995. This legislation is considered in detail below.

B Republic of South Africa

1 Introduction

The importance of South African trade increased as growing numbers of Europeans immigrated to the country. The development of a good financial system became necessary. In this regard it is possible to identify the following four periods:

(1983). See also Machunsky, Jürgen, *Amtshaftung gegenüber Kapitalanlegern für fehlerhafte Bankenaufsicht?*, (1989) KaRS 80; Brendle, Armin, *Amtshaftung für fehlerhafte Bankenaufsicht?* (1987) 427 *et seq*; Nickolaysen, Gert, *Keine Staatshaftung für die Bankenaufsicht?* in: *Gedächtnisschrift für Martens* (1987) 663; Habscheid, Edgar, *Staatshaftung für fehlsame Bankenaufsicht?*, (1988).

⁸⁸ Further amendments include the introduction of a collective supervisory method, the new limitation of the concept of equity capital and the decreasing of the maximum limit of large credits. In 1988 German banks were represented in 55 countries in more than 400 places by daughter companies, branches or simply by representatives. See in this regard Die Bank (1988), 573.

⁸⁹ Gaddum, Johann Wilhelm, *Auf dem Weg zu einem europäischen Bankenaufsichtsrecht*, Deutsche Bundesbank Auszüge aus Presseartikeln No 52 of 20.07.1988 1f.; Boos, Karl Heinz / Mentrup, Horst, *E.G.-Bankenrechtsharmonisierung* BI, 1/1989, 14.

⁹⁰ *Erste und zweite Bankenrechtskoordinierungsrichtlinie* (Abl. EG Nr. L 322, 17. 12. 1977, 30; Abl. EG Nr. L 386, 30. 12. 1989, 1); *Eigenmittelrichtlinie* (Abl. EG Nr. L 124, 5. 5. 1989, 16); *Solvenzrichtlinie* (Abl. EG Nr. L 386, 30. 12. 1989, 14); *Richtlinie über die Beaufsichtigung von Kreditinstituten auf konsolidierter Basis* (Abl. EG Nr. L 193, 18. 7. 1983, 18); *Bankbilanzrichtlinie* (Abl. EG Nr. L 372, 31. 12. 1986, 1); *Großkreditrichtlinie* (Abl. EG Nr. L 33, 4. 2. 1987, 10); *Kapitaladäquanzrichtlinie* (Abl. EG Nr. L 143, 18. 7. 1986, 35). They all are part of the *KWG* 1995, the current German legislation.

- The years 1793 - 1891, during which the first banks started trading and the first steps towards legislative regulation of banking were taken.⁹¹
- The period 1891-1919, which was marked by the centralisation of the financial market dominated at that stage by a small number of banks. The newly established Union made its first legislative attempts to give banking law a uniform legal basis.
- The period 1920-1945, during which the trend towards the amalgamation of banking continued. The Second World War led to legislation aimed at restricting the financial sector. The South African National Reserve Bank was also established during this period. Further legislation with a decisive influence on South African banking was introduced.
- The period from 1946-1990, and from then until the present, which reflects the current developments in South African banking.

2 The Period 1793-1891

The first bank to trade in South Africa was the *Bank van Leening*, also known as the Lombard Bank,⁹² which started business in 1793 just before the first British occupation of the country (1795-1803). The bank was founded by two general commissioners of the Dutch government who had been sent to the Cape to investigate the problems which had arisen due to the shortage of currency and the corruption rife in the VOC. The settlers were dissatisfied by this state of affairs and demanded action by the VOC.⁹³ In order to solve the problems, the *Rix-Dollar* was introduced as the official means of payment. The currency was issued by the *Bank van Leening*. This bank accordingly functioned much in the same way as a state bank, although it also accepted deposits, made loans

⁹¹ *Cape Bank Act, No. 6 of 1891*. See 1 *infra* n. 103.

⁹² The Dutch East India Company (VOC) was founded with a capital of 680 000 *Rix-Dollars* (the VOC currency of the time). Within a short period it grew to 800 000 *Rix-Dollars*. See Barker, H.A.F., *Banking in South Africa* (1952), 302 *et seq.*; Day, A.C.L., *The South African Commercial Banks*, in: Sayers, R.S., *Banking in the British Commonwealth* (1952), 353 *et seq.*

⁹³ Day, A.C.L., *The South African Commercial Banks*, in: Sayers, R.S., *Banking in the British Commonwealth* (1952), 353 *et seq.*

available and accepted exchange.⁹⁴ It was, however, under the complete control of the VOC. In 1808 a daughter company of the Lombard Bank, the Lombard Discount Bank, opened its doors to cater specifically for short- and middle-term loans and credit.⁹⁵

The second British occupation of the colony in 1806 resulted in its final annexation as part of the British Empire.⁹⁶ This had far-reaching effects on banking. The *Rix-Dollar* remained the only official means of payment in the colony until 1825.⁹⁷ Due to the fact that the *Rix-Dollar* tended to decrease in value against British currency (Sterling)⁹⁸ the British government decided to replace the currency entirely with Sterling. However, such a decision could only be implemented gradually. The *Rix-Dollar* finally disappeared from the market in 1841.⁹⁹

Many other banks were established subsequently. Their main aim was the distribution of the British currency.¹⁰⁰ Because the only legislative restrictions on banking were those that were in force in England at that time, there was a virtually unrestricted freedom of trade and settlement in the colony.¹⁰¹ After the liquidation of several banks between

⁹⁴ Loans were granted at an interest rate of 5% for a period of up to eighteen months against security such as real estate, gold, silver, jewellery and non-perishable trading goods. Credit issued against inferior security could only be extended to a maximum of nine months. See Willis, Nigel, *Banking in South African Law* (1981), 11 *et seq.*

⁹⁵ Barker, H.A.F., *Banking in South Africa* (1952), 302.

⁹⁶ After the colony had again been administered by the Dutch between 1803 and 1806.

⁹⁷ Initially, the English did not change anything pertaining to the legal and the monetary system. This was one of the Dutch conditions for capitulation. See art 8 of the certificate of capitulation of 10 - 18 January 1806, in: Theal, *Records of the Cape Colony* (1897-1905), vol. V, 201.

⁹⁸ The original exchange rate fell to 1 pound Sterling for 9 *Rix-Dollars*.

⁹⁹ At that time, the exchange rate was 1 Shilling for 9 *Rix-Dollars*. The implementation of Sterling as the legal method of payment was strongly opposed by the colonists, due to the fact that it would reduce their buying power.

¹⁰⁰ By 1861 29 institutions entitled to issue bank notes had been registered in the Cape Colony. Although these institutions had a part in that very profitable business, none survived the following years. Several were taken over by other institutions or were liquidated. See Barker, H.A.F., *Banking in South Africa* (1952), 302 *et seq.*

¹⁰¹ See Cassel, Sir Ernest, in: Sayers, R.S. *Banking in the British Commonwealth* (1952), Introduction, vii *et seq.*, and Crick, W.F., *Commonwealth Banking System* (1965), Chapter I: The Framework of Inter-Relations, 1 *et seq.*

1881 and 1890,¹⁰² the Government intervened for the first time by introducing legislation in the form of the *Cape Bank Act 6 of 1891*.¹⁰³

The *Cape Bank Act* required every bank to submit a certified copy of its constitution to the Treasury and the Registrar of Deeds. The constitution had to contain the names of the management and had to set out the bank's liquidity.¹⁰⁴ Every three months, the bank had to present a statement of its deposits and liabilities to the Treasury in the prescribed form.¹⁰⁵ This information was published in the Government Gazette at the bank's expense. The Treasury was also entitled to two further reports per year without prior notice.¹⁰⁶ It could further inspect the business practices of any bank if it had good reason to do so.¹⁰⁷ Bank notes could only be issued if securities of a corresponding amount were deposited with the treasury.¹⁰⁸ The right to issue bank notes was further limited to the amount of paid-up capital and the current reserves.¹⁰⁹ The Government guaranteed the issued notes in the form of gold reserves. For security the government was granted a preferent secured claim (in the nature of *pignus*) over all the assets of the banks.¹¹⁰ Furthermore, a certain amount of the bank notes had to be returned to the Treasury every month.¹¹¹ The total value of notes issued also had to be published monthly.¹¹²

The Act was therefore primarily concerned with the issuing of bank notes. Powers to intervene were only formulated in general terms. It contained no provision protecting banks against steps taken by the Treasury. It also did not contain any limitations

¹⁰² Barker, H.A.F., *Banking in South Africa* (1952), 307 *et seq.*

¹⁰³ Published in *Cape of Good Hope, Act of Parliament Session of 1891*, 219 *et seq.*

¹⁰⁴ S 3.

¹⁰⁵ S 13.

¹⁰⁶ Ss 16, 17.

¹⁰⁷ S 23.

¹⁰⁸ Ss 30 *et seq.*

¹⁰⁹ S 34.

¹¹⁰ S 42.

¹¹¹ S 48.

concerning the permission of banks to conduct business, except for certain formalities with which banks had to comply. The *Cape Bank Act* was binding on all banks in the Cape Colony. Similar legislation was also in force in the Transvaal,¹¹³ Natal¹¹⁴ and the Orange Free State.¹¹⁵

3 The Period 1892 - 1919

A number of amalgamations during this period led to the formation of some financially strong institutions.¹¹⁶ Banking was also affected by the depression of the years 1902 - 1910. In 1910 the Union of South Africa was formed. It consisted of the Cape Colony, Natal, Transvaal and the Orange Free State. In 1917 the Banks Act¹¹⁷ was passed in order to standardise the statutory law of the 4 different provinces. The provincial legislation was accordingly repealed.¹¹⁸ The Act still required the submission of quarterly reports¹¹⁹ and the reports were still published.¹²⁰ The Treasury retained the right to demand any further information it considered necessary.¹²¹

4 The Period 1920-1945

During this period several important banking statutes were promulgated.

¹¹² S 51.

¹¹³ Act No. 2 of 1893, published in: *Statute Law of the Transvaal 1839-1910*, vol.. I (1839-1900), 241 *et seq.*

¹¹⁴ The Banks Statements Act, No. 18 of 1881. In Natal, the foundation of the Natal Bank (Ltd.) was initiated by means of legislation, *i.e.* the Natal Bank (Limited) Laws 1888 to 1912 *Private Act*, No. 7 of 1912.

¹¹⁵ Ordinance No. 20 of 1902, published in: *The Statute Law of Orange River Colony*, 516 *et seq.*

¹¹⁶ Examples are the Bank of Africa Ltd. (1912) and Natal Bank (1914). In 1920, the Standard Bank took over the African Banking Corporation. At the end of that year, virtually all of South Africa's banking was controlled by only three institutions, the Standard Bank of SA Ltd., the National Bank of SA and the Netherlands Bank of SA.

¹¹⁷ Act 7 of 1917. It came into effect on 12 April 1917.

¹¹⁸ Ss 1, 2.

¹¹⁹ Ss 2-3. In this regard the requirements of the repealed Provincial legislation were supplemented.

¹²⁰ S 4.

¹²¹ S 2 (b).

The Currency and Banking Act of 1920¹²² signalled the start of a new era in South African banking. It was passed mainly as a consequence of the effects of the First World War. The first objective of the Act was to protect the gold reserves of the Union. This was achieved by requiring all banks of the Union to deposit their gold reserves at the Treasury in exchange for gold certificates. The redemption of these certificates was postponed until 30 June 1923.¹²³ The second objective of the Act was the establishment of a central bank for the entire Union.¹²⁴ The bank was founded with an original share capital of one million pounds.¹²⁵ Its powers and duties were clearly defined in the Act.¹²⁶ They were extended from time to time by amendments to the existing legislation as well as by new legislation.¹²⁷

The Currency and Banking Act provided that only the Central Bank was entitled to issue bank notes for a period of 25 years.¹²⁸ Although the notes that had been issued by the commercial banks remained in circulation, they had to be replaced by those of the Central Bank and could not be renewed after 30 June 1922. This was an important development in the history of South African banking. The commercial banks had to give up what had been a profitable and privileged position.¹²⁹ Furthermore, the Act

¹²² Act No. 31 of 1920.

¹²³ Ss 1-8 (Chapter I).

¹²⁴ S 9.

¹²⁵ S 10.

¹²⁶ Ss 13 *et seq.*

¹²⁷ Currency and Banking Act Amendment, Act No. 22 of 1923, Currency and Banking Act Amendment, Act No. 26 of 1930; and the South African Reserve Bank Act, No. 29 of 1944.

¹²⁸ S 15.

¹²⁹ See Barker, H.A.F., *Banking in South Africa* (1952), 311. At that time, the South African Central Bank had to take the gold standard principle into account when bank notes were issued. The original arrangement was that at least 40% of the bank notes issued by the Central Bank had to be secured by means of gold coins and 60% by business exchange. The idea was that the volume of notes issued should be directly related to the volume of trade as reflected in the number of bills offered for discount. However, since a large part of South African trade was not financed by exchange credits, the concept could not be implemented in practice. The Central Bank was even forced to purchase trading currency to meet the stringent requirements. In terms of the amendments introduced in 1923 (see above) up to 35% of the counter-value of issued bank notes had to be covered by British or South African treasury exchange. The amendments of 1930 (see n 127 above) abolished these provisions altogether. From then on, only gold reserves equal to at least 40% of the issued bank notes had to be retained. In 1933, the

introduced the minimum reserve system for commercial banks. This entailed, *inter alia*, that they were required to keep at least 13% of their demand liabilities¹³⁰ and 3% of their time liabilities¹³¹ as minimum reserves with the Central Bank. In the event of these requirements not being met, the Treasury was entitled to audit the bank's books and to charge a penalty interest of 10% *per annum*.¹³² Banks that had amounts outstanding were not permitted to give credit or pay out dividends for the duration of their indebtedness.¹³³ The Act also resulted in a more stringent approach to the regular reports every bank had to submit. The Central Bank was also obliged to submit a report to the Treasury. All reports had to be published.¹³⁴

The second important Act of this period was the Currency and Exchanges Act of 1933.¹³⁵ It was triggered by the decision of the United Kingdom to leave the gold standard. This placed the South African currency under immense pressure since the financial markets were expecting the Union - as a member of the Commonwealth - to do the same. The Currency and Exchanges Act, which came into effect on 8 March 1933, was an emergency measure aimed at securing the stability of the currency in view of the abandonment of the gold standard. It empowered the Governor-General to issue proclamations relating to the currency or banking should he deem it necessary.¹³⁶ Thus, the Act was mainly concerned with the possible consequences of further restrictions on the freedom of transfer of value, whether of gold or of bank notes.¹³⁷ In 1939, a time in which financial policy was largely determined by the war, these powers were used to

percentage was lowered to 30%. Commercial banks initially had to secure at least 13% of their liabilities by depositing reserves with the Central Bank. This quota was lowered to 10% by legislation in 1923.

¹³⁰ In terms of s 34 demand liabilities are credits with a maximum duration of 30 days.

¹³¹ In terms of s 34 time liabilities are credits with a minimum duration of 30 days.

¹³² S 30(7).

¹³³ S 30.

¹³⁴ S 31.

¹³⁵ Act 9 of 1933.

¹³⁶ S 9.

¹³⁷ The Finance Act 27 1940 limited this power to the extent that it had to be confirmed by both chambers of parliament within one month of its issue, or else it lapsed.

limit the freedom of commercial banks to transfer foreign exchange and gold. The transfer market was strictly regulated and restricted to a small number of authorised banks.¹³⁸

In 1942 fundamental changes were made to the banking structure. As a consequence most of the legislation in this area was reformed. The lawmaking process was aimed at standardising and improving the legal basis of banks and similar institutions.¹³⁹ The vehicle for this comprehensive reform was the Banking Act of 1942,¹⁴⁰ the third important Act of this period.

Chapter I of the Act contained a number of general provisions.¹⁴¹ The requirement of registration before business could begin was imposed for the first time.¹⁴² This facilitated an overview of all existing financial institutions. Especially noteworthy was the distinction drawn between different types of banks.¹⁴³ This structure, that is the establishment of specialist banks for different purposes (the *Trennbankensystem*),¹⁴⁴ reveals the British influence on South African banking. Thus, Chapter II of the Act dealt exclusively with commercial banks,¹⁴⁵ Chapter III with people's banks,¹⁴⁶ Chapter IV

¹³⁸ See the Emergency Finance Regulations of 1939. The Finance Act 27 of 1940 was passed as a consequence of the war. It reflected, in the context of finance, the Government's intention of supporting the Allies. Most importantly, it dealt with trade and money transactions (*Waren- und Geldaustausch*).

¹³⁹ See Malan, F.R. / Faul, W., *Introduction to the Deposit-Taking Institutions Act 94 of 1990*. TSAR (1991), 379 *et seq.*; see also the Schedule 'Laws Repealed by this Act'.

¹⁴⁰ Act 38 of 1942. It was amended in 1944 and 1947 (see the Banking Amendment Act 34 of 1944; Banking Amendment Act 26 of 1947). The following discussion is based on the Act after the 1947 amendments.

¹⁴¹ These included definitions (s 1), banking institutions exempted from the provisions of the Act (s 2), and the establishment of a Bureau of Registration (s 3).

¹⁴² Banks that were already in existence also had to be registered (s 4). The registration process was set out (s 4) along with provisions concerning temporary registration (s 5), the registration of new banks (s 6), the restriction of business activities of non-registered institutions (s 7), the Registrar's powers (s 8), revocation of registration (s 9), temporary suspension or expiry of licences (s 10), the obligation to publish registration and the name and type of bank (s 11) and name changes (s 12).

¹⁴³ In chapter II, the act distinguished between commercial banks, people's banks, loan banks and deposit-receiving institutions.

¹⁴⁴ See n 6 *supra*.

¹⁴⁵ Banks concerned mainly with deposits and loans.

with lending banks,¹⁴⁷ and Chapter V with deposit-receiving institutions.¹⁴⁸ The requirements to be met by and the duties imposed upon each of the different types of banks were set out in the Act. These included the duty to submit regular reports,¹⁴⁹ quotas of equity capital to be met,¹⁵⁰ and the principles of liquidity that had to be taken into account in the management of the banks.¹⁵¹ In the case of people's banks the Act also placed limitations on the opening of branches.¹⁵²

Chapter VI of the Act contained provisions which applied to all types of banks. It prohibited the pledging or similar encumbering of cash assets¹⁵³ as well as mergers without prior consent.¹⁵⁴ Principles of valuation for the balancing of securities were set out.¹⁵⁵ It further directed all banks to provide the Registrar with a complete list of their managers and shareholders,¹⁵⁶ to have their balance sheets audited¹⁵⁷ and to submit the auditor's report to the shareholders at the annual general meeting.¹⁵⁸ In addition the Registrar was authorised (subject to the Minister's consent) to appoint an inspector¹⁵⁹ or an administrator¹⁶⁰ if he suspected irregularities in a bank's business. In certain

¹⁴⁶ These are similar to the German *Genossenschaftsbanken*.

¹⁴⁷ Credit institutions.

¹⁴⁸ This term was intended to embrace other institutions that were not specifically mentioned but similar to banks. See the definition in s 1 (1).

¹⁴⁹ The reports were to be submitted to the Registrar and not, as before, to the Treasury. See ss 13 & 18.

¹⁵⁰ Ss 14(a), 19(a) and 28(a).

¹⁵¹ Ss 14(b) & (c), 19(b) and 28(b).

¹⁵² S 24.

¹⁵³ S 29.

¹⁵⁴ S 33.

¹⁵⁵ S 30.

¹⁵⁶ S 37.

¹⁵⁷ S 38.

¹⁵⁸ S 41.

¹⁵⁹ S 42.

¹⁶⁰ S 43.

circumstances the institutions could even be wound up.¹⁶¹ Banks were also directed to create reserves for possible losses brought about by the delictual actions of their employees.¹⁶² The Minister was further empowered to make such regulations as he deemed necessary.¹⁶³ Finally, in terms of section 52, non-compliance with the provisions of the Act amounted to a criminal offence.

The Banking Act contained no provisions which can be regarded as remedies available to banks against overzealous supervisory actions.

Further legislation of this period must be noted briefly in conclusion. The Savings Bank Societies Borrowing Powers Act of 1932¹⁶⁴ applied to both savings banks and building societies. The multiple regulation brought about by this Act was abolished soon thereafter by the promulgation of the Building Societies Act in 1934.¹⁶⁵ Further legislative reforms concerning the Central Bank led to the passing of the South African National Reserve Bank Act in 1944.¹⁶⁶

5 The Period 1945-1990

The first major new legislation concerning the financial sector from 1945 onwards was the *Banks Act of 1965*.¹⁶⁷ This Act replaced the *Banking Act of 1942*, which had been in:

¹⁶¹ S 45.

¹⁶² S 48.

¹⁶³ S 53.

¹⁶⁴ Act 6 of 1932.

¹⁶⁵ Act 62 of 1934.

¹⁶⁶ Act 29 of 1944.

¹⁶⁷ Act 23 of 1965. See in general on this Act Oelofse, A.N., *State Control of Banking Institutions in South Africa*, JIBL (1987), 34 *et seq.* The Banks Act was amended numerous times. A discussion of the amendments would be beyond the scope of this thesis. The emphasis is therefore on the Act and its final version. Further in-depth reading would span the following Acts: Financial Institutions Amendment Act 80 of 1965; Finance Act 82 of 1965; Second Finance Act 58 of 1966; Limitation and Disclosure of Finance Charges Act 73 of 1968; Financial Institutions Amendment Act 23 of 1970; Revenue Laws Amendment Act 89 of 1972; Financial Institutions Amendment Act 91 of 1972; Financial Institutions Amendment Act 67 of 1973; Financial Institutions Amendment Act 101 of 1976; Financial Institutions Amendment Act 94 of 1977; Financial Institutions Amendment Act 80 of 1978; Financial Institutions

force until then. It contained many new provisions directly applicable to banking supervision.

Chapter I of the Act consisted entirely of general definitions. It distinguished only between two different types of banks, namely banks and discount houses.¹⁶⁸ This was also the first attempt of the legislature to define the term ‘bank’ as it is commonly used.¹⁶⁹

Chapter II was concerned with the issue of registration of banks¹⁷⁰ and the permission to conduct business. The fact that an entire chapter of the Act was devoted to this issue, highlights the importance thereof.¹⁷¹ Provisions regarding the duty to register before conducting business,¹⁷² the temporary or final expiry of registration,¹⁷³ and the publication of matters pertaining to registration, all of which formed part of the previous legislation, although partly modified, were essentially retained. The accepting of deposits for banking purposes without prior registration was rendered legally ineffective.¹⁷⁴ The Act further required temporary registration for a period of twelve months before final registration.¹⁷⁵ A bank could be finally registered during this period

Amendment Act 103 of 1979; Financial Institutions Amendment Act 99 of 1980; Financial Institutions Amendment Act 36 of 1981; Financial Institutions Amendment Act 82 of 1982; Disclosure of Finance Charges Act 73 of 1968; Financial Institutions Amendment Act 80 of 1969; Inspection of Financial Institutions Act 38 of 1984; Corporation for Public Deposits Act 46 of 1984; Financial Institutions Amendment Act 86 of 1984; Financial Institutions Amendment Act 106 of 1985; Building Societies Act 82 of 1986; Transfer of Powers and Duties of the State President Act 97 of 1986; Financial Institutions Amendment Act 6 of 1988; South African Reserve Bank, Banking Institutions, Mutual Building Societies and Building Societies Amendment Act 96 of 1988; and Banking Institutions, Mutual Building Societies and Building Societies Amendment Act, No. 113 of 1989.

¹⁶⁸ S 1 (1).

¹⁶⁹ The original Act of 1965 did not include this definition. It was inserted by the *Financial Institutions Amendment Act, No. 106 of 1985*.

¹⁷⁰ Ss 4 - 12B.

¹⁷¹ The *Banking Act, No. 38 of 1942* dealt with registration as one of the general provisions in the first chapter.

¹⁷² Ss 4 - 8.

¹⁷³ Ss 10, 11.

¹⁷⁴ S 9. Such deposits had to be returned.

¹⁷⁵ Ss 4 (4), 8.

provided the necessary requirements had been met.¹⁷⁶ While it was temporarily registered, a bank could only conduct business on a limited scale.¹⁷⁷

Information regarding majority shareholders and controlling companies had to be listed with the *Registrar*.¹⁷⁸ In this respect a series of prohibitions and restrictions, some of which are referred to below, was developed.

The provisions concerning liquidity and equity capital were also amended. This was done because the Act only distinguished between banks and discount houses.¹⁷⁹ The rules were aimed at ensuring the solvency of the credit industry.¹⁸⁰ As Willis states “[t]hese requirements [were] designed to safeguard the deposits and investments of the public, to maintain economic stability and to facilitate the implementation of monetary and fiscal policy”.¹⁸¹ Higher requirements regarding the amount of equity capital and reserves were accordingly introduced.¹⁸² The limitations concerning ownership of a bank’s shares should be viewed against this background. The Act, for the first time, dealt with this issue comprehensively in order to prevent an unhealthy concentration of power in the financial sector.¹⁸³ Majority ownership of shares by individuals or companies was, in principle, prohibited.¹⁸⁴ Mergers or take-overs of companies by institutions required the permission of the Minister of Finance.¹⁸⁵ This rule was considered to be in the best interests of the public.¹⁸⁶

¹⁷⁶ S 4 (7), (8), (9).

¹⁷⁷ S 4 (5).

¹⁷⁸ Ss 12A - 12B.

¹⁷⁹ See Chapter IV ‘Financial Requirements’ (ss 14 - 25).

¹⁸⁰ Oelofse, A.N., *State Control of Banking Institutions in South Africa*, JIBL (1987), 38.

¹⁸¹ Willis, Nigel, *Banking in South African Law* (1981), 57. See also *Registrar of Banks v Trans Africa Credit and Savings Bank* 1963 (2) SA 687 (C) 692C and Report of the Commission of Enquiry into the Monetary System and Monetary Policy in South Africa (RP 70/1984) par. 17.45 - 17.69.

¹⁸² Ss 14, 15. See also Oelofse, A.N., *State Control of Banking Institutions in South Africa*, JIBL (1987), 38 *et seq.*

¹⁸³ Oelofse, A.N., *State Control of Banking Institutions in South Africa*, JIBL (1987), 42.

¹⁸⁴ Ss 28 - 28D.

The Act further provided that South African banks could only conduct business outside the borders of the Republic with the consent of the Registrar.¹⁸⁷ Requirements for the deposit business¹⁸⁸ and the limit of permissible turnover, were also stipulated.¹⁸⁹

The Act also placed banks under the obligation to have their balance sheets checked by independent auditors.¹⁹⁰ Banks that encountered financial difficulties could be placed under administration; the Registrar could replace the directors and appoint an administrator.¹⁹¹ Alternatively, the *Registrar* had the power to apply for a court order to have the bank's affairs wound up.¹⁹² Banks were further prohibited from holding their own shares.¹⁹³ The Registrar's permission was necessary to change company contracts.¹⁹⁴ Banks were required to make provision for delicts by their employees.¹⁹⁵ The Act also contained sanctions¹⁹⁶ and empowered the Minister to make regulations.¹⁹⁷

To summarise, this was the first legislation concerning bank supervision in which the *Registrar* was given a key role to play. He was granted extensive powers to enable him to perform his duties as set out in the Act. The financial requirements were expanded substantially and for the first time provisions were introduced that were aimed at

¹⁸⁵ Ss 30, 30A.

¹⁸⁶ S 28D (2). This permission could, however, only be granted to a person or company in the country.

¹⁸⁷ Ss 27A, 27E.

¹⁸⁸ S 21.

¹⁸⁹ Ss 21 A, 22.

¹⁹⁰ S 35. The corresponding auditing companies were to be permanently employed by the banks.

¹⁹¹ S 40.

¹⁹² S 41.

¹⁹³ S 27.

¹⁹⁴ S 32.

¹⁹⁵ S 45.

¹⁹⁶ S 49.

¹⁹⁷ S 50. 'Regulations' correspond to the German *Verordnungen*.

curbing the possibility of a small number of individuals or companies monopolising the banking industry.

A crisis which brought 9 South African banks to their knees¹⁹⁸ arose in the 1970s. It became apparent that the reasons for these collapses was bad management as well as the inadequate security for credits. Although the Registrar was able to prevent a catastrophe in South African banking by taking control, these events clearly demonstrated that the information required by the supervisory bodies was not comprehensive enough to identify this type of crisis timeously.¹⁹⁹ It must be noted, however, that at that time South Africa was not a signatory of the Basle Agreement, nor did it sign the Revision in 1983. This only occurred in 1985. This led to the founding of the *Technical Committee on Bank and Building Society Legislation* which commenced with its work in July 1987. Eventually, in 1990, the labours of the Committee led to new legislation which replaced the Banks Act 23 of 1965.

6 The Period since 1990 (*Banks Act, No. 94 of 1990*)

In 1990 the Banks Act of 1965 was replaced by the new the Banks Act of 1990.²⁰⁰

This legislation was an attempt to compile a standardised codification for deposit-taking institutions, including provisions for their supervision. For this purpose, the earlier legislation that distinguished between building societies and banks or banking

¹⁹⁸ The 6 largest of these banks were Spes Bona Bank Ltd, Rand Bank Ltd, Breda Bank Ltd, Rondalia Bank Ltd, Concorde Bank Ltd and the UDC Bank Ltd.

¹⁹⁹ Jordaan, Michael, *The Regulation of Deposit-taking Financial Institutions, A Comparative Analysis of the United Kingdom, Germany and South Africa*, (1997) PhD, Stellenbosch, 156. See also Koseff, S., *Bank Failure in South Africa*, (1984) University of the Witwatersrand 50ff., 123ff. who makes a number of suggestions to address this problem. See further Brümmerhof, W., *Finansieringsaktiwiteite van Bankinstellings wat nie in hulle Balansstate Verskyn nie: 'n Kritiese Ontleding van Heersende Bankpraktyke en Implikasie vir Banktoesigowerhede in die RSA en Enkele Westerse Lande*, (1988), PhD, Stellenbosch, 422 *et seq.*

²⁰⁰ Act 94 of 1990. The name 'Banks Act' is the present name of the Act. When it was first enacted, however, it was known as the Deposit-Taking Institutions Act 94 of 1990. On the reasons for the name change see the text at n. 203 *infra*. The Act was amended several times. See the Deposit-Taking Institutions Amendment Act 81 of 1991; Deposit-Taking Institutions Amendment Act 42 of 1992; Safe Deposit of Securities Act 85 of 1992; Deposit-Taking Institutions Amendment Act 9 of 1993; Transfer of Walvis Bay to Namibia Act 203 of 1993; Proclamation 132 of 27 July 1994; Banks Amendment Act 26 of 1994 and Banks Amendment Act 55 of 1996.

institutions was repealed.²⁰¹ The new legislation was aimed at establishing and maintaining financially sound deposit-taking institutions which conduct their business in such a way that the investments of depositors were safe and the integrity of the banking system as a whole well protected.²⁰²

The act was initially named the Deposit-Taking Institutions Act 9 of 1990. This name, which was intended to emphasise the legislature's intentions,²⁰³ was, however, not generally accepted. The legislature accordingly amended the title to the original 'Banks Act' in the Deposit-Taking Institutions Amendment Act 9 of 1993.²⁰⁴ The Banks Act of 1990, including its amendments until 1997, forms the basis of much of this thesis. It is considered in detail and in different contexts below.

Further legislation of this period that must be noted in conclusion is the Inspection of Financial Institutions Act 38 of 1984. This Act deals specifically with the powers of the Registrar.²⁰⁵

C Summary and Comparison

A comparison between the historical development of the law of banking supervision in South Africa and Germany reveals several differences. The first legislative attempts at supervision of the financial sector occurred considerably earlier in Germany. A central bank was also established some 45 years earlier in Germany than in South Africa. This can probably be ascribed to the fact that a united national state came into being some 39 years earlier in Germany than in South Africa. Both bank supervision in general and the

²⁰¹ See the Banks Act 23 of 1965 and the Building Societies Act 82 of 1986.

²⁰² Itzikowitz Angela 'The Deposit-Taking Institutions Act 94 of 1990: Its History and an Overview of Its Main Provisions' (1992) 4 *SA Merc LJ* 175.

²⁰³ See the preamble to the act, and also Itzikowitz Angela 'The Deposit-Taking Institutions Act 94 of 1990: Its History and an Overview of Its Main Provisions' (1992) 4 *SA Merc LJ* 170 *et seq.*

²⁰⁴ See further Itzikowitz, Angela, *Financial Institutions and Exchanges*, Paper read at the Annual Banking Law Update (ABLU) Conference 1993, Witkoppen.

²⁰⁵ See s 6 (1) of the *Banks Act*, No. 94 of 1990.

establishment of a central bank in particular, are clearly closely related to the incorporation of a number of previously separate territories into a unitary state. The central banks of the two countries did, however, have much in common. Both had the exclusive right to issue bank notes, and both were primarily responsible for safeguarding the country's currency. During the course of these developments, the commercial banks in both countries lost many of their former privileges. The state's supervision of the central bank and the activities of the commercial banks was thus restricted to the issue of notes. The protection of creditors was not really an issue. Nevertheless, although the financial requirements the banks had to meet were aimed at ensuring the solvency of every institution, they did offer creditors some protection.

However, the first attempts to restrict the freedom of entrepreneurs to establish banks, which became prevalent in both countries, occurred earlier in South Africa than in Germany. Even before the formation of the Union of South Africa, in terms of the Cape Banks Act 6 of 1891 permission to conduct business as a bank had to be acquired in the Cape and was dependent upon registration, although there were no special prerequisites for such registration. In Germany, developments of this nature only set in with the preparations for the First World War. However, since these measures were due to the war, they clearly had a different purpose. The German post-war legislation was marked by the victor's justice (*Siegerjustiz*) of the Allies as revealed in the Treaty of Versailles. Its exclusive purpose was to secure the currency and maintain the economic capacity of war-torn Germany. The first actual intervention in the freedom of trade in the financial services sector in Germany was necessitated by the banking crisis of 1931 which led first to the issuing of emergency regulations and then to the enactment of the *KWG* 1934. Similar legislative measures are found in the Banking Act 38 of 1942, and, to a greater extent, in the Banks Act 23 of 1965.

In both countries the law of banking supervision consists almost exclusively of statutory law. This is self-explanatory in the case of the German legal system, which forms part of the civil-law tradition of continental Europe. Although the South African legal system is based on Roman-Dutch law; case law holds much importance because of British influence during colonial times. Nonetheless, banking supervision is statutorily

regulated in a single Act. This does not mean that this part of the law was not influenced much by English law. The South African legislation reflects the principle of the English system of specialised banks. The supervision of individual types of banks such as savings banks and building societies was initially regulated under separate Acts.

In Germany there is general legislation regarding competition (the *Kartellgesetzgebung*).²⁰⁶ This is also the case in South Africa (the Maintenance and Promotion of Competition Act 96 of 1979). In South Africa, however, competition in the context of banking is also regulated in the *Banks Act 94 of 1990*.²⁰⁷

The organisational structure of banking supervision also developed differently in the two countries. In Germany it became the responsibility of a separate independent authority.²⁰⁸ The *Deutsche Bundesbank* only played a supportive role. In South Africa, however, as is the case in many other countries, banking supervision became the responsibility of a particular department or branch of the South African Reserve Bank.²⁰⁹

The developments in the law of banking supervision must also be seen in connection with German membership of the European Union, whose various guidelines on co-ordination have to be incorporated into national law. This development becomes evident in the *KWG 1995*. However, tendencies towards the internationalisation of the supervisory function are also evident in South Africa. Since the activities of the South African financial industry are becoming increasingly international - especially after the country was opened up to the world in the post-apartheid era - these developments are urgently necessary. Both countries have acknowledged these developments and thus co-operate in the framework of the Cooke Committee at the Bank for the International Settlements in Basle (B.I.S.).

²⁰⁶ Gesetz gegen Wettbewerbsbeschränkungen, *BGBI*. I, 235 in der Fassung vom 20. 2. 90.

²⁰⁷ See ss 36 - 69 of the *Banks Act No. 94 of 1990* and chapter 4 below.

²⁰⁸ The *Reichsaufsichtsamt für das Kreditwesen* and the *Reichsbankkuratorium*, and later the *Bundesaufsichtsamt*.

²⁰⁹ *Registrar of Banks*.

Chapter 2

The Concept, Objectives and Constitutional Legitimacy of Banking Supervision

A Federal Republic of Germany

1 Banking Supervision - Definition of the Concept

The standards which apply to the banking industry form part of *Wirtschaftsrecht* (commercial law). There is no widely-accepted definition of this term in Germany.²¹⁰ The law of banking supervision, however, forms part of a specific subdivision of *Wirtschaftsrecht*, namely *Wirtschaftsverwaltungsrecht* (administrative commercial law), which aims to set minimum standards for trade and commerce. As such, banking law forms part of public law.

The provisions pertaining to the credit industry and banking law in general form part of *Handelsrecht* (trade law). They facilitate the state's supervision of business. In addition they serve to an extent as standards for the state's organisation of business administration. This, in turn, enables the state to control the economy, and to promote the functioning of the economy in the monetary sector.²¹¹ They also provide the infrastructure for the supply of money and credit in the monetary sector of the economy.²¹² The *Kreditwesengesetz (KWG)*²¹³ forms the foundation for the organisation of the banking industry.²¹⁴

²¹⁰ The economy can, in general terms, be defined as the sum of institutions and measures designed to meet the human needs of goods, services and performances in a planned way (Fikentscher, Wolfgang, *Wirtschaftsrecht* vol. I (1983) 1; Rinck, Gerd / Schwark, Eberhard, *Wirtschaftsrecht* 6. ed. (1986) 7). *Wirtschaftsrecht*, on the other hand, has been defined in a variety of ways. Some see it as the legal provisions which directly affect the economic process as a whole as well as the economic activity of individuals (Frotscher, Werner, *Wirtschaftsverfassungs- und Wirtschaftsverwaltungsrecht*, 2). Others define it as the legal norms that regulate the transfer and allocation of economic goods through general principles and by way of broad and specific intervention in order to guarantee a balanced self-realisation and care of the citizens in the economy in accordance with standards of economic justice and within the framework of a fixed economic constitution. (Fikentscher *supra*). Yet another group regard it as the totality of the legal provisions that are aimed at realising the collective economic order. See Rittner, Fritz, *Wirtschaftsrecht*, 2. ed. (1987), 15; Huber, Ernst Rudolf, *Wirtschaftsverwaltungsrecht*, vol. I 2. ed. (1953), §1; Badura, Peter, *Wirtschaftsverfassung und Wirtschaftsverwaltung* (1971), 116 et seq.

²¹¹ Stober, Rolf, *Wirtschaftsverwaltungsrecht* (1991), § 51 I.

The *KWG* enables the state to reconcile the legal subject's self-interested participation in private business transactions with the legal rules which serve the interests of society at large.²¹⁵ It is thus a necessary regulation of the freedom of profession and of trade.²¹⁶ The state's economic policy and banking supervision should, however, be kept well apart. Although both are in a sense concerned with the state's influence on the economy, their respective goals are decidedly different. Economic policy is implemented in order to change the economy from a current, diagnosed position to one that is specifically intended.²¹⁷ The law of business supervision and especially that of banking supervision, on the other hand, is aimed at protecting the economy of the day from dangers and abuses, and to enable the free movement of persons within the framework of that economic system. Thus, the purpose of the law of banking supervision is to ensure that the behaviour of banks is in accordance with the law.²¹⁸ Supervision must be restricted to these objectives and should not endeavour to shape a country's economy.

Banking supervision should also be distinguished from general state supervision. The latter pertains to the relationship between the state and its own administrative bodies. In this domain, supervision occurs internally. Here, several different possibilities exist. For example, a superior administrative body may intervene to secure the fulfilment of functions when an inferior body does not carry out its obligations. Banking supervision is, however, concerned with private participants in the market. As such, banking supervision has a regulatory function in the marketplace.²¹⁹

²¹³ Unless otherwise stated the abbreviation "*KWG*" refers to the 1995 version.

²¹⁴ BGH WM 1979, 482, 483.

²¹⁵ Schmidt, Reiner, *Wirtschaftsaufsicht* in: *HdWW*, vol. 9 (1982), 34 *et seq.*

²¹⁶ Art. 14 *GG*.

²¹⁷ Badura, Peter, *Besonderes Verwaltungsrecht*, 8. ed. (1988), 283 *et seq.*

²¹⁸ Stein, Ekkehard, *Die Wirtschaftsaufsicht* (1967), 81.

²¹⁹ This means that public juristic enterprises are actually subject to double control. First, as administrators within the framework of state supervision and secondly, as private participants in the market within the framework of economic supervision. For example, building societies, as public enterprises, are subject to regulation in terms of administrative law. However, when a building society engages in market related activities such as the conclusion of contracts, it is regulated by private law.

The law of banking supervision must also be viewed in the light of the German Constitution (*Grundgesetz*). Supervision includes the enforcement of legal requirements. Therefore state intervention must be in accordance with the due process of law (*Rechtsstaatsprinzip*) as entrenched in art 20 III GG. This implies that the possibilities for intervention must be clearly set out in the laws pertaining to banking supervision. It must be possible to safely predict how the law will be applied.²²⁰ In the context of day-to-day business activities, however, this is problematical, since a quick and flexible response is often necessary.²²¹ Lawmakers have attempted to solve this problem by using general clauses and vague legal terminology, as the facts of every case differ and cannot be foreseen and sufficiently provided for. The application of the constitutional provisions have accordingly been somewhat problematical in the context of banking supervision.²²²

The *Bundesverfassungsgericht*²²³ has had to deal with several of these problems. On the one hand, it has addressed the issues of clarity, precision and predictability. On the other hand, it has also decided - in favour of the lawmakers - that flexibility was indeed possible.²²⁴ This decision of the *Bundesverfassungsgericht* leaves it up to the lawmakers to determine whether, when using a certain term, it intends the term to describe a range of related aspects or whether it refers to a narrowly-defined, specific scenario. The utilisation of general clauses and vague terminology can, according to the Court, be reconciled with the principle of legality, the *trias politica* system and the *Rechtsstaatsprinzip*. The Constitution, however, requires that lawmakers do not use vague general clauses that leave it up to the executive to determine the limits of the individual's freedom.²²⁵ This decision can be justified by the uncertainty and lack of

²²⁰ Schnapp, F.E, in: von Münch, I: *Grundgesetzkommentar*, vol.. I 3. ed.. (1985), marg. n. 23 on Art. 20 GG; Herzog, Roman, in: Maunz, Dürig, *Grundgesetzkommentar*, vol. II, marg. n. 57., 62 on Art 20 GG.

²²¹ See also Ipsen, H.P., *Concerning measures in the framework of insurance supervision*, DÖV (1975), 805 *et seq.*

²²² See, for example, § 46 I KWG where the term “danger” (*Gefahr*) is used and no definition for it is provided. The problems predominantly arise from the fact that business supervision, with the help of broad enabling provisions, may shape the economy instead of merely regulating it.

²²³ Federal Constitutional Court of Germany.

²²⁴ BVerfGE 8, 274, 326; 13, 153, 164; 21, 73, 79; 38, 61, 82.

²²⁵ BVerfGE 8, 274, 325.

precision pertaining to economic findings. Also, rapid technological changes and the dangers that have to be managed concurrently make broad definitions indispensable.²²⁶

2 Objectives of Banking Supervision

The duties of the *Bundesaufsichtsamt für das Kreditwesen* (the Federal Supervisory Authority) are described in § 6 *KWG*. These duties indirectly reveal the objectives or goals of the state's supervision of banking institutions. Subsection I provides that the *Bundesaufsichtsamt* must carry out the supervision of banking institutions (*Kreditinstitute*) in accordance with the stipulations of the *KWG*. A *Kreditinstitut* is defined in § 1 *KWG* as an enterprise engaged in banking transactions (*Bankgeschäfte*)²²⁷ provided that the volume of such transactions requires a commercially organised business operation.²²⁸

Except for the *Bundesbank* which should rather be seen as taking part in supervision than being subject to it,²²⁹ only those institutions that are subject to some other special form of supervision are partially or completely exempt from the application of the *KWG*. These institutions listed in § 2 *KWG* include the *Kreditanstalt für Wiederaufbau*

²²⁶ Scholz, Rupert, *Wirtschaftsaufsicht und subjektiver Konkurrentenschutz* (1971), 19, 38.

²²⁷ The term *Bankgeschäfte* (banking transactions) is comprehensively defined in § 1 I *KWG* as follows:

1. the receipt of monies from others as deposits, irrespective of the payment of interest (deposit business);
2. the granting of money loans and acceptance credits (credit business);
3. the purchase of bills and cheques (discount business);
4. the purchase and sale of securities for the account of others (securities business);
5. the custody and administration of securities for the account of others (safe-custody business);
6. the transactions designated in § 1 of the Law concerning Investment Fund Companies (investment fund business);
7. the incurring of the obligation to acquire claims in respect of loans prior to their maturity;
8. the assumption of guarantees, warranties and other sureties for the account of others (guarantee business);
9. the effecting of transfers and clearings (giro business).

The Federal Minister of Finance may, after consultations with the German Federal Bank, by ordinance designate further transactions as banking transactions if, in the accept view of the business community, this is justified having regard to the supervisory aims of this Law.

²²⁸ "Credit institutions are enterprises engaged in banking transactions, if the volume of such transactions requires a commercial organised business operation."

²²⁹ C.f. § 7 *KWG*.

(Reconstruction Loan Corporation), insurance enterprises and enterprises engaged in pawnbroking.²³⁰

Banking supervision is therefore only concerned with a restricted sphere of the state's supervision of the economy.²³¹ The supervision of banking is also restricted to credit trade, because in the same way as § 1 *KWG* positively limits the concept and activities of *Kreditinstitute*, § 3 *KWG*²³² prohibits a number of transactions. § 10 *KWG* further sets stringent requirements for equity capital and § 33 No 3-5 *KWG* provides for the refusal of permission to conduct business. This ensures that only *Kreditinstitute* perform the business of banking. On the other hand, this also determines the framework within which the public supervisory activities are performed. Supervision of the credit industry is thus restricted to the credit trade and cannot extend its supervision to other branches by regulating enterprises that are involved in a variety of activities

The duties of the *Bundesaufsichtsamt* are set out in subsection II of § 6 *KWG* which requires of the *Bundesaufsichtsamt* to take action against abuses in the banking system which may either endanger the security of assets entrusted to banks, or adversely affect the proper conduct of banking transactions, or have a material detrimental effect on the general economy.²³³ This general provision reflects a three-pronged differentiation in the goals and objectives of banking supervision, namely: (i) the securing of a fundamental order within the banking industry; (ii) the maintenance of the functional

²³⁰ See § 2 *KWG* for further exceptions.

²³¹ Business law contains a number of provisions for other branches of industry which are very similar, especially considering their goals.

²³² § 3 *KWG*: "Prohibited Business. The following types of business are prohibited:

- (1) the conduct of deposit business where the depositors mainly comprise employees of the enterprise (employee savings banks) and where no other banking business is conducted which exceeds the volume of the said deposit business;
- (2) the acceptance of deposits under terms whereby the majority of depositors obtain a legal claim to receive loans out of such deposits or to have property of any kind purchased for them on credit (special purpose savings institutions); this does not apply to building savings and loan associations;
- (3) the conduct of credit or deposit business where agreement or business practice render it impossible, or particularly difficult, to withdraw in cash the amount of credit or the deposits."

²³³ The subsection reads as follows: "The Federal Supervisory Authority shall take action against abuse in the banking system which may endanger the safety of assets entrusted to credit institutions, adversely affect the proper conduct of banking transactions, or have material adverse effect on the general economy."

capacity of the credit industry; and (iii) the most extensive possible protection of the client's assets that are entrusted to banks.²³⁴ The legislature has accordingly attempted to give effect to the fundamental principle of the freedom of trade.²³⁵ Simultaneously it has attempted to retain the power to influence activities in the event of an extraordinary or improper state of affairs or a risky situation arising in the banking trade in general or in individual institutions. The comprehensive special legal regulation of the banking industry is legitimate in the light of these goals. It is especially necessary because the banking industry is to a large extent based on trust. Virtually no other business in the economic context is similarly placed. Furthermore, crises in the banking industry invariably affect other sectors of the economy. A high degree of security is accordingly necessary for this part of the economy. A possible loss of trust in just a single bank can easily result in the loss of trust in other institutions and, in a worst case scenario, to the collapse of the entire system.²³⁶

In terms of § 6 III *KWG* the *Bundesaufsichtsamt* exercises the duties placed upon it by this and other legislation "solely in the public interest". All the activities of the *Bundesaufsichtsamt* are accordingly aimed at ensuring that the banking industry functions smoothly in the public interest. An important implication of this fact is that there can be no claim on the basis of breach of official duty against the *Bundesaufsichtsamt* under § 839 *BGB*.²³⁷ The protective function of the law corresponds to the customary understanding of the aim of the state's supervision.²³⁸ On the one hand, individuals who have a special relationship with certain credit institutions cannot demand that the *Bundesaufsichtsamt* must intervene. On the other hand, clients of a

²³⁴ BGH (1979) NJW, 1354 ("Wetterstein-Urteil"); (1979) NJW, 1879 ("Herstatt-Sparer-Urteil"), BVerfGE 14, 197, 216; *Reasons for the governmental plan (Regierungsbegründung)*, BT-Drs. 3/1114 19 and 7/3657 10.

²³⁵ See art 12 s I 1 *GG* and its historical fore-runner § 1 *Gewerbeordnung (GewO)*, the Industrial Code.

²³⁶ The crisis of the *Darmstädter und Nationalbank* in 1931 eventually triggered the bank crisis of that year even though the government of the *Reich* had guaranteed the security of the deposits at that institution. The collapse of the *Herstatt* banking house in 1976 was similar. C.f. *Chapter 1* page 17.

²³⁷ See art 34 *GG*.

²³⁸ This almost undisputed interpretation was, however, rejected by the *Bundesgerichtshof* (Federal Court) in two decisions since it did not narrow down the purpose of the legislation. (*BGHZ* 74, 144; 17, 120). This subsection was therefore added subsequently as part of the third *KWG-Änderungsgesetz vom 20. Dezember 1984 (BGBI I 1693)*.

bank who suffer damage as a consequence of a bad decision of the *Bundesaufsichtsamt*, have no claim against it for official liability.

3 Constitutional Legitimacy of Banking Supervision

3 1 Introduction

The extensive regulation in the sphere of banking sometimes appears controversial from a constitutional point of view.²³⁹ On the whole, however, it conforms with constitutional requirements.²⁴⁰

3 2 The Wirtschaftsverfassung (Constitutional Business Law)

Although the *Weimarer Reichsverfassung*²⁴¹ contained a special section²⁴² concerning business (the *Wirtschaftsleben*), there is no similar section in the current Constitution. This has led to doubt as to the role of the Constitution in the context of business law. The dispute has become known as the *Streit um die Wirtschaftsverfassung*. The law of banking supervision is accordingly marred by the lack of specific constitutional provisions that justify the supervision of certain sectors of the economy. The *Bundesverfassungsgericht* has taken the view that the Constitution does not entrench any specific economic order. The neutrality of the Constitution simply means that the compilers of the Constitution did not really have a specific economic system in mind. Government can accordingly implement its economic policy provided the Constitution is respected. In other words, different economic policies and different forms of social organisation are possible under the Constitution.²⁴³ The question is thus not whether banking law is reconcilable with the current economic and social policy but rather whether its implementation conforms with the constitution.²⁴⁴

²³⁹Möschel, Wernhard, *Das Wirtschaftsrecht*, 269 *et seq.*

²⁴⁰Jarass, Hans D., *Wirtschaftsverwaltungsrecht und Wirtschaftsverfassungsrecht* (1984), 76 *et seq.*

²⁴¹The Constitution of the German *Reich* from 1918.

²⁴²See art 151-165.

²⁴³This was the import of a decision of the Federal Constitutional Court (*BVerfGE* 4, 7, 17f.). C.f. also the later decisions: *BVerfGE* 30, 292, 315; 50, 290, 336.

²⁴⁴Frotscher, Werner, *Wirtschaftsverfassungs- und Wirtschaftsverwaltungsrecht* (1988), 21.

3 3 Constitutionality in General

The *Bundesverfassungsgericht* (Federal Constitutional Court) has had to deal with the constitutionality of the banking legislation in general. In a decision reached on 24 July 1962 it held that the legislation as it was on 10 July 1961²⁴⁵ was reconcilable with the Constitution.²⁴⁶ This case was triggered by the dispute between the Federal States (*Bundesländer*) Nordrhein-Westfalen, Bremen, Hessen and Rheinland-Pfalz and the *Bundestag* concerning the competency of the Federal Parliament to appoint an independent federal authority (the *Bundesaufsichtsamt*).²⁴⁷ In these proceedings, the *Bundesverfassungsgericht* only determined whether the *KWG* is a law which must be passed by the *Bundesrat* (Upper House of Parliament) as well as the *Bundestag* (Lower House of Parliament).²⁴⁸ The *Bundesrat* represents the German *Länder* in the National Parliament. If the consent of the *Bundesrat* were necessary, the *Länder* would be able to block the *KWG* and prevent central banking supervision. The argument therefore focused on the issue of centralisation of banking supervision and not the need for banking supervision.

3 4 Reconcilability with Specific Constitutional Provisions

Introduction

In terms of art 19 III GG credit institutions are capable of having rights. They therefore have legal capacity in the sense that the scope of constitutional protection also extends to them and their activities.²⁴⁹

²⁴⁵ BGBI I 881. Cf. n. 70.

²⁴⁶ BVerfGE 14, 197, 198.

²⁴⁷ C.f. Reischauer, Friedrich/Kleinhans, Joachim, *Kreditwesengesetz (KWG)*, *Kommentar Loseblatt*, introduction 4 *et seq.*

²⁴⁸ See art 87 III I and 84 I GG. See also BVerfGE 14, 197, 210 *et seq.*

²⁴⁹ Möschel, Wernhard, *Das Wirtschaftsrecht der Banken* 119 *et seq.* The *Bundesverfassungsgericht* has a different view concerning building societies. (BVerfGE 75, 192, 195 *et seq.*) In this decision the constitutional capacity of a *Öffentlich-rechtliche Sparkasse* (public saving bank) was denied.

Art 3 GG²⁵⁰

The importance of banking in the economy justifies its special treatment in law. Therefore the supervision of banks by the Bundesaufsichtsamt on the basis of the *KWG* does not violate the principle of equal treatment which is entrenched in the Constitution of the Federal Republic of Germany.²⁵¹

Art 12 GG²⁵²

The *KWG* contains a series of provisions that touch on the scope of protection afforded by art 12 I *GG*. Perhaps most importantly, the requirement of permission limits the constitutionally guaranteed right to occupational freedom. Occupational freedom not only includes freedom to practise the occupation but also the freedom to choose an occupation. The violation occurs whenever access to an occupation is restricted. In response the Federal Constitutional Court developed the so-called "stufentheorie" in the famous Pharmacy Case.²⁵³ In terms of the *stufentheorie* the regulating authority of the legislature is limited to three types of measures. And since the measures are listed from the least to the most interventionist the legislature may only resort to the next "step" (*Stufen*) if the previous measure was unsuccessfully tried in order to address the danger the law is aimed at.

The *Bundesverfassungsgericht* has taken the view that the *KWG* meets the requirements developed by the Court (the *Stufentheorie*). The first level deals with restrictions on the

²⁵⁰ "Art 3 (Equality before the law):

- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights.
- (3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religion or political options."

²⁵¹ Möschel, Wernhard, *Das Wirtschaftsrecht der Banken* (1972), 273.

²⁵² "Art 12

Right to choose trade, occupation or profession

- (1) All Germans shall have the right to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law.
- (2) ..."

²⁵³ C.f. the famous "*Apothekerurteil*" (BVerfGE 7, 377), in which the *Bundesverfassungsgericht* concerned itself with the freedom of settlement of pharmacists and developed the principles which are applicable in this context.

practice of a profession. Although some justification for the restriction of the freedom of practice is required, there is, at this level, significant scope for limiting occupational freedom, as long as the freedom to enter the occupation is not restricted. All forms of administrative regulations that aim to protect third parties from professional people are of course examples of a first level violation of occupational freedom. But, as was stated, the legislature has considerable leeway in deciding which measures it will use as long as the measure is not obviously unreasonable or does not impose a disproportionate burden on the individual. It is clear that the restriction of the freedom of practice in the banking profession²⁵⁴ is both meaningful and necessary in order to attain the goals of the *KWG* mentioned above.²⁵⁵ The great importance of banking in the economy makes it evident that continuous regulation is necessary. Intervention may for example take the form of regulating equity capital²⁵⁶ and liquidity.²⁵⁷

The second level developed by the Court relates to the subjective conditions in terms of which access to a profession is limited. The requirements for the permission to conduct business are second level limitations. These are found mainly in the qualitative and quantitative prerequisites of permission set out in §§ 32, 33 *KWG*. These restrictions are necessary since certain knowledge is essential for conducting a banking business. If such knowledge is absent, the individual's activities may present danger for the functioning of the credit industry as a whole.

The third level is concerned with objective limitations on access to a profession. Currently there are no such limitations in the *KWG*. But earlier there were. For example, § 4 I b of the *KWG* 1939 provided that access to the profession could be limited on the basis that there was no public need for further banking businesses. This restriction was found to be unconstitutional by the *Bundesverwaltungsgericht* in 1958. The Court held that a limitation of the number of banks is not a suitable way of averting

²⁵⁴ By §§ 1-3 *KWG*.

²⁵⁵ See 40, 41 above.

²⁵⁶ § 10 *KWG*.

²⁵⁷ § 11 *KWG*.

the general and undesirable trends in the economy. Inflation, is for example, caused by other factors.

Banking supervision, the control of interest as well as other forms of regulating the competition between banks, should rather have been considered by the legislature. The provision was therefore declared invalid and has not been re-enacted.

Art 14 GG²⁵⁸

The inroads made by the *KWG* on art 14 *GG* (the property clause) are justified. In terms of the German Constitution private property imposes duties and should also serve the public weal.²⁵⁹ The affected institutions are charged 90% of the total cost of measures implemented in terms of the *KWG*.²⁶⁰ However, the fact that banking supervision is in the public interest does not exclude this distribution of costs. It is a common principle that institutions whose business operations endanger the public may be required to contribute towards costs of this nature. An individual entrepreneur can, to protect himself from certain dangers, demand security at his own cost. This principle is just as applicable in the context of public supervision. Thus, there is no cause for concern from a constitutional point of view.²⁶¹

²⁵⁸ “Art 14

(Property, Right of inheritance, Expropriation

- (1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.
- (2) Property impose duties. Its use should also serve the public weal.
- (3) Expropriation shall be permitted only in the public weal. It may be effected only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interest of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.”

²⁵⁹ Art 14(2) *GG*.

²⁶⁰ § 51 I.

²⁶¹ Schork, Ludwig, *Kommentar zum Gesetz über das Kreditwesen*, Commentary, on § 51.

Art 2 I GG²⁶²

This article, which is in the nature of a general constitutional right to "freedom of action" does not apply in the areas governed by the more specific constitutional rights embodied in art 12 and 14 GG.

B Republic of South Africa

1 Banking Supervision - Definition of the Concept

In South Africa banking supervision is almost exclusively regulated by the *Banks Act, No. 94 of 1990* and it thus forms part of what is known as *banking law*.²⁶³ Banking law is often regarded as a subdivision of commercial law²⁶⁴ which is generally perceived as forming part of private law rather than public law.²⁶⁵ It must be noted, however, that this is not true of banking law. Banking law touches many other legal disciplines. The *Banks Act* is clearly concerned with *inter alia* criminal law,²⁶⁶ company law²⁶⁷ and administrative law.²⁶⁸ Unlike the position in Germany there is no strict jurisdictional separation between these different areas of law. There is, for example, no special administrative court.²⁶⁹ There is also no comprehensive codification of the principles of administrative law or of the procedure to approach the courts in administrative law

²⁶² "Art 2

(Rights of liberty

- (1) Everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.
- (2) Everyone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. These rights may only be encroached upon pursuant to a law."

²⁶³ Willis, Nigel, *Banking in South African Law* (1981), 5 et seq., 13.

²⁶⁴ Hahlo, H.R. / Kahn, E., *The South African Legal System and its Background* (1968), 126.

²⁶⁵ Du Plessis, Lourens M. / Du Plessis, A.G., *An Introduction To Law* (1995), 223.

²⁶⁶ For example ss 11 (2); 17 (6); 22 (3); 40; 91.

²⁶⁷ For example ss 15 (1), (3); 27; 28; 38 (1), (2); 43.

²⁶⁸ See this chapter *infra* especially 50 - 54, 56, 58, 60 et seq.

²⁶⁹ Baxter, Lawrence, *Administrative Law* (1991), 43 et seq.

matters.²⁷⁰ Therefore a clear division between the individual spheres of the law is of purely academic interest.

The responsible authority for banking supervision in South Africa is the South African National Reserve Bank as recognised by the new Constitution, the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.²⁷¹ Further details concerning this institution are to be found in the *South African National Reserve Bank Act 90 of 1989*.²⁷² This Act stipulates that the Reserve Bank is a legal person.²⁷³ It does not specify whether it has legal personality in terms of public law or of private law. All the shares of the Reserve Bank are privately owned.²⁷⁴ It is also entitled to accept deposits like any other commercial bank.²⁷⁵ It may further purchase shares of other companies, even commercial banks.²⁷⁶ From this one can conclude that the Reserve Bank is a legal person in the private-law sense.

However, the structure and the duties of the bank are determined by law and are not set out in a memorandum and articles of association.²⁷⁷ Furthermore, the Minister of Finance may call a meeting of shareholders. The size of the dividends is also regulated by law and not by the managing bodies of the institution. The acquisition of shares is in certain instances subject to the permission of the Minister of Finance.²⁷⁸ Although the Reserve Bank has the right to accept deposits, it is exempt from the provisions of the

²⁷⁰ Wiechers, Marius, *Administrative Law*, in: Joubert, W.A., *The Law of South Africa* (1993), First Reissue, Vol. 1, par. 57.

²⁷¹ Ss 223 – 225. Its actual time of foundation was in the year 1920.

²⁷² It was originally founded in terms of s 9 of the *Currency and Banking Act, No. 31 of 1920* which was later repealed by the *South African Reserve Bank Act, No. 29 of 1944*, which in turn was repealed by the current Act.

²⁷³ S 2 of the *South African National Reserve Bank Act, No. 90 of 1989*.

²⁷⁴ Du Plessis, Esme, *The structure and operation of the Reserve Bank and its relationship to the government*, MB (1980), 86, 88. See also ss 21-23 of the *South African National Reserve Bank Act, No. 90 of 1989*.

²⁷⁵ S 10 (1) (e) of the *South African National Reserve Bank Act, No. 90 of 1989*.

²⁷⁶ S 13 (b) of the *South African National Reserve Bank Act, No. 90 of 1989*. The permission of the Minister is, however, a prerequisite.

²⁷⁷ S 10 of the *South African National Reserve Bank Act, No. 90 of 1989*.

*Banks Act.*²⁷⁹ Its main duty is to protect the value of the currency in the interests of balanced and sustainable economic growth in the Republic. Profit-oriented objectives must not influence the bank's decisions.²⁸⁰ The possible liquidation of the bank may only occur in terms of an Act.²⁸¹ These provisions indicate that the Reserve Bank is a legal person in the public-law sense. A clear classification of the legal position of this institution is thus not possible in this way.²⁸²

In any event, the Reserve Bank is an *organ of state*²⁸³ in terms of the Constitution.²⁸⁴ Although the Reserve Bank discharges public duties in its supervision of banks, and is thus an organ of the executive, it was also established as an institution independent of the executive.²⁸⁵ As such, it is not subject to the government's directives. However,

²⁷⁸ S 13 (b) of the *South African National Reserve Bank Act, No. 90 of 1989*.

²⁷⁹ S 2(i) of the *Banks Act No. 94 of 1990*.

²⁸⁰ S 224 (1) *Constitution of the Republic of South Africa, Act No. 108 of 1996* and s 3 of the *South African National Reserve Bank Act, No. 90 of 1989*.

²⁸¹ S 25 of the *South African National Reserve Bank Act, No. 90 of 1989*.

²⁸² Although it can be said that the South African National Reserve Bank acts with sovereignty in the performance of its duties regarding the supervision of banks, this does not necessarily imply that it is a juristic person in the public-law sense. The legal structure of this institution contains too many elements that are typical of private-law legal personalities. For a contrary view see Oelkers, Felix, *The South African Reserve Bank under the Interim Constitution*, TSAR 1996 (4) 701 *et seq.*

²⁸³ The term *organ of state* can already be found in the *Constitution of the Republic of South Africa, Act No. 200 of 1993* (hereafter: the Interim Constitution). Here the term encompassed every statutory body or functionary. See Du Plessis, Esme, *The structure and operation of the Reserve Bank and its relationship to the government*, MB (1980), 86, 88; Basson, Dion, *South Africa's Interim Constitution - Text and Notes* (1995), 299f. Basson defines the term very broadly to include every statutory body or functionary.

²⁸⁴ S 239 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.

²⁸⁵ S 224 (2) of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*. See also: Malan, FR.; Banks, *The Reserve Bank and the Bills of Exchange Act, No. 34 of 1964*, TSAR 1993 (4), 755, 759; *Big Dutchman v Commissioner for Inland Revenue* 1993 2 SA 426 (N); Du Plessis, LM. / Corder, H., *Understanding South Africa's Transitional Bill of Rights* (1994), 110f. In this context it should be said that the Interim Constitution contained a provision defining the term "organ of state" in s 233. The authors distinguish between three different types statutory bodies: those that are organs of the government, those that are established on the basis of an Act but which are mainly treated as or run by a natural person from a private law perspective, and those that have private law status but were not established because of an Act although they perform certain duties under state control. The South African National Reserve Bank does not fall under any one of these categories. As a result, banking supervision could not be judged in terms of constitutional principles. However, the authors specified at this point that the categorization only deals with examples that deviate from the function of the statutory body. The South African National Reserve Bank undoubtedly performs state duties. These not only comprise banking supervision but also the issuing of bank notes, the securing of the currency's stability and more. That is why this institution could be regarded as a statutory body under the Interim Constitution. The term

being an *organ of state* it undoubtedly forms part of the state, which in terms of the Constitution²⁸⁶ means that it must perform its duties in accordance with the principles of the Constitution. The supervision is performed by the Registrar, a department of the Reserve Bank.²⁸⁷ The Registrar must accordingly comply with the Constitution in the performance of his duties.

There is no general codification of commercial law in South Africa. The individual branches of the economy are regulated separately. Nonetheless, the *Banks Act* can be described as a basic code in terms of which the banking industry is ordered and structured. This Act attempts to reconcile the constitutional rights of freedom of trade and occupation²⁸⁸ with the interests of public welfare.²⁸⁹

Furthermore, the Act does not include any provisions which define economic and political goals. The limitations of chapters IV²⁹⁰ and V²⁹¹ of the Act are to be understood in this context, since they have the sole purpose of preventing an unhealthy concentration of power in banking.²⁹²

organ of state, as defined in s 239 of the Constitution of the Republic of South Africa, Act No. 108 of 1996, has very much the same meaning, although the term is defined more specifically as follows: "(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution – (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer".

²⁸⁶ S 8.

²⁸⁷ S 4.

²⁸⁸ S 22 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.

²⁸⁹ Pimstone, Gideon, *Trading in principles - The economic activity clause of the Interim Constitution*, (1995) (2) SAPL, 356 *et seq.*

²⁹⁰ Chapter IV "Shareholding in, and Registration of Controlling Companies in Respect of, Banks".

²⁹¹ Chapter V "Functioning of Banks and Controlling Companies with Reference to Companies Act".

²⁹² Itzikowitz, Angela, *The Deposit-taking Institutions Act. 94 of 1990: Its History and an Overview of its Main Provisions*, (1992) 4 SA MercLJ, 170, 180 *et seq.*

Supervision as understood in the *Banks Act* must also not be confused with the state's general supervision over its own internal administration.²⁹³ The Registrar's supervision of banks does, however, pertain to the private-law sphere of finance.

As mentioned above, the Registrar,²⁹⁴ as an *organ of state*, performs public duties. This means that all measures implemented by him are subject to section 1 (c) of the Constitution in terms of which the *supremacy* of the Constitution as well as the principle of *the rule of law* must be taken into consideration. These provisions are further strengthened by section 2 of the Constitution which provides that every action in violation of the Constitution - specifically an action that violates a fundamental right - is invalid. This principle is to be taken into consideration whenever Government exercises power. Thus, it follows that measures which are based on the *Banks Act* must not contradict these principles. The Act contains many provisions that equip the Registrar and the Minister of Finance²⁹⁵ with wide discretionary powers.²⁹⁶ The question is to what extent such provisions are reconcilable with the Constitution. The exercise of wide discretionary powers may be inconsistent with the principles of a constitutional state.²⁹⁷ The problem of undetermined legal concepts or general clauses has been raised in the context of the doctrine of *separation of powers* in South Africa.²⁹⁸ The doctrine²⁹⁹ was

²⁹³ Wiechers, Marinus, *Administrative Law*, in Joubert, WA., *The Law of South Africa* (1993), First Reissue Vol. 1, par. 85.

²⁹⁴ As part of the South African National Reserve Bank.

²⁹⁵ See s 1 "Definitions".

²⁹⁶ See *inter alia* ss 12 (3); 14 (1); 16 (3); 17 (1), (2); 18A (3).

²⁹⁷ The principle of legality forms part of the notion of the constitutional state. This means that administrative action must have a legal basis. If not, the administrative act will be unlawful.

²⁹⁸ *Separation of powers* has several meanings. A summary of these can be found in Marshall, H.H., *Constitutional Theory* (1971), 100. In Germany, the administration may only exercise a discretion in accordance with criteria set out in the enabling statute. In South Africa, it is possible to delegate the authority to the administration not only to exercise the discretion, but also to determine the criteria and the consequences of its decisions. See also Baxter, Lawrence, *Administrative Law* (1991), 31f.; Mathews, Antony S., *The Darker Reaches of Government* (1971), 178; Kelson, H., *General Theory of Law and State* (1961), 269; Devenish, G.E., *Interpretation of Statutes* (1992), 10. See further *S v Vermaas, S v Du Plessis* 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC); *Collins v Minister of Interior* 1957 (1) SA 552 (A); *S v Fazzie* 1964 (4) SA 673 (A); *Bernstein v Bester NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC); *More v Minister of Co-operation and Development* 1986 (1) SA 102 (A); *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC); *Gardiner v Whitaker* 1996 (6) BCLR 755 (CC); *Key v Attorney General* 1996 (6) BCLR 788 (CC); *Teo Soh Lung v Minister for Home Affairs* (1990) LCR (Const) 490; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins*

considered by the Constitutional Court in the case of *Executive Council, Western Cape Legislature & others v President of the Republic of South Africa & others*.³⁰⁰ The Constitutional Court decided that such general and enabling provisions were in principle not inconsistent with the Interim Constitution.³⁰¹ The decision concerned a dispute between the Executive Council of the Western Cape Government and the Central Government, represented by the President of the Republic of South Africa. The question was to what extent it was permissible to transfer legislative powers to organs of the executive. The court held that in principle Parliament was entitled to delegate power to the executive to make laws.³⁰²

The power is restricted in that Parliament may not authorise organs of the executive to amend or abrogate national legislation. In particular Parliament cannot authorise the executive to amend or abrogate the legislation in terms of which the executive's power to make law is conferred. Such authorisation would clearly violate the manner and form provisions of the Interim Constitution³⁰³ and would thus be unconstitutional.³⁰⁴

The Constitutional Court confirmed this approach in another case, *Ynuico Limited v Minister of Trade and Industry & others*,³⁰⁵ in which it emphasised the necessity of broadly framed statutory provisions. According to the Court, many statutes prior to the Interim Constitution had allowed an extensive transfer of legislative authority. Such laws could not be tested against the doctrine of separation of powers, since this would mean that most of them would be unconstitutional. The court further pointed out that

³⁰⁰ 1988 (3) SA 369 (A); *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 (W); *Ynuico Limited v Minister of Trade and Industry* 1996 (6) BCLR 798 (CC).

³⁰¹ See also in general Baxter, Lawrence, *Administrative Law*, 353-364.

³⁰² *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 22 September 1995, 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC).

³⁰³ *Constitution of the Republic of South Africa, Act No. 200 of 1993*.

³⁰⁴ In this context, the court referred specifically to the historical development (1292F).

³⁰⁵ See ss 59, 60 and 61.

³⁰⁶ South African law allows the legislature to transfer extensive powers to the executive. This can be explained by the absence of a clear distinction between the legislative and executive bodies.

this result would make nonsense of section 229 of the Interim Constitution, which contained an express provision in terms of which all laws remained valid.³⁰⁶ In terms of section 2 of the *Interpretation Act 33 of 1957*, legislation was to be interpreted to include subordinate legislation passed in terms of an empowering Act. The New Constitution contains a similar provision.³⁰⁷

It would accordingly appear that wide and discretionary powers are in principle valid in South African law. The framework within which organs of the executive must stay in the execution of such empowerment is virtually unrestricted. It is suggested, however, that the constitutionality of such provisions is suspect. This is because the provisions³⁰⁸ are not clear and precise enough to facilitate their consistent application. They may lead to arbitrary decisions being taken. This may well violate the general principles of a constitutional state. It remains to be seen whether the Constitutional Court will in future depart from the stance taken in the decisions discussed above.

2 Objectives of Banking Supervision

The regulation of the financial sector can be justified on the basis that it aims at creating a stable financial system which, in turn, is a prerequisite for economic growth. In South Africa the financial sector is a highly sensitive branch of industry. Should it be adversely affected, this would, as elsewhere in the world, have far-reaching consequences for many other branches of industry. Thus, the legitimacy of, and the need for banking supervision is not questioned. It has been left to the lawmakers to enact certain laws where they see a need for this. It is, however, not clear where the line is to

³⁰⁵ *Ynuico Limited v Minister of Trade and Industry*, 21 May 1996, 1996 (6) BCLR 798 (CC), 799 (H). See also n. 304. There is actually no real distinction between legislature and executive in this sense.

³⁰⁶ S 229 of the Interim Constitution: "all laws which immediately before the commencement of this Constitution were in force ... shall continue in force ... subject to any repeal or amendment of such laws by a competent authority".

³⁰⁷ See s 242 read with Schedule 6 s 2.

³⁰⁸ Such as s 13 (2) (a) of the *Banks Act* in terms of which the Registrar is authorized to refuse an application concerning the establishment of a bank if he is of the opinion that it would not be in the public interest. The question is how an applicant can predict his chances of success in advance if the decision regarding public interest is left entirely to the Registrar.

be drawn.³⁰⁹ South African courts can accordingly expect a number of legal problems in this regard.

The central provision relating to banking supervision is section 6 of the *Banks Act*. This provision sets out the authority of the Registrar to fulfil the duties assigned to him by the Act. The objectives of supervision must therefore be ascertained from the Act as a whole. South African banking supervision aims to protect depositors from losses incurred by the collapse of banks, and to offer general protection by ensuring a functioning banking system with integrity. The prevention of the abuse of the power of banks is also an objective, as well as the prevention of too great a concentration of power. These last objectives are also aimed at maintaining healthy competition amongst banks.

In terms of section 88 of the Act, the Registrar performs his duty of supervision in the public interest only. This should prevent creditors who have suffered losses as a consequence of faulty supervision from instituting an action for damages.

3 Constitutional Legitimacy of Banking Supervision

3 1 Introduction

In South Africa banking supervision is a public function. In terms of the Constitution South Africa is a constitutional state.³¹⁰ From this it follows that no legislation or administrative action (in the widest sense) may be in conflict with the Constitution.

3 2 Constitutional Law in the Economy

The Constitution does not contain any indications as to a specific type of economic system that should be promoted. The comprehensive Bill of Rights³¹¹ rather provides a

³⁰⁹Concerning the control of the executive in general, see Asmal, Kader, *Administrative justice and democracy within the South Africa context*, 12 et seq.; Davis, D.M., *Administrative justice in a democratic South Africa*; and Meer, Yasmin Shehnaz, *Legislative Controls of the Executive*, 83 et seq. (all of them in Corder, Hugh / McLennan, Fiona, *Controlling public power - Administrative justice through the law* (1995)).

³¹⁰Ss 1 (c), 2 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.

³¹¹Ss 7 - 37 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.

framework which guarantees the freedom of the individual as far as possible. It may be argued that the promotion of a certain economic structure would be in contradiction with this freedom. However, this is not so. Fundamental rights such as the right to equality,³¹² the freedom of the person,³¹³ or also the freedom of trade, occupation and profession,³¹⁴ do not demand neutrality concerning economic policy from the state. The government of the day may adopt the economic policy of its fancy. It could be a free market economy or a planned economy. This is possible as long as the fundamental rights are not infringed. It would appear that the German *Streit um die Wirtschaftsverfassung*³¹⁵ has not really emerged in South Africa. Although certain provisions such as section 22³¹⁶ guarantee freedom of contracting on a micro-economic level, they do not prescribe a specific economic system.³¹⁷

3.3 Constitutionality in General

Before the South African Constitution came into operation, the *Banks Act* was comprehensively amended by the *Banks Amendment Act 26 of 1994*. Under Section 44(1) of the Constitution, read with Schedule 4 Part A ("Consumer Protection and Trade") the Parliament of the Republic has the authority to make legislation of this kind. The legislative authority of Parliament is comprehensive. Legislation pertaining to almost any matter is possible.³¹⁸ In this respect, the legislative authority of the individual provinces is restricted and reduced to a minimum.³¹⁹

³¹² S 9 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.

³¹³ S 12 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.

³¹⁴ S 22 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.

³¹⁵ See 43 above.

³¹⁶ Freedom of trade, occupation and profession.

³¹⁷ Davis, Dennis, *Economic Activity*, in Chaskalson, Matthew; Kentridge, Janet, Klaaren, Jonathan, Marcus, Gilbert; Spitz, Derek; Woolman, Stuart *Constitutional Law of South Africa* (1996), 29-4f.

³¹⁸ C.f. s 45 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.

3.4 Reconciliation with Individual Provisions of the New Constitution³²⁰

Introduction

In South Africa, banking institutions are all established as legal persons in accordance with the *Companies Act, No. 61 of 1973*.³²¹ In terms of section 8(4) of the Constitution they are accordingly "entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person".

Section 9 of the Constitution

Section 9 of the Constitution is concerned with equality before the law. It is possible under the Constitution to differentiate between groups and individuals in accordance with their needs and interests.³²² It is submitted that the important role of banking in the economy justifies the special treatment of banks in South Africa, and does not violate the principle of equal treatment.

Section 2 of the Banks Act may, however, be problematical since it excludes certain institutions from the provisions of the Act. As explained above, the Reserve Bank also acts as a "normal" bank in the financial sector. This poses the question why, when it acts in this capacity, it is not subject to supervision. However, if it were to be subjected to supervision this would lead to the problem that supervision would have to be excluded from the scope of its duties in order to prevent a conflict of interests.

³¹⁹ The tendency towards a centralization of power of institutions in the Republic has mainly political reasons. Too much decentralization could jeopardize the cohesion of the Republic as a whole since there have recently been efforts to separate in different parts of the country.

³²⁰ I have had to refer almost exclusively to commentary relating to the Interim Constitution. However, it largely corresponds with the subsequent final *Constitution*. A comparison of the provisions of the Bill of Rights of the two constitutions can be found in Heaton, Jacqueline, *A comparison of the Bills of Rights in the Interim and Final Constitution*, (1997) De Rebus, 331 *et seq.*

³²¹ See s 13 (2) (c) of the Banks Act, No. 94 of 1990.

³²² Kentridge, Janet, *Equality* in Chaskalson, Matthew; Kentridge, Janet, Klaaren, Jonathan, Marcus, Gilbert; Spitz, Derek; Woolman, Stuart *Constitutional Law of South Africa* (1996), Chapter 14 - 5 *et seq.*

Section 18 of the Constitution

Section 18 of the Constitution safeguards the freedom of association. This basic right does not concern only freedom of *political* association but also other domains of law.³²³ The provisions of the *Banks Act* concerning participation and the limitation of the right to vote with such participation³²⁴ may be controversial in this context. It is submitted, however, that these provisions are not unconstitutional as they are not aimed at restricting freedom of association but rather at preventing a dangerous uncontrollable concentration of power in the banking industry. The public interest in preventing such concentration of power must be regarded as taking precedence over an unfettered freedom of association.

Section 22 of the Constitution

In terms of section 22 every person has the right to choose an occupation or profession freely. However, the section also recognises that an occupation or profession may be regulated by law. The permission to conduct business as a bank requires prior registration.³²⁵ As such this requirement impacts upon the freedom of occupation. The requirement of registration, however, is necessary due to the importance of the banking industry and in order to realise the objectives of the *Banks Act*. It is precisely considerations such as these that underlie the recognition in section 22 that a particular occupation or trade may be regulated by law.³²⁶ This provision has not been authoritatively interpreted as yet. The principles underlying section 26 of the Interim Constitution are the only point of reference.

The entrenchment of this provision in the constitution was very controversial.³²⁷ In the light of the transition to a democratic, constitutional state in which all population groups

³²³ Basson, Dion, *South Africa's Interim Constitution - Text and Notes* (1995), 30.

³²⁴ See Chapter IV and V.

³²⁵ S 11 (1) of the *Banks Act, No. 94 of 1990*. For a discussion of the South African right to freedom of economic activity see in general *S v Lawrence; S v Negal; S v Solberg* 1997 (10) BCLR 1348 (CC).

³²⁶ This must also be seen in the historical context (i.e. the unequal treatment of larger parts of the population during colonial and apartheid times). See Pimstone, Gideon, *Trading in principle - the economic activity clause of the Interim Constitution*, 1995 (2) SAPL, S. 356, 359f. See also Du Plessis, Lourens M. / Corder, Hugh, *Understanding South Africa's Transitional Bill of Rights* (1994), 55, 179f.

were equally represented and empowered, certain political parties or movements³²⁸ feared that a provision of this nature would result in the rich getting richer and the poor poorer. On the other hand, especially considering the stark poverty of large parts of the population, the constitutional entrenchment of the provision was seen to have many advantages. It was not only hoped to promote economic development but also to protect the economically weak. It could, for example, protect the street vendor from disproportionate restrictions and thus guarantee the basis of his existence. These considerations eventually silenced those opposed to the provision.³²⁹

The freedom of occupation may only be limited on the basis of section 36 of the Constitution, that is "only in terms of law of general application", and "to the extent that the limitation is reasonable and justifiable in an open and democratic society". These constitutional principles determine the boundaries of any limitation. It is submitted that the provisions of the *Banks Act* which specifically regulate the admission to the banking business, stay within these limits. The restrictions concerning the admission to banking business on the one hand and the protection of the financial sector on the other must be balanced in terms of the relevant constitutional principles. The individual is not refused admission as such. Admission is merely tied to certain material and personal requirements. The individual's interest of unhindered admission, free from any conditions, must be regarded as less important than the interests of the general public to have a properly functioning banking industry

Section 25 of the Constitution

Section 25 of the Constitution protects property. The term *property* in South African law refers to movable as well as immovable property. Property may be expropriated "only in terms of law of general application".³³⁰ The section does not specifically make

³²⁷ Du Plessis, Lourens M. / Corder, Hugh, *Understanding South Africa's transitional Bill of Rights* (1994), 179.

³²⁸ Specifically the ANC and the PAC.

³²⁹ S 26 (2) of the Interim Constitution was also seen as a compromise of these conflicting interests. This section regulated the possibilities of limiting this fundamental right and is thus complementary to s 33 of this constitution. Others considered the section to be superfluous since, according to them, the Constitution contained sufficient other provisions which would have permitted a limitation of this fundamental right. See Basson, Dion, *South Africa's Interim Constitution - Text and Notes* (1995), 40.

provision for the principle encountered in German law that private property imposes duties and should also therefore serve the common weal. This principle can nevertheless be derived from the principles underlying the constitution as a whole.³³¹

The relevant aspect of bank supervision in this context is the power of the Registrar to recover costs.³³² This, it is submitted, is not unconstitutional. The power is limited in that it is activated by the business activities of a bank. The principle of causation³³³ is also of some importance here, in the sense that costs may only be recovered from those affected by supervision. This ensures that the constitutionality of these provisions is beyond doubt.

Section 33 of the Constitution

Section 33 ensures just administrative action and is therefore probably the most important right in this context. This right is recognised as fundamental by the Constitution. The *Banks Act* contains several provisions which leave decisions entirely to the discretion of the *Registrar*.³³⁴ Any of these decisions can potentially be attacked as being unconstitutional on the basis of section 33. This fundamental right influences almost every administrative action.

The right to just administrative action was traditionally determined incrementally in judge-made law. Applicants relied on the fundamental rights to freedom, property, equality or other elementary fundamental rights.³³⁵ This provision in the New Constitution expanded these common-law principles.³³⁶ Administrative action must affect either a right or a legitimate interest of the person concerned. Personal

³³⁰ A 25(2) of the Constitution.

³³¹ Du Plessis, Lourens M. / Corder, Hugh, *Understanding South Africa's transitional Bill of Rights* (1994), 182.

³³² S 90 (1).

³³³ In German: *Verursacherprinzip*.

³³⁴ e.g. ss 13 (2) (a); 14 (1); 17 (2).

³³⁵ See *Administrator, Transvaal & Others v Traub & Others* 1989 (4) SA 731 (A), 755 (C).

³³⁶ Basson, Dion, *South Africa's Interim Constitution - Text and Notes* (1995), S. 34.

involvement is an essential prerequisite to confer standing on an applicant in a claim of this nature. There is no general enforceable public right to just administrative action.³³⁷

Thus, every measure, whether it concerns intervention, performance or fiscal administrative action, must be in conformance with the requirements of section 33. The Registrar must also be guided by the section. This means that his decisions must be lawful, reasonable and procedurally fair. In the case of rights that have been adversely affected, he must give written reasons for his decision. Certain provisions of the *Banks Act* which grant the Registrar a very wide authority or discretion may well be in conflict with the Constitution. Clearly the Registrar must exercise his discretion with great care. The reasons for his decision must also be clear and understandable.³³⁸

C Summary and Comparison

The systematic classification of the law of banking supervision is very different in the two countries. In Germany the law of banking supervision has a clear place. It is regarded as part of *Wirtschaftsverwaltungsrecht* (business administration law), a specific branch of administrative law. As such it is clearly part of public law.³³⁹ In South Africa the law regarding banking supervision is less clearly placed. It is simply regarded as part of banking law which is linked to both private and public law. Essentially, however, the questions that come to the fore in the context of banking supervision are mostly questions of administrative law.

The basic conception which underlies banking supervision in the two countries is, however, very similar. A certain branch of industry is controlled by a central, national institution. The Federal Republic of Germany makes use of a special authority,³⁴⁰ the

³³⁷ Basson, Dion, *South Africa's Interim Constitution - Text and Notes* (1995), S. 35.

³³⁸ Mureinik, Etienne, *Introduction to the Interim Bill of Rights*, (1994) Part 1 SAJHR, 38 *et seq.*

³³⁹ See 37 *et seq.*

³⁴⁰ See 40, 41 and *Chapter 3 Organisation of Banking Supervision*, 65 *et seq.*

Bundesaufsichtsamt für das Kreditwesen. This institution has a small structure which necessitates close co-operation with other institutions, especially with the central bank, the *Deutsche Bundesbank*. In South Africa, on the other hand, this function is performed by a specific department³⁴¹ of the central bank, the South African Reserve Bank.

The *Bundesaufsichtsamt für das Kreditwesen* operates under directives of the *Finanzminister*. It is linked to this Ministry as *Bundesoberbehörde*.³⁴² In South Africa, on the other hand, banking supervision is performed independently by the South African Reserve Bank. The Constitution guarantees the independence of this institution so that it may also perform its duties and functions independently.³⁴³

Both institutions have far-reaching powers to enable them to perform their duties and functions of banking supervision properly. Supervision does not only include the continuous surveillance of the business policies of existing financial institutions but also involves measures aimed at institutions that have not yet commenced business.

Every measure implemented by both the institutions may be tested against principles entrenched by the respective constitutions. The principle of a constitutional state, which is entrenched as a basic principle in both countries' constitutions, plays an important role.³⁴⁴

A further similarity is that in both legal systems, the legislation confers general authorisations which enable the supervising institutions to react to circumstances that are not precisely defined in the legislation. The form of empowerment is decidedly different in the two countries. However, in both countries this empowerment has been held to be constitutional. In this respect the South African Constitutional Court goes

³⁴¹ See 50, 51 and *Chapter 3 Organisation of Banking Supervision*, 76.

³⁴² See *Chapter 3 Organisation of Banking Supervision*, 65.

³⁴³ See 50 *et seq.*, n. 285.

³⁴⁴ See especially ss 1 (1) (c), 33 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996* and art 19 IV GG.

further than its German counterpart.³⁴⁵ The essential difference is that whilst the *Bundesverfassungsgericht* sets clear limits concerning the scope of the discretion, the South African Constitutional Court has accepted that Parliament has the right to confer wide ranging powers and dispositions.³⁴⁶

The objectives of banking supervision are very much the same in the two countries. This flows from the central role of financial institutions in the economies of both countries. The creation of a basic structure in this branch of industry, the maintenance of the functioning of the financial sector and the protection of creditors are the primary objectives of both the *Kreditwesengesetz* and the *Banks Act*. The Banks Act, however, also attempts to prevent an unhealthy concentration of power in the financial sector and contains several provisions relating to competition, a matter regulated by separate legislation (*Kartellgesetz* und *Gesetz gegen den unlauteren Wettbewerb*) in Germany.³⁴⁷

In Germany the *Bundesaufsichtsamt* exercises its supervisory duties in the public interest only. This implies that it cannot be liable for damages.³⁴⁸ The *Banks Act*³⁴⁹ contains a similar provision. Presumably claims of this nature kind are therefore also not possible in South Africa.

There are noteworthy similarities in the constitutions of the two countries. Neither constitution contains any provisions which obliges the state to promote a certain economic system. There is no specific *Wirtschaftsverfassung* in either country. The constitutions of both countries contain comprehensive measures designed to protect the freedom of the individual as well as his or her personal development.³⁵⁰

³⁴⁵ Cf. pages 52 *et seq.* and n. 298, 299.

³⁴⁶ See the decisions in n. 224, 298, 300 and 305.

³⁴⁷ Cf. 40 *et seq.*, 54 *et seq.*

³⁴⁸ § 6 III *KWG*.

³⁴⁹ S 88.

³⁵⁰ See 43,44 and 56 *et seq.*

The principal instruments of banking supervision were also passed by national legislative authorities in both countries.³⁵¹ In both countries, banking supervision is a matter of national importance. It is therefore performed centrally. Neither country has delegated this authority to the individual provincial (in the case of South Africa) or state (in the case of Germany) institutions.³⁵²

Finally, it must be noted that the constitutionality of certain provisions of the *Banks Act* may be suspect in the light of the catalogue of fundamental rights in the new constitution.³⁵³ Time will tell to what extent the Constitutional Court will follow its earlier decisions in these questions.

³⁵¹ Art 87 III GG and s 44 (1) of the *Constitution of the Republic of South Africa, Act. 108 of 1996*.

³⁵² For example in the USA, a different provision exists because of the marked federal character of the constitution and the Americans' fundamental mistrust of centralization. There, individual Federal States have their own empowerments to supervise and extensive use is made of these.

³⁵³ See for example s 9 of the Constitution of the Republic of South Africa, Act. 108 of 1996.

Chapter 3

The Organisation of Banking Supervision

A Federal Republic of Germany

1 The Bundesaufsichtsamt

The organisation of banking supervision in Germany is largely determined by §§ 5 - 9 of the *Kreditwesengesetz (KWG)*. In terms of § 6 I, 5 I 2 KWG, the *Bundesaufsichtsamt* (Federal Supervisory Authority) is charged with the public supervision of banking in Germany.³⁵⁴ This office has its headquarters in Berlin.³⁵⁵

The *Bundesaufsichtsamt* exists as an *organisatorisch selbständige Bundesoberbehörde* (organisationally independent³⁵⁶ superior federal authority)³⁵⁷ for which the *Bundesfinanzminister* is responsible. It is accordingly subject to the instructions of that Ministry.³⁵⁸ The *Bundesfinanzminister* is also responsible for the supervision of the

³⁵⁴ Banking supervision was centralised (became the responsibility of the federal parliament) by the *KWG* 1961. There was much opposition to this move by the *Bundesländer*. A *Normenkontrollklage* (abstract review proceeding) which was instituted failed (BVerfGE 14, 197ff). See also text on n.71 and also text on page 44.

³⁵⁵ The reasons for the decision to open the office in Berlin when the *Aufsichtsamt* was established in 1962 were historical. Although the government at first favoured Frankfurt am Main for practical reasons, the final decision was nevertheless for Berlin. After the restoration of state unity, the *Aufsichtsamt* will be moved to Cologne. This move will probably be completed by the year 2000.

³⁵⁶ The essential characteristic of this independence is the power of the head of the *Aufsichtsamt* (the President) to sign in his own name. In terms of German administrative law, an administrative office that only signs as "representative" or "under instruction" of a Federal Ministry is not an independent *Bundesoberbehörde*.

³⁵⁷ In those spheres in which the Federal Parliament has legislative status it can establish an independent *Bundesoberbehörde*. This is authorised by art 87 III 1 GG. A *Bundesoberbehörde* is by legal nature organisationally and functionally an independent Federal Authority without an own legal personality (in the sense that in an action the defendant is the government and not the *Behörde*). These authorities are set up to fulfil functions that need to be performed throughout the entire Germany, and are therefore central authorities. They do not have any subordinate structures. They are also not authorised to employ *Landesbehörden* (authorities of federal states) in order to fulfil their duties. Assistance of a purely official nature is possible (BVerfGE, 14, 197, 211; 35, 141, 145.). The advantage of establishing this type of authority lies in its relatively easy administration. A *Bundesoberbehörde* is a central administrative authority immediately subordinate to a Ministry (the highest Federal Authority). Its field of responsibility extends across the entire area of the federal parliament. C.f. Maunz, Theodor / Dürig, Günter *Grundgesetz - Kommentar*, on art 87, marg. n. 166 *et seq.*

³⁵⁸ Originally, the *Bundeswirtschaftsminister* was also responsible for banking supervision. However, with the move of the social-liberal coalition into the Office of Federal Chancellor in 1972, essential parts

Bundesaufsichtsamt für das Kreditwesen and is entitled to issue general or specific regulations in this regard.³⁵⁹

The President of the *Bundesaufsichtsamt* who heads the office, is appointed in terms of § 5 II of the *KWG* by the *Bundespräsident* (State President) acting on the recommendation of the Federal Government. In terms of the *KWG*³⁶⁰ the Federal Government must consult with the *Bundesbank* before making its recommendation. This provision is aimed at promoting trust and co-operation between the *Bundesbank* and the *Bundesaufsichtsamt*. Such trust and co-operation is desirable due to the fact that these two bodies must work closely together. The consultation with the *Bundesbank* also ensures that the President of the *Bundesaufsichtsamt* has the necessary knowledge for the job. This consultation is an absolute prerequisite for appointment; without such consultation the appointment cannot be made.³⁶¹

The President of the *Bundesaufsichtsamt* is entitled to attend the proceedings of the *Zentralbankrat* (Central Bank Council) of the *Bundesbank* to the extent that matters within his sphere of competence are discussed. This is an enforceable right, and is not dependent upon an invitation from the *Bundesbank*. In accordance with the general principles regarding the co-operation of authorities, the *Bundesbank* is obliged to inform the *Bundesaufsichtsamt* if anything relating to the functions of the *Bundesaufsichtsamt* are to be discussed.

The functions of the *Bundesaufsichtsamt* are set out in § 6 of the *KWG*. The *KWG* aims at having both a quantitative influence (for example reserve policy) and a qualitative influence (for example conditions for admission) influence on credit institutions. This is to ensure that the goals of the legislation, namely is to guarantee general order in

of the division money and credit were assigned to the *Bundesfinanzminister*. Along with this, the responsibilities pertaining to banking supervision were transferred to that Ministry.

³⁵⁹ Szagunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, § 5, marg. n. 1; Bähre, Inge Lore / Schneider, Manfred *Kommentar zum Kreditwesengesetz*, § 5, marg. n. 1.

³⁶⁰ § 5 II 2.

³⁶¹ Szagunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, § 5, marg. n. 9. The Law does not make any mention of dismissing the President. Since his appointment represents an

banking, to maintain the functioning capacity of banking, and as far as possible to protect creditors from losses,³⁶² are attained.³⁶³

As a general rule the *Bundesaufsichtsamt* performs its functions directly, that is without the involvement of regional authorities. In terms of § 8 I of the *KWG* it may, however, employ the services of other persons and institutions.³⁶⁴ The Act accordingly reserves the most important position in banking supervision for the *Bundesaufsichtsamt*. Although a significant part of the supervisory work is performed by the *Bundesbank*³⁶⁵ and other functions are performed by the Federal Ministries of Finance and Justice, as well as by the Federal Government, these can be regarded as supplementary to the work of the *Bundesaufsichtsamt*.³⁶⁶ The real responsibility rests with the *Bundesaufsichtsamt*, which alone has the power to pass administrative measures.³⁶⁷

The *Bundesaufsichtsamt* is subdivided into five departments. The functions of one are of a general nature, and the other four of a supervisory nature.

- *Department I* is concerned with fundamental questions of banking supervision, international problems of banking, questions pertaining to matters such as the rate of interest, the interpretation of the *KWG* and the preparation of provisions regarding the implementation of the *KWG*, the co-ordination of supervision, general legal questions and the issues of cartels, competition, balance sheets and audits.

administrative act in the sense of § 35 VwVfG, the procedure of dismissing the President is determined by general principles of administrative procedure.

³⁶² See in this regard the decision reached by the BVerwG on 25 June 1980 - BVerwG 1 C 13/74. In this decision it was established that the primary objective of banking supervision was to ensure the orderliness of all banking transactions. The protection of creditors is therefore not a direct but an indirect objective. If it were a direct objective it would be conceivable for a customer to institute action against the Government on the basis that the supervisory measures did not adequately protect deposits.

³⁶³ Reasons for the governmental plan *KWG* 1961 A II sub 3, III sub 1.

³⁶⁴ Püttner, Günter *Wirtschaftsverwaltungsrecht* (1988), 213.

³⁶⁵ See also *infra* 69.

³⁶⁶ See *infra* 72 *et seq.* and see the following paragraph of this chapter concerning the participation of the German Federal Bank, 69 *et seq.*

- *Department II* continuously supervises the private credit banks. This includes the evaluation of credit reports, monthly returns, financial statements and audit reports. This department supervises the large banks, regional banks, private bankers and the *Teilzahlungsbanken* (finance houses, sales finance companies, and the consumer finance companies).

- *Department III* deals with the supervision of savings banks and *Landesbanken*³⁶⁸ as well as private and public *Realkreditinstitute* (real estate credit institutions or mortgage banks). The building societies which are also subject to the *Bundesaufsichtsamt* in terms of the *Bausparkassengesetz*³⁶⁹ also fall under this department.

- *Department IV* supervises the *Kreditgenossenschaften* (co-operative banks) as well as the *Deutsche Genossenschaftsbank* (clearing institution for all co-operative banks in Germany).

- *Department V* supervises *Kapitalanlagegesellschaften* (capital investment co-operatives), branches and daughter divisions of foreign credit institutions as well as the distribution of foreign investment participation. This department is also responsible for winding up institutions in accordance with currency legislation, for exempted enterprises and the audit of depots.³⁷⁰

In terms of § 6 III of the *KWG* the *Bundesaufsichtsamt* exercises its duties under this legislation "solely in the public interest".³⁷¹ From this, it follows that no individual may demand that the banking supervisors intervene in a particular case.³⁷²

³⁶⁷ Szagunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, § 6, marg. n. 1

³⁶⁸ State banks owned by the *Bundesländer*.

³⁶⁹ The legislation dealing with mutual loan association and building societies.

³⁷⁰ Schork, Ludwig, *Gesetz über das Kreditwesen*, § 5, marg. n. 2; Szagunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, § 5, marg. n. 7.

³⁷¹ § 6 III *KWG*: "nur im öffentlichen Interesse".

³⁷² See also *Chapter 6* below as well as a decision of the *OVG Berlin* of 7 October 1981 - *OVG I 80/80*. In this case the plaintiff alleged that she had a private-law claim for payment in the amount of 1.654.000 DM against the (defendant) *Bank GmbH*. The *Bundesaufsichtsamt* dismissed an application by the plaintiff to order banking supervisory intervention against the (defendant) bank in September 1976. This

2 The Bundesbank (German Federal Bank)

The *Bundesbank* is a public-law institution with legal capacity which is seated in Frankfurt am Main. Within its area of competence it is independent and does not act on instructions of the Federal Government. It is not subject to supervision.

This privileged position can be justified in light of the duties of the bank. These are set out in § 3 of the *Bundesbankgesetz*.³⁷³ To be able to perform its functions and to protect it from political intervention the *Bundesbank* was granted this special, independent position in several paragraphs of the *Bundesbankgesetz*.³⁷⁴

Besides its most important function, namely the safeguarding of the German currency, the *Bundesbank* is also involved in a number of supervisory activities. The Bank's co-operation with the *Bundesaufsichtsamt* is derived from § 7 of the *KWG*.³⁷⁵ In terms of

application to order the bank to pay, made in December 1979, was dismissed by the administrative court of Berlin by a decision reached on 27 August 1980. On 3 October 1980, the plaintiff appealed against this decision of which she was notified on 24 September 1980. Reasons for the decision: The permissible reference was unfounded. The appeal was dismissed because the plaintiff could not demand of the defendant to order the ...Bank GmbH to pay 1.654.000,-DM to the executor. The *Gesetz über das Kreditwesen* does not provide legal grounds for claims of this nature. The *Bundesaufsichtsamt* correctly pointed out that it is not authorised to interfere with private law disputes between clients of banks and credit institutions. See also the court order of the *VG Berlin* of 19 October 1982 (VG 14 A 149/82); decision of the *VG Berlin* of 4 January 1984 (VG 14 A 388/83); court order of the *VG Berlin* of 21 March 1985. See further Schork, Ludwig, *Gesetz über das Kreditwesen*, commentary on § 6 III, remarks No.. 3; Szagunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, § 6, marg. n. 13.

³⁷³ "Die Deutsche Bundesbank regelt mit Hilfe der währungspolitischen Befugnisse, die ihr nach diesem Gesetz zustehen, den Geldumlauf und die Kreditversorgung der Wirtschaft mit dem Ziel, die Währung zu sichern und sorgt für die bankmäßige Abwicklung des Zahlungsverkehrs im Inland und mit dem Ausland."

("With the aid of the fiscal policy authorisations granted to it by this law, the *Deutsche Bundesbank* regulates the flow of money and the supply of the economy with credit with the aim of securing the currency and it also sees to the domestic transfer of payments as well as that with foreign countries.")

³⁷⁴ See §§ 2, 12 and 13. See also Samm, C.T., *Die Stellung der Deutschen Bundesbank im Verfassungsgesüge* (1967) 54 et seq.; Stern, Klaus, *Staatsrecht*, vol. 2, 464 et seq.; Gramlich, Ludwig, *Kommentar zum BBankG*, Einleitung (Introduction) § 12.

³⁷⁵ The English translation reads as follows: "Cooperation with the German Federal Central Bank:

(1) The Federal Supervisory Authority and the *Deutsche Bundesbank* shall act in cooperation in accordance with this law. The *Deutsche Bundesbank* and the Federal Supervisory Authority shall exchange observations and findings which may be of importance in the performance of their respective functions. To this end the *Deutsche Bundesbank* shall also make available to the Federal Supervisory Authority the data which it collects based on statistical returns received in accordance

this paragraph both institutions must inform each other of any fact that could be of importance in the fulfilment of their respective duties.³⁷⁶ This close co-operation is wise due to the overlapping of the functions of these two institutions. Measures concerning currency policy can affect the position of banks³⁷⁷ and directives aimed at banking supervision can affect currency policy.³⁷⁸ The *Bundesaufsichtsamt* cannot supervise effectively without the co-operation of the *Bundesbank*.³⁷⁹

There is accordingly an obligation on the two bodies to work together, to support one another and to share information with one another.³⁸⁰

This duty to inform falls primarily on the *Bundesbank* as it, with its nine *Landeszentralbanken* and over 200 branches, is in a unique position to discover relevant facts.³⁸¹ The *Bundesaufsichtsamt* reports to the *Bundesbank* mainly to assist it in performing the functions assigned to it under the *KWG*. There is accordingly no bank or office secrecy in this respect.³⁸² The supervision conducted by the *Bundesbank* takes the form of routine inspections of the reports, monthly returns and balance sheets that have to be submitted to it.³⁸³ Flowing from its general function as "bank of banks" it

with § 18 of the *Bundesbankgesetz*. Before requiring the collection of such statistics it shall consult with the Federal Supervisory Authority; § 18, sentence 5 of the *Bundesbankgesetz* shall apply.

(2) The president of the Federal Supervisory Authority, or where prevented from attending, his deputy, shall be entitled to attend proceedings of the Central Bank Council of the *Bundesbank* to the extent that subjects are discussed within his sphere of competence. He shall have no right to vote, but may propose motions."

³⁷⁶ § 7 I 2 *KWG*.

³⁷⁷ For example, an interest rate increase by the *Bundesbank* indexed by currency policy can lead to a change in the level of yield in the case of mid- and long-term credits financed congruently with notice.

³⁷⁸ An example of this is the restriction of limiting the issuing of credits (amount) by a regulation of the *Bundesaufsichtsamt* in accordance with § 10 *KWG*. See also n. 383 *infra*.

³⁷⁹ BVerfGE 14, 197, 211.

³⁸⁰ Whilst information requested from an authority on the basis of the *Verpflichtung zur Amtshilfe* (duty of officials to render assistance) in accordance with Art 35 GG, § 4 VwVfG, requires a request from the authority seeking assistance, this is not necessary in this case. The co-operation is a duty irrespective of whether any request has been received. See Eyermann, Erich / Fröhler, Ludwig / Kormann, Joachim, *Verwaltungsgerichtsordnung, Kommentar*, § 14, marg. n. 1.

³⁸¹ Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, § 7, marg. n. 4.

³⁸² Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, § 7, marg. n. 5.

supervises the inner structure of credit institutions.³⁸⁴ In this respect, the *Bundesbank* functions as a screening mechanism and brings only noteworthy matters to the attention of the *Bundesaufsichtsamt*.³⁸⁵

This co-operation is also necessary to ensure economical administration. The *Bundesaufsichtsamt* does not have its own subordinate structures. It can only achieve the required geographical proximity with the aid of the network of branches of the *Bundesbank*.

Before the *Bundesaufsichtsamt* can issue general regulations concerning banks that may affect the operational sphere of the *Bundesbank*, it must obtain the permission of the *Bundesbank*.³⁸⁶

3 Co-operation with other Agencies

The possibility of co-operation between the *Bundesaufsichtsamt* and other agencies is expressly included in the provisions of § 8 of the *KWG*.³⁸⁷ The idea underlying this provision is that the *Bundesaufsichtsamt* should legally be able to perform its comprehensive functions with a relatively small staff.³⁸⁸ The necessity of such co-operation may arise as a consequence of the fact that the *Bundesaufsichtsamt* is located far from the majority of the banks it has to supervise. This means that it cannot become involved on the location in each individual case. In addition expert assistance is also required in some instances.³⁸⁹ The *Bundesaufsichtsamt* can, however, only make use of

³⁸³ Cf. §§ 13 (large credits), 14 (credits of one million or more), 24 (obligations to report), 25 (monthly returns), 26 (financial statements).

³⁸⁴ Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, § 6, marg. n. 29.

³⁸⁵ Official explanation BT-Drs 3 / 11114 23.

³⁸⁶ Official explanation BT-Drs 3 / 11114 23. In this context, §§ 10 I 2, 11 2 *KWG* could be cited as examples.

³⁸⁷ § 8 *KWG* provides as follows:

“Cooperation with other Agencies

(1) In the performance of its functions the Federal Supervisory Authority may employ the services of other persons and institutions.
(2) ...”

³⁸⁸ Schork, Ludwig, *Gesetz über das Kreditwesen*, commentary on § 8.

such other agencies if the nature of the case does not require it to deal with the matter itself.³⁹⁰

This provision authorises, and does not oblige, the *Bundesaufsichtsamt* to make use of other agencies. However, article 35 of the *GG* obliges the recipient of a request for official assistance from the *Bundesaufsichtsamt* to comply with the request.³⁹¹ According to § 1 IV of the *VwVfG*, authorities are under obligation to assist those who perform functions of official administration. These include the *Bundesbank*,³⁹² the *Bundes* and *Landeswirtschaftsbehörden*, the Inland Revenue Office, the Chambers of Industry and Commerce, other public juristic credit institutions, the courts (both the *Bundes* and *Landesgerichtshöfe*), the other Public Supervisory Authorities specified in § 52 of the *KWG*, and auditors and auditing companies.³⁹³ Excluded under article 35 of the *GG* are *öffentlich-rechtliche Prüfungsverbände von Kreditinstitutionen* (registered associations having right to audit) as well as the private and co-operative banks.³⁹⁴

4 Participation of the Federal Government

In terms of article 80 I of the *GG* the Federal Government can be statutorily authorised to issue *Rechtsverordnungen* (ordinances). Against this background § 47 of the *KWG* authorises the Government to intervene in the event of the economy being endangered by a certain state of affairs in the banking industry.³⁹⁵ Whilst the power of intervention of the *Bundesaufsichtsamt* is concentrated on individual banks,³⁹⁶ this empowerment of

³⁸⁹ Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, § 8, marg. n. 1.

³⁹⁰ Official explanation BT-Drs. 3/1114, regarding § 7 30. This is especially true as regards administrative acts. Without express legal authorisation, such acts cannot be delegated to other authorities. (*BegrRegE KWG* 1961 for § 7). In principle the *Bundesaufsichtsamt* is duty bound to exercise its discretion itself. It cannot delegate the authority to formulate and implement banking supervisory measures to other authorities.

³⁹¹ Art 35 *GG*, § 4 *VwVfG*.

³⁹² Bähre, Inge Lore / Schneider, Manfred, *Kommentar zum Kreditwesengesetz*, § 8, marg. n. 3.

³⁹³ Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, § 8, marg. n. 1.

³⁹⁴ Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, § 8, marg. n. 12.

³⁹⁵ Art. 72, 73 No. 4 *GG*, § 47 *KWG*.

³⁹⁶ See Stern, Ekkehart, *Staatsrecht* (1988) 157, Hesse, Konrad *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, marg. n. 206, 525 et seq., 623, 739.

the Government is primarily intended to ward off general crises.³⁹⁷ Such measures essentially amount to either a moratorium concerning individual banks, or the suspension of the entire banking and stock exchange business under § 47 of the *KWG*. The powers to impose a moratorium or to suspend are limited. § 48 II of the *KWG* determines that they are for a maximum period of three months, after which they expire automatically. In terms of § 47 II of the *KWG* the Government must consult with the *Bundesbank* before introducing such measures.

5 Participation of the *Bundesfinanzminister*

The *Bundesaufsichtsamt* falls under the *Bundesfinanzminister*. He is entitled to issue instructions to it. He also has the authority to issue *Rechtsverordnungen* aimed at regulating banking in general.³⁹⁸ As permitted under the *KWG*³⁹⁹ this authority was, however, delegated by the *Bundesfinanzminister* to the *Bundesaufsichtsamt* by an *Verordnung* of 28 June 1985.⁴⁰⁰ The *Bundesbank* must be consulted before such *Rechtsverordnungen* are issued.⁴⁰¹

6 Participation of the *Bundesjustizminister*

The participation of the *Bundesjustizminister* in banking supervision is restricted to a much smaller area. He is entitled to issue *Verordnungen* containing guidelines for the structuring of the financial statement forms⁴⁰² with the permission of the *Bundesfinanzminister*.⁴⁰³

³⁹⁷ Official explanation BT-Drs. 3/1114 for §§ 46, 47, page 42 *et seq.*

³⁹⁸ §§ 1 I 3, 10 II 1 No. 3, 10a III, 24 IV, 25 IV, 29 III, 30 II 1, 31 I, 51 I 3 *KWG*.

³⁹⁹ Art. 80 I GG, § 1 I 3 *KWG*.

⁴⁰⁰ *BGBI.* I, 1255.

⁴⁰¹ § 1 I 3, III 2; § 10a III 6; § 25 IV; § 31 I *KWG*.

⁴⁰² Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar* § 26, marg. n. 3 as well as § 52a.

⁴⁰³ §§ 330 *HGB*, 25a II, 26 IV, 52a *KWG*.

7 Co-operation with Authorities from other States within the European Union

A common domestic market within a uniform European economic area was supposed to be in operation by January 1993. According to the time schedule of the Commission of the European Community, this should have been accompanied by a uniform European banking market. With the final liberalisation of the national banking markets the full freedom of service and of settlement was to become a reality in accordance with article 52, 59 of the EC-Treaty. A domestic financial market of this kind requires a minimum standard of supervisory laws.⁴⁰⁴ The plans for creating a uniform system of banking supervision with a central supervisory authority were unsuccessful.⁴⁰⁵ Subsequently several European Community guidelines aimed at harmonisation were issued. They were designed to equalise, to an extent, the different forms of banking supervision within the different individual member states. Guideline No 77/780/EWG provides for close co-operation between the banking supervisory authorities of the member states.⁴⁰⁶ It further prescribes compulsory consultations when a decision taken in one member state may prevent a branch in another member country from conducting business.⁴⁰⁷ Guideline No 83/350/EWG regulates the transfer of information between the different supervisory authorities of the member states. In Germany this led to the addition of subsection III to § 8 of the *KWG* 1984. A further noteworthy addition to the *KWG* was § 44a which regulates cross-border information and audits.⁴⁰⁸

8 Co-operation with Banking Supervisory Authorities of States that are not Members of the European Union

A further attempt of harmonising international banking supervision came into existence with the Basle Agreement of 1975 in the 1983 revision. Agreement was reached on

⁴⁰⁴ Schulte-Mattler, Hermann, *Preisrisiken im Mittelpunkt der Sechsten KWG-Novelle*, (1994) WM, 1412, and, by the same author, *Entwicklungstendenzen in der europäischen und internationalen Bankenaufsicht*, ZBB 4/94, 333 et seq.

⁴⁰⁵ Horn, Norbert, *Bankrecht auf dem Weg nach Europa*, (1989) ZBB, 107, 111.

⁴⁰⁶ A 7 I.

⁴⁰⁷ A 8 IV.

certain ground rules for the supervision of branches of foreign banks.⁴⁰⁹ This body can only make non-binding recommendations relating to co-operation between the supervisory bodies of the signatory states.⁴¹⁰ In practice, however, its decisions, like those of the Cooke Committee, go further.⁴¹¹ This is due to the fact that the countries that have become party to this agreement have regarded themselves as bound to give effect to such decisions by converting them into national law.⁴¹²

9 Participation in an *Einlagensicherungsfonds* (deposit insurance fund)

Commercial banks may form a deposit insurance fund with the main purpose of protecting depositors. In the event of a call being made on the fund, the bank concerned will, as a rule, cease to compete in the banking market. The deposit insurance covers unsecured deposits from private persons, businesses and public authorities up to 30% of the bank's liable capital per creditor. Liabilities exceeding this amount are insured up to the stated level. The fund acquires its resources from annual contributions paid by the participating banks. These contributions are calculated with reference to the bank's liabilities to its customers.⁴¹³

The public sector (communities, associations of communities, districts) is liable as guarantor for the liabilities of the public savings banks. The central savings banks or central giro institutions have also formed an insurance reserve with the *Deutschen Sparkassen und Giroverband* (German Association of Saving Banks and Giro Institutions).⁴¹⁴

⁴⁰⁸ Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, § 44a.

⁴⁰⁹ Published by the Deutsche Bundesbank in *Bundesanzeiger* of 15th June 1983, 5606.

⁴¹⁰ *Ibid.*

⁴¹¹ The recommendation of 11 July 1988 relating to the norms for the supervision of *Eigenkapitaldeckung* (equity capital cover) provides a good example.

⁴¹² Möschel, Wernhard *Bankenaufsicht und internationales Geschäft*, (1989) ZBB, 168.

⁴¹³ Szagunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar* Einleitung (Introduction), 46 et seq.

⁴¹⁴ Szagunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar* Einleitung (Introduction), 47.

The co-operative sector has also founded a reserve fund under the auspices of the *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken e.V.* (German Commercial and Agriculture Credit Co-operation e.V.).⁴¹⁵

The *Liquiditäts-Konsortialbank* (Liquidity Syndicate Bank), of which all types of banks are members, was founded 1974. The purpose of this institution is to grant liquidity in case of need to banks of impeccable credit standing in order to prevent chain reactions in the wake of bank failures.⁴¹⁶

B Republic of South Africa

1 Introduction

As is the case in Germany, the supervision of the financial sector has a complex structure in the Republic of South Africa. No branch within this sector exists in isolation from the other. Co-operation between the different institutions is accordingly essential for effective supervision.⁴¹⁷ The Registrar of Banks, however, bears the brunt of the responsibility in this regard.

2 The Registrar of Banks

Banking supervision in the Republic of South Africa is organised mainly in section 9 of the *Banks Act 94 of 1990*. This Act provides for the establishment of an office, the "Registrar of Banks"⁴¹⁸ under the auspices of the South African National Reserve Bank. The Registrar's office is responsible for the supervision of banking. Internally, banks refer to this office as the "Banking Supervision Department".⁴¹⁹ It is situated at the head

⁴¹⁵ Szagunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar* Einleitung (Introduction), 47.

⁴¹⁶ Panowitz, Rudolf/Jung, Harald, *Kreditwesengesetz - Kommentar* (1988), S. XXVI.

⁴¹⁷ See Falkena, H B, *Financial Regulations in South Africa* (1994), 62 concerning the manner in which supervision of the financial sector is structured in South Africa.

⁴¹⁸ S 3. (Hereinafter referred as to the Registrar).

office of the Reserve Bank in Pretoria. It sees its mission as providing "a regulatory and supervisory environment that will facilitate the optimisation of the quality and effectiveness of financial risk-management in the system ".⁴²⁰

The idea underlying the provisions of the *Banks Act* is that banking supervision must ensure that there is proper risk-management of the individual banks within the scope of the Act.⁴²¹ For this purpose every banking institution must submit regular returns to the Registrar's office.⁴²² However, certain other role players also make important contributions towards the realisation of the goals of the Banks Act.⁴²³ These include the Board of Directors,⁴²⁴ the Management (of the Bank),⁴²⁵ the Audit Committee of the Board of Directors, the (internal and external) Auditors,⁴²⁶ and the Public.⁴²⁷ In addition there is also some co-operation with other state institutions.⁴²⁸

Since the Registrar's office falls under the auspices of the South African Reserve Bank, banking supervision is effected by an *organ of state*. This gives this institution the

⁴¹⁹ Until 1985 the office of the *Registrar* was subordinate to the Ministry of Finance. In light of many changes effected by amendments of the Banks Act, this office was made part of the central bank again.

⁴²⁰ Jordaan, Michael, *The Regulation of Deposit-taking Financial Institutions, A comparative Analysis of the United Kingdom, Germany and South Africa*, (1997) Dissertation (PhD) Stellenbosch, 158.

⁴²¹ South African Reserve Bank *Banks Supervision Department Annual Report* (1991), 6.

⁴²² S 75.

⁴²³ South African Reserve Bank *Banks Supervision Department Annual Report* (1991), 6 *et seq.*; (1992) 7 *et seq.* and (1993) 12 *et seq.* See also Greuning, J. H.; *The Implementation of a Risk-based Approach to Bank Supervision as a Micro-Economic Component of Monetary Policy* (1993) DCom. Thesis, University of Pretoria.

⁴²⁴ S 60 together with ss 38, 39 of the Regulations to the *Banks Act*, No. 94 of 1990.

⁴²⁵ The management is the most important organ directing an enterprise of this kind. It is appointed by the Board of Directors which also determine the division of duties. Qualification and reliability of these persons are thus irreplaceable prerequisites for effective performance of these functions. See Jordaan, Michael, *The Regulation of Deposit-taking Financial Institutions, A comparative Analysis of the United Kingdom, Germany and South Africa*, Dissertation Stellenbosch, 158, especially n. 198.

⁴²⁶ See Jordaan, Michael, *The Regulation of Deposit-taking Financial Institutions, A comparative Analysis of the United Kingdom, Germany and South Africa*, Dissertation Stellenbosch, 256 *et seq.* as well as South African Reserve Bank *Banks Supervision Department Annual Report* (1996), 2.

⁴²⁷ Jordaan, Michael, *The Regulation of Deposit-taking Financial Institutions, A comparative Analysis of the United Kingdom, Germany and South Africa*, Dissertation Stellenbosch, 159, especially n. 201.

⁴²⁸ See also *infra* 80 *et seq.*

qualities of a public authority.⁴²⁹ It accordingly follows that the implementation of measures must be regarded as administrative actions, which means that they have to respect certain procedural principles.⁴³⁰

The Registrar, who manages this office, is appointed by the Governor of the South African Reserve Bank. The Registrar must be an employee of the Reserve Bank. Before he or she may resume office, however, the permission of the Minister of Finance must be obtained. The Registrar performs the supervisory functions under the control of the Reserve Bank and is accordingly bound to give effect to its instructions. In this manner, the Reserve Bank can set guidelines for supervision.⁴³¹ The Deputy Registrar is also an employee of the Reserve Bank. His appointment is also subject to the approval of the Minister of Finance.⁴³² The Deputy Registrar is empowered to take over the duties of the Registrar should this become necessary.

The office of the Registrar is subdivided into five departments. The different areas of responsibility are subdivided in such a way that one of the departments deals with the actual supervision while the other four are more concerned with issues of fundamental principles and information. Every department has a head who is directly subordinate to the Registrar.

The department "*Supervision of Individual Banks*" is responsible for the actual supervision of banks. Its functions include: the consolidated supervision of banking groups; discussions focusing on strategic issues with various levels of bank management; the assessment of risk-management and controls; the promotion of sound risk-management practices; the holding of annual trilateral discussions and giving presentations to the board of directors; the monitoring of compliance with prudential requirements; the analysis of risk-based supervisory information submitted by banks;

⁴²⁹ See *Chapter 2, 50 et seq. supra*.

⁴³⁰ See *Chapter 2, 51 supra*.

⁴³¹ S 4 (1).

⁴³² S 4 (2).

and, finally, the analysis and research of issues of concern and the discussion thereof with banks.⁴³³

The department "*Operations, Information System and Research*" has the following functions: to represent the office in outside committees on emerging issues and new developments; the review of regulations and risk-based returns and drafting of proposed amendments; correspondence with banks; handling of administrative matters in terms of the Act; and the preparation and monitoring of the departmental budget.⁴³⁴

The department "*Legal and Regulatory Administration*" is concerned with the following: the drafting of proposed amendments to the Act; the drafting of proposed circulars to banks; dealing with all litigation regarding liquidated banks and banks placed under curatorship; the handling of new applications for registration as banks and branches of foreign banks; contraventions of the Act; and, finally, mergers and acquisitions of banks.⁴³⁵

The department "*Information Systems*" collects the necessary relevant information for the Registrar. This includes the collection of statutory returns; the capturing of information on electronic databases; the preparation of data for review by analysts; the processing of data and the production of risk-based reports; the preparation of graphs to reflect trends; the maintenance of information on database; and necessary research on latest technology to ensure that technology used in the department is at the cutting edge of development.⁴³⁶

Finally, the functions of the department "*Management Information Research and Policy*" are as follows: the analytic review of aggregated information submitted by all the institutions making up the banking sector; the compilation of a macro-report on the banking sector; the updating and administration of training material and a training

⁴³³ South African Reserve Bank *Banks Supervision Department Annual Report* (1996), S.54.

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.*

database; the presentation of lectures for training purposes; research on the latest developments in the field of bank supervision; and the development of policy responses in respect of emerging issues.⁴³⁷

The functions fulfilled in terms of the *Banks Act* are undertaken in the public interest. A claim for damages against the South African Reserve Bank or any of its officials on the grounds of some action taken by the Registrar is precluded by section 88 of the *Banks Act*.

3 The South African Reserve Bank

The constitutional status of the South African Reserve Bank arises from sections 223 - 225 of the Constitution. Section 225 specifically provides that the powers and functions of the Reserve Bank must be determined by Act of Parliament. This is done in the South African Reserve Bank Act 90 of 1989. In terms of section 10 (v) of this Act, its functions also include any functions assigned to it under the Banks Act 94 of 1990.

The South African Reserve Bank is the South African central bank. It is an executive organ in the context of banking supervision since the office of the Registrar is established under its auspices. The fact that the Registrar is an employee of the bank is indicative of the close relationship between the two. This also explains why the Registrar is bound by directives of the bank. Any concern which the Reserve Bank might have regarding banking supervision can be directly addressed by means of such directives. The Central Bank can accordingly influence supervision policies directly. Its position in the supervision system is therefore very strong.

The role of the Reserve Bank within the system of supervision accordingly coincides largely with that of the Registrar himself.⁴³⁸

⁴³⁷ *Ibid.*

⁴³⁸ In the South African Reserve Bank *Banks Supervision Department Annual Report* (1996), 6, the South African Reserve Bank relates what it considers its contribution towards banking supervision to be.

4 Co-operation with the Minister of Finance

The role of the Minister of Finance in the context of banking supervision is mainly that his consent is necessary for certain actions. In the first place the very appointment of the Registrar is dependent upon the consent of the Minister. Secondly, certain measures can only be introduced subject to the permission of the Minister, for example the placing of a bank under curatorship,⁴³⁹ or the cancellation of its registration.⁴⁴⁰ In addition, the Minister has the authority to make regulations relating to fulfilment of the duties set out in the *Banks Act*.⁴⁴¹ Finally, the Registrar must also submit an annual report of the supervision undertaken during the year to the Minister.⁴⁴²

The close connection to the Ministry of Finance can be ascribed to the very nature of the banking supervision.

The financial services sector is also closely linked with government activities in the sense of the government participating in this sector as a private juristic person, in the sense that the state also sometimes needs to deposit funds. When it does so it acts as the bearer of state power but as a juristic person in the private law domain.

The Ministry of Finance is accordingly the natural home for this part of government. Due to the close relationship between the Registrar and the Minister, the Registrar needs the trust of the Minister. Clearly the policies of the Registrar must conform with the approach of the Minister of Finance.

5 Co-operation with Parliament

The report submitted by the *Registrar* to the Minister of Finance must also be passed on to Parliament within fourteen days of its submission to the Minister.⁴⁴³

⁴³⁹ S 69.

⁴⁴⁰ S 23 (1).

⁴⁴¹ S 90.

⁴⁴² S 10 (1).

6 Co-operation with other Institutions within the State

Introduction

In South Africa there are several institutions that supervise certain financial institutions or groups. Since banks only constitute part of the financial sector and some overlap of activities within this sector is unavoidable, the effective supervision of the entire financial sector can only be achieved by close co-operation between these institutions. This co-operation mainly takes the form of an exchange of information. The main objective is the achievement of a uniform standard of supervision within the financial sector.

The Registrar for Financial Institutions

In the past, the responsibility for the supervision over the financial services sector was assigned to the office of the Registrar of Financial Institutions. This Office was established as a department within the Ministry of Finance in 1956. It became evident, however, that this authority was not capable of dealing with the wide range of duties assigned to it. This was mainly because it was exceptionally difficult to find competent employees who were skilled in these areas and to tie them to the office on a long-term basis. In the *Report of the Commission of Inquiry into the Winding-up of the Short-term Insurance Business of the AA Mutual Insurance Association Ltd (1988)*⁴⁴⁴ this problem was explicitly raised. The recommendations of the Commission⁴⁴⁵ led to a restructuring.⁴⁴⁶ The result was the establishment of the Van der Horst Committee. On the basis of its final report⁴⁴⁷ the Financial Services Board was established.⁴⁴⁸

⁴⁴³ S 10 (2).

⁴⁴⁴ Par. 4.6 "...It would appear that the difficulties in the Office of the *Registrar* were, and are, caused mainly by the lack of suitably qualified permanent staff. This is apparent from the various annual reports of the *Registrar* and the evidence before the commission. This shows that apart from the shortage, there has been an almost complete change in the staff supervising short-term insurance over the past few years. ..."

⁴⁴⁵ *Report of the Commission of Inquiry into the Winding-up of the Short-term Insurance Business of the AA Mutual Insurance Association Ltd.* (1988), Par. 4.6 (e) "... A commission or working group should be appointed to consider the creation of a national council or board for financial institutions on the lines of the National Energy Council. ..."

⁴⁴⁶ Jordaan, Michael, *The Regulation of Deposit-taking Financial Institutions, A comparative Analysis of the United Kingdom, Germany and South Africa*, Dissertation Stellenbosch, 161.

The Financial Services Board

As noted above⁴⁴⁹ the Financial Services Board came into existence as a consequence of the recommendations of the Van der Horst Committee. It was founded by the *Financial Services Board Act 140 of 1990*. In terms of the Act it has the following functions: (i) to supervise the exercise of control, in terms of any law, over the activities of financial institutions and financial services; and (ii) to advise the Minister on matters concerning financial institutions and financial services both, of its own accord and upon request by the Minister.⁴⁵⁰

The Financial Services Board is, *inter alia*, responsible for the supervision of insurance companies.

The Policy Board for Financial Services and Regulation

This institution was founded on 1 July 1993. In November of the same year, it was restructured to form a legal institution when the Policy Board of Financial Services and Regulation Act 141 of 1993 came into operation. The Board does not have the authority to intervene, in the sense discussed above. However, it carries much responsibility concerning the formulation and co-ordination of the policies, which may determine further developments of the financial sector. This includes the proposal of legislation in this field. Thus, the Board actually functions as a body of experts which may advise the Minister.⁴⁵¹

⁴⁴⁷ Van der Horst Verslag (1989) *Verslag van die Komitee oor hul ondersoek na 'n Nasionale Raad vir Toesighouding oor Finansiële Instellings*, Johannesburg, September, 8 et seq.

⁴⁴⁸ See next point *infra*.

⁴⁴⁹ Page before *supra*.

⁴⁵⁰ Jordaan, Michael, *The Regulation of Deposit-taking Financial Institutions, A comparative Analysis of the United Kingdom, Germany and South Africa*, Dissertation Stellenbosch, 162.

⁴⁵¹ Concerning the understanding this institution has of itself, see De Swardt, *Addressing the Problems of Regulation, Supervision and Restructuring of Regulatory Institutions and Guarding against Systemic Risk*; Presentation at the 1994 Banking Industry Conference, Sandton, 2-3, February 1994.

Co-operation within the Context of the Companies Act

A bank being by definition a public company,⁴⁵² there is of necessity an overlap between the provisions of the Banks Act and the Companies Act. This calls for some co-operation. A good example is within the field of compromises, amalgamations, arrangements and affected transactions. Such transactions are often subject to clearances, decisions and rulings by the *Securities Regulations Panel* established under section 440 of the Companies Act, 61 of 1973. In terms of section 54 of the Banks Act, the ruling of the *Securities Regulation Panel* can only be made once the Minister's consent has been obtained.⁴⁵³

Supporting Commissions

The commissions that have most recently assisted in banking supervision are the Masterbond-Nel Commission, the Jacobs Committee and the Melamet Committee. These commissions all more or less served as consultants. They were brought into being as a consequence of the bankruptcy of large financial institutions or in order to maintain competition. Parts of their final reports have had much influence on new legislation.⁴⁵⁴

7 Co-operation on an International Level

The Republic of South Africa has also committed itself to co-operating with the new 1983 version of the Basle Agreement of 1975. In certain instances, the South African legal system explicitly refers to it.⁴⁵⁵ The principles, which were developed within the framework of the Basle and the Cooke Committees, have already partly been incorporated into national legislation.⁴⁵⁶

⁴⁵² S 1 of the Banks Act.

⁴⁵³ Such as ss 11, 51 *et seq.*

⁴⁵⁴ See Jordaan, Michael, *The Regulation of Deposit-taking Financial Institutions, A comparative Analysis of the United Kingdom, Germany and South Africa*, Dissertation Stellenbosch, S. 161 *et seq.*

⁴⁵⁵ See s 34 (2B) (b) (ii), for example.

⁴⁵⁶ See the provisions of Chapter 6 of the Banks Act.

8 Participation in a Deposit Insurance Fund

There is no deposit insurance fund akin to that in Germany in the South African banking industry. There is no statutory foundation for such a fund. Thus, deposits are not secured against complete loss in the event of a bank failure.

C Summary and Comparison

In the Federal Republic of Germany, only the *Bundesaufsichtsamt* has the authority to implement measures relating to banking supervision. As an independent *Bundesoberbehörde* it forms part of the *unmittelbare Sttaatsverwaltung* (direct state administration). On the other hand it is subordinate to the *Bundesfinanzminister* and thus bound by his instructions. It co-operates most closely with the German *Bundesbank* which, in essence, provides the intermediary structure required by the *Bundesaufsichtsamt* to fulfil its functions. Through its extensive network of *Landeszentralbanken*, the *Bundesbank* also assists with the gathering of information. This is an important contribution.⁴⁵⁷

In the Republic of South Africa, a different structure was chosen to perform this function. The task of supervising banks is undertaken by the South African Reserve Bank (the central bank). The Registrar's office, which forms part of the Reserve Bank, is primarily responsible for the supervision of banks in South Africa.⁴⁵⁸ The link between the Reserve Bank and the Registrar is indicative of a relationship of dependence. Because of his affiliation to the Reserve Bank, the Registrar is subordinate to it and bound to observe its instructions.⁴⁵⁹ The Reserve Bank can thus have a decisive influence on banking supervision.

⁴⁵⁷ See *supra* 65 *et seq.* and 69 *et seq.*

⁴⁵⁸ See *supra* 76 *et seq.*

⁴⁵⁹ See *supra* 80.

In South Africa it is mainly the Registrar who has the authority to implement measures relating to banking supervision. In some instances, however, he needs the permission of the Minister of Finance.⁴⁶⁰ Certain measures relating to banking supervision can only be implemented by the Minister himself, and not by the Registrar.⁴⁶¹ This is indicative of the close co-operation between the Minister of Finance and the Registrar.

It would accordingly appear that the Registrar is more closely bound to the Ministry of Finance in South Africa than the *Bundesaufsichtsamt* is in Germany. In practice, however, it is difficult to imagine banking supervision to deviate from the instructions of the respective Ministries in either of the countries. Clearly, in both countries, the Ministry of Finance can have considerable influence on banking supervision by passing the subordinate legislation (regulations in South Africa and *Verordnungen* in Germany) he sees fit, or simply by political pressure.

An important similarity in the organisational structure of banking supervision of the two countries is that responsible authorities co-operate in international bodies working towards international unification of banking. Germany's position differs slightly from that of South Africa in this respect, since it, as a member of the European Union, also needs to be involved in the process of harmonisation within the Union. This process has progressed very rapidly. One of the consequences has been that credit institutions are now free to establish branches in the entire area of the European Union, provided that their head office is situated in one of the members of the European Union.

In both countries, the problem of securing deposits is regulated on a voluntary basis. Unlike the Federal Republic of Germany, the Republic of South Africa does not have general deposit insurance.⁴⁶² In Germany, however, this problem is solved in part by

⁴⁶⁰ S 23 Cancellation or suspension of Registration by *Registrar*.

⁴⁶¹ S 69 Appointment of curator to bank.

⁴⁶² This problem is the subject of much discussion. Attempts to establish such an insurance failed due to the fact that it was opposed by large banking institutions on the basis that it would be too costly. See Jordaan, Michael, *The Regulation of Deposit-taking Financial Institutions, A comparative Analysis of the United Kingdom, Germany and South Africa*, Dissertation Stellenbosch, 273 *et seq.*

indirect pressure exerted towards the desired state, which is participation in a securing fund of this nature.⁴⁶³

In conclusion, it can be said that the manner in which banking supervision is structured in Germany as well as in South Africa, is complex. The co-operation with other state departments and supporting commissions is, broadly speaking, similar in the two countries. The aim is to cover the financial sector to the extent necessary to ensure optimal supervision. The financial sector is extremely innovative. As a consequence a growing number of mixed institutions offer a wide spectrum of financial services. This places high demands on structures involved in supervision. Close co-operation between those responsible for supervising banks and those responsible for supervising insurers is also highly desirable, since these branches of the financial sector overlap considerably.⁴⁶⁴

⁴⁶³ See below *Chapter 5*, 124.

⁴⁶⁴ Here, reference can be made to the ABSA-Group in the Republic of South Africa. In Germany the *Deutsche Bank AG* as well as the *Allianz-Versicherungs AG* have many daughter companies which offer a comprehensive range of financial services that are nonetheless closely incorporated into the structure of the concerns.

Chapter 4

The Scope of Banking Supervision

A Federal Republic of Germany

1 The Term *Kreditinstitut* (Credit Institution)

The *Bundesaufsichtsamt* (Federal Supervisory Authority) supervises *Kreditinstitute* (credit institutions) in accordance with the provisions of the *Kreditwesengesetz (KWG)*.⁴⁶⁵

The term *Kreditinstitut* is defined in § 1 I KWG in terms of which it is an enterprise engaged in banking transactions provided that the volume of such transactions requires a commercially organised business operation. The term was incorporated into German legislation by the *Verordnung über eine Gründungssperre für Kreditinstitute vom 4. September 1934*⁴⁶⁶ and was adopted by the KWG of 1934, 1939 and 1961 as well as by other statutes.⁴⁶⁷ The term has often been considered in case law.⁴⁶⁸ Whilst the term is defined in general terms in § 1, § 2 specifies certain institutions that are *Kreditinstitute* for the purposes of the KWG.

The term is defined in the first instance to include only banking establishments of a specific size.⁴⁶⁹ Subject to certain exceptions a specific legal form is not required.⁴⁷⁰ It is

⁴⁶⁵ See § 6 I KWG.

⁴⁶⁶ See n. 57.

⁴⁶⁷ Sazgunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, on § 1, marg. n. 1.

⁴⁶⁸ OVG Berlin vom 3. August 1988 (OGV 1 B 4/87), vom 24. Februar 1986 (OGV 1 S 1/86), vom 11. November 1983 (OGV 1 S 16/83), vom 13. Juli 1983 (OGV 1 S 27/83); VG Berlin vom 18. November 1986 (VG 14 A 98/86), vom 23. Dezember 1985 (VG 14 A 376/85), vom 6. Dezember 1985 (VG 14 A 315/85), vom 8. Juni 1984 (VG 14 A 318/84), vom 13. April 1983 (VG 14 A 77/83), vom 3. März 1983 (VG 14 A 38/83) and many others.

⁴⁶⁹ It is not decisive whether the requirements of § 4 HGB have been met. With reference to BVerwG, GewA 1981, 70 = Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar* on § 1, marg. n. 8, the *Bundesaufsichtsamt* considers the following to be the minimum requirements for a commercially organised business operation:

- a deposit volume of DM 25,000; this amount may be exceeded if the total volume consists of less than 6 individual deposits or a portfolio of 25 individual deposits;

also irrelevant whether a license was issued by the *Bundesaufsichtsamt* in terms of § 32 *KWG*, or has been withdrawn in accordance with § 35 *KWG*.⁴⁷¹ The existence of such business activities is in itself sufficient to subject the enterprise to supervision by the *Bundesaufsichtsamt*. The *Unternehmens-Begriff* (enterprise) is not defined.⁴⁷²

Since far-reaching consequences are linked to the properties which render an enterprise a *Kreditinstitut*, the term is clearly defined. The types of business to be regarded as banking business within the meaning of the *KWG* are enumerated in § 1 (1) sentence 2 No. 1 to 9. The transacting of just one of these types of business is sufficient to render the enterprise a bank⁴⁷³ provided the limit specified in 2 is exceeded.

In terms of this provision only *Kreditinstitute* conduct banking transactions. It does not matter whether a *in kaufmännischer Weise eingerichteter Geschäftsbetrieb*

- a total lending volume of DM 1 million; this amount may be exceeded if the total lending volume consists of less than 21 individual loans, or a portfolio of 100 outstanding loans;
- a total volume of DM 1 million in discounted and still outstanding bills or cheques; this amount may be exceeded if the total volume consists of less than 21 discounted and still outstanding bills or cheques, or a portfolio of 100 discounted and still outstanding bills or cheques;
- The volume of the securities business depends on the individual case. There are no generally valid limits, but it is taken on a case-by-case basis;
- the administration of 5 safe-custody accounts or the administration of 25 separate securities;
- a total liability volume of DM 1 million; this amount may be exceeded if the total volume of all guarantees assumed consists of less than 21 separate guarantees, or a portfolio of 100 guarantees assumed.

The above limits are reduced if several types of banking business are transacted alongside each other. Enterprises whose banking activities remain below the above-mentioned limits are not subject to the provisions of the *KWG*. In the case of doubt, the *Bundesaufsichtsamt für das Kreditwesen* decides whether an enterprise is subject to the provision of the act. In § 4 *KWG* it is provided that this decision is binding on all administrative authorities. The transaction of banking business without the necessary licence is punishable with imprisonment of up to three years or with a fine (§ 54 *KWG*).

(Sazgunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, on § 1, marg. n. 8.)

⁴⁷⁰ Amtl. Begründung, BT-Drs. 3/1114 27. With the second *KWG*-reform in 1976 (*BGBI.* I, 725) § 2a *KWG* was added. In accordance with this provision credit institutions may no longer conduct business in the form of a sole proprietorship. See also § 2 I *HypBG* and § 2 I *SchiffsBG*: For some special institutions such as mortgage banks and *Schiffspfandbriefbanken* (specialized banks in financing ships) which may only be conducted as *Aktiengesellschaften* (public limited companies) or as *Kommanditgesellschaften auf Aktien* (company limited by shares, but having one or more general partners), special duties concerning legal form are valid. See also Schork, Ludwig *Gesetz über das Kreditwesen - Kommentar*, on § 1.

⁴⁷¹ Sazgunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, n § 1, marg. n. 6.

⁴⁷² This is ascribed to great practical difficulties (*große praktische Schwierigkeiten*). See *BegrRegE* on § 15 *AktG*.

⁴⁷³ This is the case even if the enterprise also conducts many other types of transactions.

(commercially organised business operation) actually exists. What is important is whether, judging by commercial criteria and business management principles, a full commercial organisation (especially accounts, central filing system, personnel) is necessary. There is no general answer to the question of what volume of banking business requires a commercially organised business operation; the individual circumstances in each case must always be taken into account.

In the event of an enterprise conducting banking transactions as well as other commercial transactions, the provisions of the *KWG* usually only apply to the banking transactions. However, certain provisions, such as that directors of the enterprise must be qualified as required by the *KWG*, apply to the whole enterprise.

The banking transactions specifically listed in § 1 I s 2 *KWG* are:

*(i) The Receipt of Monies as Deposits, Irrespective of whether Interest is Paid (Deposit Business).*⁴⁷⁴

Although roughly⁴⁷⁵ defined in the *Zinsverordnung vom 5. Februar 1965*⁴⁷⁶, the term "*Einlagen*" (deposit) is not defined in the *KWG*. In practice the *Bundesaufsichtsamt* essentially regards deposit business as being the acceptance of money from persons other than credit institutes, as a loan for consumption or something similar, without a written contract or the usual bank securities,⁴⁷⁷ and that can be reclaimed any time after maturity by the depositor.⁴⁷⁸

⁴⁷⁴ See also n. 227.

⁴⁷⁵ Sazgunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, on § 1, marg. n. 17.

⁴⁷⁶ *BGBI.* I, 33 (Regulations concerning interest): "Einlagen sind fremde Gelder, die Kreditinstitute von Nichtkreditinstituten entgegennehmen, mit Ausnahme von Geldern, die zur Weiterleitung als durchlaufende Kredite angenommen werden, zur Durchführung öffentlicher Kreditprogramme zweckgebunden angenommen werden und als Kredit angenommen werden, sofern für den Einzelfall ein schriftlicher Kreditvertrag geschlossen und der Kredit banküblich gesichert wird."

⁴⁷⁷ Securities that are individually required for creditors and that would provide satisfaction directly without the co-operation of third parties (*BAK I 5 173-70/82 vom 23. December 1985*).

⁴⁷⁸ OVG Berlin 12, 217, 219.

So viewed, money owed to the credit institute by another credit institute, as well as other rights such as to claim compensation for damages, or payment of a purchase price, are not regarded as deposits. Deposits by partners also do not qualify as deposits.⁴⁷⁹

(ii) The Granting of Money Loans and Acceptance Credits (Credit Business)⁴⁸⁰

Lending comprises the granting of money loans or acceptance credits, regardless of the type or form of the loan. Even if a bank grants a loan in its own name for the account of a third party (a conduit loan), this must still be regarded as lending business within the meaning of this provision. It is also immaterial whether the loans are granted from a bank's own funds or from outside funds.⁴⁸¹ Not included under the concept of lending business is loan intermediation on an agency basis in so far as the agent concludes loan agreements exclusively on behalf of his principal, but not in his own name.⁴⁸²

In the case of an acceptance credit, the bank undertakes to accept a bill of exchange drawn by the customer on the bank on the basis of a contract of mandate. The bank is obliged to honour the bill at maturity. In his relations with the bank, however, the drawer of the bill must ensure that cover is available.⁴⁸³ The client can acquire funds by discounting the accepted bill of exchange.⁴⁸⁴

⁴⁷⁹ See, *inter alia*, OVG Berlin vom 10. Februar 1988 (OGV 1 81/87) and VG Berlin vom 21. August 1987 (VG 14 A 214/87); vom 23. Juli 1987 (VG 14 A 16/87); vom 23. Dezember 1985 (VG 14 A 376/85); vom 6. Dezember 1985 (VG 14 A 315/85).

⁴⁸⁰ See also n. 227.

⁴⁸¹ Reischauer-Kleinhans, KWG-Kommentar, § 1, marg. n. 21.

⁴⁸² Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 1, marg. n. 36.

⁴⁸³ *Ibid.*

⁴⁸⁴ Concerning this section, see OVG Berlin vom 12. Juni 1970 (OGV V B 48/69); vom 13. Mai 1965 (OGV VI B 36/63) and VG Berlin vom 8. Juni 1984 (VG 14 A 318/84).

(iii) The Purchase of Bills and Cheques (Discount Business)⁴⁸⁵

Discount business is very similar to credit business. It takes place when bills and cheques are purchased at a discount prior to maturity.⁴⁸⁶

(iv) The Purchase and Sale of Securities for the Account of Others (Securities Business)⁴⁸⁷

A security is a certificate in which a personal right vests in such a way that the possession of the certificate is necessary in order to exercise the right.⁴⁸⁸ They include shares,⁴⁸⁹ mining shares,⁴⁹⁰ provisional certificates,⁴⁹¹ interest, dividend and renewal certificates; bonds and other securities such as investment certificates, and property certificates irrespective of whether or not the issuer is located abroad.

Fixed-date transactions with such securities as well as commission transactions in the sense of §§ 383, 406 HGB are also covered by this section.⁴⁹²

(v) The Custody and Administration of Securities for the Account of Others (Safe-custody Business)

The safe-custody business comprises the safe-custody and administration of securities for the account of others. The legal relation between the depositor of the securities and the custodian bank are governed by the *Depotgesetz* (Act Concerning the Safe-Custody

⁴⁸⁵ See also n. 227.

⁴⁸⁶ Sazgunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, on § 1, marg. n. 39. In addition, see *OVG Berlin* of 12. Oktober 1972 (VG III A 74/72).

⁴⁸⁷ See also n. 227.

⁴⁸⁸ Heinsius, Theodor / Horn, Norbert / Than, Peter, *Kommentar zum Depotgesetz*, on § 1, marg. n. 3.

⁴⁸⁹ §§ 1 *et seq.* AktG.

⁴⁹⁰ § 1 I PrABG.

⁴⁹¹ §§ 8, 10 AktG.

⁴⁹² Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 1, marg. n. 40 *et seq.* See also *OVG Berlin vom 8. Oktober 1979 (OVG I S 258/79); VG Berlin vom 11. Januar 1988 (VG 14 A 384/87), vom 5. Mai 1980 (VG 14 A 83/79)*.

and and Procurement of Securities) of 1937. The custody of securities in the form of a sealed deposit and the leasing of safes are not regarded as safe-custody business.⁴⁹³

*(vi) Investment Fund Business;*⁴⁹⁴

The investment fund business may only be transacted by capital investment companies. They are defined in § 1 of the *Gesetz über Kapitalanlagegesellschaften*, 1970 (Capital Investment Companies Act). They are enterprises whose business activity consists of investing moneys deposited with them in their own names for the joint account of depositors in accordance with the principle of risk diversification in securities, real estate or long-term building leases deriving from such investments. It must be the sole object of business. They are not allowed to mix the activities with other banking activities as designated in the *KWG*.⁴⁹⁵

*(vii) Revolvingkreditgeschäft (Revolving Credit Business);*⁴⁹⁶

This activity is actually also a credit transaction since it provides the client with the possibility of intermediate financing of obligations that are not yet mature.⁴⁹⁷

*(viii) The Assumption of Guarantees, Warranties or Suretyship for the Account of Others (Guarantee Business)*⁴⁹⁸

Guarantees are not regulated in the *KWG*. This aspect of banking business takes the form of the bank, after it has been paid a guarantee commission, issuing a guarantee in

⁴⁹³ Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 1, marg. n. 40 et seq and 50.

⁴⁹⁴ See also n. 227.

⁴⁹⁵ Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 1, marg. n. 57, 58.

⁴⁹⁶ See also n. 227.

⁴⁹⁷ Szagunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 1, marg. n. 60.

⁴⁹⁸ See also n. 227.

favour of another for its customer.⁴⁹⁹ Guarantees are regulated by §§ 765ff *BGB*, 349f *HGB*.⁵⁰⁰

*(ix) The Effecting of Transfers and Clearings (Giro Business)*⁵⁰¹

In the first instance, giro business is understood as the cashless transfer of payment (giro transfer). It exists in the form of transfers, cheque entries, debit entry transfers and other forms of the collections business. Legally this concerns - besides the actual banking contract - the contract of business procurement as set out in § 675 *BGB*.

In addition, due to the innovation encountered in the financial sector, the *Bundesfinanzminister* has the authority under § 1 s I s 3 *KWG* to classify other transactions⁵⁰² as banking transactions by *Verordnung* (regulation) if this is the generally accepted view. In so doing the Minister must give due consideration to the purposes of supervision.

2 Credit Institutions Located Abroad

2 1 Introduction

The scope of application of the *KWG* is restricted to the territory of the Federal Republic of Germany. Nonetheless, in terms of § 53 foreign credit institutions settled in Germany are subject to the *KWG*.⁵⁰³

⁴⁹⁹ Canaris, Claus Wilhelm, *Bankvertragsrecht* (1981) marg. n. 1102 *et seq.*

⁵⁰⁰ See also *OVG Berlin vom 19. Oktober 1966 (OVG V B 19/66), vom 28. Oktober 1965 (OVG VI B 43/64; VGB Berlin vom 13. Oktober 1983 (VG 14 A 299/83), vom 13. August 1970 (VG III A 284/69), vom 12. September 1968 (VG III A 130/68), vom 16. Dezember 1965 (VG III A 77/65); BVerwG vom 27. Februar 1967 (BVerwG I B 12/67).*

⁵⁰¹ See also n. 227.

⁵⁰² Such as factoring and leasing business.

⁵⁰³ Diehl, Wolfram *Zweigniederlassungen ausländischer Banken* 1978, 15 *et seq.*

A distinction should, however, be made between *rechtlich selbständigen Tochtergesellschaften* (legally independent subsidiaries), *rechtlich unselbständigen Tochtergesellschaften* (legally dependent subsidiaries) and representative offices.

2 2 Legally Independent Subsidiaries

Legally independent subsidiaries are not subject to any specific regulations. However, if they meet the requirements of § 1 *KWG*, they are fully subject to supervision by the *Bundesaufsichtsamt* and, in particular, are obliged to acquire a license as set out in § 32 *KWG*.⁵⁰⁴ They are, therefore, not treated differently from domestic German credit institutions.

2 3 The Legally Dependent Subsidiaries (Branch Settlements)

Since the directors and organs of the main establishment are located in a different country, any coercive measures or fines imposed in terms of the *KWG* would be difficult to enforce. Therefore, in accordance with § 53 II no 1 *KWG*, the enterprise must appoint at least two natural persons residing within the area in which the *KWG* applies who are empowered to manage and represent the business. They must be registered in the commercial register. Such persons are deemed to be directors for the purposes of the *KWG* and are accordingly bound by all regulations concerning directors in general.⁵⁰⁵ Two such directors must be employed so that the four-eyes principle, which is inherent to the *KWG*, can be realised.⁵⁰⁶

In terms of § 53 II no. 2 the institution must keep separate books and prepare separate financial statements covering its transactions and the assets utilised. The regulations of the *Bankbilanzrichtliniengesetz* (*BaBiRiG*) and the *Handelsgesetzbuch* (*HGB*) pertaining to accounting are applicable. These regulations also make clear that the books must be kept and safeguarded within the territory of the Federal Republic of

⁵⁰⁴ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 53, marg. n. 1 *et seq.*

⁵⁰⁵ § 53 II NR. 1 S. 2 *KWG*.

⁵⁰⁶ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 53, marg. n. 10.

Germany.⁵⁰⁷ An overview of assets must be compiled at the end of every business year in accordance with § 242 I *HGB*.⁵⁰⁸

As a rule, the German branch of a foreign credit institution is, for balance-sheet purposes, managed as a booking post from the main location. The branch does not therefore have any equity capital as contemplated in the *KWG*. § 53 II no. 4 *KWG* is thus aimed at ensuring that there is a minimum degree of security. The paragraph requires branches to be left with sufficient assets to cover liabilities. Working capital and profits that were made are included. These must remain within Germany.

In terms of § 53 II no 5 of the *KWG* legally dependent branches of a foreign *Kreditinstitut* whose main office is outside the European Union⁵⁰⁹ need permission⁵¹⁰ to conduct business.⁵¹¹ The *KWG* treats such branches and domestic *Kreditinstitute* in the same way. Both require a license in accordance with § 32 *KWG*. The grounds for refusal of the license set out in § 33 I *KWG* are also equally applicable. It must further be noted that the license can also be refused in the absence of reciprocity, that is if branches of German banks are not allowed to trade in the country concerned.⁵¹²

⁵⁰⁷ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 53, marg. n. 14 *et seq.*

⁵⁰⁸ § 53 II Nr. 3 *KWG*. For further details see Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 53, marg. n. 18 *et seq.*

⁵⁰⁹ The *Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft vom 25. März 1957 (BGBl. II 766)* (Treaty to found the European Community) makes provision for the gradual abolition of the restrictions on the establishment of banks between member states. Therefore, according to the first banking law co-ordinating guideline of the EC (Guideline 77/780/EWG), a license must be granted before the first branch may commence with business activities. Notice must be given to the *Bundesaufsichtsamt* of the opening of each further branch (§ 24 I Nr. 7 *KWG*). Art. 6 I 1 of the second banking law co-ordinating guideline (guideline 89/646/EWG) allows for this requirement to be cancelled as well.

⁵¹⁰ In terms of § 24 I Nr. 7 *KWG* the establishment of a branch of a German *Kreditinstitut* outside Germany needs only to be notified to the *Bundesaufsichtsamt*. See Schork, Ludwig, *Gesetz über das Kreditwesen*, commentary on § 24.

⁵¹¹ C.f. § 1 IV - IX *KWG*.

⁵¹² § 53 II Nr. 5 S. 2 *KWG*.

Another important provision regarding branches of foreign banks is § 53 IV *KWG* which provides that the jurisdiction⁵¹³ of the German courts cannot be excluded by agreement.

2 4 Repräsentanzen (Representative Offices)

In accordance with § 53a *KWG*, notice must be given of the opening, transfer or closing of a representative office. No banking transactions are conducted from representative offices. They serve the general purposes of advertising and maintaining links. The notice requirement ensures that the *Bundesaufsichtsamt* as well as the German *Bundesbank* are kept informed of all the representative offices operating in Germany. This facilitates their task of investigating whether such offices remain within the scope of activities suited to their status.⁵¹⁴

3 Institutions that are not Subject to Supervision in terms of the *KWG*

Certain institutions that conduct banking transactions in the sense of § 1 I *KWG*, are fully or partially exempted from the provisions of the Act and are not subject to supervision by the *Bundesaufsichtsamt* in the full sense. These exceptions which are necessary for practical reasons⁵¹⁵ are set out in § 2 *KWG*. They are:

(i) The Bundesbank

The German *Bundesbank* is itself a supervisory organ within the framework of the *KWG*. In terms of § 7 *KWG* it performs its duties in close co-operation with the *Bundesaufsichtsamt*. The supervision, under the *KWG*, of an institution which itself has the duty to supervise under the *KWG* would clearly not make sense. The *Bundesbank* is therefore in no way subject to the *KWG*. It is, however, the only institution fully exempted from the provisions of the *KWG*.⁵¹⁶

⁵¹³ See § 21 of the *Zivilprozeßordnung* (civil procedure legislation).

⁵¹⁴ See *VG Berlin vom 22. Januar 1979 (VG 14 A 4/78); Sazgunn, Volkhard / Wohlschieß, Karl, Gesetz über das Kreditwesen - Kommentar*, on § 53a, marg. n. 1 *et seq.*

⁵¹⁵ BT-Drs. 3/1114 27f.

(ii) The Kreditanstalt für Wiederaufbau (Reconstruction Loan Corporation)

The *Kreditanstalt für Wiederaufbau* was founded by legislation introduced on 5 November 1948.⁵¹⁷ The current legislation dates back to 29 June 1969.⁵¹⁸ This Corporation was exempted from supervision by the *Bundesaufsichtsamt* on the basis that its business activities were narrowly defined in the legislation and that it worked closely together with state offices.⁵¹⁹ However, in accordance with § 2 II KWG read with § 14 KWG it must report credits of one million DM or more. It is also subject to the regulations concerning the handling of a crisis provided for by §§ 47 I no 2 and 48 KWG.

(iii) The Sozialversicherungsträger und the Bundesanstalt für Arbeit (Social Security Institutions and the Federal Labour Office)

The social security institutions are the health insurance companies, trade co-operatives, insurance companies, the Federal Insurance Company for Employees and the Federal Miners' Association. These bodies, as well as the Federal Labour Office, conduct credit business by investing their assets.⁵²⁰ They are exempted from normal banking supervision due to the fact that they are subject to specialised state supervision.⁵²¹ In terms of § 2 II KWG they are, however, obliged to report credits one million DM or more as stipulated in § 14 KWG.

⁵¹⁶ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 2, marg. n. 2.

⁵¹⁷ *WiGBL*. 123.

⁵¹⁸ *BGBI*. I 573.

⁵¹⁹ *Begr. RegE KWG* 1961 on § 2 IV.

⁵²⁰ E.g. by means of the investment of promissory note loans.

⁵²¹ Bähre, Inge Lore / Schneider, Manfred, *KWG - Kommentar*, on § 2, marg. n. 5, Beck, Heinz, *Gesetz über das Kreditwesen*, commentary on § 2, marg. n. 62.

(iv) Versicherungsunternehmen (Private and Public-law Insurers)

In terms of § 1 of the *Gesetz über die Beaufsichtigung von Versicherungsunternehmen (VAG)*⁵²² *Versicherungsunternehmen* are enterprises which conduct insurance business and are not *Sozialversicherungsträger* (social securities authorities). Insurers are subject to supervision in terms of the *VAG*. The supervising authority is the *Bundesaufsichtsamt für das Versicherungswesen* (Federal Insurance Supervisory Authority). There is accordingly no need for supervision under the *KWG*.

(v) Pfandleihbetriebe (Pawnbrokers)

A pawnbroker is an enterprises that issues a professional loan against a pledge of movable things (*pignus*). In accordance with § 2 III *KWG* pawnbrokers are only subject to supervision to the extent that they conduct banking transactions that do not form part of their normal business (*nicht eigentümliche Bankgeschäfte*).

(vi) Unternehmensbeteiligungsgesellschaften (Investment-fund Companies)

In terms of the *Gesetz über Unternehmensbeteiligungsgesellschaften* (Statute on Business Participation Companies)⁵²³ such a company has the exclusive aim of acquiring, administering and selling shares or participations (*Beteiligungen*) as silent partner of an enterprise situated within the country and whose shares, at the time of acquisition, were neither admitted nor listed at a local stock exchange, nor traded with at a foreign stock exchange.⁵²⁴

In accordance with § 2 III *KWG* *Unternehmensbeteiligungsgesellschaften* are only subject to supervision to the extent that they conduct banking transactions that do not form part of their normal business (*nicht eigentümliche Bankgeschäfte*).

⁵²² Translation: Act on the Supervision of Insurance Companies.

⁵²³ § 2 II *Gesetz über Unternehmensbeteiligungsgesellschaften*, of December 17, 1986 (*BGBI. I* 2488).

⁵²⁴ *Ibid.*

(vii) The Deutsche Bundespost

The German *Bundespost* (Postal Service) was also formerly exempted under § 2 *KWG*. However, the *Bundespost* has recently established the *Postbank AG* and is now treated on a par with other credit institutions. The reference to the *Bundespost* was accordingly struck from this paragraph.

As evident from (v) and (vi) above it may be crucial in certain cases to determine whether certain conduct amounts to *nicht eigentümliche Bankgeschäfte* (banking transactions that do not form part of normal business). This concept is, however, not defined in the legislation. In this regard the specific type of enterprise (under § 2 I no 5-9 *KWG*) is referred to in each case.

In case of doubt, the Bundesaufsichtsamt has the competence, in accordance with § 4 *KWG*, to decide whether an enterprise is subject to the *KWG*.

Since the concept of bank is very broadly defined in § 1 (1), enterprises which, owing to the nature of their business, do not require supervision may nevertheless fall under the *KWG*. These include, for example, purchasing associations or purchasing companies that engage in guarantee and lending business within the framework of a centralised settlement system, or automobile associations that engage in guarantee and lending business by issuing letters of credit. § 2 (4) *KWG*, therefore, stipulates that in individual cases the *Bundesaufsichtsamt für das Kreditwesen* will exempt such enterprises from provisions imposing special requirements on banks (for example capital adequacy and liquidity provisions, lending business and submission of monthly returns).⁵²⁵

The *Bundesaufsichtsamt* can exempt all banks or certain specified banks from specific provisions. In terms of § 31 *KWG* a statutory order of the *Bundesfinanzminister* is required. The order can only be issued after consultation with the *Bundesbank*.⁵²⁶ The

⁵²⁵ Szagunn, Volkhard / Wohlschließ, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 2, marg. n. 29.

⁵²⁶ Szagunn, Volkhard / Wohlschließ, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 31, marg. n.

Bundesfinanzminister can, however, delegate this power to the *Bundesaufsichtsamt*, which he did in 1985.⁵²⁷

In terms of § 31 II *KWG* the *Bundesaufsichtsamt* may also exempt individual parent banks (within the meaning of § 10a (2) and 13a (2) *KWG*) by administrative act from certain obligations contained in the legislation concerned.⁵²⁸

Whilst the exemptions under § 2 IV and 31 *KWG* are not subject to time limits (*zeitlich unbefristet*) exemptions under § 12 III are temporary (*vorübergehend*).⁵²⁹ § 12 *KWG* limits the illiquid assets of a bank. The basic idea is that assets serving the business operations of a bank on permanent basis should not be financed by funds from outside sources. On application, the *Bundesaufsichtsamt* can allow temporary exceptions from these provisions.

4 Prohibited Business

In the interests of general order in the banking industry § 3 *KWG* prohibits business of such a nature that deposits or the currency are exposed to particular risk. Thus the operation of employee savings banks (§ 3 No. 1) and specific-purpose saving banks (§ 3 No. 2) are prohibited. Furthermore the transaction of lending or deposit business is prohibited if, as a consequence of agreement or business usage, withdrawal of the loan amount or the deposit in cash is excluded or seriously impeded (§ 3 No. 3).

In terms of § 37 s 1 *KWG* the *Bundesaufsichtsamt* can immediately act against any prohibited business. It can also implement coercive measures in accordance with the *Verwaltungsvollstreckungsgesetz* (the administrative enforcement legislation) to ensure the general order of the credit industry.⁵³⁰

1-18.

⁵²⁷ Ordinance of 28 June 1985 *BGBI*. I 1255.

⁵²⁸ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 31, marg. n. 19 *et seq.*

⁵²⁹ Beck, Heinz, *Gesetz über das Kreditwesen*, commentary on § 31 marg. n. 6; Bähre, Inge Lore / Schneider, Manfred, *KWG - Kommentar*, on § 31, marg. n. 1, marg. n. 6 especially.

In accordance with § 44 II, enterprises that are not *Kreditinstitute* are also subject to these provisions. In other words, not only banks are prohibited from conducting the business prohibited in the *KWG*.⁵³¹

However, the fact that particular business might be prohibited business in terms of the *KWG* does not mean that it is ineffective from a civil-law point of view.⁵³²

5 Persons Subject to Supervision

Besides the institutions discussed above, certain natural persons are also subject to the *KWG*'s regulations. A director must, for example, meet certain requirements concerning professional qualifications and reliability. Directors are often held personally responsible for the *Kreditinstitut*'s compliance with the provisions of the *KWG* in its business operations.⁵³³

B Republic of South Africa

1 Definition of terms

1 1 Introduction

The scope of banking supervision is disclosed in the preamble of the *Banks Act, No. 94 of 1990* which reads that it is an Act to "provide for the regulation and supervision of the business of public companies taking deposits from the public; and to provide for matters connected therewith".

⁵³⁰ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 37, marg. n. 1 *et seq.*

⁵³¹ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 44, marg. n. 36 *et seq.*

⁵³² Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 3, marg. n. 8.

Two points should be noted from this preamble. First, it refers to *public companies taking deposits from the public*. Secondly it refers to this being the *business* of such companies.

Since coming into effect the *Banks Act* has been amended several times.⁵³⁴ The original version has been substantially altered in the process. In particular the amendments dealt with the definitions stipulating the size of the financial institutions that are subject to the Act.

1 2 Public Companies Taking Deposits from the Public

"Bank"

The term "deposit-taking institution" was replaced by the term "bank" in 1993. It is defined as "a public company registered as a bank in terms of this Act".⁵³⁵

Whether or not a company qualifies as a bank is therefore determined solely by registration in terms of the *Banks Act*. Only by formal registration can a company become a bank.⁵³⁶ Today it is generally accepted that discount houses, commercial banks, merchant banks and building societies are all "banks" in this sense.⁵³⁷

⁵³³ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 1, marg. n. 69 *et seq.*

⁵³⁴ When this Act first came into operation it was known as the *Deposit-taking Institutions Act 94 of 1990*. The aim of this name was to provide a general term covering all financial institutions that were to be subject to the Act. The name was, however, not generally accepted and the earlier name was reinstated by the *Deposit-taking Institutions Amendment Act 9 of 1993*. In this context, the range of definitions of s 1 (1) also had to be changed to correspond with the new circumstances. The definition of a deposit-taking institution was, for example, replaced by the term 'bank'. The act now only distinguishes between banks and mutual banks.

⁵³⁵ S 1 (1) "Definitions".

⁵³⁶ The forerunner of this Act, the *Banks Act 23 of 1965*, used the more cumbersome term "banking institution" or "institution". See Willis, Nigel, *Banking in South African Law* (1981), 44 *et seq.*

⁵³⁷ See Jordaan, Michael, *The Regulation of Deposit-taking Financial Institutions, A comparative Analysis of the United Kingdom, Germany and South Africa*, (1997) Dissertation Stellenbosch, 122 *et seq.*

"Other Banks"

The Banks Act refers to other institutions which are also known as "banks".⁵³⁸ These are, as a general rule, special institutions which have to meet specific statutory requirements. They include the Land Bank,⁵³⁹ Mutual Banks⁵⁴⁰ and the Reserve Bank.⁵⁴¹ These institutions are exempt from the provisions of the Banks Act.⁵⁴²

1 3 Business

The concept "the business of a bank" is comprehensively defined in the Act.⁵⁴³ The Act furthermore provides that the definition can be amended by notice in the Government Gazette issued by the Registrar after consultation with the Governor of the Reserve Bank.⁵⁴⁴ This means that the definition can be amended quickly and with relative ease. Both its comprehensiveness and the ease with which it can be amended lead to the conclusion that the legislature intended the definition to cover every conceivable situation.

The "business of a bank" is:

4

(a) "[T]he acceptance of deposits⁵⁴⁵ from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question".⁵⁴⁶ This amounts to deposit business, that is the acceptance of deposits as investments. The Act does not stipulate that interest must be paid on the investment. It

⁵³⁸ S 1(1).

⁵³⁹ S 1 (1): "Land Bank" means the Land and Agricultural Bank of South Africa".

⁵⁴⁰ S 1 (1): "'mutual bank' means a mutual bank as defined in section 1 (1) of the Mutual Banks Act, 1993 (Act 124 of 1993)". These financial enterprises are not established as public companies. They are supervised in accordance with the provisions of the *Mutual Banks Act*. See Oelofse, A.N., *The South African Deposit-Taking Institutions Act 94 of 1990*, (1991) Journal of International Banking Law, 98.

⁵⁴¹ S 1 (1) "'Reserve Bank' means the *South African Reserve Bank*".

⁵⁴² S 2(b). See also in this chapter, 109 below.

⁵⁴³ S 1 (1).

⁵⁴⁴ S 1 (1) "the business of a bank" (e).

⁵⁴⁵ The term "deposit" is also defined in the Act (s 1 (1)).

can therefore be concluded that the acceptance of interest free deposits also amounts to the business of banking.⁵⁴⁷

(b) "[T]he soliciting of or advertising for deposits".⁵⁴⁸ Thus, the mere canvassing for deposits is already considered as the conducting of banking business, irrespective of whether or not the bank is ultimately successful and deposits are actually made.⁵⁴⁹

(c) "[T]he utilisation of money, or of the interest or other income earned on money, accepted by way of deposit as contemplated [above] ... (i) for the granting by any person, acting as lender in his own name or through the medium of a trust or a nominee, of loans to other persons; (ii) for investment by any person, acting as investor in his own name or through the medium of a trust or a nominee; or (iii) for the financing, wholly or to any material extent, by any person of any other business activity conducted by him in his own name or through the medium of a trust or a nominee".⁵⁵⁰ In this provision the legislature describes the typical utilisation of the deposits received by banks. Due to the fact that the acceptance of a deposit already constitutes banking business irrespective of the ultimate utilisation of such money, this paragraph of the definition does not really take the matter any further.⁵⁵¹

(d) "[T]he obtaining, as a regular feature of the business in question, of money through the sale of an asset, to any person other than a bank, subject to an agreement in terms of which the seller undertakes to purchase from the buyer at a future date the asset so sold or any other asset".⁵⁵² This section refers to a repurchase agreement,⁵⁵³ a kind of

⁵⁴⁶ S 1 (1) "the business of a bank" (a).

⁵⁴⁷ See also the German concept of a deposit discussed at 90 above.

⁵⁴⁸ S 1 (1) "the business of a bank" (b).

⁵⁴⁹ Oelofse, A.N., *The South African Deposit-Taking Institutions Act 94 of 1990*, (1991) JIBL, 100.

⁵⁵⁰ S 1 (1) "the business of a bank" (c).

⁵⁵¹ Oelofse, A.N., *The South African Deposit-Taking Institutions Act 94 of 1990*, (1991) JIBL, 100.

⁵⁵² S 1 (1) "the business of a bank" (d).

⁵⁵³ See also the definition of "repurchase agreement" in the *Regulations and Rules Pertaining to the Banks Act 94 of 1990* (Malan F. R. & Oelofse A. N., *South African Banking Legislation*, Juta, Cape Town, 1-200D).

Termingeschäft in the form of a loan. It is controversial due to the fact that it has been so broadly formulated that it could include countertrade transactions, a consequence probably not foreseen by the legislature.⁵⁵⁴

(e) "[A]ny other activity which the Registrar has, after consultation with the Governor of the Reserve Bank, by notice in the Gazette declared to be the business of a bank".⁵⁵⁵ This provision is extremely controversial due to the extraordinarily far ranging powers it confers on the Registrar. Theoretically, he can declare any conceivable business banking business. These powers are only limited by the Act which expressly states that certain specified activities do not constitute banking business.⁵⁵⁶

1 4 Summary

It is thus clear that banking supervision in terms of the *Banks Act* is activated both by registration and by the conducting of banking business. The mere fact that an institution conducts "the business of a bank" does not automatically render it a bank for the purposes of the Act. The Registrar, in furtherance of his duty to supervise banks, is nevertheless empowered to intervene in the activities of such institutions.

2 Credit Institutions Located Abroad

2 1 Introduction

A foreign bank wishing to conduct banking business in South Africa, is subject to some or other form of supervision by the Registrar.⁵⁵⁷ Before 1994 all such banks had to register in terms of the *Banks Act*. However, since the *Banks Amendment Act 26 of 1994*, the *Banks Act* differentiates between what may be termed "legally independent subsidiaries" and "legally dependent branches".

⁵⁵⁴ Oelofse, A.N., *The South African Deposit-Taking Institutions Act 94 of 1990*, (1991) JIBL, 100.

⁵⁵⁵ S 1 (1) "the business of a bank" (e).

⁵⁵⁶ See 109 *et seq* below.

⁵⁵⁷ S 11 (1).

2 2 Legally Independent Subsidiaries

Such companies are dealt with in the same way as any South African bank. They must accordingly register in terms of the *Banks Act* in order to conduct business legally.⁵⁵⁸ An important aspect that must be borne in mind by foreign banks wishing to conduct business in South Africa is that the *Banks Act* contains severe limitations on shareholding in banks.⁵⁵⁹ Some of the general restrictions are: In terms of section 37(1) no person may acquire shares in a bank exceeding 15 % of the total nominal capital without the prior written approval of the Registrar. Section 79(1)(a) prohibits a bank from issuing shares with no par value and section 79(4) provides that this prohibition applies to controlling companies as well. Section 54(1) prohibits the transfer of all or any part of the assets and liabilities of a bank to another person without the prior consent of the Minister of Finance.

2 3 Legally Dependent Enterprises in the Form of Branches⁵⁶⁰

The *Banks Amendment Act of 1994* simplified the position of a foreign bank wishing to conduct business in South Africa by opening a branch in this country. In terms of section 18A a bank that has its head office in another country and conducts banking business in accordance with the law of that country, may, with the Registrar's prior permission, also conduct business as a branch in South Africa provided certain requirements are met.⁵⁶¹ The requirements to be satisfied have been published in the Government Gazette.⁵⁶² They relate to liquidity,⁵⁶³ the management⁵⁶⁴ and the envisaged

⁵⁵⁸ See also Chapter 5 below.

⁵⁵⁹ See, for example, ss 36 *et seq.*

⁵⁶⁰ On 31 December 1996 there were six foreign institutions with branches registered in South Africa. See in this regard the South African Reserve Bank *Banks Supervision Department Annual Report* (1996), 59.

⁵⁶¹ S 18A. It used to be necessary to undergo a process of registration when a new bank was to be established. Nowadays, this has become easier since the terminology provides for the opening of a branch. See Oelofse, A.N., *Banking Regulation Reform*, JIBL (1995) 4, N-76.

⁵⁶² 16356, Government Notice 521 of 3 April 1995.

⁵⁶³ Par. 1 (3) of the Government Notice 521 of 3 April 1995. If the institution wished to become active in South Africa it had to meet certain requirements additional to those imposed under s 72 of the *Banks Act* ("Minimum Liquid Assets"). They are supplemented by provisions restricting the possible volume of business activities.

banking business.⁵⁶⁵ There are also certain requirements relating to supervision by the Registrar.⁵⁶⁶ Certain formalities must also be met and certain fees paid.⁵⁶⁷ The Registrar may further demand all information he deems necessary from the institution concerned. His decision must be conveyed to the institution in writing and must also contain the reasons for the decision. If he is of the opinion that effective supervision cannot be ensured, he may refuse to grant the required permission. If permission is granted, the foreign bank must be furnished with a certificate to this effect.⁵⁶⁸

2 4 Representative Offices⁵⁶⁹

The Act also deals with the opening of representative offices. Again the prior permission of the Registrar is required.⁵⁷⁰ In addition there are specific provisions concerning the required information and documentation.⁵⁷¹ The Registrar must be notified of a prospective name change, the replacement of the chief representative

⁵⁶⁴ S 1 (4) of the Government *Notice* 521 of 3 April 1995. The appointment of qualified and reliable directors is one necessity. The requirements are the same as for South African banks. Two natural persons domiciled in South Africa must be the directors. One of them must be the chief executive officer of the institution.

⁵⁶⁵ S 1 (5) of the Government *Notice* 521 of 3 April 1995. Only deposits up to R 1 million may be accepted. Every further establishment of a new branch within the Republic requires the Registrar's prior permission. Every business activity of this branch must be secured by way of the main company ensuring cover of all liabilities entered into. This letter of comfort and undertaking contains several guarantees given by the main company. The content is predominantly determined by the applicable law since it essentially ensures that all requirements of the South African legal system will be met and that compliance with these will be monitored continuously.

⁵⁶⁶ S 1 (6) of the Government *Notice* 521 of 3 April 1995. This includes the requirement that the *Registrar* must be of the opinion that the bank conducts banking business successfully and lawfully in its country of origin, that the foreign supervisory authority is not opposed to the establishment of a branch in South Africa, that it complies with the principles of the Basle Agreement, that it ensures that, as far as possible, the selection of directors will be in accordance with the requirement that they must be suitably qualified and reliable.

⁵⁶⁷ S 18A (2).

⁵⁶⁸ S 18A (3) - (6).

⁵⁶⁹ See s 34. It was reported that on 31 December 1996, 58 foreign banking institutions had representative offices in South Africa. See South African Reserve Bank *Banks Supervision Department Annual Report* (1996), 60 *et seq.*

⁵⁷⁰ S 34(1).

⁵⁷¹ S 34(2), (2A) & (5).

officer, or the changing or giving up of the business address.⁵⁷² The conducting of banking business by such a representative office is, however, prohibited.⁵⁷³

3 Exceptions

3 1 Introduction

The *Banks Act* contains a number of exceptions. These exceptions relate both to certain institutions and to certain business activities or transactions.

3 2 Institutions not Subject to the Banks Act

Certain institutions listed in section 2(b) of the Act are not subject to the provisions of the *Banks Act*, mainly for practical reasons. They include the Reserve Bank,⁵⁷⁴ the Land Bank,⁵⁷⁵ the Development Bank of Southern Africa,⁵⁷⁶ the Corporation for Public Deposits⁵⁷⁷ established in terms of the *Corporation for Public Deposits Act*,⁵⁷⁸ the Public Investment Commissioners⁵⁷⁹ as understood in the *Public Investment Commissioners Act*,⁵⁸⁰ any mutual bank⁵⁸¹ and any other institution or body designated by the Minister by notice in the Gazette.⁵⁸²

⁵⁷² S 34(3).

⁵⁷³ S 34 (4).

⁵⁷⁴ S 2 (b) (i).

⁵⁷⁵ S 2 (b) (ii).

⁵⁷⁶ S 2 (b) (iii).

⁵⁷⁷ S 2 (b) (iv).

⁵⁷⁸ Act 46 of 1984 (s 2).

⁵⁷⁹ S 2 (b) (v).

⁵⁸⁰ Act 45 of 1984 (s 2).

⁵⁸¹ S 2 (b) (vi).

⁵⁸² S 2 (b) (vii). These include the Kwazulu Finance and Investment Corporation Ltd. (Government Notice 1891 (Government *Gazette* 16865) of 8 December 1995); The National Housing Finance Corporation Ltd. (Government Notice 281 (Government *Gazette* 17793) of 14 February 1997); Post Office Savings Bank (Government Notice 334 (Government *Gazette* 13744) of 24 January 1992), Industrial Development Corporation of South Africa Ltd. (Government Notice 2169 (Government

3.3 Activities not Subject to Supervision under the Banks Act

In terms of the Act the business of a bank does not include:

"(aa) [T]he acceptance of a deposit by a person who does not hold himself out as accepting deposits on a regular basis and who has not advertised for or solicited such deposit".⁵⁸³ The main purpose of this exception is that small and individual loans, particularly those given in private, should not as a matter of course be considered banking transactions. Otherwise, such loans would also be subject to supervision by the Registrar. The exception is subject to the proviso that the person in question must not hold deposits, at any given time, from more than 20 persons, or amounting in the aggregate to more than R500 000. Further, it must be noted that a person, and a person controlled directly or indirectly by him, as well as a subsidiary of such last mentioned person, are regarded, for the purposes of this exception, as one person. Thus, the provisions of the Act cannot be circumvented for example by making use of a network of subsidiaries.⁵⁸⁴

"(bb) [T]he borrowing of money from its members by a co-operative subject to such conditions as may be prescribed".⁵⁸⁵ The conditions which deal, *inter alia*, with the minimum amount and duration of such loans, have been taken up in the *Regulations and Rules Pertaining to the Banks Act 94 of 1990*.⁵⁸⁶

"(cc) [A]ny activity of a public sector, governmental or other institution, or of any person or category of persons, designated by the Registrar, with the approval of the Minister, by notice in the Gazette, provided such activity is performed in accordance with such conditions as the Registrar may with the approval of the Minister determine

Gazette 16167) of 14 December 1994). The latter two are only partially exempt from the provisions of the *Banks Act, No. 94 of 1990*.

⁵⁸³ S 1(1) "the business of a bank" (aa).

⁵⁸⁴ See Oelofse, A.N., *The South African-Deposit Taking Institutions Act 94 of 1990*, (1991) JIBL, 101. See also *S v Rosenthal* 1980 1 SA 65 (A), 74B-D.

⁵⁸⁵ S 1(1) "the business of a bank" (bb).

in the relevant notice".⁵⁸⁷ This provision exempts the activities of governmental institution from supervision under the *Banks Act*. Also excluded under this provision are: (i) Mining Houses, insofar as they accept deposits earmarked for the development of mining from members of the affiliated group (that is a group consisting of a public company that is a member of the Chamber of Mines, its subsidiaries and affiliates);⁵⁸⁸ (ii) activities of the Teba Savings Fund;⁵⁸⁹ (iii) certain repurchase agreements by stockbrokers;⁵⁹⁰ (iv) the acceptance of money from the general public against the issue of commercial paper;⁵⁹¹ (v) certain securitisation schemes;⁵⁹² and (vi) certain activities of "a group of persons between the members of which exists a common bond".⁵⁹³

(dd) Any activity which would normally be regarded as banking business in terms of paragraph (a), (b) or (c),⁵⁹⁴ but which is "(i) performed by any institution registered or established in terms of, or by or under any other Act of Parliament and designated by the Minister by notice in the Gazette; or (ii) performed in terms of any scheme authorised and controlled by, and conducted in accordance with the provisions of, any other Act of Parliament and so designated by the Minister, provided such activity is performed in accordance with such conditions as the Minister may determine in the relevant notice".⁵⁹⁵ In terms of this provision business activity controlled under a different Act can be released from supervision under the *Banks Act*. The provision does not make much sense as one would expect that the Act in question would in any event

⁵⁸⁶ Regulation 46. See Malan F. R. & Oelofse A. N., *South African Banking Legislation*, Juta, Cape Town, 1-200DE.

⁵⁸⁷ S 1(1) "the business of a bank" (cc).

⁵⁸⁸ Government Notice 2170 (*Government Gazette* 16167) of 14 December 1994. The term "affiliate is defined in s 1 of the Schedule.

⁵⁸⁹ Government Notice 1890 (*Government Gazette* 16865) of 8 December 1995.

⁵⁹⁰ Government Notice 2171 (*Government Gazette* 16167) of 14 December 1994. See also Oelofse, A.N., *The South African Deposit-Taking Institutions Act 94 of 1990*, (1991) JIBL, 101.

⁵⁹¹ Government Notice 2172 (*Government Gazette* 16167) of 14 December 1994.

⁵⁹² Government Notice 153 (*Government Gazette* 13723) of 3 January 1992.

⁵⁹³ Government Notice 2173 (*Government Gazette* 16167) of 14 December 1994.

⁵⁹⁴ See 104 *et seq.* above.

⁵⁹⁵ S 1(1) "the business of a bank" (dd).

contain provisions rendering this provision superfluous.⁵⁹⁶ The acceptance of money in terms of the *Participation Bonds Act 55 of 1981* and the *Unit Trusts Control Act 54 of 1981* are exempted under this provision.⁵⁹⁷

*Certain transactions, which involve the acceptance of money against debentures, negotiable instruments, or other similar financial instruments, provided the money is not used to grant loans or credit to the public.*⁵⁹⁸ This provision, while recognising the value to companies of utilising such financial instruments to generate funds, that funds acquired in this manner may not be utilised to grant credit or loans to the public.

(ff) *The effecting of a money lending transaction directly between a lender and a bank as borrower through the intermediation of an agent, provided the funds so to be lent are entrusted by the lender to the agent under a written contract of agency in which at least the following must be recorded: (i) that the agent acts as the agent of the lender; and (ii) that the lender assumes all risks connected with the administration of the entrusted funds by the agent, and the responsibility of ensuring that the agent executes the instructions recorded in the contract of agency.* As Oelofse⁵⁹⁹ argues convincingly this entire exception may have been inserted *ex abudanti cautela*. The provision appears to be aimed at protecting the intermediary. His receipt of funds from the lender, is not to be regarded as the business of a bank. However, in the light of (aa) above⁶⁰⁰ it is unlikely that the receipt of such funds by the agent would in any event qualify as a deposit. It must finally be noted that this exception is also subject to the provisions of any other Act of Parliament and to any conditions the Registrar may determine by notice in the Gazette.

⁵⁹⁶ See Oelofse, A.N., *The South African Deposit-Taking Institutions Act 94 of 1990*, (1991) JIBL, 101.

⁵⁹⁷ Government Notices 195 & 196 (*Government Gazette* 13003) of 31 Jan 1991. See also Oelofse, A.N., *The South African Deposit-Taking Institutions Act 94 of 1990*, (1991) JIBL, 101.

⁵⁹⁸ S 1(1) "the business of a bank" (ee).

⁵⁹⁹ *The South African Deposit-Taking Institutions Act 94 of 1990*, (1991) JIBL, 101-102.

⁶⁰⁰ See 110 above.

(gg) *The final exception in the Act refers to the business of a mandatary who has been designated by the Registrar by notice in the Gazette, and whose activities are regulated or controlled under any other Act of Parliament, and who, for the purposes of effecting a money lending transaction with a bank, accepts money from the mandator in terms of the contract of mandate, and in the execution of this mandate deposits this money into an account maintained by the mandatary with a bank, irrespective of whether such money is deposited together with money accepted in the same manner by the mandatary from other mandataries.*

4 Undesirable Practices

A number of business practices are regarded as undesirable. They are listed in section 78 of the Act. Included are, *inter alia*, the holding of shares by the bank in a company of which that bank is a subsidiary,⁶⁰¹ the granting of loans to any person on security of its own shares,⁶⁰² and the granting of loans to further the sale of its own shares against insufficient security.⁶⁰³ Moreover, this comprehensive list is augmented by the fact that the Registrar has the authority to notify a bank that "a practice employed by that bank and specified in the notice constitutes an undesirable practice for that bank".⁶⁰⁴

5 Natural Persons

Natural persons are only indirectly subject to the Act. A bank must be a company, that is a juristic person. This means that natural persons acting in partnership (with the concomitant personal and unlimited liability of the partners) cannot register a bank. Bank managers and directors are, of course, natural persons. They are indirectly subject to supervision. The Registrar may, for example, refuse registration of a bank if he is not satisfied that the directors or chief executive officer of the institution are suitably

⁶⁰¹ S 78(1)(a).

⁶⁰² S 78(1)(b).

⁶⁰³ S 78(1)(c).

experienced and qualified.⁶⁰⁵ Should it, moreover, become clear at a later stage that any member of the key personnel is incompetent, the measures of banking supervision are directed at the bank which must then see to it that such persons are replaced to prevent the bank from being deregistered.⁶⁰⁶

C Summary and Comparison

The scope of banking supervision in Germany is limited by the statutory definition of a *Kreditinstitut* in § 1 I *KWG*. This means that the *Bundesaufsichtsamt* in terms of § 6 I *KWG* is only concerned with the *Kreditinstitute listed in § 1 I*. Whether a particular institute qualifies as a *Kreditinstitut* depends upon two points. First, it depends upon whether it has been allowed to conduct business under § 32 *KWG*. Secondly, any person (natural or legal) can fall under the *KWG* if it conducts banking business as described in § 1 II *KWG*.⁶⁰⁷ Thus, in Germany, a *Kreditinstitut* is either an institution that has the permission to conduct business as a bank, or which simply conducts banking business without permission.

The position is somewhat different in South Africa. Here a bank is only a bank if it is registered as such. A person conducting banking business without having been registered as a bank commits an offence but is not a bank. The concept "business of a bank" is also statutorily defined, but does not serve to qualify an institute as a bank. The unlawful conducting of banking business (i e without registration) does, however, bring the institution under the banking supervision powers of the Registrar.⁶⁰⁸

The scope of supervision of domestic and foreign banks is similar in both countries. Under both systems there are no special provisions for legally dependent subsidiaries of

⁶⁰⁴ See s 78(2).

⁶⁰⁵ S 13(2)(fA) & (g) read with s 17(2)(a).

⁶⁰⁶ Ss 14, 23 & 24.

⁶⁰⁷ See 89 above.

foreign banks.⁶⁰⁹ The only difference is that in South Africa majority control of domestic banks is not possible. There is no similar restriction in Germany, where 100% foreign ownership is possible although antitrust measures may contain some restrictions. The restrictions in South Africa can be ascribed partly by the political situation in the Apartheid era. Against the background of the political isolation of the country it was possible by means of such restrictions to keep the economic power within the country and control the business of financial institutions.

In Germany representative offices are merely required to give notice.⁶¹⁰ The position in South Africa is more strict. Representative offices require permission which is only granted on fulfilment of certain conditions.⁶¹¹

Subsidiaries, both those which are separate juristic persons and branches (*Tochtergesellschaften* and *Zweigniederlassungen*) have to meet very much the same requirements as those imposed upon normal local institutions in both countries. However, in both countries foreign institutions have to meet additional requirements.⁶¹² In Germany, for example, branches of banks with head offices outside the European Union have to meet stricter requirements.⁶¹³

In both countries the legislation specifically exempts certain institutions from normal banking supervision.⁶¹⁴ The legislation in both countries also contains a provision in terms of which the exemptions can be extended to other institutions simply by means of regulations. This has occurred to a considerable extent in both countries.⁶¹⁵

⁶⁰⁸ Ss 81 - 84. See also 103.

⁶⁰⁹ See 95 and 107.

⁶¹⁰ See 97.

⁶¹¹ S 34 and see also page 108.

⁶¹² See 95 and 107 above.

⁶¹³ § 53 KWG. See 95, 96 above.

⁶¹⁴ See § 2 KWG and s 2 of the *Banks Act, No. 94 of 1990*.

⁶¹⁵ See § 2 IV KWG and s 2 (b) (vii) of the *Banks Act, No. 94 of 1990*.

Banks are prohibited from taking part in certain business activities in both countries.⁶¹⁶ Under South African law, however, the *Registrar* has the possibility of extending this range merely by regulations. There is no such possibility in German law. This is further evidence of the much-criticised extensive powers of the *Registrar* in South Africa.

Although supervision in both countries is directed primarily towards the banks themselves, the legislation in both countries also contains provisions aimed at natural persons. In Germany the provisions address partners in partnerships who can be held personally liable,⁶¹⁷ as well as directors of companies.⁶¹⁸ South African law does not recognise a bank in the form of a partnership. Banks may only be established as companies.⁶¹⁹ As is the case in Germany, however, the directors must meet certain requirements concerning expertise and reliability.⁶²⁰

One may conclude by noting that in the context of this chapter, the similarity of the two systems is evident. This can probably be ascribed to the fact that different countries experience very much the same problems in this context.

⁶¹⁶ § 3 *KWG*. See also s 78 of the *Banks Act*, No. 94 of 1990.

⁶¹⁷ *Offene Handelsgesellschaft* and *Kommanditgesellschaft*. Here, the partners have permission in accordance with § 32 *KWG*.

⁶¹⁸ See 102 above.

⁶¹⁹ S 11 (1).

⁶²⁰ See also § 33 I No. 4 *KWG* and ss 13 (2), 17 (2) of the *Banks Act*.

Chapter 5

Permission to Conduct Business as a Bank

A Federal Republic of Germany

1 Permission to Conduct Banking Transactions

In terms of § 32 I (1) *KWG* "[w]hoever intends to conduct banking transactions to the extent indicated in § 1, paragraph (1), in the territory in which this Law is effective, shall require a written licence from the Federal Supervisory Authority." No banking transactions may therefore be conducted without permission. The general freedom of trade as set out in § 1 I *GewO* is accordingly restricted by § 32 *KWG*.⁶²¹

The granting of permission in the form of a licence and the features of a credit institution are, however, independent of one another. If an institution conducts any business described in § 1 I 1 and 2, this is enough to render it a credit institution irrespective of whether it has acquired the necessary licence. The converse is also true; an institution which is in possession of the relevant licence only becomes a credit institution once it starts conducting banking transactions.⁶²²

The prohibition on conducting banking transactions without a licence serves to prevent unsuitable persons or insufficiently funded enterprises from gaining entry into the credit trade.⁶²³

⁶²¹ See also *Chapter 2, 37, 38 above*.

⁶²² Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 2.

⁶²³ *BegrRegE KWG* 1961 A VII No. 1; Schork, Ludwig *Die Zulassungsvorschriften des Gesetzes über das Kreditwesen, GewArch.* 1962, 241 *et seq.*

This requirement of a licence does not violate the principle of freedom of trade as embodied in article 12 *GG* and § 1 *GewO*. In terms of § 1 *GewO* the principle of freedom of trade is subject to exceptions or limitations that are prescribed or allowed by the relevant industrial code.⁶²⁴ Such limitations of the principle of freedom of trade have also been recognised by the *Bundesverfassungsgericht*.⁶²⁵ The licence requirement in the banking industry can be justified with reference to the goals of banking supervision. These include the protection of the industry, the maintenance of its capacity to function, and the protection of investors.

In terms of § 32 *KWG* the licence is required for the conducting of banking transactions "in the territory in which this Law is effective". This territory is the Federal Republic of Germany. The requirement is therefore also applicable to someone who has already been conducting banking transactions elsewhere, and now intends to conduct business in Germany.

The licence must be obtained before banking transactions can be conducted.⁶²⁶ This is also clear from § 43 *KWG* which provides that entries in public registers can only be made after possession of the licence has been proved to the satisfaction of the *Registergericht* (Registration Court).⁶²⁷

The licence requirement is also applicable to public credit institutions (*Öffentlich-rechtliche Kreditinstitute*) that are subject to special public supervision in accordance with § 52 *KWG*.⁶²⁸

The licence is not only required for the initial establishment of a credit institution, but also for an expansion of the banking transactions it conducts as well as for any change

⁶²⁴ See § 1 *GewO* (Trade Code).

⁶²⁵ BVerfGE 7, 377; 33, 303, 43 313.

⁶²⁶ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 9.

⁶²⁷ Consbruch, Johannes, *Registergerichtliche Funktionen bei der Bankenaufsicht nach dem Kreditwesengesetz*, (1966) BB, 102.

⁶²⁸ Bähre, Inge Lore / Schneider, Manfred, *KWG - Kommentar*, on § 52, marg. n. 1.

of the legal form of the establishment, if that change implies that the holder of the licence changes.⁶²⁹ If a change of legal form does not simultaneously bring about a change in the holders of the licence, it needs only to be notified to the *Bundesaufsichtsamt* in accordance with § 24 I 4 *KWG*.⁶³⁰ So, for example, a change from a sole proprietor (*Einzelfirma*) to a partnership (*Personenhandelsgesellschaft*) or to a company (*Kapitalgesellschaft*) requires only notification.

2 Holders of the Licence

In the case of sole proprietors and partnerships, the owner and partners are respectively the holders of the licence. It follows that, in the event of a change of partners, the new partner or partners will have to acquire the necessary licence for the concern to continue conducting banking transactions. If the credit institution is a juristic person, the juristic person holds the licence.⁶³¹

3 Legal Nature of the Licence

The issuing of a licence is, in South African terms, best described as a quasi-judicial administrative act (*begünstigender, gestaltender Verwaltungsakt*) in the sense of § 35 *VwVfG*.⁶³² The law of banking supervision, as part of *Wirtschaftsverwaltungsrecht*,⁶³³ forms part of administrative law. The decision on whether a licence is to be granted or refused is therefore determined in accordance with the general principles of administrative law and procedure. However, these principles are supplemented by the provisions of the *KWG*. The provisions of the *KWG* have precedence. German administrative law is organised in a way that specific statutes, such as the *KWG*, prevail

⁶²⁹ See *infra* under section 2 *Holder of the Licence*.

⁶³⁰ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 3 *et seq.*

⁶³¹ Schork, Ludwig, *Gesetz über das Kreditwesen*, commentary on § 32.

⁶³² Bähre, Inge Lore / Schneider, Manfred, *KWG-Kommentar* on § 32, marg. n. 1. For the wording of § 35 *VwVfG* see chapter 6, n. 836 below.

⁶³³ See chapter 2, 37 above.

over general regulations.⁶³⁴ This also means that if the KWG contains a specific rule on an issue, it must be applied. If there is no such rule, the general regulations must be applied.

The granting of a licence is an administrative act with permanent effect (*Verwaltungsakt mit Dauerwirkung*) in the sense that it constitutes the basis of the applicant's right to conduct banking transactions of the permitted nature for as long as the licence remains valid.⁶³⁵ The compulsory permission required by § 32 KWG and the reasons for refusal of the licence set out in § 33 KWG thus constitute a preventative prohibition with reservation of permission.⁶³⁶ Without the permission the conducting of banking business is unlawful.

The applicant is accordingly entitled to the licence unless one of the grounds for expiry or suspension mentioned in § 35 KWG is applicable,⁶³⁷ for example if there is a danger that the credit institution will not be able to meet its obligations to its creditors.⁶³⁸ The applicant has this right irrespective of whether there is in fact a need for banking transactions of the envisaged nature.⁶³⁹

⁶³⁴ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 14.

⁶³⁵ Beck, Heinz, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 32.

⁶³⁶ Bähre, Inge Lore / Schneider, Manfred, *KWG -Kommentar*, on § 32 marg. n. 1; Beck, Heinz, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 11. One can distinguish between two types of licence; *Präventives Verbot mit Erlaubnisvorbehalt* (preventative prohibition with reserved licence) and *Erlaubnis aufgrund des Erlaubnisvorbehalts einer Verbotsnorm - Dispensvorbehalt* (repressive prohibition with reserved release). Gusy, Christoph, *Verbot mit Erlaubnisvorbehalt - Verbot mit Dispensvorbehalt*, (1981) JA, 80; Schwabe, Jürgen, *Das Verbot mit Erlaubnisvorbehalt*, (1973) JUS, 133.

⁶³⁷ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 2; BVerwG NJW 1959, 590.

⁶³⁸ § 35 II 4.

⁶³⁹ Cf. BVerfGE 14, 197. The *Bedürfnisprüfung* (i.e. determining whether the establishment of another bank is in the public interest) on the third level may not be conducted. See also *supra Chapter 2, 46, 47*. See also the text to n.253.

In the past, before a licence could be granted for the establishment of a German branch of a foreign credit institution, an audit was required.⁶⁴⁰ This requirement, however, fell away with the 1984 amendments to the *KWG*.⁶⁴¹

4 The Process of Granting the Licence

The licence is issued by the *Bundesaufsichtsamt*. In terms of § 32 I *KWG* it must be in writing for reasons of security.⁶⁴²

In accordance with the provisions of § 33 *KWG* a licence can only be issued upon application.⁶⁴³ The application must be accompanied by all the necessary documents.⁶⁴⁴ Two aspects regarding this application need to be emphasised. First, it is the inception of the process and serves as the basis of the eventual granting of permission.⁶⁴⁵ Secondly, the granting of permission is a *mitwirkungspflichtiger Verwaltungsakt*: this means that the licence is not simply granted automatically by the *Aufsichtsamt* as a consequence of its office, but that the *Mitwirkung* (co-operation) of the applicant in the form of an application is required.⁶⁴⁶

Before a licence can be issued, the *Bundesaufsichtsamt* must consult the relevant association which may be, *inter alia*, the *Deutscher Sparkassen- und Giro-Verband*, the *Bundesverband Deutscher Banken*, or the *Deutscher Genossenschaftsverband*.

⁶⁴⁰ § 53 II 5, 2 *KWG*.

⁶⁴¹ In the past the *Bedürfnisprüfung* (public-need test) took account of whether the country of the foreign bank concerned allowed German banks. Only if this question could be answered in the affirmative would the foreign bank be permitted. This is no longer the case. The matter is now largely determined on the level of international agreements. See also *amt. Begründung*, BT-Drs 10/1441 52.

⁶⁴² *BegrRegE KWG* 1961 on § 31 III.

⁶⁴³ Schork, Ludwig, *Gesetz über das Kreditwesen*, commentary on § 32.

⁶⁴⁴ The *Bundesbank* has published a leaflet in several languages which deals with the requirements and formalities for the granting of a licence to conduct banking transactions. It can be ordered from the Deutsche Bundesbank, Referat Öffentlichkeitsarbeit, Postfach, Frankfurt a.M.

⁶⁴⁵ See 123 below.

⁶⁴⁶ This is not possible since the *Bundesaufsichtsamt* would not have access to the documents necessary to reach a decision.

However, from the wording of § 32 III *KWG* it is clear that this rule only applies if the credit institution in question intends to conduct deposit business. This subsection must be seen in its historical context. Since the extension of the securing of deposits as a reaction to the Herstatt bankruptcy,⁶⁴⁷ the manner in which deposit business was conducted has been of great importance not only to the institution itself and its creditors but also to the associations that set aside the funds to secure such deposits.⁶⁴⁸ Their interest in maintaining the functioning capacity of these deposit-securing funds is enough to justify their right to be consulted. The association, after all, and not the *Bundesaufsichtsamt*, decides on whether the institution should be granted security facilities. This can to a large degree prevent a credit institution being granted a licence though not being allowed membership to a security fund.⁶⁴⁹ However, technically, as regards the granting of the licence, the *Bundesaufsichtsamt* is not bound to follow the view of the association.

The application for the licence must be considered in accordance with the principles established by the *Verfassungsgericht* since it entails an intervention in the freedom of profession entrenched in art 12 GG.⁶⁵⁰ In the event of the application being refused, or the licence being restricted to specified types of banking transactions, or if it is subject to conditions, the applicant, in terms of §§ 68 ff *VwGO*, can submit a *Verpflichtungsklage* to the *Verwaltungsgericht* (administrative court) after the conclusion of the preliminary process. If the court decides that the refusal or limitation

⁶⁴⁷ See Chapter 1, 17 above.

⁶⁴⁸ Günther, Hans, *Die künftige Einlagensicherung der privaten Banken*, (1975) *Bank-Betrieb*, 250; the same author, *Erweiterte Aufgaben für den Prüfungsverband deutscher Banken*, (1976) *Bank-Betrieb*, 92; Schwark, Eberhard, *Einlagensicherung bei Banken*, (1974) *NJW*, 1849; Ungnade, Dieter, *Verfassungsrechtliche Aspekte der Einlagensicherung*, (1974) *ZfgK*, 1072; Fischer, Reinfried, *Fragen der Einlagensicherung in der Kreditwirtschaft*, (1975) *Gemhlt.*, 99; Starke Otto-Ernst, *Staatliche Bankenaufsicht und Einlagensicherung*, (1976) *VW*, 280; Scholl, Claus, *Einlagensicherung bei Kreditinstituten*, (1981) *JUS*, 88; Kruk, Josef, *Einlagensicherung: Auf Anhieb bewährt*, (1976) *Bank-Betrieb*, 255; Habscheid, Edgar, *Sicherung von Bankeinlagen trotz fehlenden Rechtsanspruchs und ausgeschlossener Amtshaftung?*, (1988) *BB*, 2328.

⁶⁴⁹ Sazgunn, Volkhard / Wohlschließ, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 15.

⁶⁵⁰ C.f. Chapter 2, 45 et seq.

was unlawful and the applicant's rights were consequently infringed,⁶⁵¹ it can instruct the *Bundesaufsichtsamt* to issue a licence or to free it from the relevant limitations.⁶⁵²

The cost of the licensing process is fixed. The amount is determined in accordance with § 51 II *KWG*.

5 Limitation of the Licence

The act of granting a licence basically represents a purely administrative act (or ministerial decision) since the applicant is entitled to a licence in terms of § 32 I *KWG* unless there are valid grounds for refusal.⁶⁵³ The principle of *Gesetzesvorbehalt*, namely that a fundamental right such as the freedom to trade may only be limited in terms of the law, must be applied. The licence may, therefore (and in accordance with § 36 I 1 Alt. *VwVfG*), only be restricted or limited if so provided in some provision of law. Such a provision can be found in §32 II 1 *KWG*, which allows conditional or limited licencing within the framework of the objectives of the *KWG*.⁶⁵⁴

A condition may compel the beneficiary to do something, tolerate something or refrain from something.⁶⁵⁵ If the condition is not satisfied the licence can be revoked.⁶⁵⁶ The imposed conditions must be in harmony with the objectives of the *KWG*. A condition not in harmony with the objectives of the *KWG* would be indicative of an abuse of discretion and the condition would be contestable.⁶⁵⁷

⁶⁵¹ Note the wording of § 113 I, IV *VwGO*.

⁶⁵² Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 17. See also *Chapter 6 below*.

⁶⁵³ This can be deduced from § 33 *KWG* according to which "[t]he licence may be refused only if...".

⁶⁵⁴ Cf. the wording in § 32 II *KWG*.

⁶⁵⁵ See § 36 II No. 4 *VwVfG*.

⁶⁵⁶ § 35 II *KWG* in connection with 49 II 1 No. *VwVfG*.

⁶⁵⁷ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 12.

The issuing of a condition usually takes place within the framework of a supplementary provision to a *Begünstigender Verwaltungsakt* (an administrative act which benefits the recipient and takes nothing from him). Conditions that effectively compel the credit institution to broaden its base of equity capital, or to employ a further manager of suitable expertise, or to exclude a personally liable partner without the necessary expertise from managing or representing the credit institution are acceptable.⁶⁵⁸

A controversial question, for many years, was whether the *Bundesaufsichtsamt* could impose the condition that the credit institution was to join a deposit-securiting fund. The *Verwaltungsgericht* (Berlin) took the view that there was no legal basis for such a condition in the *KWG*.⁶⁵⁹ The *Bundesaufsichtsamt* subsequently adapted its administrative practice to this verdict.⁶⁶⁰ In these circumstances the licence is now granted together with a suggestion to the effect that the credit institution should join a deposit-securiting fund. In the event of the credit institution not following this suggestion, the *Bundesaufsichtsamt* responds by imposing the condition that all the relevant documents of the institution must expressly state that the institution is not a member of any securing fund. In this way the credit institution is placed under considerable pressure to conform.

The possibility of removing supplementary requirements, especially in the form of conditions, has for many years been a controversial topic in administrative-law theory. The matter has not yet been clearly resolved by the courts. A particular administrative act can be removed in its entirety through the procedure known as the *Anfechtungsklage*. However, should the aggrieved party wish not to remove the entire administrative act (for example the permission to conduct business), but only some condition relating to the act (for example the condition that an additional director be appointed) this can be

⁶⁵⁸ Bähre, Lore Inge / Schneider, Manfred, *KWG-Kommentar*, on § 32 *marg. n. 5*; Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, *marg. n. 12*.

⁶⁵⁹ VG Berlin WM 1987, 370.

⁶⁶⁰ The *Ökobank*, which was founded in 1988, is an example of a bank that is not a member of a deposit securing fund. *Grünes Licht für die Ökobank*, FAZ vom 9. März 1988; Gesterkamp, Harald, Die *Ökobank* - eine funktionsfähige Kreditgenossenschaft, (1988) ZfgK, 60; Kuffer, Wolfgang, *Typologische Betrachtung alternativer Banken* (1987).

achieved by means of the so-called *isolierten Anfechtungsklage*.⁶⁶¹ If successful, the original administrative act remains in place, but the condition is removed.

The *Bundesaufsichtsamt* can enforce the directions and conditions it has issued. In terms of § 50 *KWG* it has the powers conferred by the *Verwaltungs-Vollstreckungsgesetz* (Administration Enforcement Act). The culpable non-compliance with a condition is a misdemeanour in terms of § 56 I 3 *KWG*. This does not automatically lead to cancellation of the licence. However, the licence can be revoked in accordance with the provisions of § 35 II *KWG* read with § 49 II 2 *VwVfG*.⁶⁶² Another possibility is that it might lead to the dismissal of managers (in terms of § 36 *KWG*) or the imposition by the *Bundesaufsichtsamt* of provisional measures in terms of § 46 *KWG* aimed at protecting the safety of assets entrusted to the credit institution.

Furthermore, in terms of § 32 II 2 *KWG* the licence can be limited to certain types of banking transactions.⁶⁶³

§ 2 II c *KAGG* prohibits banks from conducting investment business along with other banking transactions.⁶⁶⁴ Other regulations affecting special banks and their fields of activity remain untouched by § 62 I *KWG*.

The restriction to certain types of banking cannot be removed by means of the *isolierte Anfechtungsklage* procedure.⁶⁶⁵ The limitation of a licence in this manner is not regarded as a supplementary provision (*Nebenbestimmung*) that can be attacked in this manner.⁶⁶⁶

⁶⁶¹ *BVerwGE* 65, 139, commissioned by *BVerwGE* 55, 135, 157f; Osterloh, Lerke, *On BVerwG, Urteil vom 17. Februar 1984 4C 70/80*, (1984) *Jus*, 978; Stelken, Paul, *Problem Auflage*, (1985) *NVwZ*, 469.

⁶⁶² Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 16.

⁶⁶³ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 32, marg. n. 13. It must be assumed, deviating from the legislative wording, that limitation of this kind is not just limited to individual banking transactions. Prior licensing for each type of banking transaction is not executable in practice which means that a restriction can, at the most, refer to certain individual banking transactions.

⁶⁶⁴ See also § 1 I 2 6 *KWG*.

⁶⁶⁵ *BVerwG*, DÖV 1974, 380; *BVerwGE* 69, 37; BayOLG, UPR 1988, 26.

An institution that has applied for but not yet been granted a licence, does not act in contravention of a condition but is actually operating the business without permission. Permission to conduct banking transactions for which application has been made but not yet granted can only be obtained by way of a *Verpflichtungsklage* (mandamus) in accordance with § 42 I 2 *VwGO*.

Conditions as set out in § 36 II 2 *VwVfG* and time limits (§ 36 II 1 *VwVfG*) are only permissible insofar as they ensure that the administrative act meets its objective.⁶⁶⁷

6 Refusal of Licence

The freedom of profession guaranteed by art 12 I *GG* entitles applicants, in principle, to the necessary licence.⁶⁶⁸ However, this principle is effectively restricted by § 33 I 1-5 *KWG* which sets out the grounds upon which a licence can be refused. The presence of any such ground does not necessarily mean that the licence will be refused. The *Bundesaufsichtsamt* retains a discretion in this regard.⁶⁶⁹ If, on the other hand, there is no ground for refusal, the *Bundesaufsichtsamt* has no discretion. It must grant the licence.⁶⁷⁰ The following grounds for refusal are recognised:

⁶⁶⁶ Maurer, Hartmut, *Allgemeines Verwaltungsrecht* (1988) § 12; *marg. n.* 16; Weyreuther, Felix, *Modifizierte Auflagen*, (1984) *DVBl.*, 365.

⁶⁶⁷ Beck, Heinz, *Gesetz über das Kreditwesen - Kommentar*, on § 32, *marg. n.* 25.

⁶⁶⁸ *BVerwG*, NJW 1959, 590.

⁶⁶⁹ *BegrRegE KWG* 1961 on § 32; *BT-Drs.* 3/1114 on § 32 39; Reischauer, Friedrich / Kleinhans, Joachim, *Kreditwesengesetz - Kommentar*, on § 33, *marg. n.* 3. The discretionary scope the *Bundesaufsichtsamt* should be comparably small (also because of the principle of equal treatment) so that, as a rule, an actual refusal is often the result. See also Günther, Hans, *Der Ermessensspielraum des Bundesaufsichtsamtes für das Kreditwesen bei der Neuzulassung von Banken*, (1968) *Bank-Betrieb*, 80. A different opinion, even if only that of a minority, is held by Bading, Arnold / Holzer, Siegfried / Wirsching, Heinz *Kommentar zum Kreditwesengesetz* (1978), on § 33, *marg. n.* 1. These authors see refusal as compulsory if a reason for it exists.

⁶⁷⁰ See Chapter 6 below. See further Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 33, *marg. n.* 3.

6 1 Insufficient Means

A licence can be refused if the institution does not have sufficient means, especially liable equity capital, within the country.⁶⁷¹ By "means" is meant "monetary means".⁶⁷² This can be equity or foreign capital. Comprehensive foreign means without sufficient equity capital is, however, still a sufficient ground for refusal of the licence.⁶⁷³ As to what is meant by sufficient (*ausreichend*), clear standards have not yet emerged from the decisions of the *Bundesaufsichtsamt*.⁶⁷⁴

The *Bundesaufsichtsamt* has developed certain minimum requirements through the years. Different requirements are set, however, for different types of banks. The requirements for *Sparkassen* (savings banks) are, for example, more lenient than those imposed upon other banks due to the fact that they have the backing of the public (the *Gemeinde*, *Stadt* and *Bundesland*) as guarantors.⁶⁷⁵

6 2 Unreliability of the Applicant

A licence can be refused on the basis of facts indicative of the applicant or any of the other persons mentioned in § 1 II 1 *KWG* (that is any of the natural persons appointed to manage or represent a credit institution) being not reliable.⁶⁷⁶ The meaning of "unreliable person" has been developed in case law (as in § 35 *GewO*). Essentially, if there is no certainty that a person will in future conduct business in a regular manner, he is unreliable.⁶⁷⁷ In the context of § 33 I 2 *KWG*, this means that an unreliable person

⁶⁷¹ § 33 I No. 1 *KWG*.

⁶⁷² In terms of § 33 I Nr. 1 "means" should be understood as "monetary means" (*Geldmittel*) as opposed to "means of operation" (*Betriebsmittel*) which is a wider concept including for example office equipments. See also *BegrRegE KWG* 1961 on § 32.

⁶⁷³ C.f. the rule in §§ 10 I, 10 a I *KWG* where "adequate" equity capital is mentioned. The difference is due to the fact that the quota of equity capital is determined over the risk-laden assets during the course of business.

⁶⁷⁴ Reischauer, Friedrich / Kleinhans, Joachim, *Kreditwesengesetz-Kommentar*, on § 33, *marg. n. 6*.

⁶⁷⁵ See the listing in Sazgunn, Volkhard / Wohlschleiß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 33, *marg. n. 5*.

⁶⁷⁶ § 33 I No. 2 *KWG*. This regulation arises from the protective function of the law (*BVerwG NJW* 1961, 1834).

is one whose personality does not guarantee the regular and legally sound management of a credit institution.⁶⁷⁸

Examples of unreliable persons in this sense are: someone who has committed a *Vermögensdelikt* (financial offence); someone who has contravened the regulations relating to the operation of a credit institution; and, someone who has shown in his private or business conduct that sound business management cannot be expected of him.⁶⁷⁹ Conducting banking business without a licence also forms part of this list as it constitutes an offence in terms of § 54 *KWG*.

Unreliability is established objectively with reference to the gravity of the offence and subjectively with reference to the degree of fault or culpability. The gravity of the offence or misconduct is therefore weighed up against the degree of fault on the part of the person concerned.⁶⁸⁰ In terms of § 33 I 2 *KWG* reliability is presumed in principle until facts that contradict this presumption become known. In determining unreliability the *Bundesaufsichtsamt* must in each case take account of the specific banking business applied for.⁶⁸¹ For example, can it be said that the same criteria should apply for deposit business as for credit business? The concept of reliability represents an indefinite concept of law (*unbestimmter Rechtsbegriff*). This means that the concept is not defined in the legislation but must be developed in case law. Since this is not considered a discretionary decision, it can be tested in court to its full extent.⁶⁸²

The *Bundesaufsichtsamt* has the discretion to decide on the manner in which to discover the relevant facts necessary for evaluation purposes. Here, §§ 150a I 2a *GewO* and 8 II

⁶⁷⁷ *BVerwGE* 65, 1.

⁶⁷⁸ *BVerwG*, Beschlüß vom 31. Mai 1976.

⁶⁷⁹ Abs. III *BegrRegE* *KWG* 1961 zu § 32.

⁶⁸⁰ General information regarding the obligation of a neat and conscientious manager to be thorough and responsible as regards legal literature and case law can be found in Kust, Egon, *Zur Sorgfaltspflicht und Verantwortlichkeit eines ordentlichen und gewissenhaften Geschäftsleiters*, (1980) WM, 758.

⁶⁸¹ Amtl. Begründung, BT-Drs. §/1114, on § 32 39; Reischauer, Friedrich / Kleinhans, Joachim, *Kreditwesengesetz - Kommentar*, on § 33, marg. n. 9.

⁶⁸² *BVerwGE* 28, 202, 204; Beck, Heinz, *Gesetz über das Kreditwesen - Kommentar*, on § 33, marg. n. 24.

1 *Anzeigeverordnung*⁶⁸³ are usually applied and an extract from the *Strafregister* (register of previous convictions) is obtained.⁶⁸⁴ In terms of these provisions of the *GewO* the different German *Behörden* (public offices) are entitled to exchange information relating to the applicant. The *Behörde* who requires the information simply asks for it from the other *Behörden* but must give the grounds for which the information is needed.

A rejection of the application for a licence on the grounds of unreliability must be entered in the *Gewerbezentralregister* (central trade register).⁶⁸⁵

6 3 Unreliability of a Person seeking Considerable Participation

The *KWG* also provides for the situation where someone who has been found to be unreliable under § 33 I No. 2 *KWG* attempts to acquire influence over a *Kreditinstitut* indirectly by means of a *Beteiligungsgesellschaft* (participation or an associated company). In terms of a recent addition to the *KWG* (§ 33 I No. 2a) this may also constitute a ground for refusal of the licence.

6 4 Insufficient Professional Qualification

A licence can further be refused on the ground that the *Inhaber* (proprietor) or any of the persons described in § 1 II 1 *KWG* (that is any of the natural persons appointed to manage or represent a credit institution) does not possess the professional qualifications necessary for managing the affairs of a credit institution.⁶⁸⁶ Professional qualification includes sufficient theoretical and practical knowledge of banking business as well as senior management experience.⁶⁸⁷ The onus is on the applicant to satisfy the

⁶⁸³ *Verordnung vom 20. August 1985, BGBl. I 1716.*

⁶⁸⁴ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 33, marg. n. 11.

⁶⁸⁵ § 153a *GewO*. § read with 149 II 1a *GewO*.

⁶⁸⁶ § 33 I No. 3 *KWG*.

⁶⁸⁷ *Schreiben des Bundesaufsichtsamtes für das Kreditwesen vom 23. Juni 1987 (Gesch No. I 2-151-7/87.* Printed in Bading, Arnold / Holzer, Siegfried / Wirsching, Heinz, *Kommentar zum Kreditwesengesetz*, on § 33, marg. n. 2.

Bundesaufsichtsamt that he has the necessary qualifications. The *Bundesaufsichtsamt* is not required to establish whether the necessary qualifications are present.⁶⁸⁸

The required theoretical knowledge embraces economics, business economics, tax and general legal matters. The practical knowledge must include comprehensive professional competence as well as other capabilities necessary for the position, such as intelligence and leadership qualities. As a general rule the *Bundesaufsichtsamt* takes the view that this can only be acquired by experience in a credit institution⁶⁸⁹ or in a supervisory body.⁶⁹⁰ Insufficient practical experience in banking business therefore results in a more stringent test for the entrant.⁶⁹¹

Management experience, in turn, should preferably be in the management of another comparable credit institution or in the managing of a branch provided the branch was so structured that it allowed its manager a sufficient responsibility and the opportunity of making his own decisions.⁶⁹² Experience outside a credit institution as the manager of a team of auditors or as a board member of a federation of auditors is, however, also acceptable.⁶⁹³

In reaching its decision the *Bundesaufsichtsamt* may only take account of past experience and conduct. A mere abstract consideration of the person is not permitted. The previous post is to be used as a point of departure. The unspecified term "professional qualification" was given substance in the 1984 revision of the *KWG* in terms of which three years' service in an executive position with a credit institution of

⁶⁸⁸ See Kopp, Ferdinand O., *Verwaltungsverfahrensgesetz*, on § 24 VwVfG, marg. n. 24 *et seq.*

⁶⁸⁹ *Schreiben des Bundesaufsichtsamtes vom 23. Juni 1987*, Gesch.-No. I2-151-7/87.

⁶⁹⁰ *BegrRegE KWG-Novelle 1984 zu § 33.*

⁶⁹¹ Hafke, Heinz Christian, *Über die Zulassung von Außenseitern*, (1980) *ZKW*, 664

⁶⁹² Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 33, marg. n. 13.

⁶⁹³ *BegrRegE KWG-Novelle 1984 zu § 33.*

comparable size and type is as a general rule deemed to constitute sufficient professional qualification.⁶⁹⁴

The requirements necessary in terms of the *KWG* can be met in this way only. The relevant activity or experience need not immediately precede the application for a licence. However, should it precede the application by a considerable period, the presumption falls away and the *Bundesaufsichtsamt* will determine whether the requirement is met with the aid of further documents.⁶⁹⁵

It must be noted that a licence can be refused if even only one of the managers does not have the necessary professional qualifications. This is the case despite the fact that not all the managers need to have comprehensive knowledge of the entire business. General knowledge combined with detailed special knowledge in one or more domains is sufficient.⁶⁹⁶

6.5 Insufficient Number of Managers

For the licence to be granted the institution must have at least two managers. The requirement of a minimum of two managers arises from the dangers inherent in having a single manager. The illness of such a manager, or his absence on vacation, or the fact that he has proved to be unreliable may lead to important decision not being taken. Furthermore, this four-eyes principle secures greater protection against malpractice and criminal acts and is thus in line with the objectives of the *KWG*.⁶⁹⁷ Thus, in terms of § 33 I No. 4 *KWG*, the licence must be refused if the bank does not have at least two managers. The four-eyes principle is only a minimum requirement. It is therefore quite admissible to appoint more than two managers.

⁶⁹⁴ § 33 II *KWG* read with § 33 I 3 *KWG*. See also: *Amtl. Begründung, BT-Drs. 10/1441*, on No. 28 (§ 33 *KWG*), 49; Dürr, Wolfram, *Bankleiterqualifikation*, (1987) ZIP, 1289; Beckmann, Klaus / Bauer, Joachim, *Bankenaufsichtsrecht, Entscheidungssammlung*, on § 33 II (Nr. 4 und 13); Buchholz, Angelika, *Aufsicht ohne Nachsicht*, WiWo No. 3, 13 January 1989, 28.

⁶⁹⁵ Bähre, Inge Lore / Schneider, Manfred, *KWG-Kommentar* on § 33, *marg. n. 5*; Beck, Heinz, *Gesetz über das Kreditwesen - Kommentar*, on § 33, *marg. n. 26 et seq.*; Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 33, *marg. n. 19*.

⁶⁹⁶ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 33, *marg. n. 20*.

It is to be assumed, in principle, that a manager can only devote his working capacity to one bank. If it is foreseen that in an exceptional case a particular manager is also to manage another bank (for example a subsidiary), this will only be allowed by the *Bundesaufsichtsamt* if it is clear that the orderly management of neither bank will be impaired.

In essence, § 33 I No. 4 *KWG* corresponds with art 3 II of the first EU Banking Law Co-ordinating Guideline (no 77/780/EWG9 of 12 December 1977)⁶⁹⁸ which standardises the introduction of the *Vier-Augen-Prinzip*.

The *Bundesaufsichtsamt* requires the managers to be full-time heads. They may not act in a merely honorary capacity. This is regarded as controversial in legal literature due to the fact that the above mentioned EU Co-ordinating Guideline does not exclude the employment of managers acting in an honorary capacity as long as these are only active in decisionmaking.⁶⁹⁹

6 6 Other Reasons

A branch of a foreign credit institution may be refused a licence on the basis of an absence of reciprocity in accordance with international agreements (that is that German institutions are not allowed to open branches in that country).⁷⁰⁰

In terms of § 2a *KWG* credit institutions may not be conducted in the form of a sole proprietorship. Other intentions constitute a reason for refusal.⁷⁰¹

⁶⁹⁷ *BT-Drs.* 7/3657, on § 33, 15.

⁶⁹⁸ *AbI.E.G.* No. L 322 of 17 December 1977, 30.

⁶⁹⁹ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 33, marg. n. 22.

⁷⁰⁰ § 53 II 5 2 *KWG*. See further Bähre, Inge Lore / Schneider, Manfred, *KWG - Kommentar*, on § 53, marg. n. 6; Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 53, marg. n. 27.

⁷⁰¹ Cf. § 2a *KWG*.

The licence can also be refused if § 3 *KWG* is contravened, in other words if the institution intends conducting prohibited business.

6 7 Refusal for Reasons outside the KWG

In terms of the general principles of administrative law, the participation of the administration in illegal or immoral causes is not allowed.⁷⁰² The unavoidable consequence would be the suspension of the licence as contemplated in § 35 *KWG*.

7 The Absence of a Licence

In terms of § 32 I 2 *KWG*, a licence can only be granted after application for it has been made. In the absence of an application, no banking transactions may be conducted. If the licence was granted in part, in other words for only some of the categories of banking business requested, it follows that only those categories of transactions may be conducted.

7 1 Expiry of the Licence

In terms of § 35 I *KWG* a licence expires if it has not been used within 1 year of it being granted. This provision is aimed at guarding the *Übersichtlichkeit* (ability to supervise) of the granted licences.⁷⁰³ Thus it is ensured that the *Bundesaufsichtsamt* has a reliable overview of the number of licences issued and utilised. The expiry is automatic. "Making use" of the licence is to be understood as the taking up of the full commercial operation of a bank in the sense of §§ 32 I, 1 I *KWG*.

In addition, in terms of the *GewO*, which applies to a far wider range of enterprises including *Kreditinstitute*, the licence will expire if it is refused or on the death of the holder.⁷⁰⁴

⁷⁰² Bähre, Inge Lore / Schneider, Manfred, *KWG-Kommentar* on § 33, *marg. n. 2*; Schork, Ludwig, *Gesetz über das Kreditwesen, Kommentar*, on § 33, *marg. n. 3*.

⁷⁰³ *BegrRegE KWG* 1961 on § 34.

⁷⁰⁴ Schork, Ludwig, *Die Zulassungsvorschriften des Gesetzes über das Kreditwesen*, (1962) *GewArch*, 244.

A licence is granted for a specific period. It follows that the precise moment of inception and conclusion of a period can be very important. In German law this is regulated in §§ 187 I, 188 II *BGB* read with § 43 *VwVfG*.⁷⁰⁵

In principle, there is no legal remedy, except the *Feststellungsklage* according to § 43 *VWGO*, to terminate the licence. For a *Feststellungsklage* to be brought a special interest to seek a declaratory judgment (*besondere Feststellungsinteresse*) must be shown. This implies that the applicant must in fact be affected by the termination of the licence. The purpose is to ensure that only a person who has a personal interest in the matter should be able to bring the application.⁷⁰⁶

In terms of § 34 II *KWG* the licence also expires on the death of the holder. § 34 I *KWG* expressly excludes § 45 of the *Gewerbeordnung* (Trade Code) in terms of which an enterprise cannot be continued by a representative in these circumstances. § 34 II *KWG*, however, provides that the credit institution may, in the interest of the heirs, be continued for a period of up to a year by 2 deputies. During this time the deputies are considered to be the managers.⁷⁰⁷ § 24 I 1 *KWG* stipulates that their appointment must be reported to the *Bundesaufsichtsamt*. The managers themselves are required by § 24

⁷⁰⁵ § 187 *BGB* reads as follows: "(1) Ist für den Anfang einer Frist ein Ereignis oder ein in den Lauf eines Tages fallender Zeitpunkt maßgebend, so wird bei der Berechnung der Frist der Tag nicht mitgerechnet, in welchen das Ereignis oder der Zeitpunkt fällt. (2) Ist der Beginn eines Tages der für den Anfang einer Frist maßgebende Zeitpunkt, so wird dieser Tag bei der Berechnung der Frist mitgerechnet. Das gleiche gilt von dem Tage der Geburt bei der Berechnung des Lebensalters."

§ 188 *BGB* reads as follows: "(1) Eine nach Tagen bestimmte Frist endigt mit dem Ablauf des letzten Tages der Frist. (2) Eine Frist, die nach Wochen, nach Monaten oder nach einem oder mehreren Monate umfassenden Zeiträume - Jahr, halbes Jahr, Vierteljahr - bestimmt ist, endigt im Falle des § 187 I mit dem Ablauf desjenigen Tages der letzten Woche oder des letzten Monats, welcher durch seine Benennung oder seine Zahl dem Tage entspricht, in den das Ereignis oder der Zeitpunkt fällt, im Falle des § 187 II mit dem Ablauf desjenigen Tages der letzten Woche oder des letzten Monats, welcher dem Tage vorhergeht, der durch seine Benennung oder seine Zahl dem Anfangstage der Frist entspricht. (3) Fehlt einer nach Monaten bestimmten Frist in dem letzten Monat der für ihren Ablauf maßgebende Tag, so endigt die Frist mit dem Ablauf des letzten Tages dieses Monats.

§ 43 *VwVfG* reads as follows: "(1) Ein Verwaltungsakt wird gegenüber demjenigen, für den er bestimmt ist oder der von ihm betroffen wird, in dem Zeitpunkt wirksam, in dem er ihm bekanntgegeben wird. Der Verwaltungsakt wird mit dem Inhalt wirksam, mit dem er bekanntgegeben wird. (2) Ein Verwaltungsakt bleibt wirksam, solange und soweit er nicht zurückgenommen, widerrufen, anderweitig aufgehoben oder durch Zeitablauf oder auf andere Weise erledigt ist. (3) Ein nichtiger Verwaltungsakt ist unwirksam."

⁷⁰⁶ Redeker, Konrad / Oertzen, Hans Joachim von, *Verwaltungsgerichtsordnung-Kommentar*, on § 43 *VwGO*, *marg. n. 3*.

III also to report to the *Bundesaufsichtsamt*. In exceptional cases the one-year deadline can be extended in terms of § 34 II *KWG*.

7 2 Revocation of the Licence

The granting of a licence constitutes a *Begünstigender Verwaltungsakt* in the sense of § 35 *VwVfG*,⁷⁰⁸ in other words an administrative act which benefits the recipient and takes nothing from him. The revocation of a licence can be the withdrawal of an unlawful administrative act (*Rücknahme eines rechtswidrigen Verwaltungsaktes*). An example would be if the applicant was younger than 18 years and was therefore contractually incapable. In this case the revocation is effected in terms of § 48 *VwVfG*. However, the revocation can also be revocation of a lawful administrative act (*Widerruf eines rechtmäßigen Verwaltungsaktes*). This would be the case where the licence was properly issued but is revoked later due to non-fulfillment of stipulated conditions. This revocation then takes place in terms of § 49 *VwVfG*. The authority to revoke in terms of § 48 or 49 must be sought in § 35 II *KWG*.⁷⁰⁹

The revocation amounts to a *Belastender, gestaltender Verwaltungsakt*, the opposite of a *begünstigenden Verwaltungsakt*, in that it takes a right from a person and gives nothing.⁷¹⁰ As a general rule a *Widerspruch* (objection) or an *Anfechtungsklage* (application to rescind) relating to an administrative act has *Aufschiebende Wirkung* (a postponing effect) in German law. In other words the legal consequences of the administrative act are postponed until the *Widerspruch* or *Anfechtungsklage* has been decided. It must be noted however, that this is not the case with administrative action based on § 35 II 2, 3. (§ 49 *KWG*).

⁷⁰⁷ § 34 II 3 *KWG*.

⁷⁰⁸ See *supra* in this chapter under 3 *Legal Nature of the Licence*.

⁷⁰⁹ Bähre, Inge Lore / Schneider, Manfred, *KWG-Kommentar*, on § 35, *marg. n. 3.*

⁷¹⁰ Sazgunn, Volkhardt / Wohlschließ, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 35, *marg. n. 30.*

The bases upon which the *Bundesaufsichtsamt* may suspend a licence are set out in § 35 II *KWG*. The decision is discretionary. The *Bundesaufsichtsamt* may revoke the licence; it is not duty-bound to do so.⁷¹¹ This implies that it must consider carefully all the relevant circumstances in order to reach a fair decision. Irrelevant considerations should not be taken into account. It is also possible not to revoke the licence immediately, but rather to allow some time for the parties concerned to meet the necessary conditions. The discretion also extends to a partial revocation, that is a discontinuation of the permission to conduct certain but not all banking transactions.⁷¹²

The licence may be revoked by the *Bundesaufsichtsamt* if the business operations to which the licence refers have not been exercised for the period of one year (§ 35 II no 1 *KWG*). This regulation is also aimed at maintaining the ability to supervise.

§ 35 II 2 *KWG*, which was introduced by the amending legislation of 1976 also allows for revocation if the credit institution is conducted in the *Rechtsform des Einzelkaufmans* (form of a sole proprietorship).⁷¹³

The licence may further be revoked if the applicant or a manager is unreliable or if he does not have sufficient professional qualification (§ 35 II No. 3a *KWG*). In this case it is crucial to know whether these facts already existed when the licence was granted, or whether they were subsequently discovered, or whether they arose after that time. If the facts were known at the time of the granting of the licence, but they were disregarded, there will not necessarily be a revocation. The moment upon which knowledge of the facts is gained is thus decisive.⁷¹⁴

⁷¹¹ This contrary to § 35 I *KWG* in terms of which the licence expires. Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 35, *marg. n. 17*.

⁷¹² Bähre, Inge Lore / Schneider, Manfred, *KWG-Kommentar*, on § 35, *marg. n. 3*.

⁷¹³ This provision, however, does not affect individual bankers who were already in existence on 1 May 1976. Since that date, individual bankers have not been permitted. Thus, the rule only pertains to credit institutions that were transformed to the legal form of the single businessman or if that form came about as a result of the death or retirement of a partner after 30 April 1976 (*BegRegE KWG-Novelle 1976 zu § 35*).

The *KWG* distinguishes between *geborene Geschäftsleiter* and *gekorene Geschäftsleiter*. A *geborene Geschäftsleiter* is a manager who leads automatically by virtue of being, for example, a partner or managing director. A *gekorene Geschäftsleiter* (chosen manager), on the other hand, is one who is temporarily in charge as a consequence of some crisis, for example the sudden death of the previous manager. The unreliability and insufficient professional qualification of such a chosen manager will not justify the revocation of a licence.⁷¹⁵

Similarly, if it becomes known that the credit institution does not have at least two managers who are not acting merely in an honorary capacity, the licence can be revoked.⁷¹⁶

The licence may also be revoked if the obligations of a credit institution towards its creditors are endangered, especially if this threatens the security of the assets entrusted to the institution and the danger cannot be averted by other measures available under the *KWG*. Such a danger is regarded as being present, and therefore does not need to be proven by the *Bundesaufsichtsamt*, if the institution has lost half the standardising liable equity capital (determined in accordance with § 10 VII *KWG*), or if more than 10% of the liable equity capital has been lost during the course of at least three consecutive business years.⁷¹⁷

As noted above the revocation can be based on the provisions of §§ 48 or 49 *VwVfG*. The licence can be revoked in terms of § 48 *VwVfG* if it was obtained by wilful deceit, threats or bribery,⁷¹⁸ or by submitting fraudulent particulars upon application.⁷¹⁹ In terms of § 48 IV 1 *VwVfG* the application to revoke an administrative act must be brought

⁷¹⁴ A list of exemplary circumstances that lead to a retrospective suspension of the licence can be found in Sazgunn, Volkhard / Wohlschieß, Karl *Gesetz über das Kreditwesen - Kommentar*, on § 35, *marg.* n. 22.

⁷¹⁵ *BVerwG*, WM 1971, 1214.

⁷¹⁶ § 35 II 3b *KWG*.

⁷¹⁷ § 35 II 4 *KWG*.

⁷¹⁸ § 48 II 3 No. 1 *VwVfG*.

⁷¹⁹ § 48 II No. 2 *VwVfG*. See Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 35, *marg.* n. 14.

within one year of the act. However, in accordance with § 35 IV *KWG* this time limit does not apply to the revocation of a licence as set out in § 32 I *KWG*.⁷²⁰

The revocation of the licence can be based on § 49 *VwVfG*, especially in the case of the submission of fraudulent particulars⁷²¹ and where the holder of the licence does not meet the conditions attached to the licence in terms of § 32 II *KWG* or is late in complying with the conditions.⁷²²

7 3 Legal Consequences of the Absence of a Licence

The expiry or suspension of a licence means that the banking transactions covered by the licence may no longer be conducted.

Conducting banking transactions without a licence is punishable in terms of § 54 *KWG*. The maximum penalty is imprisonment for a term of three years or a fine. In addition it may constitute a misdemeanour under § 56 *KWG* read with §§ 30 I, 130 *OWiG*⁷²³

The *Bundesaufsichtsamt* may, in terms of § 37 *KWG*, take immediate action against the illegal conduct of banking transactions, and may implement corresponding coercive measures in accordance with § 50 I *KWG* and the provisions of the *VwVG*.⁷²⁴

7 4 Liquidation of a Credit Institution

From the moment upon which the licence is suspended, the credit institution may no longer conduct banking transactions.⁷²⁵ It must, however, fulfil all its existing

⁷²⁰ This Section was introduced by the 1984 amendments to the *KWG*. The suspension of the licence is often only the *ultima ratio*. Audits in the banking trade to determine whether the discovered deficiencies can be removed by way of less charging measures, often require a long period of time which often exceeds one year (*Amtl. Begründung, BT-Drs. 10/1441*, on No. 29 (§ 35 *KWG*) 50).

⁷²¹ § 49 II No. 2 *VwVfG*.

⁷²² Bähre, Inge Lore / Schneider, Manfred, *KWG-Kommentar*, on § 35, *marg. n. 3*.

⁷²³ See also below *Chapter 6*, 167 *et seq.*

⁷²⁴ Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 35, *marg. n. 31* and on § 37 *marg. n. 1 et seq.*

obligations. This is necessary to protect the interests of creditors. Thus, all transactions that serve the purpose of winding up the business of the institution must be completed. Only then can the criminal law take its course, or banking supervisory measures be imposed.⁷²⁶ The order of liquidation must be entered in the Register of the relevant *Registergericht* (Registration Court). The *Bundesaufsichtsamt* may issue general directives regarding the liquidation of a credit institution and may apply to the Registration Court to have liquidators appointed if the persons otherwise responsible for the liquidation afford no guarantee of orderly liquidation proceedings.⁷²⁷

8 Conducting Banking Transactions without a Licence

Banking transactions may be conducted without a licence in the following circumstances: (i) where the volume of the transactions does not require a commercially organised business operation;⁷²⁸ where their nature does not necessitate supervision and the enterprise is consequently exempted;⁷²⁹ where the institution is continued after the death of the holder of the licence by a representative;⁷³⁰ and, where the credit institution is being liquidated.⁷³¹

9 Other Duties related to Licensing and Registration

This concerns especially § 14 I 1 of the *GewO* (Trade Code) which requires registration to take place with the competent authority of the relevant place according to the Law of that *Land* when an independent enterprise of an existing trade is started, or a branch or an independent branch is established.

⁷²⁵ As to what amounts to a "banking transaction" see § 1 I of the *KWG*.

⁷²⁶ *BGH, DB* 1966, 1725; Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 35, *marg. n.* 9.

⁷²⁷ § 38 II 2 *KWG*.

⁷²⁸ § 1 I 1 *KWG*.

⁷²⁹ § 2 IV *KWG*.

⁷³⁰ § 34 II *KWG*.

⁷³¹ § 38 I *KWG*).

Furthermore, §§ 137, 138 *AO*⁷³² must be taken into account. These statutes provide that taxpayers who are not natural persons must report circumstances affecting tax that are of importance to the Inland Revenue Office as well as the community. Especially common in this regard is the reporting of acquisitions abroad and participation in foreign partnerships and of participation of a particular amount.

B Republic of South Africa

1 Introduction

Section 11 of the Banks Act 94 of 1990 provides:

- "(1) Subject to the provisions of section 18A, no person shall conduct the business of a bank unless such person is a public company and is registered as a bank in terms of this Act.
- (2) Any person who contravenes a provision of subsection (1) shall be guilty of an offence."

The issue of permission to conduct banking business in South African law must be approached from this point of departure.

2 Obligatory Permission

According to this provision, prior registration is necessary in order to take up and conduct banking business.⁷³³ This prerequisite of registration in effect implies that permission to conduct banking business is obligatory. Contravention of section 11 of the Banks Act (that is conducting banking business without permission) is an offence.⁷³⁴

⁷³² Abgabenordnung (Tax Code).

⁷³³ Before a bank is finally registered, however, a series of preliminary procedures must be carried out. See in this chapter, 143 below.

⁷³⁴ S 11 (2).

The reasoning behind a general prohibition of this nature can be found in the objectives of banking supervision.⁷³⁵ Admission to the banking business can, by withholding permission (registration), be refused if the applicant is not suitable. The criminal sanctions following on a contravention of section 11, guarantee the strongest possible protection of the banking industry in this regard.

It is suggested that these provisions are not suspect from a constitutional viewpoint. The banking sector of the economy clearly needs provisions of this nature to maintain and ensure its capacity to function properly, especially in light of its elevated position in the economy as a whole. The fundamental rights of individuals, which might possibly be infringed by these provisions, must yield to the general, predominating interest of the public to maintain the functioning capacity of this sector of the economy.⁷³⁶

The obligation to register clearly relates only to the territory within which the Banks Act is in force, that is within the Republic of South Africa.

The Banks Act does not contain any provisions that automatically render an enterprise conducting banking business a bank. However, it must be noted that the *Registrar*, as the supervising organ, has the power to intervene and implement measures to prevent the further conduct of such prohibited economic activity.⁷³⁷

3 Who Holds the Permission?

The permission is only granted to public companies established in accordance with the Companies Act 61 of 1973. Neither natural persons nor partnerships can register as a bank. Only a particular type of juristic person, a public company, can so register.⁷³⁸ The company is the holder of the permission.

⁷³⁵ C.f. Chapter 2, 54 et seq. above.

⁷³⁶ C.f. Chapter 2, 54, 55 above.

⁷³⁷ Ss 81 - 84 and see also page 155 below.

⁷³⁸ S 11 (1).

4 Legal Nature of the Permission

The granting of permission is an administrative act.⁷³⁹ According to the theory of subordination in South African law, an administrative act is performed when an administrative body executes an act of state power which affects the public. "Public" includes both natural and juristic persons. The *Registrar*, acting as an *organ of state*, can clearly be regarded as an administrative authority.⁷⁴⁰

South African courts have developed categories of such acts of state power. In this respect the terms "legislative", "judicial" and "administrative" have been utilised to differentiate between different administrative acts. These have further been supplemented by terms such as "semi-" or "quasi-judicial", "purely administrative" and "ministerial".⁷⁴¹ In accordance with this approach the category into which an administrative act falls determines the legal rules and principles governing it. It is, however, disputed whether these classifications are unequivocal.⁷⁴²

The granting of permission represents a purely administrative act. This is because it concerns an administrative body that makes a decision within the legal framework of its

⁷³⁹ See on the definition and function of an administrative act in South African Law: Robson, William A., *Justice and Administrative Law: a Study of the British Constitution*, (1951) London 3rd ed., Griffith, J. A. G. / Street, H., *Principles of Administrative Law*, (1973) 5. ed., 140 *et seq.*; De Smith, S. A., *De Smith Judicial Review of Administrative Action*, (1980) 4. ed. By Evans, J. M. , Ch 2; Wiechers, Marinus, *Administratiefreg*, (1984) 2. ed., Ch 4.

⁷⁴⁰ Wiechers, Marinus, *Administrative Law*, in Joubert, W. A., *The Law of South Africa* (1993), First Reissue Vol. 1, Par. 60f.

⁷⁴¹ In accordance with this approach a legislative act that has a similar effect to an Act, e.g. a proclamation by the State President or by a Provincial Governor or an ordinance. See in this regard S v Adams; S v Werner 1981 (1) SA 187 (A); 222F-G; S v Ockers 1974 (2) SA 523 (C), 529-30; Bedfordview Village Council v Kovar 1960 (4) SA 333 (W), 337; Oertel NO v Direkteur van Plaaslike Bestuur 1983 (1) SA 354 (a), 378F-379A. Judicial acts are seldom encountered. They are acts of court like institutions that are concerned with certain questions of administration such as the court of the Commissioner of Patents, the Court of the Commissioner for Inland Revenue or courts martial. See in this regard Britten v Pope 1916 AD 150, 157; Municipality of Vereening v Mahomed Essop 1916 AD 550, 553; Theron v Ring van Wellington 1976 (2) SA 1 (A), 17-20; James Brown and Hamer (Pty) Ltd. v Simmons NO 1963 (4) SA 656 (A), 660B-C; Prinsloo v Newman 1975 (1) SA 481 (A), 505.

⁷⁴² Baxter, Lawrence, *Administrative Law* (1991), 344.

empowerments.⁷⁴³ This decision may be subject to control by the courts by means of the review procedure.⁷⁴⁴

5 The Process of Obtaining Permission

5 1 Introduction

The granting of permission is a lengthy procedure, which involves two steps.⁷⁴⁵ Before registration can actually be applied for, the applicant must apply for authorisation to establish a bank. However, banking business cannot be commenced before registration. Different requirements are set for authorisation to establish a bank and registration of that bank.

5 2 Authorisation to Establish a Bank

Before the actual registration can take place the *Registrar* must authorise the process of establishing a bank.⁷⁴⁶ To set the process in motion the applicant must complete a specific form, form DI 002, which is published as part of the Regulations issued by the Minister of Finance in terms of the Banks Act.⁷⁴⁷ The application must be accompanied by a statement containing prescribed information⁷⁴⁸ which includes a statement concerning the intended range of business to be conducted by the company,⁷⁴⁹ an opening balance sheet,⁷⁵⁰ the names and addresses of the auditors⁷⁵¹ and several other

⁷⁴³ See Baxter, Lawrence, *Administrative Law* (1991), 347 and Wiechers, Marius, *Administrative Law*, in Joubert, W. A., *The Law of South Africa* (1993), First Reissue, Vol. 1, Par. 71*et seq.*

⁷⁴⁴ See Chapter 6, 176 *et seq. below.*

⁷⁴⁵ In its original version of 1990, this procedure still had three levels. Between authorisation and registration, preliminary registration had to take place. This intermediary step was, however, abolished by the *Banks Amendment Act 26 of 1994*. See the explanations of Oelofse, A. N., *Banking Regulation Reform*, (1995) 4 JIBL, N-75 *et seq.*

⁷⁴⁶ S 12 (1).

⁷⁴⁷ See S 12(2)(a) of the Banks Act read with Reg 33.

⁷⁴⁸ S 12 (2) (b).

⁷⁴⁹ Application form DI 002 (f).

⁷⁵⁰ Application form DI 002 (g) and (h) read with application form DI 100.

⁷⁵¹ Application form DI 002 (q).

prescribed declarations.⁷⁵² The *Registrar* has the power to call for any further information or documents he may deem necessary.⁷⁵³ He may also require the submission of a report as defined⁷⁵⁴ in the Public Accountants' and Auditors' Act 80 of 1991.⁷⁵⁵ When these documents have all been submitted, the *Registrar* decides whether or not to authorise the establishment of the bank. In terms of section 13 he then has a discretion whether or not to register. However, in terms of section 13(2), the *Registrar* has no discretion, and must refuse authorisation, if he has not been satisfied that the applicant meets all the requirements set in section 13(2)(a)-(h) of the Act.⁷⁵⁶ Once the *Registrar* has made his decision he must give notice of it in writing to the applicant.⁷⁵⁷

If the application is successful, the applicant is entitled to start making the necessary arrangements in order to establish a bank. An institution of this kind can also be described as a "banking company in foundation" and thus has the legal personality comparable to but also different from that of a *Vorgesellschaft* in German law.⁷⁵⁸

During the phase of foundation, the authorisation to establish such an institution may be revoked (in writing) at any time should it become known that the *Registrar* received false or misleading information concerning the application, or if the applicant has not managed to form a bank within a period of 6 months from the date of the authorisation.⁷⁵⁹

⁷⁵² Cf. form DI 002.

⁷⁵³ S 12 (3) (a).

⁷⁵⁴ S1(1).

⁷⁵⁵ S 12 (3) (b).

⁷⁵⁶ See in this *chapter*, 147 *et seq. below*.

⁷⁵⁷ S 13(3).

⁷⁵⁸ In German law the legal capacity of a *Gesellschaft* comes into existence upon entry into the *Handelsregister*. Before such entry it is generally regarded as a *BGB-Gesellschaft*, i e a civil law *Gesellschaft*. During this period the different members are collectively liable for the obligations of this *Vorgesellschaft*.

⁷⁵⁹ S 14 (1).

5.3 Application for Registration as a Bank

Within a period of 12 months of the granting of authorisation to form a bank, an application may be submitted to the *Registrar* for the actual registration of the bank.⁷⁶⁰ Registration is a *sine qua non* for operating as a bank. The application must contain certain prescribed documents. At this stage too the *Registrar* may call for further information apart from that specified in the Act.⁷⁶¹ The application itself and all documents relating to it that are submitted to the *Registrar* must be signed by the chairman or the chief executive officer of the institution.⁷⁶²

Provided the information submitted is satisfactory and the *Registrar* is satisfied that (i) the business the applicant intends conducting is that of a bank, (ii) undesirable methods of conducting business will not be adopted, and (iii) the public documents of the institution are consistent with the Banks Act and are not undesirable for any reason, the application must be successful (that is the *Registrar* does not have the discretion to refuse the application).⁷⁶³ The Act specifically provides in which circumstances the *Registrar* does have a discretion to refuse the application.⁷⁶⁴ This matter is specifically dealt with below.

The applicant must be notified in writing of the decision to grant or dismiss the application.⁷⁶⁵ If the application is granted, and on payment of the registration fee, the applicant is issued with a certificate of registration as a bank.⁷⁶⁶ Provided the bank meets

⁷⁶⁰ S 16 (1).

⁷⁶¹ S 16 (1). The legally required documents that must be handed in are the company's constitution as well as a declaration of the intended name of the bank, the address of its head office as well as its postal address, the specifications as to which banking transactions will be conducted, the mentioning of names and addresses of the bank's management as well as a list of majority shareholders with participation in the sense of s 59.

⁷⁶² S 16 (4).

⁷⁶³ Joubert, W. A. / Scott, T. J. / Faris, J. A.; *The Law of South Africa*, Cumulative Supplement 1996, Par. 742. See also s 17 (1).

⁷⁶⁴ See S 17(2).

⁷⁶⁵ S 17 (3).

the requirements of section 70 of the Act (in which the requirements relating to minimum share capital and unimpaired reserve funds are set out) it may then commence with banking business.⁷⁶⁷

5.4 Branches of Foreign Institutions

In conclusion it must be noted that in terms of section 18A of the Banks Act a branch of a foreign bank may, notwithstanding the absence of formal registration, conduct banking business in South Africa provided it has been authorised to do so by the Registrar. A specific procedure akin to registration that such an institution needs to follow is set out in section 18A of the Act.

6 Restriction of Permission

The possibilities of restricting permission are extensively provided for in the Act. The point of departure in this regard is to be found in sections 13(1) (in the context of the application for authorisation) and 18 (1) (in the context of the application for registration). Both sections empower the *Registrar* to restrict the permission by imposing any conditions he deems fit.⁷⁶⁸ In this regard the *Registrar* is master of his own decision. Naturally the *Willkürverbot*, which also forms part of South African administrative law, may not be contravened.⁷⁶⁹ The conditions he decides to impose must also relate to the objectives of banking supervision under the Act, and must not stem from other considerations.



If the applicant disregards any of the conditions imposed by the *Registrar* this may lead to cancellation or suspension of the authorisation or registration.⁷⁷⁰ An applicant who

⁷⁶⁶ S 17 (4).

⁷⁶⁷ Cf ss 17 (5), 18 (1). The conditions laid down in s 70 refer to the required amounts concerning minimum capital and reserves.

⁷⁶⁸ Cf also s 13(1) which contains a similar provision relating to the application for authorisation.

⁷⁶⁹ S 33 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.

⁷⁷⁰ S 14 (1) and s 17 (2).

feels aggrieved with conditions imposed by the *Registrar* may appeal in terms of the Act to the Board of Appeal or may institute review proceedings.⁷⁷¹

7 Refusal of Permission

7 1 Introduction

The Act makes provision for the refusal of permission in numerous situations.⁷⁷² In this regard it is necessary to differentiate between application for authorisation and application for registration. The point of departure should, in principle, be that an applicant is entitled to be successful with his application for authorisation of registration. If this were not the case, section 22 of the Constitution (which entrenches the right to freedom of trade, occupation and profession) would be contravened. However, sections 13 and 17 of the Banks Act curtail this right by setting out specific bases upon which the *Registrar* may refuse the application. If the *Registrar* decides to refuse the application, he must notify the applicant in writing and give reasons for his decision.⁷⁷³

7 2 Application for Authorisation to Establish a Bank

In terms of section 13(2) the application for authorisation *must* be refused by the *Registrar* in the following situations:

(i) *The Registrar is not satisfied that the establishment of the proposed bank will be in the public interest:*⁷⁷⁴ The Act gives no guidance on the circumstances in which the establishment of the bank will not be in the public interest. The constitutionality of this provision may be suspect. Certainly, if it is interpreted as intending to enable the *Registrar* simply to prevent a large number of banks from flooding the market, the

⁷⁷¹ See *Chapter 6*, 170 *et seq.* and 178 *et seq.*

⁷⁷² Joubert, W. A. / Scott, T. J. / Faris, J. A.; *The Law of South Africa*, Cumulative Supplement 1996, Par. 742.

⁷⁷³ Ss 13 (3), 17 (3). Reasons must be given as this is a requirement of just administrative action. See S 33 of the Constitution read with Item 23 Schedule 6.

⁷⁷⁴ S 13 (2) (a).

provision must be questioned. It is, after all, in conflict with the right to freedom of profession and trade which is entrenched in the Constitution.⁷⁷⁵ It is suggested that the infringement of this fundamental right by this provision of the Banks Act cannot be justified by the objectives of the Act. More banks simply means more competition, and if the *Registrar*, for this reason, wants to prevent more banks in this manner, his conduct would amount to *inadmissible* state intervention.

(ii) *The Registrar is not satisfied that the business the applicant proposes to conduct is banking business:*⁷⁷⁶ The concept "the business of a bank" is defined in the Act. In terms of this provision the *Registrar* must refuse authorisation unless he is convinced that the proposed business is "the business of a bank"⁷⁷⁷ in this sense. This provision serves to protect the banking industry by distinguishing clearly between the activities of banks and other sectors of the economy.

(iii) *The Registrar is not satisfied that the business will be conducted by a public company incorporated under the Companies Act:* Unless it is clear that the applicant intends conducting banking business in the form of a public company, the *Registrar* is obliged to refuse authorisation.⁷⁷⁸

(iv) *The Registrar is not satisfied that the applicant will be able to establish itself successfully as a bank:* This is a broad provision. One application would be that the *Registrar* must refuse authorisation if he is of not satisfied that the applicant's management has the qualifications and qualities to establish itself successfully as a bank.⁷⁷⁹ This would include sufficient practical and theoretical knowledge of banking affairs. It is suggested that the principle in German law to the effect that similar

⁷⁷⁵ S 22.

⁷⁷⁶ S 13 (2) (b).

⁷⁷⁷ S 1 (1) *the business of a bank* together with ss 76 *et seq.*

⁷⁷⁸ S 13 (2) (c); simultaneous registration of a company that intends to conduct banking transactions under the *Companies Act, No. 61 of 1973* may only take place with the *Registrar's* permission. See s 15.

⁷⁷⁹ S 13 (2) (d).

previous business activity is a good indication that the applicant should be able to establish itself successfully as a bank, is equally applicable here.⁷⁸⁰

(v) *The Registrar is not satisfied that the applicant has the financial means to comply with the requirements of the Act:* The Banks Act contains certain prudential requirements designed to protect depositors.⁷⁸¹ If the *Registrar* is not satisfied that these requirements can be met he must refuse authorisation.⁷⁸²

(vi) *The Registrar is not satisfied that the bank's business will be conducted prudently:* Should the *Registrar* suspect the envisaged bank will not be managed in a risk-conscious manner as can be expected in the banking industry, he must refuse the application for authorisation.⁷⁸³ Due to the extreme sensitivity of this trade and its dominant position in the economy, the business policy of a banking establishment must meet certain requirements, and be sufficiently risk conscious.

(vii) *The Registrar is not satisfied that the directors and executive officers of the proposed bank are fit and proper persons to hold such offices:* Authorisation must also be refused if the *Registrar* does not consider the directors and executive officers of the bank to be sufficiently reliable.⁷⁸⁴ Reliability means that the person who has this position justifies the trust placed in him or her. The conduct of these people in the past is an important point of reference in this regard.

(viii) *The Registrar is not satisfied that an executive officer of the proposed bank has sufficient relevant experience:* Whilst the previous ground for refusing authorisation relates to the trustworthiness of the executive officers, this provision focuses on objective criteria such as experience (and perhaps qualifications).⁷⁸⁵

⁷⁸⁰ See 130 above.

⁷⁸¹ See ss 70 *et seq.*

⁷⁸² S 13 (2) (e).

⁷⁸³ S 13 (2) (f).

⁷⁸⁴ S 13 (2) (fA).

(ix) *The Registrar is not satisfied that the board of directors is appropriate having regard to the nature and scale of the business it intends conducting:* This provision is intended to ensure that the board of directors of the bank is sensibly chosen to result in a group of people who have sufficient experience concerning the nature and the extent of the business activities.⁷⁸⁶

7 3 Application for Registration as a Bank

The *Registrar* is not only empowered to refuse authorisation, but can also, in certain circumstances, refuse to register an institution that was successful at the authorisation stage. The Banks Act provides for this in detail.⁷⁸⁷ In terms of section 17(2) the *Registrar* has the discretion to disallow registration in the following cases, which may overlap:

(i) *The institution no longer meets the requirements of section 13(2) (that is the requirements necessary for authorisation to form a bank):* If the institution therefore no longer meets any one of the requirements it had to meet during the authorisation process, the *Registrar* has the discretion to refuse the application for registration.⁷⁸⁸

(ii) *The institution is likely not to be able to meet a requirement of the Act, or to pursue a practice contrary to a provision of the Act:* Registration may accordingly be refused if it becomes evident that the bank will probably not be able to meet the requirements of the Act or that its practices will be irreconcilable with the provisions of the Act.⁷⁸⁹

(iii) *The interests of some person in the institution appear to be inconsistent with the provisions of the Act:* Registration can also be refused if it appears that the interests of

⁷⁸⁵ S 13 (2) (g). Cf also the details in this chapter, 148, 149.

⁷⁸⁶ S 13 (2) (h).

⁷⁸⁷ The conceptualisation of the registration procedure was slightly changed by means of the *Banks Amendment Act, No. 55 of 1996*. See also South African Reserve Bank *Banks Supervision Department Annual Report* (1996), 52.

⁷⁸⁸ S 17 (2) (a).

any person in the institution is inconsistent with any provision of the Act.⁷⁹⁰ This would be the case where, *inter alia*, unclear connections with other companies makes effective supervision impossible or difficult. Unclear and overly complex company structures may not only endanger the security of deposits but could also be abused for the purposes of organised crime such as money-laundering operations.

(iv) *The interests of depositors will be affected detrimentally by the manner in which the institution proposes to conduct its business, or for some other reason.* Thus, if the Registrar is of the opinion that for whatever reason the interests of depositors will be detrimentally affected, he can refuse registration.⁷⁹¹ This provision gives effect to one of the main objectives of banking supervision namely the protection of the depositors.

(v) *Problems relating to the name of the institution:* If the name intended for the bank already exists or is similar to an existing or previously registered bank name, and as a consequence may mislead the public, registration can also be refused.⁷⁹²

(vi) *The application does not comply with the requirements of the Act:* In this case, too, the Registrar may refuse registration.⁷⁹³ One example would be where the company is unable to meet the liquidity requirements of the Act.

7 4 Branches of Foreign Institutions

As noted above, a foreign institution wishing to conduct banking business in the form a branch needs authorisation in terms of section 18A of the Act. In the present context it is of interest to note that such authorisation will be refused by the Registrar if he is not

⁷⁸⁹ S 17 (2) (b). *cf* the details in this chapter, 148 and 149.

⁷⁹⁰ S 17 (2) (c).

⁷⁹¹ S 17 (2) (d).

⁷⁹² S 17 (2) (e).

⁷⁹³ S 17 (2) (f). See also *Barclays (DC & O) v Volkskas Bpk* 1951 (2) SA 296 (T), 1952 (3) SA 343 (AD); *Willis, Nigel, Banking in South African Law* (1981), 55 *et seq.*

satisfied that proper supervision will be exercised by the supervisory authority of the foreign institution's domicile.⁷⁹⁴

8 Revocation, Cancellation and Suspension of Permission

8 1 Introduction

As is evident in the above discussion both the authorisation to establish a bank and the subsequent registration of that bank are subject to the permission of the registrar. The fact that such permission has been granted, does not mean that it cannot be revoked or suspended. The circumstances in which the Registrar can revoke or suspend are spelt out in the Banks Act which makes provision for both the revocation of authorisation to establish a bank, and the cancellation or suspension of registration.

8 2 Revocation of Authorisation

In terms of section 14 of the Banks Act, the authorisation to establish a bank can be revoked by the *Registrar* on two grounds. The first is that the application contained false or misleading information. This would also generally constitute an offence under the Act.⁷⁹⁵ The second ground for revocation is that no progress had been made within a period of 6 months from the granting of the authorisation towards establishing the bank. This provision ensures both that applicants execute the process speedily and that there are no old, valid, but unused authorisations of this nature. As such this provision helps the Registrar to have an accurate overview of new potential banks.

8 3 Cancellation or Suspension of Registration

The registration of a bank may be cancelled or suspended by the Registrar in certain circumstances, and otherwise by the Court on application by the Registrar.

Cancellation or suspension by the *Registrar* is dealt with in section 23 of the Act. This is possible if: (i) the bank has not conducted the business of a bank for a period of 6

⁷⁹⁴ S 18A(5)

⁷⁹⁵ See s 21 (a) and in this chapter *Legal Consequences of Cancellation*, 154.

months commencing on the date of its registration;⁷⁹⁶ (ii) its registration was obtained on the strength of untrue or misleading information furnished by a person who has since been convicted of an offence in terms of section 21 of the Act;⁷⁹⁷ (iii) it has failed to comply with conditions prescribed by the Registrar;⁷⁹⁸ and (iv) its main place of business is outside the Republic and its authorisation to conduct business has been revoked in that country.⁷⁹⁹

Before steps of this nature are taken, the *Registrar* must, however, notify the Chairman or the Chief Executive Officer of the bank of his intention and the reasons for it. The notice must call upon the affected institution to show cause within a period of 30 days of the notice why its registration should not so be cancelled or suspended.⁸⁰⁰ After considering any representations by the bank the Registrar must reach his decision and inform the chairman or chief executive officer in writing.⁸⁰¹

If the Registrar on some other ground than those set out in section 23, is of the opinion that the registration of a bank should be suspended or cancelled, he can, in terms of section 25 of the Act, apply to the Court for an order to this effect. In lieu of such an application the Registrar is empowered, by written notice to the bank concerned, to restrict with immediate effect the activities of such bank as he sees fit.⁸⁰²

The registration of a bank will also be cancelled by the Registrar on submission to him of (i) a special resolution of the bank authorising such cancellation,⁸⁰³ or (ii) a certificate by the Master to the effect that the bank has been wound up.⁸⁰⁴

⁷⁹⁶ S 23(1).

⁷⁹⁷ S 23(2)(a).

⁷⁹⁸ S 23(2)(c).

⁷⁹⁹ S 23(2)(b).

⁸⁰⁰ S 24(1).

⁸⁰¹ S 24(2).

⁸⁰² S 26.

⁸⁰³ S 27.

The cancellation or suspension of registration of a bank, or any restriction on its activities must be published by the Registrar in the Government Gazette.⁸⁰⁵ A cancellation or suspension in terms of section 23 becomes effective 30 days after publication in the Government Gazette, or, if an appeal was lodged by the bank against the decision of the *Registrar* to the *Board of Appeal*,⁸⁰⁶ on the date upon which it is notified that the *Board* has confirmed the *Registrar's* decision.⁸⁰⁷ The cancellation or suspension in terms of section 25 becomes operative on the date ordered by the court.⁸⁰⁸ The Registrar determines the date upon which the cancellation comes into effect where it stems from a special resolution or a Master's certificate.⁸⁰⁹

When the registration becomes effective the Registrar may order the institution in writing to pay back all deposits and interest, and to change its name and public documents to reflect its new status.⁸¹⁰

8.4 Foreign Institutions

A procedure akin to the cancelling of registration by the Registrar is provided for as regards branches of foreign banks in section 18B of the Act. By following this procedure the Registrar can cancel or suspend his authorisation to such an institution to conduct banking business.

Legal Consequences of Cancellation

The cancellation of a bank's registration means that it may not conduct any further banking business.⁸¹¹ Non-compliance is a serious criminal offence punishable with a

⁸⁰⁴ S 28.

⁸⁰⁵ S 30 (a) (11) & (iv).

⁸⁰⁶ See *Chapter 6*, 170 *et seq.*

⁸⁰⁷ S 31(b)

⁸⁰⁸ S 31(c).

⁸⁰⁹ S 31(d).

⁸¹⁰ S 32(1).

⁸¹¹ S 11 (1).

maximum fine of R 100.000 and/or five years imprisonment.⁸¹² To ensure compliance the *Registrar* has the powers conferred upon him by section 6 of the Act as well as those provided for in the Inspection of Financial Institutions Act 38 of 1984. They include the power to appoint an inspector to investigate existing or suspected malpractice, as well as the power of short-term, unannounced audits.⁸¹³

After the cancellation of the registration, the affairs of the institution are finally wound up. This is done in accordance with section 32, which determines that deposits must be repaid. The *Registrar* may specify further details.

9 Conducting Banking Transactions without Authorisation

It has been noted that only registered banks may conduct banking business. The powers of the *Registrar* to ensure compliance with this fundamental principle are far reaching. In terms of section 81 of the Act he may apply for an interdict to prohibit an anticipated contravention of section 11, or to prohibit the continuation or repetition of such conduct. In terms of section 82 he has the power to exact information from unregistered persons (in order to ascertain whether they might be conducting banking business). Furthermore, in terms of sections 83 and 84 the Registrar can order and control the repayment of money illegally obtained from depositors. Non-compliance with orders of the Registrar in this regard is a criminal offence.⁸¹⁴

C Summary and Comparison

In the Federal Republic of Germany, every enterprise that intends to conduct banking business requires a licence from the *Bundesaufsichtsamt* as set out in § 1 I KWG. In the Republic of South Africa, the institution must be registered as a bank by the

⁸¹² S 11 (2) together with s 91 (4) (a).

⁸¹³ Ss 2 - 8 of the *Inspection of Financial Institutions Act, No. 38 of 1984*.

⁸¹⁴ S 82 (3) & 91.

*Registrar.*⁸¹⁵ The effect of the registration is similar to that of the licence. Thus, the admission to banking business is strictly controlled and regulated in both countries.

In principle, in both countries, if there are no reasons for refusal, the application for a licence or registration should be granted. This principle is, however, somewhat weaker in South Africa than in Germany due to the general provision in section 13(2)(a) in terms of which the *Registrar* is entitled to refuse authorisation on the ground of the public interest.⁸¹⁶ This provision must now, however, be interpreted in the light of the new Constitution which entrenches the right of freedom of trade, occupation and profession.⁸¹⁷ This provision binds the state to a neutral approach to economic policy.⁸¹⁸

Although different in some respects, the application procedure is formalised in both countries. In both countries, granting of permission is seen as an administrative act. The procedure in Germany is simply in accordance with the general codified law of administrative procedure. In South Africa the procedure is set out in detail in the Banks Act itself.⁸¹⁹ There are substantial differences between South African and German administrative law. This is a consequence of the difference in the respective legal structures. The principles of administrative law in South Africa are derived from the common law and case law (with a significant English influence) and not primarily from a general statute as in Germany.⁸²⁰

A further similarity between the two systems lies in the question whether a particular institution should be subject to supervision. In Germany the point of departure is whether the institution is a credit institution. If this is the case, it is subject to the supervision by the *Bundesaufsichtsamt*. An institution is regarded as a credit institution

⁸¹⁵ See 140 *et seq.* above.

⁸¹⁶ The constitutionality of this provision is thus doubted.

⁸¹⁷ Under the previous constitutional dispensation (the dispensation in which the Banks Act was initially drafted) Parliamentary legislation was supreme and could not be attacked for being unconstitutional.

⁸¹⁸ See Chapter 2, 58 *above*.

⁸¹⁹ See this Chapter, 143 *et seq.* *above*.

⁸²⁰ See this Chapter, 121 *et seq.* and 143 *et seq.* *above*.

both if it is licensed as such or if it conducts banking transactions (irrespective of whether it is licensed). There is no similar provision in South African law. However, the *Registrar* is empowered to intervene if banking business is conducted by an unregistered institution.⁸²¹ The end result is very much the same.

In both countries the supervisory organs examine the financial situation of the planned bank and the experience and qualifications of key personnel of the applicants on the basis of comprehensive data submitted by the applicant.⁸²² Negative findings in either of these areas constitute the main reasons for the dismissal of applications. In the absence of some valid ground for refusal the applicant is basically entitled to the necessary permission.⁸²³

In South Africa, unlike in Germany, the application procedure has two levels: authorisation and registration. The applicant may only commence business once both procedures have been successfully completed and it has been notified of the *Registrar's* decision.⁸²⁴

Because of the fact that the issuing of a licence in the Federal Republic of Germany is a *gebundene Entscheidung* (a non-discretionary decision), the applicant has a right to licence if all legal requirements have been met. Restrictions are only possible in accordance with § 36 I *VwVfG*. Such restrictions, which usually take the form of conditions, must, however, be reconcilable with the objectives of the *KWG*.⁸²⁵ In this regard the powers of the *Registrar*, in South Africa, are more far-reaching. The wide-ranging possibilities of restriction are based on the power of the *Registrar* to attach any conditions he sees fit to registration.⁸²⁶ This does not mean, however, that the *Registrar*

⁸²¹ See § 32 I 1 *KWG* and s 11 of the *Banks Act No. 94 of 1990*.

⁸²² Next to other criteria, see § 33 I Nr. 2, 2a, 3 *KWG* and ss 13 (2) (fa), (g); 17 (2) (a) of the Banks Act.

⁸²³ See § 33 *KWG* and ss 13, 17 of the *Banks Act No. 94 of 1990* and in this chapter, 126 *et seq.* and 147 *et seq.*

⁸²⁴ See 147 *above*.

⁸²⁵ See 123 - 125 *above*.

⁸²⁶ See 146, 147 *above*.

can attach conditions arbitrarily. The right to fair administrative action is fundamental and entrenched in the Constitution.⁸²⁷

In both countries provision is also made for the revocation of the licence or registration.⁸²⁸ An interesting difference is that in South Africa the *Registrar* can cancel the authorisation if no use has been made of it within six months. If he does not cancel it, it remains in force. In Germany, in contrast, permission is automatically nullified if it has not been used within one year.⁸²⁹ Both systems recognise several other grounds for cancellation. In Germany the *Bundesaufsichtsamt* can revoke permission on any of the grounds stipulated in the KWG. In addition, it has the general provisions of the *VwVfG* at its disposal. In South Africa the *Registrar* can only cancel or suspend registration on the specific grounds provided for in the Banks Act. However, the court is entitled to cancel registration on any ground on application by the *Registrar*.⁸³⁰

Conducting banking transactions without the necessary permission is a criminal offence in both countries.⁸³¹

In conclusion, it can be said that the two systems are surprisingly similar. The objectives of the legislation are very much the same. This can be explained by the fact that in this area the problems faced by the two countries are also similar.

⁸²⁷ See s 33 of the Constitution.

⁸²⁸ See § 35 KWG and s 23 of the *Banks Act*.

⁸²⁹ See § 35 I KWG.

⁸³⁰ See §§ 35 KWG, 48, 49 *VwVfG*, see therefor 134 *et seq.* above and ss.13, 17 of the *Banks Act No. 94 of 1990*, see 146 *et seq.*

⁸³¹ §§ 54 *et seq.* KWG and s 91 of the *Banks Act No. 94 of 1990*.

Chapter 6

The Remedies of Financial Institutions against Supervisory Action

A Federal Republic of Germany

1 Introduction

If a person's rights are affected or violated by a public authority, that person has standing to challenge such action in terms of article 19 IV *GG*. The *Bundesaufsichtsamt*, as a Superior Federal Authority,⁸³² qualifies as a public authority in terms of article 19 IV 1 *GG*. Thus, all decisions made and all steps taken by the *Bundesaufsichtsamt* may be tested by the courts.⁸³³

2 Protection Based on Administrative Law

2 1 General Provisions

As a rule § 6 I *KWG* forms the legal basis of administrative action taken by the *Bundesaufsichtsamt*.⁸³⁴ This rule is invoked irrespective of whether the action favours or prejudices the credit institution concerned. Further, the precise nature of the action, that is whether it is a decree, regulation, licence, prohibition (*Verfügung*, *Anordnung*, *Erlaubnis*, *Untersagung*) or something else, is irrelevant.⁸³⁵

⁸³² § 5 I 1 *KWG*.

⁸³³ Münch, Ingo von / Kunig, Philip, *Grundgesetz-Kommentar*, on Art 19 IV, *marg. n. 47 et seq.* Concerning credit institutions see Möschel, Wernhard, *Das Wirtschaftsrecht der Banken*, 119 *et seq.*

⁸³⁴ Banking supervisory measures usually rely on this provision which does not, however, mean that there are no other legal bases for such action in the *KWG*.

⁸³⁵ Bähre, Inge Lore / Schneider, Manfred, *KWG - Kommentar*, on § 6, *marg. n. 4*.

An administrative act may be defined as every decree, decision or other measure taken by a public authority aimed at having immediate and external legal effect. A general decree is an administrative act that addresses a specific group of persons, or concerns the public at large.⁸³⁶

Every decision taken by the *Bundesaufsichtsamt* aimed at fulfilling its functions in terms of the *KWG* is of special importance to the particular credit institution concerned. For example, an administrative decision enables the credit institution to function. It is taken in response to an application of the institution and clearly has external consequences.

In most cases, the *Bundesaufsichtsamt* has a discretion. It must, however, exercise its discretion in accordance with the criteria set out in the *KWG*. The exercise of the discretion is further governed by the principle of proportionality (*Grundsatz der Verhältnismäßigkeit des Verwaltungshandelns*). The exercise of its discretion is therefore governed by the principle that the means must always be proportionate to the end. This entails that the means must be rationally connected to the objective and that the least infringing measure must be chosen. Stricter measures may only be used if less infringing alternatives cannot achieve the desired result.⁸³⁷

The *Bundesaufsichtsamt* also needs to consider the general principles of procedure relating to administrative acts as set out in §§ 9-30 *VwVfG*. Especially relevant is § 28 *VwVfG*,⁸³⁸ which contains the *audi alteram partem* principle. Other important principles

⁸³⁶ § 35 *VwVfG* reads as follows: „Der Verwaltungsakt ist jede Verfügung, Entscheidung oder andere hoheitliche Maßnahme, die eine Behörde zur Regelung eines Einzelfalles auf dem Gebiet des öffentlichen Rechts trifft und die auf unmittelbare Rechtswirkung nach außen gerichtet ist. ...“

⁸³⁷ *BVerfGE* 60, 295; *BVerwG*, *NVwZ* 1987, 886. See also Stelkens, Paul / Bonk, Heinz Joachim / Sachs, Michael; *Verwaltungsverfahrensgesetz - Kommentar*, on § 1, *marg. n.* 19.

⁸³⁸ „§ 28 (*VwVfG*)

(1) Bevor ein Verwaltungsakt erlassen wird, der in die Rechte eines Beteiligten eingreift, ist diesem Gelegenheit zu geben, sich zu den für die Entscheidung erheblichen Tatsachen zu äußern.
 (2) Von der Anhörung kann abgesehen werden, wenn sie nach den Umständen des Einzelfalls nicht geboten ist, insbesondere wenn
 1. eine sofortige Entscheidung wegen Gefahr im Verzug oder im öffentlichen Interesse notwendig erscheint;
 2. durch die Anhörung die Einhaltung einer für die Entscheidung maßgeblichen Frist in Frage gestellt würde;

pertain to clarity and form:⁸³⁹ the measure must be clear⁸⁴⁰ and properly announced.⁸⁴¹ Generally, an administrative act can in terms of § 37 II *VwVfG*, be issued in a written, oral or other form. However, banking supervisory measures of the *Bundesaufsichtsamt*, including the granting of a licence, must be in writing.⁸⁴² One of the reasons for this is to secure evidence in these matters.

Written administrative acts that negatively affect a person must be accompanied by a notice containing the possible remedies available to such a person.⁸⁴³ The notice must identify the correct remedy, the authority where it may be sought, and the time period available (or the deadline) to set it in motion (generally 1 month⁸⁴⁴).⁸⁴⁵ The identification of the remedy is compulsory.⁸⁴⁶ If it is not identified, the deadline for the correct remedy is extended to one year in terms of § 70 II read with § 58 *VwGO*.

Before such an *Anfechtungsklage* or *Verpflichtungsklage* can be instituted against the *Bundesaufsichtsamt* for supervisory measures taken by it, a preliminary procedure, the *Widerspruchsverfahren*, must be instituted in terms of §§ 68 ff *VwGO*.⁸⁴⁷ This process

3. von den tatsächlichen Angaben eines Beteiligten, die dieser in einem Antrag oder einer Erklärung gemacht hat, nicht zu seinen Ungunsten abgewichen werden soll;
 4. die Behörde eine Allgemeinverfügung oder gleichartige Verwaltungsakte in größerer Zahl oder Verwaltungsakte mit Hilfe automatischer Einrichtungen erlassen will;
 5. Maßnahmen in der Verwaltungsvollstreckung getroffen werden sollen.
- (3) Eine Anhörung unterbleibt, wenn ihr ein zwingendes öffentliches Interesse entgegensteht."

⁸³⁹ § 37 *VwVfG*.

⁸⁴⁰ § 39 *VwVfG*.

⁸⁴¹ § 41 *VwVfG*.

⁸⁴² § 32 I *KWG*.

⁸⁴³ For the general requirements iro advice of legal remedy, see Kopp, Ferdinand O., *Verwaltungsgerichtsordnung*, on § 58, marg. n. 10 *et seq.*

⁸⁴⁴ If the advice of legal remedy provides a longer period for contradiction, the given period counts as deadline.

⁸⁴⁵ §§ 59, 70, 73 III *VwGO*.

⁸⁴⁶ This stems from the fact that the *Bundesaufsichtsamt* is a Federal Authority. See § 59 *VwGO*. See further Eyermann, Erich / Fröhler, Ludwig / Kormann, Joachim, *Verwaltungsgerichtsordnung - Kommentar*, on § 59, marg. n. 1; Redeker, Konrad / Oertzen, Hans-Joachim von, *Verwaltungsgerichtsordnung - Kommentar*, on § 59, marg. n. 1 *et seq.*

requires the legality and the merits of the administrative act to be re-evaluated by the *Bundesaufsichtsamt*. The preliminary procedure is initiated by submitting an informal objection (*Widerspruch*) to the *Bundesaufsichtsamt*. This objection must be made within the period of one month after the administrative act took place. If this deadline is not met, the administrative act becomes effective and a complaint will not be allowed. The *Bundesaufsichtsamt* is also the authority⁸⁴⁸ (*Widerspruchsbehörde*) that deals with the objection within an appropriate period of time and, correspondingly, gives notice of the result of the objection in accordance with § 73 I 1, 2; § 56 *VwGO*. As far as the objection is not successful, a notice must be given in accordance with the stipulations of the *VwZG*. The notice must be in writing and be accompanied by an advice concerning the possibilities of legal remedies (§ 73 III *VwGO*).

Should the preliminary procedure be unsuccessful, the objecting credit institution may submit a complaint (within a specified period)⁸⁴⁹ to the administrative court in Berlin.⁸⁵⁰ Depending on the nature of the administrative act, the application is either for setting the administrative act aside or for a mandamus to compel the performance of the administrative act. The action is brought against the Federal Republic of Germany as represented by the *Bundesaufsichtsamt*.

A complaint relating to banking supervisory measures or to the rejection or the omission of an administrative act must comply with all the procedural prerequisites.⁸⁵¹ For example, the correct statutory provisions must be invoked, the correct defendant must be specified, the internal remedies must be exhausted, and the time periods must be complied with. The substance of the complaint is then dealt with.

⁸⁴⁷ The purpose of the preliminary procedure is to relieve the burden of the courts. Moreover, a reconsideration of the matter by the *Bundesaufsichtsamt* could determine the facts of the matter more clearly, settle legal issues and give attention to the complaints of the objector. This could lead to the resolution of disputes without involving the courts (*BVerwGE* 26, 161; *NJW* 1967, 1245; Bettermann, Karl August, *Das erfolglose Vorverfahren als Prozeßvoraussetzung des verwaltungsgerichtlichen Verfahrens*, (1959) DVBl, 308). The preliminary procedure therefore serves to test the legitimacy of the administrative action.

⁸⁴⁸ This also arises from its construction as an independent Superior Federal Authority.

⁸⁴⁹ See §§ 74, 81 *VwGO*. The period is one month.

⁸⁵⁰ Since the *Bundesaufsichtsamt* is based in Berlin, the Berlin Administrative Court is responsible.

⁸⁵¹ Most of these are not problematical and they are normally complied with.

Section 40 I *VwGO*⁸⁵² regulates such disputes, provided that the dispute is not of a constitutional nature.⁸⁵³ The *KWG* clearly forms part of public law. The powers of the *Bundesaufsichtsamt* are derived straight from the *KWG*. Thus, its decisions are of a public nature.⁸⁵⁴

A complaint may be brought directly to the administrative court, without first going through the preliminary procedure, if the *Bundesaufsichtsamt* fails to decide on the objection within the time limit and offers no valid explanation for the failure to do so. This complaint is known as an action for the failure to perform (*Untätigkeitsklage*).⁸⁵⁵ In terms of § 75 2 *VwGO* the credit institution must wait for a period of three months before it can lodge such a complaint.⁸⁵⁶

To lodge a complaint the credit institution must, however, be *klagebefugt* (that is capable of lodging a complaint) in accordance with § 42 II *VwGO*. The rights of the institution must have been affected by the banking supervisory measure. This will always be the case where the administrative act is unlawful. Where the administrative act is unlawful, an infringement of the institution's art 2 I *GG* rights always takes place since the general freedom right may only be limited by decisions which conform with the legal order as a whole.⁸⁵⁷ In this way art 2 I *GG* serves to uphold the rule of law. The

⁸⁵² In principle, recourse is ensured by art 19 IV 2 *GG*. However, this provision is subsidiary and has no real importance in these circumstances. § 40 *VwGO* stipulates the more specific provision, which provides for remedies in the administrative procedure.

⁸⁵³ There is no specific provision in this regard. The general provisions of § 40 *VwGO* are accordingly applicable.

⁸⁵⁴ See on the theories relating to the difference between private and public law Maurer, Hartmut, *Allgemeines Verwaltungsrecht*, § 3, *marg. n.* 12ff for further detail. See also Wolff, Hans J., *Der Unterschied zwischen öffentlichen und privatem Recht*, (1950) AöR, 205 and Bachof, Otto, *Über öffentliches Recht*, in: *Festgabe für BVerwG*, 1978, 1; For the legal classification of banking supervisory measures see also *Chapter 5*, 119 *et seq. above*.

⁸⁵⁵ This is an attempt to prevent the administration to protract a contradiction.

⁸⁵⁶ Redeker, Konrad / Oertzen, Hans Joachim von, *Verwaltungsgerichtsordnung - Kommentar*, on § 75, *marg. n. 1 et seq.*

⁸⁵⁷ Credit institutions, as juristic persons have, according to general consensus, constitutional legal capacity. See Möschel, Wernhard, *Das Wirtschaftsrecht der Banken*, 120 *et seq.*

plaintiff must present facts which show that the administrative act infringed his own subjective rights.⁸⁵⁸

2 2 The Specific Actions

Anfechtungsklage (Action for setting aside)

An *Anfechtungsklage* (action for setting aside) is brought if the aggrieved party wishes to avoid the consequence of a specific administrative act (*in casu* the particular banking supervisory measure). This can only be done if the administrative act is not academic or moot. For example, if the *Bundesaufsichtsamt* rules that a certain credit institution must close for a period of one week, ending on the third of June 1998 and the complaint is lodged on the tenth of June, this issue will be moot. In other words, this occurs if the administrative act no longer has any legal consequences. This will be the case if it has been revoked, or if the complaint against it has fallen away, or when for reasons such as such as the passing of time, the setting aside becomes impossible or useless.

The complaint may be directed against the original administrative act (§ 79 I no 1 *VwGO*) or against the notice of *Bundesaufsichtsamt* itself (§79 I no 2, II *VwGO*) insofar as the latter may give rise to an additional complaint because it compromised the position of the credit institution even further.

In terms of § 113 I 1 *VwGO*, an action may be brought to set an administrative act aside if the action of the *Bundesaufsichtsamt* is unlawful and infringes the rights of the credit institution concerned.

The court must test both the formal⁸⁵⁹ and the material lawfulness of the banking measure. The material requirements are that the administrative act must be lawful in the

⁸⁵⁸ This corresponds with the so-called ‘theory of possibility’ which is seen as the predominant opinion in legal literature and case law.

⁸⁵⁹ Cf. the section *supra* dealing with the formal legal requirements such as the consideration of principles of procedure (§§ 9-30 *VwVfG*), the rule of determination (§ 37 *VwVfG*), the explanation (§ 39 *VwVfG*) and the orderly announcement (§ 41 *VwVfG*).

sense that it must be in accordance with a specific provision of the *KWG* and must satisfy the requirements of the provision.⁸⁶⁰

The administrative court must also test whether the *Bundesaufsichtsamt* exercised its discretion properly,⁸⁶¹ and whether the principles of proportionality were considered.⁸⁶²

Verpflichtungsklage (Mandamus)

The aim of the *Verpflichtungsklage* (the mandamus) is to compel the authority to do something, in this context normally the issuing of a licence in terms of § 32 I *KWG*. The application may only be brought if the matter is ready to be decided on (*spruchreif*)⁸⁶³ and if the credit institution's rights were infringed by the unlawful refusal to commit the desired administrative act.⁸⁶⁴

The rule that the matter must be ripe for legal decision (*spruchreif*) is problematic. In the absence of valid reasons, the *Bundesaufsichtsamt* has no discretion to refuse to issue a licence.⁸⁶⁵ But the *Bundesaufsichtsamt* has the discretion to subject the licence to conditions or restrict it to certain types of banking transactions.⁸⁶⁶ Thus, the administrative court can generally only direct that the discretion ought to be exercised (*Bescheidungsurteil* in terms of § 113 IV 2 *VwGO*). The court cannot usurp the authority of the *Bundesaufsichtsamt* or decide on its behalf.

⁸⁶⁰ Here usually § 6 I *KWG*.

⁸⁶¹ §§ 114 *VwGO*, 40 *VwVfG*.

⁸⁶² See 160 and n. 837 *supra*.

⁸⁶³ *Spruchreife* means that no further arguments are required for a final decision to be reached (Redeker, Konrad / Oertzen Hans-Joachim von, *Verwaltungsgerichtsordnung - Kommentar*, on § 113 *marg. n. 45 et seq.*).

⁸⁶⁴ § 113 IV 1 *VwGO*.

⁸⁶⁵ See *Chapter 5*, 120 *et seq. above*.

⁸⁶⁶ § 32 II *KWG*.

In other words, it may not replace the administrative discretion of the *Bundesaufsichtsamt* with its own. The court would therefore direct that the *Bundesaufsichtsamt* reconsider the matter, in accordance with the legal position as set out in the decision of the court. In this way the court may give guidance to the *Bundesaufsichtsamt*.⁸⁶⁷

2 3 Form of the Decision

In general, the administrative court passes judgement after entertaining oral argument (§§ 101, 107 *VwGO*). An appeal (§ 124 *VwGO*) to the Highest Administrative Court in Berlin (*Oberverwaltungsgericht Berlin*) against this decision may be brought within one month after the verdict. The decision of this appeal tribunal may be reviewed by the *Bundesverwaltungsgericht* (Federal Administrative Court). Such a review, however, is only possible if allowed by the court (§ 132 I, II *VwGO*) or if substantial deficiencies are evident. (§ 133 *VwGO*).

Under certain conditions *Sprungrevision* may be submitted to the Federal Administrative Court according to § 134 *VwGO*. In other words, the complaint may be lodged directly with the Federal Administrative Court, without first approaching the Highest Administrative Court in Berlin. This is permissible when the *Bundesaufsichtsamt* agrees thereto and the complaint raises issues of fundamental importance for the credit industry as a whole. This ensures that time is saved and legal certainty achieved.

2 4 Interim Legal Protection

Both the *Verpflichtungsklage* and the *Anfechtungsklage* generally have the effect of suspending the challenged administrative act (§ 80 I *VwGO*). But there are many exceptions to the principle. Suspension does not take place, according to § 80 II no 1 *VwGO* when the *Bundesaufsichtsamt's* demand is one for costs and fees, according to §

⁸⁶⁷ Kopp, Ferdinand O., *Verwaltungsverfahrensgesetz*, on § 113, marg. n. 72ff; Redeker, Konrad / Oertzen, Hans-Joachim von, *Veraltungsgerichtsordnung - Kommentar*, on § 113, marg. n. 19 *et seq.*

51 *KWG*.⁸⁶⁸ In terms of § 80 II no 3, the suspension is also cancelled in the cases listed in § 49 *KWG*.⁸⁶⁹

The *Bundesaufsichtsamt* may in addition order immediate compliance with the measure if it is in the public interest or in the interest of an affected person or institution (§ 80 I, II no 4 *VwGO*). However, in terms of § 80 III *VwGO*, reasons must be given in writing for such a decision.⁸⁷⁰

Interim relief may further not be requested if it would undermine the purpose of the regulation of the credit industry. For example, when an application for permission to conduct business is to be decided, interim relief may in fact mean that the credit institution is allowed to operate. This should be avoided. Therefore the complaint must not be made in terms of § 123 *VwGO* but only in terms of § 80 V *VwGO*. Put differently, where the granting of a licence (as set out in § 32 *KWG*) is refused, a temporary order in terms of § 123 *VwGO* would theoretically be the correct remedy in order to obtain immediate protection. However, an application of this kind is not admissible since it would have the same result as the main remedy and as such contradict the essence of preliminary legal protection.⁸⁷¹

⁸⁶⁸ Haftke, Heinz Christian, *Zur Kosten- und Gebührenpflicht gegenüber dem Aufsichtsamt*, (1983) ZfgK, 610.

⁸⁶⁹ § 49 *KWG*: „Widerspruch und Anfechtungsklage gegen Maßnahmen des Bundesaufsichtsamtes haben in den Fällen des § 2b Abs. 1 Satz 5 und Abs. 2 Satz 1, des § 12a Abs. 2, des § 35 Abs. 2 Nr. 2, 3 Buchstabe b und 4, der §§ 36, 45, 45a Abs. 1, §§ 46, 46a Abs. 1 und des § 46b sowie bei einer Prüfung nach § 44 Abs. 1 Nr. 1 und 1a und § 44a Abs. 2 Satz 1 keine aufschiebende Wirkung.“ The most important of these regulations are § 35 s 2 No. 2, 3 b and 4 (the suspension of the license if there is a danger that the credit institution will be unable to meet its obligations towards its creditors); § 36 (request for the dismissal and prohibition of the manager from exercising his functions); §§ 46, 46a (measures in case of danger of bankruptcy); § 46b (bankruptcy petition); and § 28 s 1 (appointment of an auditor in special cases). On the basis of the last mentioned provision, the *Bundesaufsichtsamt* can refuse the credit institution's appointment of an auditor for purposes of auditing the financial statements if this is necessary for the purpose of the audit. This could happen if the appointed auditor does not have the necessary amount of co-workers to ensure that the audit will be completed in time or if he has objectively contravened certain duties which arise from his appointment as an auditor or from his professional duties. (Sazgunn, Volkhard / Wohlschieß, Karl, *Gesetz über das Kreditwesen - Kommentar*, on § 28, marg. n. 7.) The refusal of such an auditor is a could be countered by way of an objection (*Widerspruch*) and a legal complaint (*Anfechtungsklage*). A further legal ground for exclusion outside the *KWG* can be found in § 36c *SchiffsBG*.

⁸⁷⁰ Finkelnburg, Klaus / Jank, Klaus Peter, *Vorläufiger Rechtsschutz im Verwaltungsverfahren*, 3. ed. 1986, marg. n. 231 et seq.

The affected credit institution must therefore apply to the administrative court in Berlin, in terms of § V 1 *VwGO* in order to obtain complete or partial interim relief in the cases of § 80 II no 1-3 or to restore it in the case of § 80 II no 4. Should the administrative court in Berlin grant the application,⁸⁷² the *Bundesaufsichtsamt* can, in terms of § 146ff *VwGO*, lodge a complaint against this decision. If the administrative court does not reject the complaint, as set out in § 148 *VwGO*, it must present the matter to the *Oberverwaltungsgericht Berlin* for its decision in terms of § 150 *VwGO*.⁸⁷³

3 Process of Fining

According to § 60 *KWG* read with § 36 I no 1 *OWiG*, the *Bundesaufsichtsamt* is the administrative authority responsible for imposing fines. There is no legal obligation to take action for misdemeanours. Therefore the *Bundesaufsichtsamt* normally has a discretion whether to impose a fine or not. Until notice of a fine is given (as stipulated in §§ 65,66 *OWiG*), the process can be interrupted at any time in terms of § 47 I *OWiG*.⁸⁷⁴ The principles which apply to this process is that equal treatment must be given in similar cases and the appropriateness of the measure must be considered. The fine is imposed by means of notice (*Bussgeldbescheid*). The notice must be delivered in order to comply with § 50 *OwiG* and reasons for the fine must be given.

Fines range between 5 DM and 100 000 DM.⁸⁷⁵ The degree of guilt, the level of unlawfulness and the economic situation of the perpetrator⁸⁷⁶ as well as the financial benefit the perpetrator derived from the deed must be taken into account.⁸⁷⁷

⁸⁷¹ Kopp, Ferdinand O., *Verwaltungsgerichtsordnung - Kommentar*, on § 123, marg. n. 13ff; Eyermann, Erich / Fröhler, Ludwig / Kormann, Joachim, *Verwaltungsgerichtsordnung - Kommentar*, on § 123, marg. n. 8; Finkelnburg, Klaus / Jank, Klaus Peter, *Vorläufiger Rechtsschutz im Verwaltungsverfahren*, 3 ed. 1986, marg. n. 231 *et seq.*

⁸⁷² The decision is made in accordance with the *VwGO* in the *Beschlußverfahren*.

⁸⁷³ Redeker, Konrad / Oertzen Hans-Joachim von, *Verwaltungsgerichtsordnung - Kommentar*, on § 80, marg. n. 34 *et seq.*

⁸⁷⁴ The institution of an action for a fine can be announced informally (§ 50 I 1 *OWiG*).

⁸⁷⁵ Negligently or recklessly committed misdemeanours are fined with up to 50 000 DM.

⁸⁷⁶ BegRegE 1959 zu § 52 - BT-Drs. 3/1114 44.

After being fined, the person or institution concerned may appeal to the *Bundesaufsichtsamt* within two weeks.⁸⁷⁸ If the appeal is rejected and the *Bundesaufsichtsamt* does not revoke the fine, the file is sent to the office of the Attorney General (*Staatsanwaltschaft*) in terms of § 69 III *OWiG*.⁸⁷⁹ From this moment, this office is the prosecuting authority. The Berlin *Tiergarten* lower district court⁸⁸⁰ then decides whether the fine is legally valid or not.

It is admissible to submit a complaint against the judgement of the *Amtsgerichts Berlin-Tiergarten* or against the decision according to § 72 *OWiG* to the Berlin chamber court (*Kammergericht Berlin*) under the conditions of § 79 *OWiG*.

Misdemeanours as provided for in § 56 *KWG* prescribe after three years.⁸⁸¹

4 Public Claims of Liability

It is also possible for a natural person or a credit institution that has suffered damage to its assets as a result of the negligence of *Bundesaufsichtsamt* to claim compensation. The claim is based on § 839 *BGB*⁸⁸² read with art 34 *GG*.⁸⁸³ In terms of art 34 *GG* the

⁸⁷⁷ § 17 IV *OWiG*.

⁸⁷⁸ § 67 *OWiG*.

⁸⁷⁹ If the objection is not allowed, the *Bundesaufsichtsamt* may reject it in accordance with § 69 I 1 *OWiG*.

⁸⁸⁰ The seat of the *Bundesaufsichtsamt* is in the district of the *Amtsgerichts-Tiergarten* of Berlin.

⁸⁸¹ § 31 II No. 1 *OWiG*.

⁸⁸² „§ 839 (BGB)

(1) *Verletzt ein Beamter vorsätzlich oder fahrlässig die ihm einem Dritten gegenüber obliegende Amtspflicht, so hat er dem Dritten den daraus entstehenden Schaden zu ersetzen. Fällt dem Beamten nur Fahrlässigkeit zur Last, so kann er nur dann in Anspruch genommen werden, wenn der Verletzte nicht auf andere Weise Ersatz zu erlangen vermag.*
(2)"

⁸⁸³ „Art. 34 (GG)

Verletzt jemand in Ausübung eines ihm anvertrauten öffentlichen Amtes die ihm einem Dritten gegenüber obliegende Amtspflicht, so trifft die Verantwortlichkeit grundsätzlich den Staat oder die Körperschaft, in deren Dienst er steht. Bei Vorsatz oder grober Fahrlässigkeit bleibt der Rückgriff vorbehalten. Für den Anspruch auf Schadensersatz und für den Rückgriff darf der ordentliche Rechtsweg nicht ausgeschlossen werden."

civil courts have jurisdiction over a dispute of this nature. However, in terms of § 6 III *KWG*, a claim of this nature has little chance of succeeding since the *Bundesaufsichtsamt* only performs the duties assigned to it by the *KWG* in public interest.⁸⁸⁴

B Republic of South Africa

1 Introduction

Section 1 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996* guarantees the rule of law. It provides that the Republic of South Africa is one, sovereign, democratic state founded on, *inter alia*, the value of "supremacy of the constitution and the rule of law".

Thus, all conduct of the executive⁸⁸⁵ - and the *Registrar* as an *organ of state* forms part of the executive – must be judged in the light of this provision. Should a bank⁸⁸⁶ disagree with a decision of the *Registrar*, there are, in principle, two ways in which the bank can have the decision reviewed. One possibility is to lodge a complaint with the *Board of Appeal*. The other is to approach a court for relief. The first is not a prerequisite for the second.

2 Proceedings before the *Board of Appeal*

The proceedings take place in terms of section 9 of the *Banks Act, No. 94 of 1990*. The section affords everyone who does not agree with a decision of the *Registrar* the possibility of approaching the *Board of Appeal*.⁸⁸⁷ This tribunal is authorised to overrule or amend the decisions of the *Registrar* if necessary.⁸⁸⁸

⁸⁸⁴ Earlier decisions of the *BGH* that were opposed to the interpretation eventually lead to the addition of sub 3 to § 6 *KWG*. C.f. also *Chapter 2, 42 et seq. above*.

⁸⁸⁵ See *Chapter 2, 50 et seq. above*.

⁸⁸⁶ See s 8 (4) of the Constitution which extends the protection of the Bill of Rights to juristic persons.

The *Board of Appeal* consists of five members who are all appointed by the Minister of Finance.⁸⁸⁹ They are: (i) the chairman who must be a lawyer with appropriate experience;⁸⁹⁰ (ii) three members whom the Minister deems to have extensive experience and knowledge concerning developments in banking;⁸⁹¹ and (v) a chartered accountant (in terms of section 15 of the *Public Accountants' and Auditors' Act, No. 80 of 1991*). The Minister must be satisfied that this person is qualified for appointment on the basis of experience and knowledge regarding the latest developments in his field of expertise.⁸⁹²

When the Board of Appeal sits to decide on a particular dispute it must be composed of at least four members namely the chairman and the chartered accountant (both of whom must sit in all hearings), and two of the other members.⁸⁹³ If one of the members of the *Board of Appeal* has a personal interest, he or she must be excluded from the proceedings. Should this be the chairman, the Minister must appoint another person to that position for the proceedings in question.⁸⁹⁴ The same applies for the accountant.⁸⁹⁵ The other members can also be replaced with substitutes. If one of them has an interest, the Minister will temporarily appoint a new member for the proceedings.⁸⁹⁶

⁸⁸⁷ S 9 (1).

⁸⁸⁸ S 9 (10).

⁸⁸⁹ The appointment has a duration of three years. After that one, several or all of the members can be re-appointed. See s 9 (5). The members receive remuneration for their efforts in terms of this act. See s 9 (14).

⁸⁹⁰ This always concerns a trained lawyer with completed tertiary training and several years of professional experience. See s 9 (2) (a).

⁸⁹¹ S 9 (2) (b).

⁸⁹² S 9 (2) (c).

⁸⁹³ S 9 (3).

⁸⁹⁴ S 9 (4) (a).

⁸⁹⁵ S 9 (4) (c).

⁸⁹⁶ S 9 (4) (b). A temporary vacancy of that post is filled by the short-term nomination of a new member for the remaining period of office by the Minister. See s 9 (6).

The bank must submit a written appeal to the *Board of Appeal* within 30 days of the *Registrar's* decision.⁸⁹⁷ The *Registrar* obtains a copy from the chairman who simultaneously gives the *Registrar* a deadline for giving reasons for the decision.⁸⁹⁸ The petitioning bank receives a copy of the reasons by registered mail, and must declare within 21 days whether it wishes to withdraw the appeal.⁸⁹⁹ In other words, the bank first approaches the Board, who then instructs the Registrar to give reasons and the bank then has time to consider the reasons and decide whether to proceed with the appeal against the decision.

If the bank wishes to withdraw its appeal, the proceedings are terminated.⁹⁰⁰ Should the bank decide to continue with the proceedings, it must give notice of its intention within the specified time in the form of an answering statement.⁹⁰¹ Payment of the costs of the proceedings must accompany this statement.⁹⁰² After receiving these documents, the chairman determines a date, time and place of the proceedings, and notifies the bank and the *Registrar* in writing.⁹⁰³

The course of the proceedings is determined by the chairman.⁹⁰⁴ The *Board of Appeal* has wide-ranging powers to determine facts. It can, for example, call as a witness any

⁸⁹⁷ Here, a specific form of representation of an application of this nature is required. The formalities are set out in *Regulation No. 34 (1)* as promulgated in *Government Notice R 628 of 26 April 1996 (Government Gazette 17115)*.

⁸⁹⁸ *Regulation No. 34 (2)* as promulgated in *Government Notice R 628 of 26 April 1996 (Government Gazette 17115)*.

⁸⁹⁹ The chairman has the possibility of extending the time limit. See *Regulation No. 34 (3)* as promulgated in *Government Notice R 628 of 26 April 1996 (Government Gazette 17115)*.

⁹⁰⁰ If this time limit or the time limit specified by the chairman is exceeded, the proceedings are automatically disallowed because of expiry. See *Regulation No. 34 (4)* as promulgated in *Government Notice R 628 (Government Gazette 17115) of 26 April 1996*.

⁹⁰¹ *Regulation No. 34 (5)* as promulgated in *Government Notice R 628 (Government Gazette 17115) of 26 April 1996*.

⁹⁰² At present, these are R 5.700, (including VAT). See *Regulation No. 34 (6)* as promulgated in *Government Notice R 628 (Government Gazette 17115) of 26 April 1996* in connection with *Regulation No. 40 (1)* as promulgated in *Government Notice R 628 (Government Gazette 17115) of 26 April 1996*.

⁹⁰³ S 9 (7).

⁹⁰⁴ S 9 (9).

person who, in the opinion of the *Board* may possess relevant information. It can also demand the presentation of documents in the possession of such a person, and may keep these documents until the matter has been decided.⁹⁰⁵ The *Board of Appeal* is also empowered to administer the oath to all parties involved and to take affidavits.⁹⁰⁶ All persons coincidentally present during the proceedings may be called as witnesses and be questioned on the matter should it become evident that they have knowledge that would facilitate a decision in the case.⁹⁰⁷

After the proceedings the *Board of Appeal* decides whether to confirm, invalidate or amend the *Registrar's* decision. It can also instruct the *Registrar* to comply with a decision if that is the finding of the Board.⁹⁰⁸ The decisions of the *Board of Appeal* are reached by means of majority vote. Should the votes be equal, the chairman has a casting vote.⁹⁰⁹ The decision and the reasons for it must be forwarded to the bank and the *Registrar* in writing.⁹¹⁰ In cases where the *Registrar's* decision is set aside, the plaintiff receives a refund of the fees of the proceedings. If the *Registrar's* decision is only partially set aside, the *Board of Appeal* has the discretion to determine who will be liable for the costs of the proceedings and to what extent.⁹¹¹

⁹⁰⁵ S 9 (8) (a).

⁹⁰⁶ S 9 (8) (b).

⁹⁰⁷ S 9 (8) (c). This empowerment is even more far-reaching than s 9 (8) (a). The provision covers people who are coincidentally present.

⁹⁰⁸ S 9 (10).

⁹⁰⁹ S 9 (11).

⁹¹⁰ S 9 (12).

⁹¹¹ S 9 (13).

3 Legal Action

3.1 Introduction

Historically, the structure of the courts in South Africa is based on the *South Africa Act of 1909* and the *Administration of Justice Act, No. 27 of 1912*, which were later replaced by the *Supreme Court Act, No. 59 of 1959*. It must be noted that the South African legal structure contains neither special administrative courts,⁹¹² nor other special courts that could, for example, review a fine imposed by the *Registrar*. The South African legal system distinguishes mainly between criminal and civil cases. All matters that are not criminal (*Strafprozeßrecht*) are regarded as civil matters. These include executive measures, which, in the broad sense, form part of administrative law.

Remedies against banking supervision measures must accordingly be sought within the domain of civil procedure. Civil jurisdiction in South Africa is divided five levels.⁹¹³ The bottom level consists of the Small Claims Courts which deals with civil proceedings of minor importance.⁹¹⁴ The next level is the Magistrate's Court with jurisdiction as set out in the *Magistrate's Court Act, No. 32 of 1944* and the *Magistrate's Courts Rules*.⁹¹⁵ The High Court⁹¹⁶ ranks above the Magistrate's Court and its jurisdiction is set out in the *Supreme Court Act, No. 59 of 1959* and the *Supreme Court Rules*.⁹¹⁷ This court has inherent jurisdiction that includes jurisdiction over all disputes of a civil, criminal, administrative and constitutional nature.⁹¹⁸ There are two

⁹¹² There is also, for example, no act comparable to an Administrative Procedure Act as it is known in other legal systems (such as the USA, England or Germany).

⁹¹³ S 167 read with s 170 of the *Constitution*.

⁹¹⁴ For its jurisdiction, see Eckard, C.F., *Principles of Civil Procedure in the Magistrates' Court* (1990); 12.

⁹¹⁵ S 167 and s 170 of the *Constitution*.

⁹¹⁶ This Court used to be known as the Supreme Court. The name was changed on 4 February 1997. Concerning the structure of the courts before this time, see Zimmermann, Reinhard, *Das römisch-holländische Recht in Südafrika: Einführung in die Grundlagen und usus hodierus* (1983), 28 et seq. See also s 166 read with s 169 of the *Constitution of the Republic of South Africa, Act No. 108 of 1996*.

⁹¹⁷ The change of the name of this act in the High Court Act is foreseeable in the near future.

ways of continuing after a matter has been decided by the High Court: the aggrieved party can appeal to the Supreme Court of Appeal⁹¹⁹ or, if it is a constitutional matter, a party can approach the Constitutional Court.⁹²⁰

3.2 The Jurisdiction of the High Court

The High Court is the court of first instance when it comes to the lawfulness of banking supervisory measures.⁹²¹ In terms of section 19 of the Supreme Court Act the High Court's jurisdiction extends to all matters that are not specifically assigned to other courts in terms of legislation. This inherent jurisdiction also arises from the common law.⁹²² As has been held in a Canadian decision "the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."⁹²³

The wide-ranging jurisdiction of the High Court has been recognised in South Africa for a long time.⁹²⁴ As part of its inherent jurisdiction, the High Court also has the power to review administrative action. It has the authority to protect and regulate its own

⁹¹⁸ Zimmermann, Reinhard, *Das römisch-holländische Recht in Südafrika: Einführung in die Grundlagen und usus hodiernus* (1983), 29.

⁹¹⁹ The name of this court was also changed due to the new constitution. It used to be known as the Appellate Division of the Supreme Court. This court's jurisdiction is also determined by the *Supreme Court Act, No. 59 of 1959*, specifically s 12.

⁹²⁰ Its jurisdiction is determined by s 166 and 167 of the *Constitution* read with the *Constitutional Court Complementary Act, No. 13 of 1995* as well as the *Constitutional Court Rules*.

⁹²¹ Pistorius, David, *Pollak on Jurisdiction* (1993) 2. ed., 30. Magistrate's courts only have very limited jurisdiction. The areas of jurisdiction are not all applicable to measures of banking supervision. See Erasmus, H.J. / Van Loggerenberg, D. E., *The Civil Practice of the Magistrates' Courts in South Africa* (1996) 9. ed., 343 *et seq.* In the context of banking supervision the parties can apply directly to the High Court. See Eckard, C.F., *Principles of Civil Procedure in the Magistrates' Court* (1990) 2. ed., 48 *et seq.*

⁹²² Taitz, Jerold, *The Inherent Jurisdiction of the Supreme Court* (1985), 7 *et seq.*

⁹²³ *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd.* (1971) 2 DLR (3 rd) 75. See also Jacob, G.; *The Inherent Jurisdiction of the Court* (1970) 23 *Current Legal Problems* 23; Millsite Investment Co (Pty) Limited ; *Ex parte 1965 (2) SA 582 (W)*.

⁹²⁴ *C.f. Ritchie v Andrews* (1881-1882) 2 EDL 254 or *Collony v Ferguson* 1909 TS 195; *Union Government v Union Steel Corporation (SA) Ltd.* 1928 AD 220 at 237.

process.⁹²⁵ The procedure for such review proceedings is set out in Rule 53 of the Supreme Court Rules.⁹²⁶

⁹²⁵ S 173 of the *Constitution* read with s 19 of the *Supreme Court Act, No. 59 of 1959*. The latter, especially s 3, serves as the legal basis for the creation of the Rules of Court.

⁹²⁶ S 24 of the *Supreme Court Act, No. 59 of 1959* provides for the review of decisions of a lower court. The review proceedings applicable in the banking supervision context, however, solely refer to Rule 53 proceedings. Rule 53 standardises and simplifies the proceedings but it is not absolute. The court has the discretion to demand further requirements to be met (see *Adfin (Pty) Ltd. v Durable Engineering Works (Pty) Ltd.* 1991 (2) SA 366 (C) at 368F; *Steyn v Delport* 1973 (1) SA 822 (T); *Motaung v Mukubela & NNO; Motaung v Mothiba NO.* 1975 (1)SA 618 (O) at 625F-626A; *Safcor Forwarding (Pty) Ltd. v National Transport Commission* 1982 (3) SA 654 (A) at 673C-G; *Government of the Republic of South Africa v Midkon (Pty) Ltd.* 1984 (3) SA 552 (T) at 558I; *Rampa v Rektor, Tshiya Onderwyskollege* 1986 (1) SA 424 (O) at 429G; *Nakani v Attomarg. n ey-General, Ciskei* 1989 (3) SA 655 (Ck) at 656A-C; *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A)). In this way, the court may, in the case of proceedings dealing with banking supervision, suspend such proceedings until the plaintiff's complaint to the *Board of Appeal* (as set out in the *Banks Act, No. 94 of 1990*) has proved to be unsuccessful (see *Baxter, Lawrence, Administrative Law* (1991), 720ff, *Rose Innes, L.A., Judicial Review of Administrative Tribunals in South Africa* (1963), 76 et seq., *Wiechers, Marinus, Administratiefreg* (1984) 2^o ed., 304 et seq.; *Bindura Town Management Board v Desai & Co* 1953 (1) SA 358 (A) at 362H; *Golube v Oosthuizen* 1955 (3) SA 1 (T) at 4F). Such suspension is compulsory if the result of preliminary proceedings may have a bearing on the outcome of the court case. The same applies if there is uncertainty as to whether the court applied to has the necessary jurisdiction to try the case. (See *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502C - 503C. This decision was used as authority in many subsequent cases, such as *Wahlhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A); *Lenz Township Co (Pty) Ltd. v Lorentz NO.* 1961 (2) SA 450 (A) at 459A; *Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (N) at 593; *Theron en andere v Ring van Wellington van die NG Sendingkerk van SA* 1976 (2) SA 1 (A) at 25B; *Haysom v Additional Magistrate, Cape Town* 1979 (3) SA 155 (C); *Msomi v Abrahams NO.* 1981 (2) SA 256 (N) at 260G-H; *Lawson v Cape Town Municipality* 1982 (4) SA 1 (C) at 6C-G; *Grundlingh v Van Rensburg NO.* 1984 (3) SA 207 (W) at 208 H-209B; *South African Technical Officers Association v President of the Industrial Court* 1985 (1) SA 597 (A) at 613C; *Mahlaela v De Beer NO.* 1986 (4) SA 782 (T) at 790E-G; *Shah v Minister of Education and Culture (House of Delegates)* 1989 (4) SA 560 (D) at 573D-I; *Ndara v Umtata Presbytery, Nederduitse Gereformeerde Kerk in Afrika (Transkei)* 1990 (4) SA 22 (Tk) at 26A-27B; *Simpson v Selfmed Medical Scheme* 1992 (1) SA 855 (C) at 862J-863B; *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 638E-G). The prescription of this legal remedy is not determined by law. General consensus is, however, that an application must be made within a reasonable period of time. The question as to what exactly is a "reasonable" period of time is a disputed one (see *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA (A) at 38H-42D; *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) at 798A-F). The court may decide whether the applicant brought the proceedings within a reasonable period of time. Even if the application is considered to have been late, the court may still decide to allow it. This must, however, be explained in the reasons for the decision and supported by good reasons so that the other parties to the review will not have grounds for criticism (see *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipaliteit van George* 1983 (4) SA 678 (C) at 697D-698A; *Setsokosane Busidiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommisie* 1986 (2) SA 57 (A) at 75D-83C; *Jeffrey v President, SA Medical and Dental Council* 1987 (1) SA 387 (C) at 390D; *South African Transport Services v Chairman, Local Road Transportation Board, Cape Town, 1988* (1) SA 665 (C) at 668E-F; *Sedgefield Ratepayers' and Voters' Association v Government of the Republic of SA* 1989 (2) SA 685 (C) at 696C-E; *National Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry v Photocircuit SA (Pty) Ltd.* 1993 (2) SA 245 (C) at 250F-J; *Mnsi v Chauke* 1994 (4) SA 715 (T) at 719G-720C.) The problem of the prescription of the application is usually taken into consideration by the court. An applicant is thus well advised to already give reasons for this in the written application (see *Scott v Hanekom* 1980 (3) SA 1182 (C) at 1193C-G).

The term *administrative action* needs to be analysed. It includes every act or action of a public office or a public-law body, which carries out its responsibilities directly or indirectly in accordance with a statute.⁹²⁷ The term is not defined by legislation but was developed over the years in case law – a good example of the importance of case law as a source of law in South Africa (more so than in Germany). The High Court has not limited its review jurisdiction to decisions of the bodies described above, but has extended it to decisions of several other types of institutions.⁹²⁸ It is thus evident that the jurisdiction of the High Court not only includes the administrative actions of a public office but also that its sphere of jurisdiction is virtually limitless.

The term *review* must also be distinguished from the term *appeal*. In *Changuoin & Another v Secretary for the Interior*,⁹²⁹ Potgieter J explained the difference as follows:

"The application to the court... was not an appeal from the Secretary's decision ... but a review of his decision ... [thus] this Court is not called upon to adjudicate on the correctness of the classification but on the validity thereof."

The purpose and effect of review proceedings therefore goes further than merely providing a remedy to the plaintiff. It extends to the actual validity of a provision or decision. As such, review proceedings, in a sense, serve as a mechanism of judicial control of decisions and provisions. The review proceedings can be multi-faceted and are not necessarily limited to providing a plaintiff with a legal remedy.⁹³⁰

Judicial review can be based on legislation or on the common law.⁹³¹

⁹²⁷ See *Johannesburg Consolidated Investment Co v Johannesburg Municipality* 1903 TS 111 at 115.

⁹²⁸ Such as Voluntary Associations (see *Goldman v Johannesburg Club* 1904 TH 251, *Crisp v SA Council of the Amalgamated Engineering Union* 1930 AD 225 or *Theron en andere v Wellington Ring van die NG Sendingskerk in Suid-Afrika* 1976 (2) SA 1 (A)), Universities (see: *Jacob & another v The Council of the University of Durban-Westville* 1974 (3) SA 552 (A)) or Courts of Arbitration (see *Allied Mineral Development Corporation (Pty) Ltd. v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C), *Stuart Nixon Estate Agency (Pty) Ltd. v Brigadoon (Pty) Ltd. & another* 1970 (1) SA 97 (N)).

⁹²⁹ 1971 (1) SA 1 (A) 5A.

⁹³⁰ Taitz, Jerold, *'When is an Appeal not an Appeal? A Legal Conundrum'* (1979) 42 THRHR 70, 71.

⁹³¹ Taitz, Jerold, *The Inherent Jurisdiction of the Supreme Court* (1985), 7 et seq.

3.3 The Review Procedure in terms of Rule 53

The formal requirements of the review procedure are set out in Rule 53.⁹³² Essentially a review is a specific type of application.⁹³³ Thus Rule 53 can be considered as a specific rule to be read in conjunction with Rule 6 (which deals with the application procedure in general).⁹³⁴

It must also be noted that South African proceedings are characterised by principle known in Germany as '*Parteienmaxime*'. This means that the parties alone determine what the case is about. It is therefore the business of the disputing parties to formulate their submissions and supporting affidavits (in application proceedings). As far as the facts are concerned, the role of the judge in this regard is a passive one.

The bank bringing the application must first submit a notice of motion to the court as set out in First Schedule to the Rules Form 2.⁹³⁵ A sufficient number of copies for everyone who is to be a party to the proceedings must be included. The original documents, along with the application, are kept by the *Registrar* (of the court).⁹³⁶ The respondent must be named. The application is then signed and delivered to the addressed to the chairman of the Board of Appeal. Legal representation is permissible but not obligatory. This must, however, be made clear by way of a power of attorney.⁹³⁷ The plea is not regarded as an affidavit, which means that it can be corrected at any time.⁹³⁸

⁹³² This rule describes the procedure which forms the basis of a review of the decision of an official who executes administrative legal duties (see *Brenner's Service Station and Garage (Pty) Ltd. v Milne* 1983 (4) SA 233 (W) at 238E).

⁹³³ *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661E.

⁹³⁴ See *inter alia* *Du Plessis v Tager* 1953 (2) SA 275 (O) at 277F-G. For a detailed discussion of the distinction between the two: *De Villiers Van Wilsen, Louis / Eksteen, Johannes Paulus Gardener / Cilliers, Andries Charl, Herbstein and Van Wilsen - The Civil Practice of the Superior Courts in South Africa* (1979) 3. ed., 69 *et seq.* und 660 *et seq.*

⁹³⁵ Rule 53 (1). Other acts may prescribe a different form. This happened in s 33 (1) and (2) of the *Arbitration Act, No. 32 of 1965*, for example.

⁹³⁶ The naming of the parties involved is especially important to define the point of dispute.

⁹³⁷ *Levinsohn's Meat Products (Edms) Bpk v Addisionele Landdros, Keimoes* 1981 (2) SA 562 (NC).

Extra-judicial preliminary proceedings are not obligatory.⁹³⁹ The submission of the application commences the proceedings. The proceedings can be directed against the decision of the *Board of Appeal*⁹⁴⁰ or of the *Registrar*.⁹⁴¹ The parties' arguments are then heard and the court will decide on whether the measure should be upheld or struck down.

3 4 Remedies against Decisions of the High Court

A party who is dissatisfied with the decision of the High Court in the review proceedings may appeal to a full bench of the High Court.⁹⁴² The appeal must be brought within fifteen days after the decision of the High Court by submitting a notice of appeal. The legal basis of these proceedings is to be found in sections 20 and 21 of the *Supreme Court Act, No. 59 of 1959* read with Appeal Court Rule 49. It is also possible to appeal directly to the Supreme Court of Appeal. The rules applicable here are the same as those for the High Court.

If the question concerned is a constitutional one, the aggrieved party may also approach the Constitutional Court.⁹⁴³ Direct access to the Constitutional Court is expressly guaranteed in section 167 (6) of the *Constitution*. It is not necessary to exhaust all other

⁹³⁸ Deputy Minister of Tribal Authorities V Kekana 1983 (3) SA 492 (B) at 497E-G; Chief Motlegi v President of Bophuthatswana 1992 (2) SA 480 (B) at 488D; Federal Convention of Namibia v Speaker, National Assembly of Namibia 1994 (1) SA 177 (NmHC) at 193A-B.

⁹³⁹ Odendaal v Kerkraad van die Gemeente Bloemfontein & another 1952 (2) SA 83 (O).

⁹⁴⁰ Rule 53 (1) "of any board". It is irrelevant whether the proceedings of the Board were of a purely administrative legal nature or whether they were, in terms of the *Banks Act, No. 94 of 1990*, to be seen as proceedings concerned with legal protection. See also LF Boshoff Investments (Pty) Ltd. v Cape Town Municipality 1969 (2) SA 256 (C) at 274H and Kennasystems South Africa CC v Chairman, Board on Tariffs and Trade 1996 (1) SA 69 (T).

⁹⁴¹ Rule 53 (1) "or officer". The term *officer* has no generally accepted definition, although a wide-ranging interpretation is accepted.

⁹⁴² The abovementioned proceedings are usually carried out by a single judge. The full bench consists of a chamber of at least three judges.

⁹⁴³ This will probably be the case very often in the future, since the *Constitution of the Republic of South Africa, Act No. 108 of 1996* (Administrative Justice) contains a provision that can be used as a provision in virtually every decision of the *Registrar*. See Harms, L.T.C., *Civil Procedure in the Supreme Court* (1990) Issue 12, W2 *et seq.*

possible remedies before approaching the Constitutional Court. The proceedings are governed by the *Constitutional Court Complementary, Act No. 13 of 1995* as well as the *Constitutional Court Rules of 1995*.⁹⁴⁴

3 5 Interim Relief

The proceedings dealing with temporary relief follow the same order as the main proceedings. The relevant provision in this regard is Rule 6. It is virtually identical to Rule 53. The only significant difference is that the proceedings are carried out more speedily, and if successful it leads to temporary relief.⁹⁴⁵ It is up to the plaintiff to begin the proceedings as soon as possible. This can usually be achieved by means of a notice of motion.⁹⁴⁶ In very urgent matters the notice of motion can be addressed to the *Registrar* (of the court). Normally, the respondent must also receive a copy. The notice of motion must be supported by an affidavit.⁹⁴⁷ The court, after considering the papers submitted, can grant temporary relief (for example by allowing a bank to proceed with business) pending the final decision of the Court in the application proceedings (that is the review application in terms of Rule 53).

3 6 Process of Fining

The provisions of the *Banks Act* that contain the terms *offence* or *penalty* refer to criminal proceedings. These are instituted by the state prosecutor, but the Registrar obviously hands the prosecutor all relevant documents. The prosecution then takes place in accordance with the *Criminal Procedure Act, No. 51 of 1977*.⁹⁴⁸ In the event of a conviction one of the possible penalties is a fine.

⁹⁴⁴ See Erasmus, H.J. / Breitenbach, A.M. / Van Loggerenberg, D.E., *Superior Court Practice* (1994) [Revision Service 7, 1997] S. A2-103, 113, 115; C4-25/34.

⁹⁴⁵ Pietermaritzburg City Council v Local Road Transportation Board 1959 (2) SA 758 (N); Safcor Forwarding (Pty) Ltd. v National Transport Commission 1982 (3) SA 654 (A) at 674C-D; I L & B Marcow Caterers (Pty) Ltd. v Hypermarkets (Pty) Ltd. 1981 (4) SA 108 (C); Nasionale Bierbrouery (Edms) Bpk v John NO. 1991 (1) SA 85 (T); Magano v District Magistrate Johannesburg (1) 1994 (4) SA 169 (W) at 172A-C.

⁹⁴⁶ Rule 6 (2).

⁹⁴⁷ See the wording in Rule 6 (4) "supported by an affidavit".

⁹⁴⁸ For a comprehensive overview, see Geldenhuys, Tertius / Joubert, J.J., *Criminal Procedure Handbook* (1996) 2. ed.

In terms of the Banks Act the Registrar is also empowered to impose fines for certain transgressions with or without recourse to criminal law.⁹⁴⁹ The imposition of such a fine is also a form of administrative action subject to the review procedure discussed above.⁹⁵⁰

4 Public Claims of Liability

In terms of South African law, a claim against the Registrar for negligence in the performance of his duties is excluded. Section 88 of the Banks Act, No. 94 of 1989 precludes such a claim.

C Summary and Conclusion

The comparative overview reveals that in both systems a party who feels aggrieved by banking supervisory measures imposed upon him, has certain remedies in law. There are, however, both similarities and considerable differences between the approaches of the two systems.

The similarities are the following. The Constitutions of both countries guarantee an aggrieved party (also in the context of banking supervision) access to the courts. In Germany, the guarantee arises from s 19 IV GG whereas in South Africa, it is based on section 33 and 34 of the *Constitution*. Both systems also provide a procedure by which a banking supervisory measure can be challenged outside the courts. In Germany this procedure is the *Widerspruchsverfahren* and in South Africa it is the appeal to the *Board of Appeal*.⁹⁵¹ It is also possible in both systems to obtain interim (temporary) legal protection and to challenge any fines imposed under the legislation in court.⁹⁵² A claim for damages against the state arising from banking supervisory measures is

⁹⁴⁹ See s 74 (3) & (4).

⁹⁵⁰ Rule 53.

⁹⁵¹ Cf. in this chapter, 161 *et seq.* (§§ 68 *et seq.* *VwGO*) and 170 *et seq.* (also s 9 of the *Banks Act*).

⁹⁵² Cf. 166 *et seq.* and 180 *et seq.*, also 168 *et seq.* and 180 *above*.

excluded in both countries. This is provided for in § 6 III KWG in Germany and section 88 of the *Banks Act* in South Africa.

The differences between the two legal systems are to be found in the details of the respective remedies. In Germany the remedies are based on the *Verwaltungsgerichtsordnung* (Code of the Administrative Court). Such legislation pertaining to administrative procedure does not, however, exist in South Africa. The only clear procedural distinction in South Africa, is between criminal and civil procedure, where the latter encompasses all cases that are not of a criminal nature. In Germany, these proceedings would be brought before special administrative courts - the *Verwaltungsgericht*, the *Oberverwaltungsgericht* and the *Bundesverwaltungsgericht*. These courts were created specifically to hear administrative disputes. There are no similar courts in South Africa. The dispute is brought before the general courts whose jurisdiction encompasses both private-law and public-law issues.⁹⁵³

These differences are, to a large degree, due to historical influences. South African law was strongly influenced by English law during the colonial era. The court structure was also based on the English model. German law, on the other hand, underwent a different development.

The order of institutions to be approached is also strictly regulated in Germany. As a general rule a court can only be approached after the extra-judicial *Widerspruchsverfahren*.⁹⁵⁴ In South Africa the proceedings before the *Board of Appeal* may have very much the same objective, that is to provide an extra-judicial remedy. However, unlike in Germany, there is no clear indication that this procedure is compulsory. This means that in South Africa the bank in question may possibly have the two proceedings running alternatively or concurrently. There is no statutory provision that precludes such an approach, but, applying the general principles of administrative law, the courts may take the view that the applicant bank must first

⁹⁵³ See 163 and 174 *et seq. above*.

⁹⁵⁴ C.f. §§ 68 *et seq. VwGO* and in this *chapter*, 162 *et seq. above*.

exhaust the internal remedy before approaching the court. Case law in this area is very sparse and there is no precedent in point.⁹⁵⁵

In Germany, an aggrieved bank may, in terms of § 124 VwGO, only approach two institutions namely the *Verwaltungsgericht* and the *ObERVERWALTUNGSGERICHT*.⁹⁵⁶ In South Africa, the lowest court having jurisdiction over the review of banking supervisory measures is the High Court (which may be compared to the German *ObERVERWALTUNGSGERICHT*). However, the affected bank may take these proceedings all the way to the Constitutional Court. This difference can be ascribed to the fact that specialised administrative-law courts have a long tradition in Germany that has led to an independent course of law. No such independent course of law has developed in South Africa. Administrative-law disputes are dealt with as part of civil procedure. This may be an indication that administrative law has generally been regarded as more important in Germany than in South Africa. This conclusion is strengthened by the fact that administrative law is not governed by a specific Act but originates from case law. However, because of the new constitution, changes in this field can be expected in the near future.

The jurisdiction of the High Court and the Supreme Court of Appeal is also more far-reaching than that of comparable German courts. The proceedings in South Africa are not necessarily restricted to testing the contested measure of banking supervision but may also extend to the legal basis (constitutionality) of the measure.⁹⁵⁷ In Germany, the court of first instance, the *Verwaltungsgericht*, does not have similar powers. Should the need for such a finding arise, the matter must be adjourned and referred to the *ObERVERWALTUNGSGERICHT* to decide on the constitutionality of the measure as set out in § 47 VwGO.

The two systems also differ considerably when it comes to the grounds for testing banking supervisory measures. German courts undertake comprehensive scrutiny of the

⁹⁵⁵ Cf. n. 926 and 940 above.

⁹⁵⁶ If the review is permitted, the *Bundesverwaltungsgericht* can eventually also become involved.

⁹⁵⁷ Cf. 175 et seq. above.

legitimacy of the administrative act. Apart from testing whether the formal requirements for a valid administrative act have been met, the courts also investigate whether jurisdictional facts on which the legal decision is based are present and whether the *Bundesaufsichtsamt* has exercised its authority in an orderly way.⁹⁵⁸

A similar comprehensive test of a formal and factual nature has not yet been developed in South Africa. This can probably be ascribed to the wide powers of the Registrar. Time will tell whether these powers can be retained in the Act. It seems unlikely, especially since section 33 of the *Constitution* (Just Administrative Action) might well bring with it the limitation of such a wide discretion.

The procedures relating to interim legal protection are also different. § 80 V of the German *Verwaltungsgerichtsordnung* contains a specific provision in terms of which a bank can obtain temporary legal protection. There is no such specific provision in South Africa. Interim protection is acquired by means of the general Rule 6 application.⁹⁵⁹

The legitimacy of fines is not decided upon by the *Verwaltungsgerichte* in Germany but by the *Strafgerichte* (criminal-law courts). In South Africa, fines may be imposed by the criminal-law courts (as penalty upon conviction for an offence) or in certain specific situations by an administrative act of the Registrar. In the former case an aggrieved bank's only recourse would be the appeal procedure, and in the latter case the review procedure (in terms of Rule 53).⁹⁶⁰

⁹⁵⁸ C.f. the whole procedure in this *chapter*, 159-168 *above*.

⁹⁵⁹ C.f. in this *chapter*, 166 *et seq.* and 180 *et seq.* *above*.

⁹⁶⁰ C.f. in this *chapter*, 168 *et seq.* and 180 *above*.

Conclusion

This thesis is concerned with the law of banking supervision in the Federal Republic of Germany and South Africa. The legal systems of the two countries are compared and contrasted. The matter is topical especially in the context of the increasing internationalisation of banking. The globalisation of markets and the co-operation encountered in and between international organisations makes it highly advisable for those active in this field to look wider than their own countries. It must be stressed that the topic is by no means exhausted in this thesis. It provides only an overview of part of this extensive area of law. The comparison has revealed that the supervisory institutions of the two countries face very similar problems.

The legal system of the Federal Republic of Germany forms part of the Germanic or Continental European legal family whilst the South African legal system amounts to a mixture of *Roman-Dutch law* and *common law*. Despite the differences, both systems deal with the problems of banking supervision in a surprisingly similar way. This might seem strange since the influence of English law, with its emphasis on case law, is unmistakable in South Africa. German law, in contrast, is codified. In practice, however, this difference has not been as far-reaching as one may have imagined. On the one hand the art of distinguishing uncomfortable precedents is highly refined in South Africa.⁹⁶¹ On the other hand case law is also becoming increasingly important in Germany; a *Präjudizienrecht*⁹⁶² in the sense of an adherence to the decisions of the highest courts in Germany has lately come to the fore. One may add that in any event this area of law is dominated by legislation, rather than case law, in South Africa.

The following conclusions can be drawn.

⁹⁶¹ Zweigert, Konrad / Kötz, Hein, *Einführung in die Rechtsvergleichung* (1996), 227 et. seq. David, René / Grasmann, Günther, *Einführung in die Rechtssysteme der Gegenwart* (1988), 62 et. seq.

⁹⁶² Kriele, Martin, *Theorie der Rechtsgewinnung* (1976), 243ff, 260 et. seq. Zajtay, Imre, *System und*

In Germany the law of banking supervision is precisely defined, more so than in South Africa. It is regarded as a specific part of administrative law namely *Wirtschaftsverwaltungsrecht* (the law of business administration). The principles of administrative law are to be found in a statute in Germany. In South Africa the law of banking supervision is also largely governed by the principles of administrative law. There is, however, no finer subdivision. Unlike in Germany administrative law in South Africa is derived from the common law and case law.

Both systems regulate banking supervision almost exclusively by means of legislation that is effective nation-wide. This means that in Germany it is a federal issue and does not fall into the province of the different *Bundesländer*.

The supervision in both countries is performed by an institution with comprehensive powers.⁹⁶³ However, they are not totally independent of the executive. Their powers can be curtailed by regulations or directives. Furthermore, they must of course move within the confines of the enabling parliamentary legislation.

In both countries banking is highly regulated because of its importance to the economy. Thus, in both countries, the conducting of business as a bank requires permission or a licence. The formal process of acquiring permission in both countries is primarily aimed at ensuring that only those who are competent to do so shall operate a bank. Thus, permission can be refused due to the insufficient qualifications of the applicant or his insufficient financial means. In addition, in South Africa, permission can also be refused on considerations of public interest. This may, however, be unconstitutional. Certainly, in Germany, this test of need is irreconcilable with *Art 12 I GG*. The requirements for opening a Representative Office differ somewhat in the two countries. In Germany submission of a notice to the supervisory authority (*Bundesaufsichtsamt*) is sufficient. The requirements for such an establishment in South Africa are considerably higher.

Präjudiz in den kontinentalen Rechten und im Common Law, ACP 165 (1965), 97 et. seq.

⁹⁶³ In the Republic of South Africa, the *Registrar* is in charge of this office whereas the *Bundesaufsichtsamt für das Kreditwesen* is responsible for it in the Federal Republic of Germany.

The permission to conduct banking business (or registration) is regarded as an administrative act in favour of the applicant in both countries. In the absence of one of the reasons for refusing permission stipulated in the legislation, the applicant has a right to be permitted to conduct business as a bank. This right is stronger in Germany than in South Africa due to the fact that unlike in Germany, registration of a bank can be disallowed by the Registrar on the basis that it is not in the public interest.

In both countries the permission can be conditional or restricted to certain specified activities.

The objectives of banking supervision are very much the same in both countries. They are essentially the maintenance of a well-functioning banking industry, the protection of depositors and the protection of the economy as a whole.

The foundation of a deposit-secur ing fund is currently being considered in South Africa. In Germany, it is already possible to join one of these voluntarily, and there is significant indirect pressure on banks to join.

In South Africa a bank is subject to the supervisory measures of the Banks Act from the moment of registration. From this moment it is entitled to conduct banking business. The size of the business is largely immaterial. In Germany, this is different. The supervisory measures under the legislation become applicable once the institution qualifies as a *Kreditinstitut* in terms of § 1 I KWG. Here the size of the business does play an important role.

A further similarity between the two systems is that the measures of banking supervision may also affect natural persons. This is especially true in Germany where it is possible for a bank to exist in the form of a *Personenhandelsgesellschaft* which is never the case in South Africa. In both countries natural persons are also affected by these measures insofar as they have to fulfil certain personal and professional requirements in order to hold certain posts within the bank.

In both systems an act in violation of statutory provisions does not necessarily mean that it is invalid and ineffective in the private-law sense. However, such a contravention is an offence which may lead to criminal prosecution.

The supervisory institutions of both countries have access to a wide range of possibilities of intervention and of obtaining information to ensure effective and sensible supervision. In Germany the instrument of obligatory notice is more widespread than in South Africa where the procedure requires prior permission more often. In both systems banks are obliged to report on various issues periodically. In Germany this includes the *Jahresabschluß* as well as the *Prüfungsbericht des Abschlußprüfers*, and in South Africa the various returns. These are supplemented by informal supervision in the sense of regular consultations between the *Registrar* and the individual banks. In this context, the annual audit by external, independent auditors which is necessary in both countries should also be mentioned. In so doing, they contribute in a significant way to the stability of the banking system as a whole.

In both countries the central bank plays a decisive role in the supervision process. In Germany the *Bundesbank* aids the *Bundesaufsichtsamt* by placing its network of *Landeszentralbanken* to its disposal. Essentially this contributes to the gathering of information. In South Africa, the Reserve Bank is in charge of banking supervision seeing that the *Registrar's Office* forms part of it.

The legislation of both countries contains provisions that empower the supervisory bodies to react to imminent crises or to take action against violations of the law. The *Bundesaufsichtsamt* is equipped with more far-reaching authority than the *Registrar* in this regard. The *Registrar* must, for example, work in exceptionally close co-operation with the Minister of Finance when an institution is to be subjected to compulsory administration. However, it is common practice in both countries to react to certain developments informally in advance. This is especially to prevent the waning of general trust in the banking industry. The formal powers to intervene are thus only used reluctantly.

In South Africa the measures are often derived from a very general provision of the legislation, such as that application of the measures are simply subject to *Registrar's* discretion. Whether such wide latitude can stand the test of a constitutional review remains to be seen. In Germany the enabling provisions tend to be more specific. The German Federal *Kreditwesengesetz* only provides for one really general clause in § 6 I..

Both legal systems exclude claims for damages against the state for faulty actions of the supervisory authorities.

In special cases of danger, the authorities in both systems have the powers to impose temporary measures. In both countries, the formalities of the proceedings may be scrapped if the matter is urgent.

In Germany the administrative courts do not decide on the lawfulness of fines imposed by the *Bundesaufsichtsamt*. Only the criminal courts have jurisdiction in such matters. In South Africa it is necessary to distinguish between a fine as punishment of a offence (criminal law) and a fine imposed in terms of administrative law. The latter is dealt with in general courts in terms of the review proceedings.

In both countries a party who feels himself aggrieved by supervisory actions has some redress to law. In Germany Art 19 IV GG entrenches a guarantee of the course of law against unlawful measures of a public authority. The South African equivalent of this provision can be found in s 1 read in conjunction with s 34 of the *Constitution*. The redress to law is, however, formalised to a larger degree in Germany than in South Africa. The aggrieved party has access to the remedies stipulated in the *Verwaltungsgerichtsordnung* before special administrative courts. In South Africa there is no special court of this nature and the matter must be heard by the normal courts (the High Court).

The testing of measures of banking supervision by the courts is somewhat different in the two countries. Since the *Registrar* in South Africa has wide-ranging discretion, the control is mainly concerned with whether the rules of procedure were followed. The

German administrative courts consider the formal as well as the material requirements for the validity of the administrative act.

The German Federal administrative courts also do not have as comprehensive a competency of norm control as the South African courts do. In the Federal Republic of Germany, this is restricted to special courts.

The steps that have been taken towards the internationalisation of banking supervision require further efforts. The harmonisation within the European Union as well as co-operation in international bodies of experts such as the *Bank für Internationalen Zahlungsausgleich* in Basle. This co-operation is urgently necessary because of the globalisation of the financial markets. This phenomenon is accelerated by the advent of new means of electronic and digital communication, such as satellites and the internet.