



EVERYTHING MATTERS

# Supervisory Laws and European Cross-Border Issues after the Implementation of the Reinsurance Directive

Germany

Gunne W. Bähr, Cologne



AIDA Europe Conference, Zurich, 22 October 2009  
Working Group State Supervision

A Reinsurance Directive

B Reinsurance Supervision in Germany

I EC/EEA Reinsurance Companies

II Non-EC/EEA Reinsurance Companies

III Non-EC/EEA Mixed Insurance Companies

C Statement of BaFin

## Scope

- EC Reinsurance Directive 2005/68/EC of 16 November 2005
- The Reinsurance Directive provides a regulatory system for **pure** reinsurance companies domiciled in EC/EEA countries
- In principle the Reinsurance Directive only applies:
  - to reinsurers headquartered in the EC/EEA (*EC/EEA domestic reinsurers*); and
  - to reinsurers which exclusively conduct reinsurance business and do not engage in primary insurance business (*pure reinsurers*)
- This “limited scope” of the directive does not have the effect that:
  - pure reinsurers headquartered outside the EC/EEA (third countries) and
  - primary insurers from third countries carrying out reinsurance business (Mixed Insurance Companies)would be exempt from reinsurance supervision within the EC/EEA

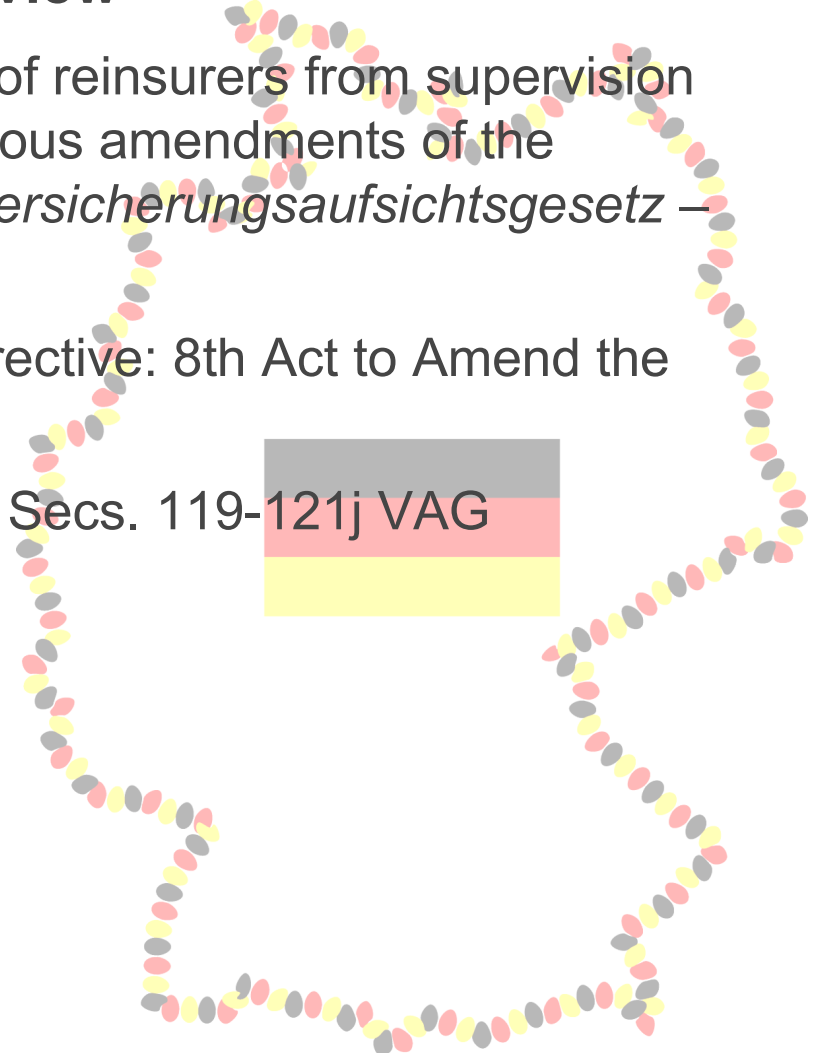
## Implementation in the EC/EEA jurisdictions

- For pure reinsurers domiciled outside the EC/EEA, the Reinsurance Directive only contains the so-called “*prohibition of more favourable treatment*” in Article 49. This provision states that:  
*“A Member State shall not apply to reinsurance undertakings having their head offices outside the Community and commencing or carrying out reinsurance activities in its territory provisions which result in a treatment more favourable than that accorded to reinsurance undertakings having their head office in that Member State”*
- (Incidentally) the legislators of the EC/EEA countries are free to regulate the reinsurance business of companies from third countries for their territory
- In the different EC/EEA countries diverse provisions apply for the reinsurance business of pure reinsurers and mixed insurers from third countries
- Overview: CEIOPS database on the regulatory and supervisory treatment of third country reinsurance undertakings and existing equivalence practices

<http://www.ceiops.eu/media/files/supervisory-disclosure/CEIOPS-public-database-treatment-3rd-country-reinsurers.xls>

## Implementation in Germany – Overview

- In recent years, the former exemption of reinsurers from supervision was gradually given up through numerous amendments of the German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz – “VAG”*)
- Implementation of the Reinsurance Directive: 8th Act to Amend the VAG from 28 May 2007
- Reinsurance Directive implemented in Secs. 119-121j VAG

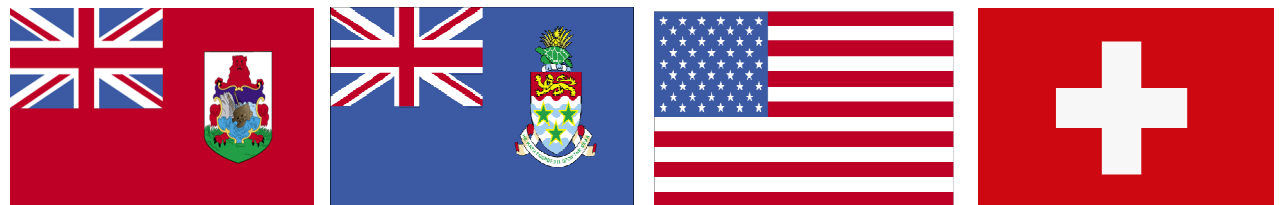


### I EC/EEA Reinsurance Companies

- As for primary insurers, the principle of home country control applies to EC/EEA reinsurers
- German reinsurers who are authorised by the Federal Financial Services Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – “BaFin”) to operate reinsurance business can transact reinsurance business within the entire EC/EEA (Sec. 120 (2) VAG, “European Passport”)
- Reinsurers from other EC/EEA countries having an authorisation from the competent authorities in their home country are allowed to carry out business activities in Germany (Sec. 121h VAG)
- Unlike primary insurers (Secs. 13a-13c VAG, Sec. 110a VAG), EC/EEA reinsurers do not need to go through any further “notification procedure” in order to operate in another EC/EEA country
- **Conclusion:** No supervisory challenge

## II Non-EC/EEA Reinsurance Companies (1)

- Basic Conditions in Sec. 121i (1) VAG
- Pure Reinsurers domiciled in a non-EC/EEA country (Third Country) are principally allowed to carry out reinsurance business in Germany through a branch office or directly from their domicile
- Provided:
  1. Respective reinsurer is allowed to carry on reinsurance business in the country of its corporate domicile
  2. Reinsurer has its main office there and
  3. Reinsurer is supervised there in accordance with internationally recognised principles and
  4. A satisfactory cooperation between the competent authorities in the country of domicile and BaFin is ensured
- Sec. 121i VAG serves as a German implementation tool of the prohibition of a more favourable treatment of Article 49 Reinsurance Directive



## II Non-EC/EEA Reinsurance Companies (2)

- Notification procedure according Sec. 121i (1) VAG for pure reinsurers
- Confirmation by the competent authority in the country of the non-EC/EEA reinsurer's domicile to BaFin that requirements of Sec. 121i (1) VAG are fulfilled
- BaFin verifies in particular whether the company is a pure reinsurance company (or a mixed insurer)
- Determination by BaFin whether the reinsurance company is supervised in accordance with internationally recognized principles: *Supervisory Standard No. 8 of the International Association of Insurance Supervisors (IAIS) „Standard on Supervision of Reinsurers“ of October 2003*
- BaFin confirms in writing that the reinsurance business can be carried out in Germany on the basis of Sec. 121i (1) VAG
- BaFin has issued a guideline for the notification procedure and a sample confirmation

[http://www.bafin.de/clin\\_115/nn\\_721290/SharedDocs/Veroeffentlichungen/DE/Service/Auslegungsentscheidungen/Versicherungsaufsicht/ae\\_080118\\_rueckversicherungsgeschaeft\\_va.html?\\_\\_nnn=true](http://www.bafin.de/clin_115/nn_721290/SharedDocs/Veroeffentlichungen/DE/Service/Auslegungsentscheidungen/Versicherungsaufsicht/ae_080118_rueckversicherungsgeschaeft_va.html?__nnn=true)



## II Non-EC/EEA Reinsurance Companies (3)

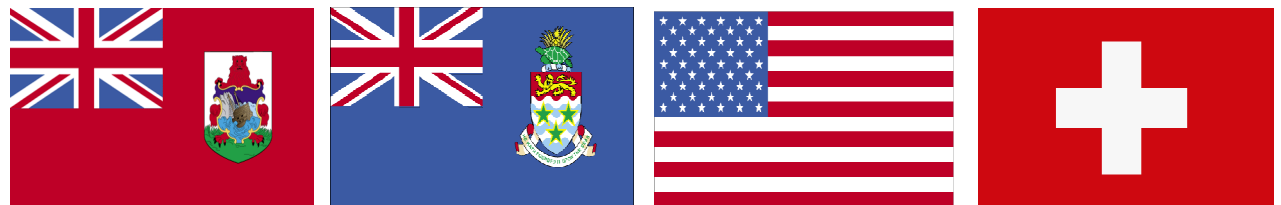
- Upon notification, a pure reinsurer from a non-EC/EEA country is allowed to carry out business activities from its domicile in Germany without fulfilling any further requirements by way of the so-called “cross-border business” (Sec. 121i (1) sentence 3 VAG)
- Cross-border business is a business activity which would represent an activity of reinsurers from EC/EEA countries by way of the freedom to provide services (i.e. services rendered cross border without a branch office)
- Both the reinsurers’ employees and self-employed persons may temporarily travel to Germany from abroad for business purposes
- Domestic reinsurance brokers and other domestic persons may temporarily be involved in soliciting, concluding and implementing reinsurance contracts

## II Non-EC/EEA Reinsurance Companies (4)

- If reinsurance business is to be conducted through a “permanent presence” in Germany, the pure reinsurance company must establish a branch office
- To establish a branch office in Germany, in addition to the notification procedure pursuant to Sec. 121i (1) VAG, a formal authorisation by BaFin according to Sec. 121i (2) VAG is necessary
- Procedure to obtain such authorisation basically equates the authorisation procedure for primary insurers from non-EC/EEA countries according to Secs. 105 (2), 106 (2) VAG

### III Non-EC/EEA Mixed Insurance Companies (1)

- Sec. 121i VAG applies only to pure reinsurers which carry out reinsurance business exclusively
- For insurance companies having a licence in their home country to conduct both primary insurance business and reinsurance business, the supervisory provisions for primary insurers from non-EC/EEA countries contained in Sec. 105 VAG apply
- In terms of regulation BaFin regards such *Mixed Insurers* as primary insurance companies even if they merely intend to conduct reinsurance business in Germany
- **Conclusion:** Rules for primary insurers apply



## III Non-EC/EEA Mixed Insurance Companies (2)

- Concerns from the (Re-)Insurance Market
  - By applying Sec. 105 (2) VAG to the reinsurance business of *Mixed Insurers*, the legislator did not create uniform competitive conditions within the reinsurance market
  - To determine whether an insurer from a third country must observe the supervisory rules applicable to primary insurers, or is governed by the supervisory provisions which apply to reinsurers, it cannot be decisive what business activities the insurer carries out in its home country
  - Whether the regulation for primary insurers or reinsurers should be applicable in Germany should depend on the nature of the business operations in Germany

### III Non-EC/EEA Mixed Insurance Companies (3)

#### **Sec. 105 (2) VAG**

*„Non-Member State insurance undertakings who wish to carry out primary insurance or reinsurance business in Germany through intermediaries/“Mittelpersonen” are subject to authorisation.“*

#### **Sec. 106 (2) (3) VAG**

*„The undertakings shall establish a branch within the territorial scope of this Act, where they shall retain all records concerning the branch. [...]“*

*An authorised agent whose domicile and permanent residence is within the territorial scope of this Act shall be appointed for the branch [...]“*

### III Non-EC/EEA Mixed Insurance Companies (4)

- BaFin considers intermediaries/“*Mittelspersonen*” in terms of Sec. 105 (2) VAG every person who conducts activities aimed at the conclusion or implementation of insurance contracts, irrespective:
  1. of whether it is employed by or independent from the non-EC/EEA insurance company
  2. of whether these activities are conducted in Germany permanently or from time to time
- Only *Insurance by Correspondence* (“*Korrespondenzversicherung*”) is free from German insurance regulation
- *Insurance by Correspondence* is commonly assumed where **upon initiative of a person** residing in Germany an insurance contract was **concluded by way of correspondence** (letter, e-mail, fax etc.) with an insurance company abroad **without the involvement of an commercially acting intermediary** in Germany

### I Primary and Mixed Insurance Companies from Third Countries

- **Reinsurance business subject to permission:** domestic representative or a domestic authorised person (1), a domestic reinsurance broker (2) or a domestic employee (3) is involved in the conclusion or the implementation of the contract
- **Reinsurance business free from permission:**
  - the conclusion of the contract is effected by means of insurance by correspondence, without an intermediary participating in the conclusion and the implementation of the contract on part of both contracting parties
  - the conclusion of the contract and the implementation is effected involving intermediaries based abroad without any intermediary activities in Germany
- **Not permissible:** the conclusion and the implementation of a contract involving a branch based in another EC/EEA Member State or third country by means of the European freedom to provide services

[http://www.bafin.de/clin\\_108/nn\\_722564/SharedDocs/Downloads/DE/Service/Statistiken/Statistiken2008/R\\_C3\\_BCckversicherungsunternehmen/st\\_07\\_08\\_ges.html](http://www.bafin.de/clin_108/nn_722564/SharedDocs/Downloads/DE/Service/Statistiken/Statistiken2008/R_C3_BCckversicherungsunternehmen/st_07_08_ges.html)

### II Pure Reinsurance Companies from Third Countries

- **Reinsurance business subject to permission:** reinsurance contracts are concluded via a domestic branch office (authorisation) or by way of the freedom to provide services (notification)
- **Reinsurance business free from permission:**
  - the conclusion of the contract is effected by means of insurance by correspondence, without an intermediary participating in the conclusion and the implementation of the contract on behalf of both contracting parties
  - the conclusion of the contract and the implementation is effected involving intermediaries based abroad without any intermediary activities in Germany
- **Not permissible:** the conclusion and the implementation of a contract involving a branch based in another EC/EEA Member State or third country by means of the European freedom to provide services

[http://www.bafin.de/clin\\_108/nn\\_722564/SharedDocs/Downloads/DE/Service/Statistiken/Statistiken2008/R\\_C3\\_BCckversicherungsunternehmen/st\\_07\\_08\\_ges.html](http://www.bafin.de/clin_108/nn_722564/SharedDocs/Downloads/DE/Service/Statistiken/Statistiken2008/R_C3_BCckversicherungsunternehmen/st_07_08_ges.html)





EVERYTHING MATTERS

# Thank You!



Dr. Gunne W. Bähr

DLA Piper UK LLP

Hohenzollernring 72

50672 Cologne

Germany

P: +49 (0)221 – 277 277 285

F: +49 (0)221 – 277 277 71

E: [gunne.baehr@dlapiper.com](mailto:gunne.baehr@dlapiper.com)

W: [www.dlapiper.com](http://www.dlapiper.com)