

**C/M/S/ Hasche Sigle**

Rechtsanwälte Steuerberater

Client briefing note

**General Decrees from BaFin:  
FAQ published with clarifications on the  
territorial scope of the decrees banning  
certain uncovered short sales and CDS**

25 May 2010

## **BaFin publishes Frequently Asked Questions List with clarifications regarding the territorial scope of the decrees**

On 18 May 2010 the German Federal Financial Supervisory Authority (BaFin) published three general decrees (*Allgemeinverfügung*) prohibiting certain kinds of uncovered short sales and certain uncovered credit default swaps (CDS). The decrees did not provide guidance on their territorial scope. BaFin now made some clarifications through FAQs on their website ([www.bafin.de](http://www.bafin.de)).

### **Background**

One decree bans short sales of euro bonds admitted to trading on a regulated market in Germany which are issued by a Member State of the European Union whose legal currency is the Euro. BaFin also banned short sales of shares in the following entities operating in the financial sector: Aareal Banking AG, Allianz SE, Generali Deutschland Holding AG, Commerzbank AG, Deutsche Bank AG, Deutsche Börse AG, Deutsche Postbank AG, Hannover Rückversicherung AG, MLP AG, Münchener Rückversicherungsgesellschaft AG. Finally, BaFin banned contracting of uncovered CDS in every case a not more than insignificant reduction of the protection buyer's risk is achieved thereby.

### **The territorial scope**

According to BaFin's FAQ, the ban on short selling of euro bonds is applicable, if the contract is entered into in Germany, regardless of whether it is concluded on the regulated market or over the counter (OTC). It is our understanding that the scope of the ban does not encompass transactions entered into between natural or legal persons located outside of Germany at the time the transaction is entered into or on a stock exchange located outside of Germany.

In respect of short sales in the aforementioned shares, BaFin does not take any position on the territorial scope of the decree. However, the FAQ referring to the March 2010 decree which introduced certain transparency

obligations for short sales in the same shares state that such obligations apply to every person in possession of a net short position regardless of the location or seat/habitual residence of the holder.

This leads to a different territorial regime in the two cases of short sales. The short selling of the aforementioned shares falls within the scope of the ban even if two persons abroad are acting, whereas the short selling of euro bonds needs to be transacted on a German regulated market or otherwise entered into in Germany.

With regard to uncovered CDS, BaFin states that the ban is applicable to all contracts that were entered into in Germany from a civil law perspective, but has not provided further guidance or examples. According to our understanding it can be taken from general civil law principles that a CDS contract is not entered into in Germany in cases where the party accepting the offer to enter into a CDS contract is located outside of Germany at the time the transaction is entered into. In any event, a CDS agreed upon between two persons located outside of Germany is not affected by the ban.

For further information please refer to your CMS contact.

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