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High Frequency Trading – Restrictions on Ultra-Fast Stock Trading

Impending Regulation of Money Market Funds

Assigning the Right to Compensation under Section 16 of the Renewable Energy Act: Insolvency-proof Collateral?

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The financial services sector is one of the most strictly regulated sectors of the economy. In close collaboration with other Practice Groups of Heuking Kühn Lüer Wojtek, the Banking & Finance Practice Group offers its clients comprehensive legal advice. In our articles, we are discussing important new developments, changes of law and the most recent jurisdiction in the field of Banking & Finance.

Is Crowdfunding a Feasible Alternative Source of Financing for Start-Up Projects?

It is not always easy to raise growth capital at reasonable terms when establishing a new company. Online crowdfunding platforms have developed as an alternative funding solution and investment form that allow companies to bridge their financing needs during the initial growth phases.

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Because the investment amounts offered to each investor are typically less than traditional commitments, the potential for capital contribution is in fact larger than for customary financing and investment forms. Interested market participants have embraced crowdfunding as an untapped financing source with positive growth potential.

In Germany, crowdfunding is a relatively new source of financing. Crowdfunding can be used to develop new products, implement innovative business ideas (business start-ups), or for other commercial projects. Online crowdfunding platforms are becoming readily accessible, allowing community interests groups to invest in a particular project or emerging company. These capital providers are made up of a variety of people connected by universal access to the internet. Originally, crowdfunding was developed in English-speaking countries to raise capital for projects geared toward social or artistic purposes.

The idea that financing needs can be fulfilled by a large number of smaller contributions is, from an economic and legal standpoint, not a novel one. Comparable techniques are used when funds are solicited in order to form a stock corporation. However, using crowdfunding as a means to cover financing requirements is not quite the same as compared to more traditional forms of investment funding.

How does crowdfunding work?

The crowdfunding tools now available in the online marketplace provide a platform for companies seeking capital funding and potential investors. The models and the investment opportunities that are offered are often designed quite differently (e.g., form of investment, monies transferred by the operator to the offering party, borrowed capital or equity capital, rights and obligations of the investors, platform as an investment or payment manager). Yet, the framework is relatively simple: investors acquire a share of the business as silent partners in companies that are introduced and assessed on the platform. For example, one crowdfunding platform even offers a share subscription option. In any event, investors are asked to invest with the promise of a share of the profits and opportunity to take an equity position in a venture with high growth potential.

Irrespective of the crowdfunding concept, what must be considered is that any investment in a start-up remains a high-risk investment. Though it may attract potential investors with the promise of considerable profits, the flipside is the potential for a total loss.

Differing concepts are offered with respect to the degree of investor participation in the company's success. Typically, for example, investors can expect interest payments on invested capital (in cases involving dividend earning shares), a percentage of the annual net earnings, or realization of a windfall when the company is bought or goes public. Another possible option may be to share in the benefits resulting from the business model, the product being offered, or the project being financed.

Legal framework of crowdfunding
Regulatory considerations

Depending on the structure of the crowdfunding model, various regulatory issues need to be considered before investing. For example, operating a crowdfunding platform may require a permit according to a) the German Banking Act, if bank transactions take place within Germany or financing services are offered (when investment or acquisition brokerage or underwriting transactions with respect to financial instruments as interpreted according to Section 1(11) of the German Banking Act are provided and such services are commercial in nature or require a commercially established business location); or b) The German Payment Services Oversight Act, if payment services are provided as a payment authority to the degree of this mag-

nitude. Furthermore, additional oversight obligations under the German Securities Trading Act oversight laws may be relevant for crowdfunding platform operators.

Even if the business model and platform operator do satisfy an applicable permission obligation, in some cases there may be exceptions to the permit requirement. For example, if silent partnerships or participation rights are being offered through a crowdfunding platform and no monetary funds are received from investors, the operators are generally not subject to a permit requirement under the German Banking Act.

How the permit obligation is assessed under regulatory law depends on the manner in which the participation and modalities are structured. Due to the wide range of crowdfunding models currently offered in the German market and their relative differences, it is not possible to apply uniform standards to evaluate all possible scenarios under regulatory laws.

Prospectus obligation?

Those parties offering investments in some form or fashion should verify whether the investment is subject to a prospectus obligation under the German Capital Investment Act or the German Securities Prospectus Act. In Germany, any capital investment in which no securities have been issued (e. g., silent partnerships, participation rights, investments in a limited liability company (GmbH), sole proprietorships, and registered bonds) as well as those where shares and other securities may not be offered to the public without a prospectus first approved by the German Federal Financial Supervisory Authority (BaFin). Drafting a prospectus involves a great deal of time and effort and is generally not feasible for business start-ups or smaller capital funding projects.

The prospectus obligation generally applies to any public offering with the intention of attracting investment capital. The crowdfunding model is often used to offer capital assets as defined in the Capital Investment Act and in some cases shares and securities as understood in Securities Prospectus Act. Therefore, any offers of this nature to the public may be subject to the prospectus obligation.

There are, however, exceptions to the prospectus obligation which may simplify matters significantly for the offering party. For instance, section 2(3) of the Capital Investment Act stipulates

that any investments offered up to a certain capital minimum are excluded from the prospectus obligation. Lawmakers presume that these investors do not require any particular protection regarding proceeds from a public offering that does not exceed EUR 100,000 over a 12-month period. The exception EUR 100,000 threshold value is also governed by the Securities Prospectus Act for shares and other securities instruments.

Other exceptions under the Capital Investment Act, such as limiting an investment to a maximum of 20 shares or a minimum price of EUR 200,000 per share, typically do not need to be considered where crowdfunding is concerned. The most important feature of this investment model is to attract a large number of investors who invest relatively small amounts into the business venture.

Conclusion: It remains to be seen whether crowdfunding or similar platforms can become a successful business model in the German market. Existing laws mandate the legal framework under which these investment models can operate. Under applicable law, there are generally no exceptional characteristics of crowdfunding platforms as compared to existing risk capital models. When considering these regulatory requirements, crowdfunding operators are advised to subject their business model to a comprehensive legal review. Those offering investments of this kind should determine whether the investment offering is subject to a prospectus obligation. Normally, the cost for preparing a prospectus would be prohibitive. Providers may also want to consider other structuring decisions that might exclude them from the prospectus obligation.

High Frequency Trading – Restrictions on Ultra-Fast Stock Trading

The German High Frequency Trading Act entered into force on May 15, 2013. Germany is setting the pace for the balanced regulation of high frequency stock trading. The Act aims to curtail the risks of high frequency trading without banning it across-the-board.

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Algorithmic trading, computer-based trading, or "high-frequency trading" (HFT) – all these terms have the same meaning and connotation. They allow for nearly instantaneous trading as orders are sent and accounted for on a stock exchange floor in a matter of micro-seconds. As a result, tiny time advantages allow high frequency traders to acquire securities before customary traders. This has an impact not only on the subsequent, later-in-time transactions, but it also enables high frequency traders to capitalize on minute price fluctuations in other trading centers through rapid resale.

Keywords are governing purchase and sale

Since modern network throughputs are completed in approximately 250 to 300 microseconds from order placement to processing, it is understandable that traders rely on computers to settle stock transactions. However, greater numbers of trades are being conducted according to algorithmic sequences programmed to react instantaneously to keywords, numbers, and other indicators from a myriad of company, industry, and regulatory press releases. Thus, this new form of high frequency trading is hardly a novel form of "market strategy," but rather a further development in trading technology.

Because the key to computer-based trading is speed, most high frequency positions are sold and resold in less than twenty-four hours. Normally only smaller positions are traded using algorithmic trading. Therefore, the proceeds of individual transactions are relatively small. Nevertheless, when viewed in the aggregate, these fractional transactions add up due to the sheer volume of the orders.

Moreover, the physical location of the high frequency computers is critical in the world of algorithmic trading. The shorter the distance between the computers of the high frequency traders and the servers of the stock exchange, the more rapidly transactions can be fed into the system. As a result, high frequency traders attempt to access networks in close proximity to the stock

exchange. In order to ensure as short a distance as possible, they frequently pay for what is referred to as a "co-location." Leasing co-locations represents a significant source of income for the stock exchange.

Despite the cost of procuring a co-location, being able to take advantage of the speed pays off – high frequency trading accounts for 40 % of German trading activities and an estimated US-$20 billion is collected annually using this system. It represents an extremely lucrative business for all those who can take advantage of this type of trading.

The critical features of high frequency trading are obvious. However, there may be exploitation of the general public, made possible by a few using the aforementioned time advantages (it is debatable, however, whether this is actually the case because more liquidity is also brought into the market as a result of the active trading of high frequency traders), putting strain on exchange systems through massive orders, as well as extreme price fluctuations associated with high frequency trading. Despite existing security mechanisms, the threat posed to market participants by a malfunctioning algorithm persists.

Licensing obligations for high frequency trading

The HFT Act now includes a licensing obligation for companies engaged algorithmic trading. Under Section 1 I 1a sentence 2 no. 4 d) of the Banking Act, the term proprietary trading now includes high frequency trading as an independent category. In addition to the previous elements of proprietary trading, the purchase and sale of financial instruments by means of algorithmic high frequency strategies now falls under this term. Corresponding traders are now classified as financial service institutions, subject to the supervision of the Federal Agency for Financial Market Supervision (BaFin). Where traders already possess a license to engage in proprietary trading for other reasons or they operate by means of the European passport, there is no additional licensing obligation. A licensing obligation does exist for companies which are subject to the supervision of a regulatory authority outside of the EU/EEA. On the other hand, algorithmic trading strategies, which are not classified as high frequency trading, do not require a license and are also not provided as a service.

The High Frequency Trading Act entered into force the day after its enactment. However, with regard to the licensing obligation, the act allows for transitional periods in the application process

(Section 64p Banking Act). For German firms, the deadline for filing an application is six months. For companies which are not domiciled in Germany and operate under a European passport exemption, the period is nine months.

As financial service providers, HFT traders are subject to ongoing BaFin supervision. Consequently, the generally applicable provisions of the German Banking Act and the German Securities Trading Act apply. Applicable provisions concerning minimum capitalization, business organization, risk management, as well as reporting and communications obligations are worth noting.

Material statutory changes

The HFT Act includes the following amendments:

- Both the Securities and Exchange Commission as well as the Trade Monitoring Agency are equipped with enhanced monitoring authority over high frequency traders. This has been accomplished by means of a special right to information provision, which requires high frequency traders to provide information on their algorithmic trading practices, the systems they use, their trading strategies as well as details regarding the trading parameters of their systems (Section 3 IV no. 5, Section 7 German Stock Exchange Act amended version; Section 4 III Securities Trading Act).
- A disclosure and reporting requirement has been imposed on high frequency traders under which each change of the computer algorithm used for trading is subject to certification (Section 33 Ia Securities Trading Act amended version). This should ensure that BaFin obtains an insight into the earlier versions, even after the modification of the computer algorithm is put into place, in order to better comprehend possible violations or market-manipulating behaviors.
- In addition to the supervision of BaFin, securities services companies should organizationally ensure that their trading systems are designed such that disruptions of the market are avoided (Section 32c V Securities Trading Act amended version).
- In the event of sharp price fluctuations, trading will be suspended.
- As a prerequisite for an adequate monitoring of trading activity, computer orders should be flagged in the future, in order to quickly identify and locate those person(s) responsible for a breakdown (Section 16 II Stock Exchange Act amended version). Due to a change to Section 2 VI Banking Act, an

unrestricted licensing obligation has been introduced for companies which conduct algorithmic high frequency trading.

- In order to better react to defective or market-manipulating computer algorithms, Section 3 V of the Stock Exchange Act has been introduced, making it possible for BaFin to prohibit offending algorithms through alteration of the Market Manipulation Definition Regulation for computer algorithms, which can send out misleading signals, are now classified as market manipulation.
- In order to guarantee a reasonable ratio between order entries, changes, cancellations and the actual transactions executed, an amended version of Section 26a Stock Exchange Act was introduced. This "order-to-trade-ratio" amendment should theoretically prevent market manipulations. These arise in most cases because a large number of orders are entered and cancelled within a very period of time. This is done in order to sound out the order behavior of other market participants and to move it in a desired direction and subsequently exploit it. Violations of compliance with the order-trade-ratio are sanctioned per Section 19 VIII 3 Stock Exchange Act, including possible suspension or the revocation of the authorization under Section 19 of the Stock Exchange Act.
- Section 26b of the Stock Exchange Act has been amended to obligate the stock exchange to set a reasonable amount of the smallest possible price change in traded financial instruments. This provision should counter the current trend of ever-smaller minimum price change amounts and the further splitting up of orders into ever-smaller amounts. The proper pricing mechanism should thereby be ensured.
- A fee for the excessive use of the trading systems was introduced in order to counteract the excessive strain being placed on stock exchange infrastructure (Section 17 IV Stock Exchange Act amended version)
- The regulations in effect are also applicable to multilateral trading systems, in order to prevent evasive movements to other trading systems (Section 31f Securities Trading Act amended version)

Conclusion: Whether this law offers the desired improvements or whether, as widely criticized, it is a „brazen fraud," remains to be seen. It is now clear, however, that an action against high frequency trading will only be truly meaningful when it is taken not only in Germany, but rather when an appropriate regulation is made applicable to all EU jurisdictions.

Impending Regulation of Money Market Funds

The European Commission is preparing a proposal for a special regulation tailored to the risks posed by money market funds

As part of the impending regulation of what has been referred to as a "shadow banking system," money market funds are increasingly coming under the microscope of supervisory authorities and legislators. The European Commission will soon issue a proposal for the regulation of money market funds. It is likely that the proposal will adhere closely to the prior recommendations of the International Organization of Securities Commissions (IOSCO).

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The EU Commission has announced its intention to extensively regulate so-called shadow banking practices in order to provide greater resiliency and stability to the financial sector. The Commission's policy proposals were first introduced in a Green Paper report published in late March 2012. On one hand, the Commission intends to confront previously identified risks inherent to shadow banking practices. On the other hand, the Commission's regulatory proposals will attempt to counteract the evasion of more stringent regulations in currently regulated industry segments.

Money market funds

In the report, the Financial Stability Board (FSB) defined the shadow banking system as "the system of credit intermediation that involves entities and activities outside the regular banking system." Money market funds (MMFs) were included within the Board's definition because the funds are supposed to allow for a maturity period. MMFs permit investors to redeem shares on a daily basis. The MMFs themselves, however, are invested in financial instruments which can be subject to longer residual terms. MMFs are financial products invested either exclusively or primarily in money market paper and liquid securities with short residual terms.

Generally, MMFs can be divided into two types,

- MMFs with Constant Net Asset-Value – CNAVs, and
- MMFs with Variable Net Asset-Value – VNAVs.

In particular, CNAVs have been criticized because their share net value remains constant at 100% (EUR 1 or US-$1). Thus, CNAV asset funds are not assessed according to current market prices, but rather on the basis of their acquisition cost (amortized cost accounting). Neither the market risks nor realized losses are

actually reflected in the share price of the assets. Credit institutions regularly operate as parent companies of MMFs, thereby contributing to their entanglement with other financial sectors.

If the actual asset value of a CNAV decreases and a large enough number of investors contemporaneously redeem their shares, the fund will encounter serious difficulties. The fund will be required to sell its assets at the current market value, thereby suffering a loss while remaining obligated to fund investors at constant share value (100 %), in spite of the deviation between constant and actual share values. If this deviation reaches a critical threshold, the fund must be closed and liquidated. The investors, who remain in the fund until liquidation, are disproportionately affected by the realized losses while those who have immediately redeemed their shares often suffer no loss. Therefore, one may speak of CNAVs as particularly „run-susceptible," incentivizing investors to redeem their shares at the first sign of crisis that could conceivably trigger a chain reaction.

IOSCO recommendations

In Germany, MMFs are classified as investment funds and fall under the auspices of the Investment Act or future provisions of the Capital Investment Code. Nevertheless, all the potential risks inherent in these investment products have yet to be addressed. In relation to Europe as a whole, the regulation of MMFs actually turns out to be relatively inconsistent. The amortized cost accounting approach that is characteristic of CNAVs is strictly limited in Germany according to Section 36(1) sentence 2 of the Investment Act. Conversely, the cost accounting approach is generally permitted in other European jurisdictions. In order to address these varying approaches, the FSB commissioned the International Organization of Securities Commissions (IOSCO) to develop recommendations to synthesize regulation of MMFs. These recommendations will serve as the foundation for further legislative measures. Among other proposals, the IOSCO has specifically recommended:

- Only fund valuations based on market value should be permitted. Ultimately, this recommendation would prohibit investment in CNAV funds. As such, the recommendations may restrict future MMF investment to VNAVs.
- MMFs should be subject to a minimum liquidity requirements.
- Investors' options should be limited to redeeming their shares, if the risk of a run on a fund is imminent. As a result, regulators

will limit or may go as far as to completely suspend redemptions in such cases.
- The use of external rankings should be restricted. Instead, individualized risk assessments must be conducted.

Implementation of the IOSCO recommendations would require all CNAVs to be converted to VNAVs, a prospect the IOSCO has already acknowledged. Alternatively, equivalent measures could be implemented. The most likely measure being minimum capital requirements, per IOSCO advisements.

Conclusion: As the Commission may attach greater weight to these recommendations, increased regulation of CNAVs should be expected in the near term. CNAVs in their previous form, functioning as „replacement funds," will likely become a thing of the past.

Assigning the Right to Compensation under Section 16 of the Renewable Energy Act: Insolvency-proof Collateral?

A plant operator's right to assert a claim against a network operator as defined in Section 16 of the Renewable Energy Act is in many cases the only source of valuable collateral for the banks funding the investment. What is questionable, however, is how insolvency-proof an assignment might be. Case law on this issue does not yet exist.

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According to Section 91 of the German Insolvency Act, rights to objects forming parts of a bankruptcy estate cannot be legally acquired after insolvency proceedings have been initiated. What this means with regard to accounts receivable assigned in advance is that it is no longer possible to acquire a right to a receivable that is deducting from the bankruptcy estate, if that receivable was not created until after the insolvency proceedings were initiated (German Federal Court of Justice, ZInsO 2010, 1001 et seqq.)

However, the assignee does have an insolvency-proof legal position. If the assignee acquired a collateralized position prior to the initiation of the bankruptcy proceedings the answer may be different. (Federal Court of Justice, loc. cit.). This is the case, for example, if the receivable had already been fully exited from the assets of the (future) insolvency debtor prior to the initiation of bankruptcy proceedings.

Insolvency-proof assignment: Lease receivables

The law recognizes that receivables from lease financing agreements are assignable as insolvency-proof assets; however, it does not apply to the accrued interest. The Federal Court of Justice reasoned that this difference regarding the financing function was that the lease agreement had been fulfilled. The relevant amount owed had already been defined completely by the lease agreement. The agreement would define exactly the term, the due date and the number of installment payments due. (BGHZ 109, 368 et seqq.).

Therefore, the lease receivable is created fully at the time the lease agreement is signed; only the due date for each respective installment is conditioned on a specific deadline.

Section 16 Renewable Energy Act

Until now, there has been no discussion dedicated to the legal nature of the receivable as defined in Section 16 of the Renew-

able Energy Act in legal commentaries. There are also no court opinions on the subject.

In some instances, it has been argued that Sections 16 and 21 of the Renewable Energy Act provide a right against the network operator as soon as the intent to supply power to the plant operator exists. The amount owed is payable in installments over a period of 20 calendar years. As such, it is comparable to a lease receivable making an assignment insolvency-proof.

Based on the scattered criteria gleaned from the case law, however, it is doubtful whether this is in fact the case. The amount of compensation depends on how much power is supplied to the energy network. Neither the amount of compensation payable in installments nor the compensation owed throughout the entire supply period can be calculated from the start.

As such, there are several noteworthy arguments in favor of assuming that the amount of compensation owed is based only on how much power is in fact supplied, which cannot be clearly defined at the start of the relationship. Therefore, the payment request as defined in Section 16 of the Renewable Energy Act cannot be assigned in an insolvency-proof manner.

Conclusion: It is doubtful whether a payment request under Section 16 of the Renewable Energy Act can be considered as an insolvency-proof assignment. As far as we can tell, this has neither been a topic of discussion amongst legal experts or on a practical level. As such, it is strongly recommended that banks offering financing not use the assignment to a payment demand alone as collateral. Even assigning the plant as security cannot always be a safe bet. Demanding a limited personal lien can secure, from a commercial standpoint, an assignment that provides equivalent financing security that is insolvency-proof. When working out the details of agreements of this nature, it is advisable to give due thought to negotiating exactly the (secured) amount owed under obligations law, the scope of the personal lien, and the collateral agreement.

Migration to SEPA-Payment Methods

As of February 1, 2014, the transfers and direct debits customary today will be mandatorily replaced by the new SEPA formats

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Due to the mandatory migration to the Single Euro Payments Area (SEPA) beginning February 1, 2014, companies should begin to adjust their payment systems as soon as possible. After the deadline expires, it will no longer be possible to process transactions using formerly acceptable payment methods.

As part of the creation of SEPA (Single Euro Payments Area), effective February 1, 2014, customary national payment regimes for transfers and direct debits will be replaced by SEPA payment methods under EU Regulation No. 260/2012 („SEPA Migration Regulation"). After the Regulation becomes effective, payments can no longer be processed using the usual form or previously accepted formats. For example, formerly accepted account numbers and bank routing numbers will be permanently replaced by the IBAN and BIC standards.

Early action required

Therefore, companies should waste no time in preparing for these changes and make the necessary arrangements early in the process. Financial services institutions, even those whose main focus is not payment transactions, in addition to implementing these changes internally, should inform their customer bases of the coming changes whenever possible.

Necessary preparations

In particular, SEPA imposes a significant adjustment requirement with regard to direct debits. In the future, what is referred to as a "creditor identification number," which must be applied for at the German Bundesbank, will be required for the collection of direct debits. Moreover, previously accepted direct debit authorizations, even in the corporate client sector, will no longer be valid unless the account is newly acquired. In individual cases, compliance may include considerable investments in additional time and resources. Technical adjustments will also be needed, particularly with respect to chosen data formats.

In order to ensure a smooth transition, it is of vital importance for businesses to thoroughly prepare for SEPA by developing a detailed plan in collaboration with one's principal bank to create step-by-step transfer procedures. Otherwise, payment flows can come to a complete standstill because traditional payment methods can no longer be used after the cutoff date.

Conclusion: The realization of SEPA will affect everyone who participates in the global marketplace. The necessary adjustments should not be taken lightly. The practical implications, such as obtaining new direct debit authorizations, may take considerable time. Those who fail to convert to SEPA, however, risk complete disruption in the flow of payment transactions as of February 2014.

This Newsletter in no way constitutes professional legal advice. While the information contained in this Newsletter has been carefully researched, it offers only a partial reflection of the law and its developments. It is not a substitute for individual consultation, appropriately tailored to the facts of individual cases.

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