

## The Secondary Credit Market Act after two years

What has proven successful? What needs to change?

# Introduction of the speakers



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# Fundamentals of the Secondary Credit Market Act

# Fundamentals of the Secondary Credit Market Act

## An overview

### Content

The law defines the obligations of credit institutions when selling non-performing loans and the responsibilities of buyers of such loans.

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In addition, it stipulates requirements for credit services, the supervision of credit service institutions, and the application of the Legal Services Act to credit services

### Affected parties

Credit service institutions are companies that provide credit services on behalf of the credit purchaser commercially or to an extent that requires commercial business operation. However, this does not include credit institutions established in Germany or certain capital management companies, as well as non-credit institutions that are subject to certain supervisory authorities.

2

### Credit services

Credit services include the collection and enforcement of due payment claims arising from a credit agreement, the renegotiation of contract terms, the processing of complaints and informing the borrower about changes related to the credit agreement.

3



### Background – Non-performing loan portfolios

Since the financial crisis, non-performing loans have been accumulating on the balance sheets of European banks. These are a major obstacle to the recovery of the financial sector, as they tie up financial resources that could otherwise be used for new lending.



### Strengthening the market

The aim of the law is to strengthen the European market for the sale of non-performing loans and expanding the scope for banks to act. In addition, the creation of an efficient secondary market for non-performing loans, which will, among other things, ensure market stability and appropriate consumer protection.



### Implementation of the European Directive

The Federal Republic of Germany is obliged to implement the European legal acts in accordance with Art. 288 (3) TFEU. The minimum harmonization requirements of the Credit Market Directive (EU 2021/2167) must be transposed into national law.



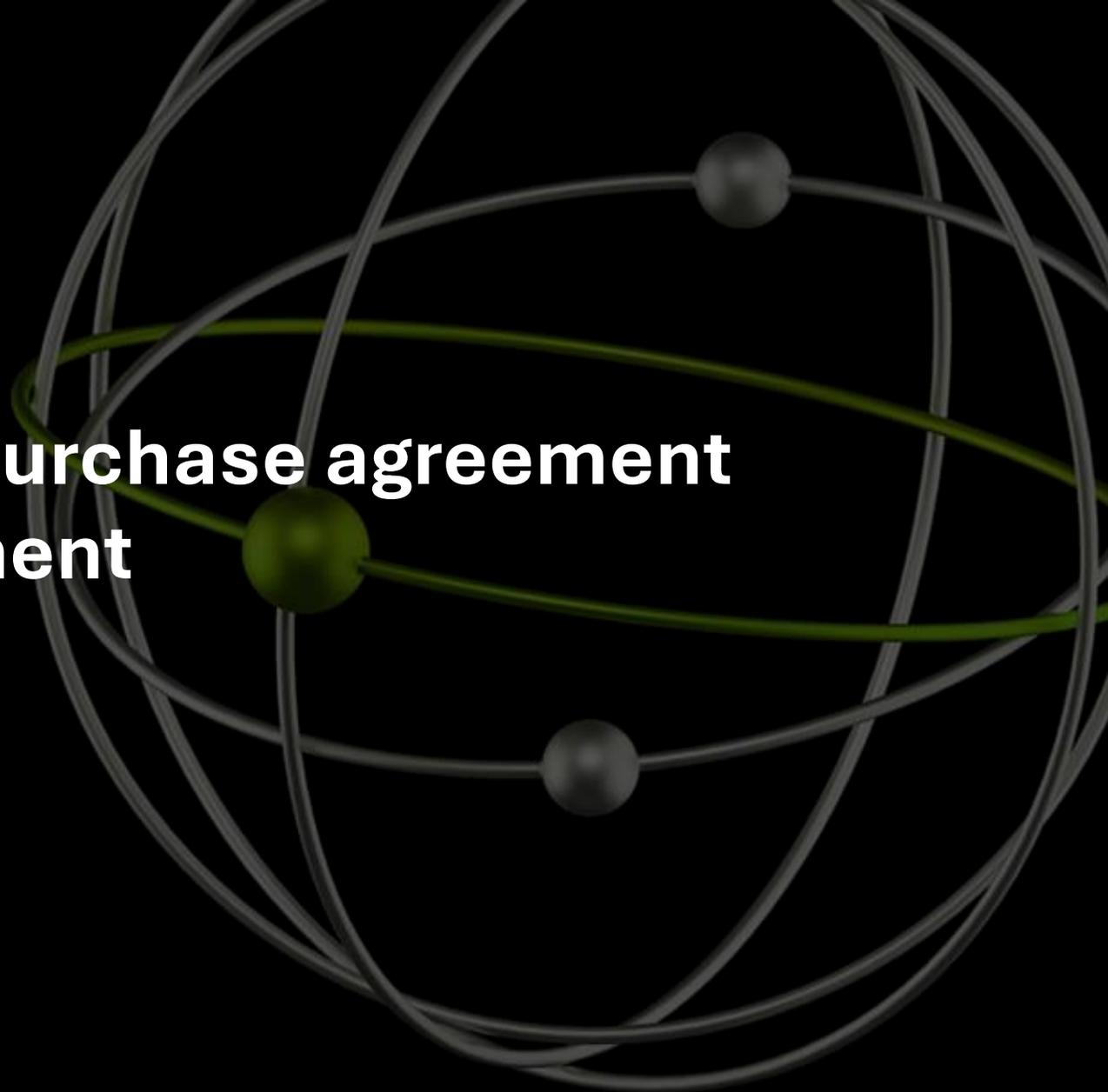
### Schedule

The Credit Market Act came into force on December 30, 2023 (implementation deadline of the Credit Markets Act). A transitional period of six months is provided for companies that were already active before the Act came into force, a transitional period of six months is provided.



### Authorization procedure

Companies wishing to provide credit services must obtain written or electronic permission from the Federal Financial Supervisory Authority in accordance with Section 10 (1) KrZwMG, must obtain written or electronic permission from the Federal Financial Supervisory Authority (BaFin) Financial Services Authority. Section 10 (3) KrZwMG lists the necessary components of the license application.



# **Provisions in the sale and purchase agreement and in the servicing agreement**

# Provisions in sale and purchase agreement and servicing agreement

## Application to non-performing loan agreements

### » Application to non-performing loan agreements in accordance with Section 47a CRR (generally more than 90 days past due)

- *No leasing agreements or rental agreements covered.*
- *Analogy?*

### » No application to complex transactions in which non-performing loan agreements are only part of such a transaction:

- *Sale of branches*
- *Sale of business units*
- *Sale of customer portfolios*
- *Synthetic transfers*
- *NPL securitizations?*

***Credit purchaser must engage a credit service provider (unless they are a credit service provider themselves)***

***Debtors: Natural persons and medium-sized enterprises (up to 249 employees / annual turnover of no more than EUR 50 million / total assets of no more than EUR 43 million)***

***Treatment of special purpose entities (?)***

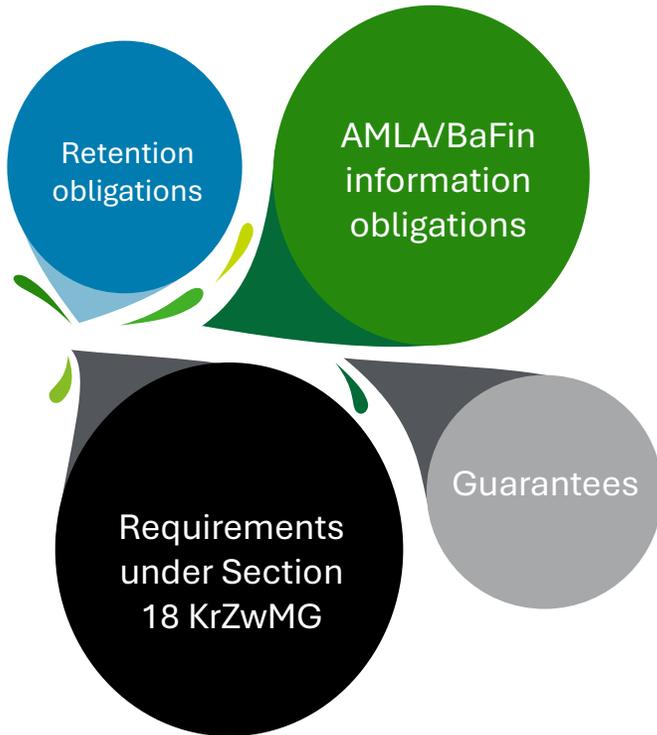
# Provisions in sale and purchase agreement and servicing agreement

Application to non-performing loan agreements



## Requirements of Section 18 KrZwMG

*Conclusion of a written credit services agreement*



Detailed description of the services to be provided

Amount of remuneration or details of how it is calculated

Information on the scope of the credit service provider's power of representation for the credit seller vis-à-vis the borrower

Obligations regarding content

Declaration by the parties on compliance with the contractual provisions and relevant legal provisions

Duties of consideration of the parties

Credit service provider's duty to inform about outsourcing intentions



# Organizational obligations for credit service providers

# Organizational obligations for credit service providers

## Proportionality principles

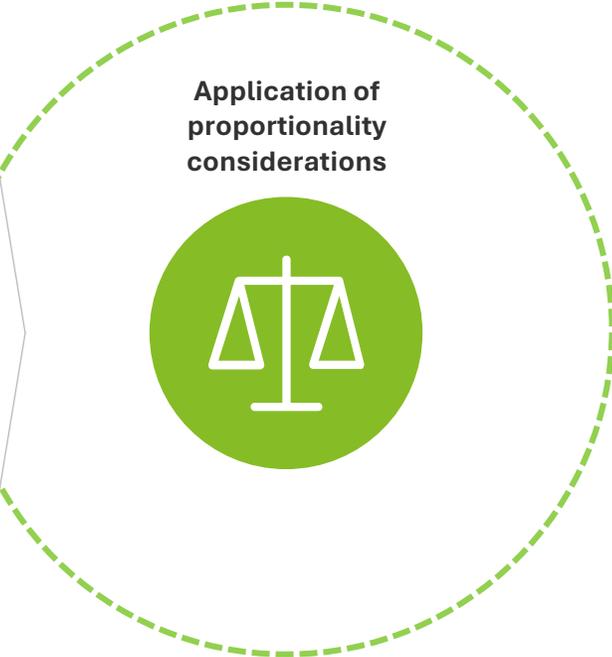
### Principle of proportionality

- 1 Double proportionality**

Design of internal processes in proportion to the size, business volume, and risk structure of the credit service provider, as well as review of the process in terms of frequency and intensity in proportion to the design of the internal processes.
- 2 Adequacy and effectiveness**

Credit service providers should take precautions in individual cases that go beyond the requirements set out by BaFin, insofar as this is necessary to ensure the adequacy and effectiveness of risk management.
- 3 Risk differentiation**

Institutions that are particularly large or whose business activities are characterized by particular complexity, internationality, or particular risk exposure, must take further precautions in the area of risk management.

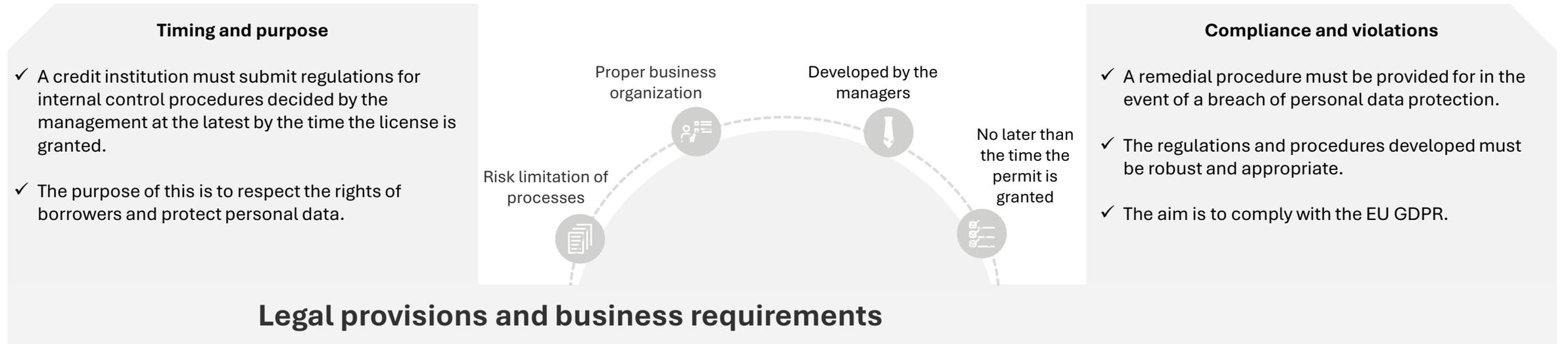


### Quality-oriented supervision of credit service providers

-  Partial parallelization with the requirements for credit institutions
-  Supervision based on proportionality considerations
-  Consideration of the type of company
-  Inclusion of the extent of business activity
-  Consideration of the complexity of the business

# Organizational obligations for credit service providers

## Requirements and guidelines pursuant to Section 14 KrZwMG



### Design of internal controls Section 14 (2) KrZwMG

- Creation of written or electronic internal control regulations and procedures.
- The measures are intended to ensure compliance with the legal requirements in a preventive manner.

### Principles for the protection of borrowers Section 14 (3) KrZwMG

- Establishment of clear guidelines for communication and measures vis-à-vis borrowers.
- Identification of relevant areas of the company and definition of decision-making criteria and principles of conduct for employees.

### Establishment of procedures for credit Complaints, Section 14 (4) KrZwMG

- Establishment of special operating procedures to ensure that borrower complaints are recorded and processed.
- Documentation and temporary archiving of complaints and the respective measures taken.

# Organizational obligations for credit service providers

## Internal controls



*The internal control system refers to the principles, procedures, and measures (regulations) introduced by the company's management that are aimed at the organizational implementation of management decisions.*

Identification of the relevant areas of the company for data processing and communication with borrowers.



Implementation of mechanisms for continuous monitoring and supervision to ensure compliance with the measures specified (internal monitoring system).



Arrangements for regular reporting to management on compliance with the rules of conduct by integrating them into the organizational and procedural structure.



Establishment of specific organizational safeguards as internal control measures.

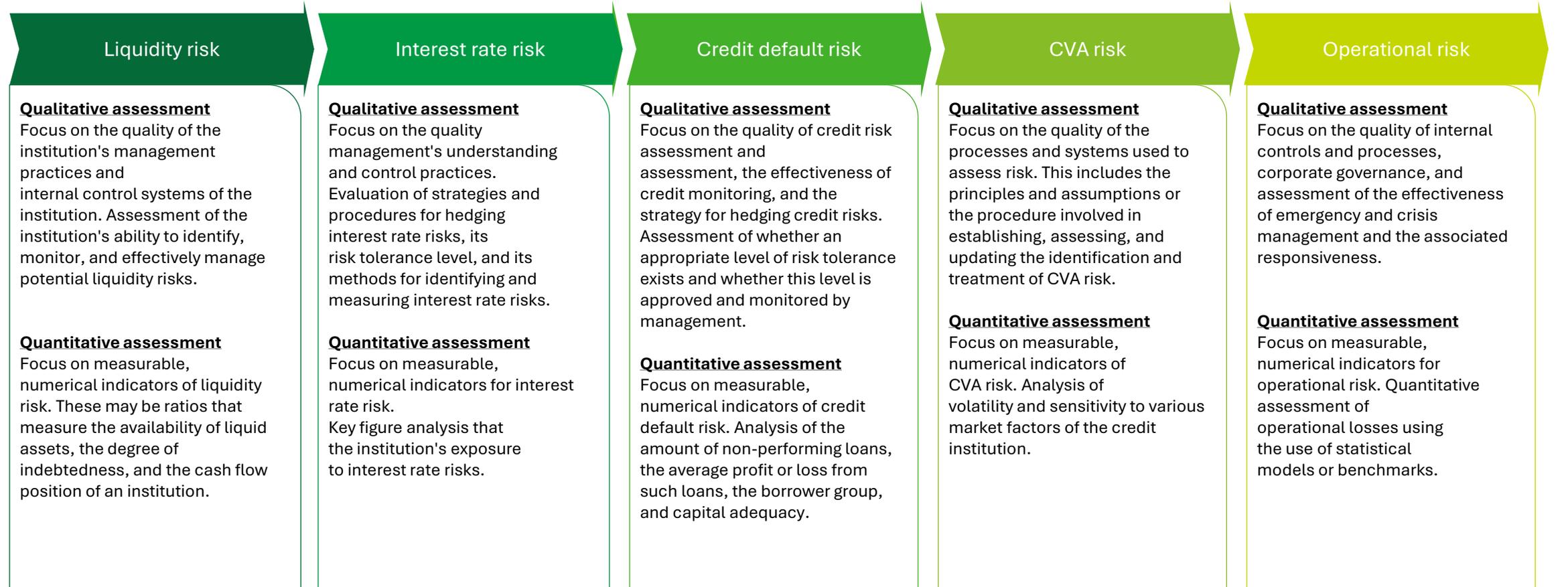


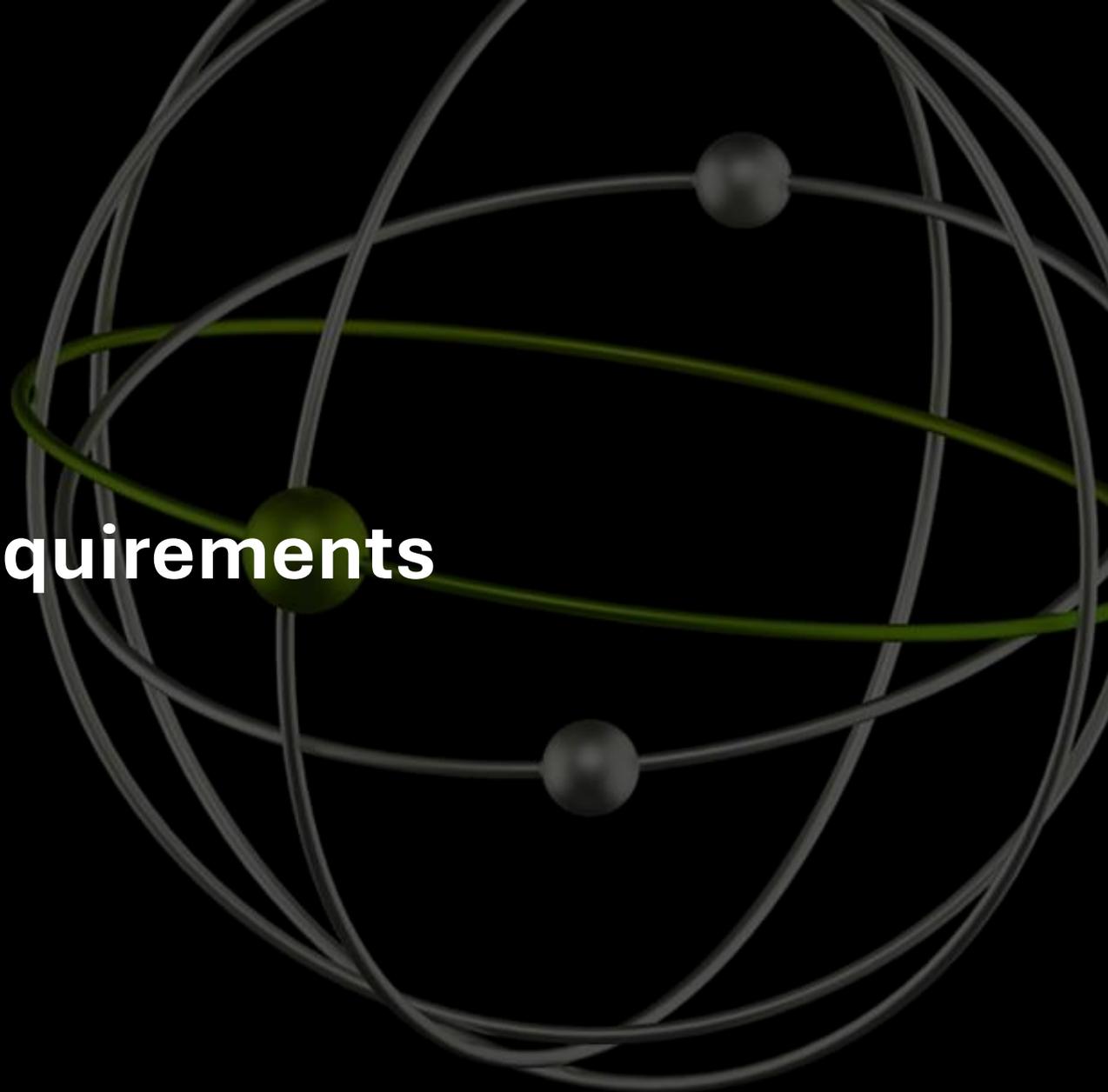
Implementation of internal control procedures so that risks and errors in work processes are detected and prevented by appropriate countermeasures.

# Organizational obligations for credit service providers

## Implications for risk management

Both quantitative and qualitative risks arise for credit service providers





# Disclosure and reporting requirements

# Disclosure and reporting requirements

## Selection of various regulatory requirements



### Credit service institutions

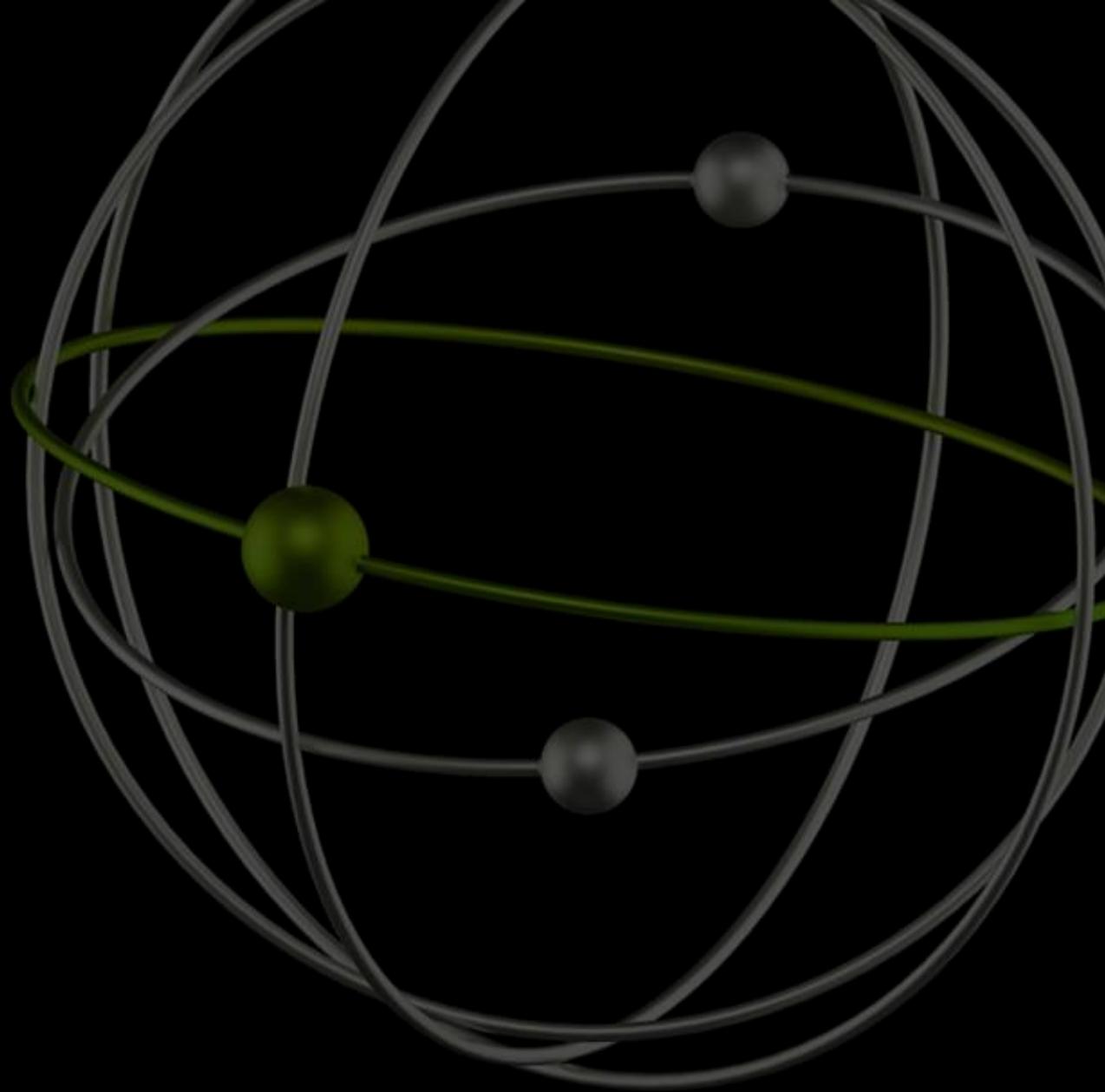
- Significant changes in the actual and legal circumstances relating to the information provided and documents submitted as part of the authorization process; changes in the legal form, name, or registered office of the credit services institution, as well as any intentions to cease business operations or impending insolvency
- Changes in the management or sole power of representation of the credit services institution; changes in the members of the administrative or supervisory bodies
- Holders of significant shareholdings and their authorized representatives and/or personally liable partners
- Outsourcing of (activities related to) credit services
- Changes to the qualified person pursuant to Section 15 (4) KrZwMG
- (Consolidated) annual financial statements and, if applicable, (consolidated) management report, audit report and notification of the appointment of the auditor / annual reporting obligation regarding detailed information on counterparties, credit agreements, collateral and repayments and the use of standardized EBA data templates.



### Credit buyers and sellers

- Appointment of a representative within the EU for credit purchasers from countries outside the EU and the EEA (Section 9 (1) KrZwMG).
- Certain reporting requirements for non-performing credit agreements (Sections 6 (3) and 8 (3) KrZwMG) – half-yearly reports.

# Outsourcing Management



# Outsourcing Management

## Specifications of the outsourcing agreement

### Outsourcing in accordance with MaRisk



In principle, activities and processes may be outsourced as long as the proper functioning of the business organization and appropriate and efficient risk management in accordance with Section 25a (1) KWG are ensured.



With regard to sub-outsourcing, the outsourcing institution's reservations regarding approval or specific conditions governing when sub-outsourcing of individual work and process steps is possible must be agreed in the outsourcing agreement.



The institution must adequately manage the risks associated with outsourcing and properly monitor the execution of the outsourced activities and processes. This also includes ongoing monitoring of the agreed performance of the outsourcing company based on specific criteria.



Every institution that outsources activities must appoint a central outsourcing officer within the institution. Provisions must also be made in the event of any expected or unexpected termination of the outsourcing agreement.

Permission for a singular and correlative assessment of the risk position

Requirement to establish outsourcing management proportional to outsourcing activity

Creation of an appropriate regulatory framework

Ensuring a dual control principle within the control environment

Adjustment of regulatory compliance

Compliance with regulatory requirements and monitoring of changes to internal rules and procedures

# Outsourcing management

## Specifications of the outsourcing agreement – requirements under MaRisk

### Ensuring regulatory compliance in outsourcing in accordance with MaRisk

- ✓ Specification of the services to be provided by the outsourcing company
- ✓ Regulations for compliance with data protection provisions
- ✓ Determination of necessary rights to issue instructions
- ✓ Ensuring unrestricted information and audit rights
- ✓ Determination of the responsibilities of both contracting parties
- ✓ Regulation of modalities in the event of further outsourcing
- ✓ Agreement on information obligations
- ✓ Liability and remuneration
- ✓ Escalation processes and potential sanctions

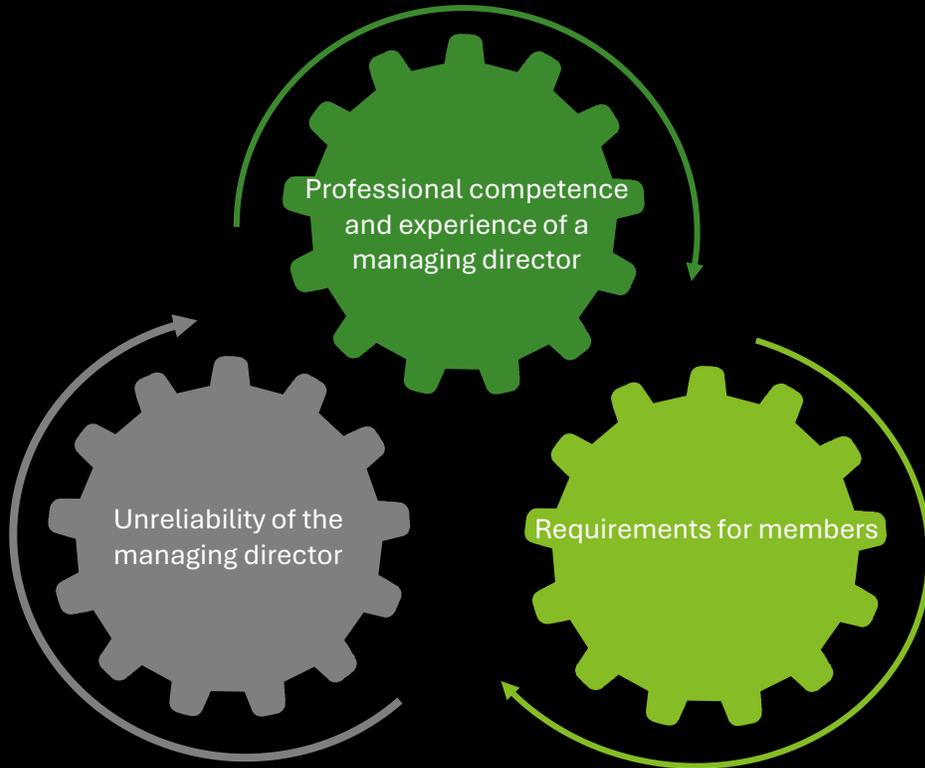
### Ensuring regulatory aspects in outsourcing

- ✓ Ensuring that the credit service institution meets the licensing requirements pursuant to Section 10 (1) sentence 1 KrZwMG, Sections 20 ff. KrZwMG
- ✓ Direct access to all outsourced data to fulfill information rights
- ✓ Credit service institutions must continue to be able to provide the relevant services after the outsourcing has ended
- ✓ Compliance with data protection requirements for confidentiality and protection of customer data, especially in the case of outsourcing companies outside the EU
- ✓ Continuous protection of trade secrets
- ✓ Appropriate risk management and controlling in all phases of outsourcing

# Requirements for Managing Directors



# Requirements for managing director



## Professional qualifications and experience of a managing director

- Natural person with unlimited legal capacity
- Theoretical and practical knowledge
- Management experience
- Overall professional suitability and reliability



## Unreliability

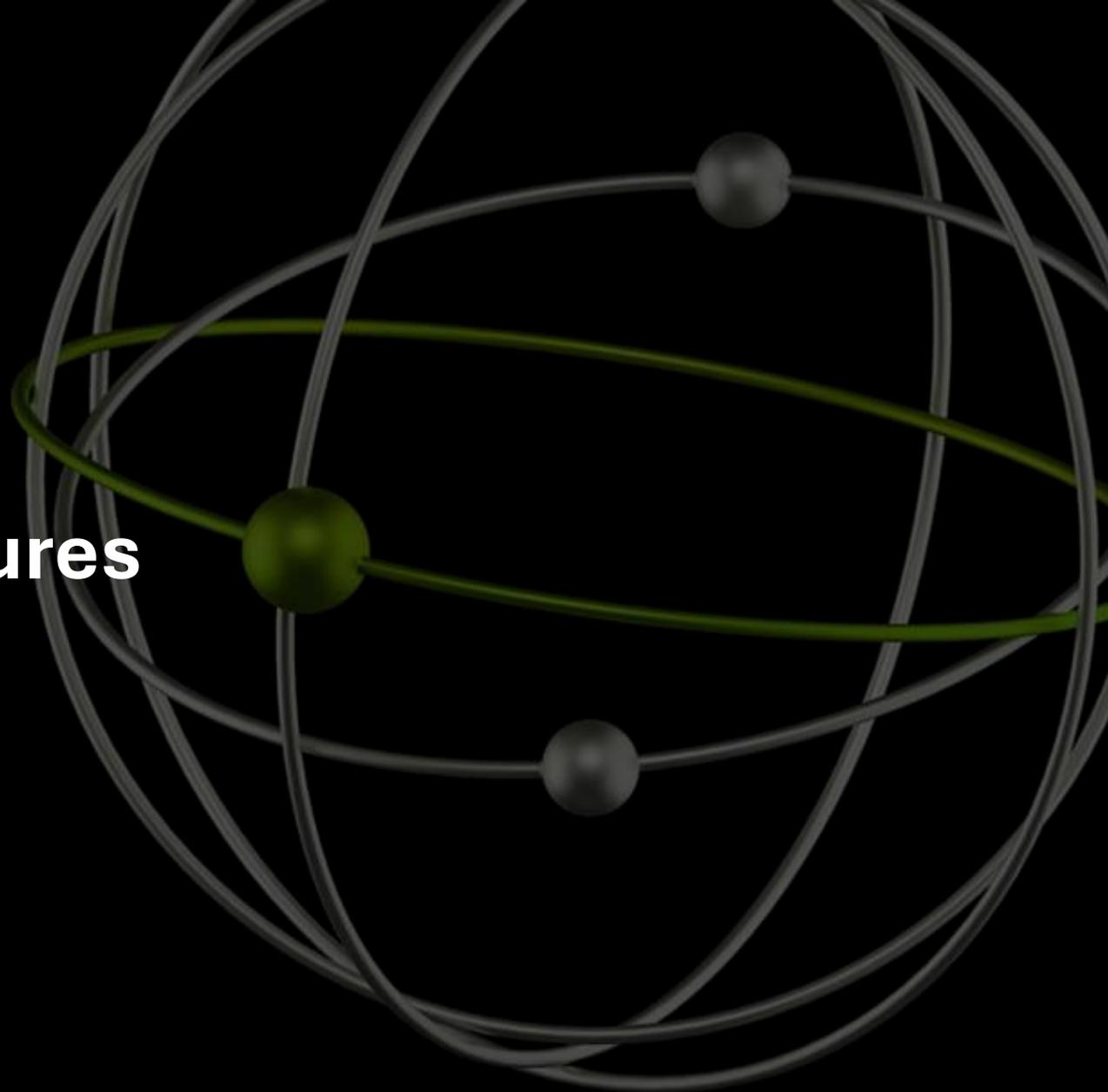
- Legally binding conviction for relevant criminal offenses, particularly in connection with financial services, money laundering, etc.
- Lack of transparency, openness, and cooperation in business dealings with supervisory and regulatory authorities
- Insolvency proceedings or similar proceedings initiated or concluded in respect of the assets of the manager, giving rise to doubts as to his or her reliability



## Proof of reliability

- Submission of an official certificate of good conduct in accordance with Section 30 (5) BZRG or a corresponding document from abroad
- At the request of BaFin or in accordance with Section 10 (9) KrZwMG (basis for authorization) and Section 35 (4) KrZwMG (duty of disclosure), further evidence of reliability must be provided.

# Ownership Control Procedures



# Ownership control procedures

## Ensuring the reliability of owners Section 16 KrZwMG



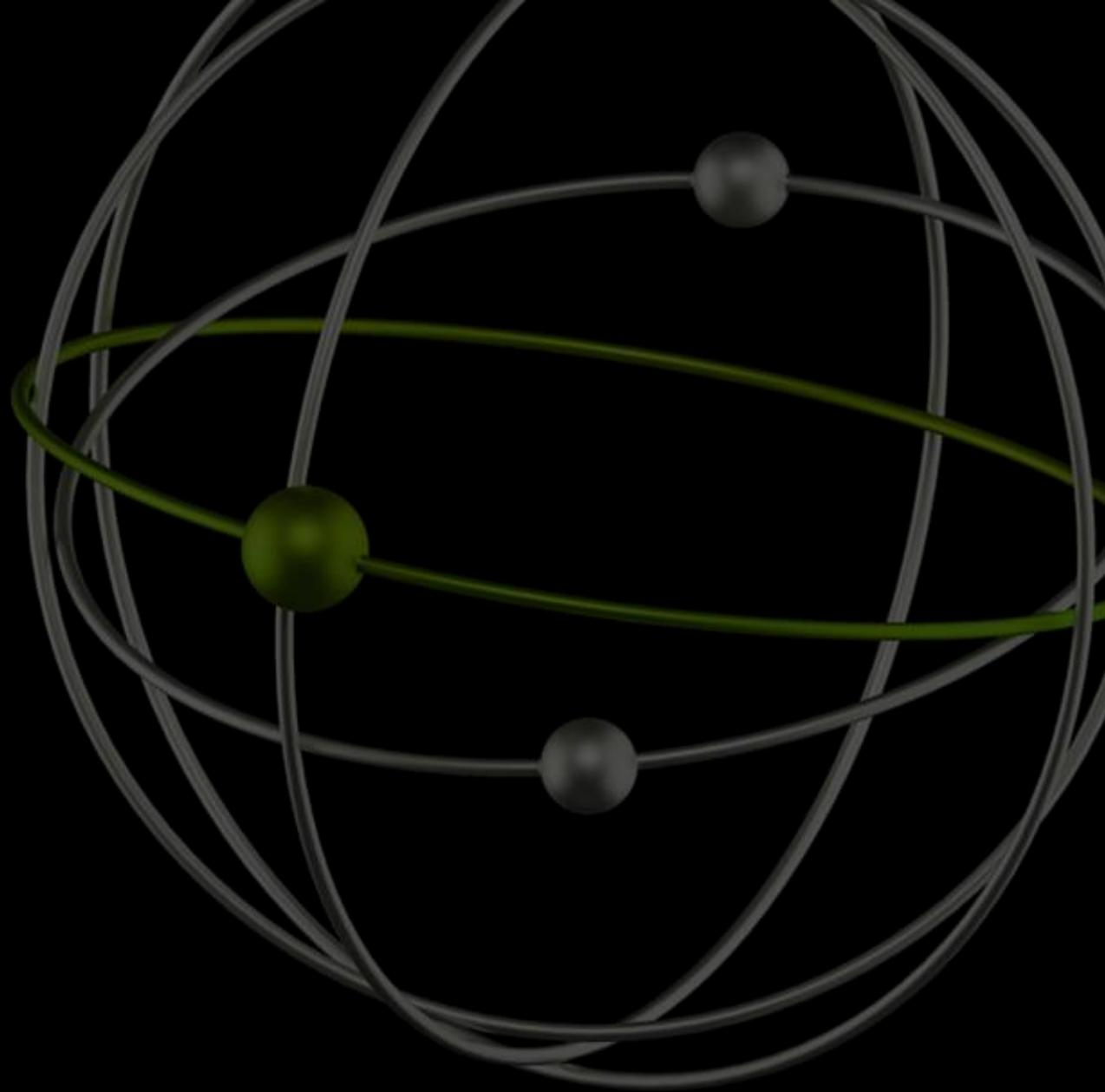


Do you have any  
questions for us?



**Thank you very  
much**  
for your attention.

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### Profile

Dr. Simon Grieser is a partner at Deloitte Legal in Frankfurt am Main and has more than two decades of experience advising sellers, investors, and financiers on transactions involving non-performing and performing loans, as well as on structuring carve-outs of non-strategic banking units.

He is co-editor and co-author of the handbook "Performing and Non-Performing Loan Transactions Across the World – A Practical Guide." He is regularly recommended in national and international publications in the field of regulatory banking sector.

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Dr. Anselm Reinertshofer is counsel at Deloitte Legal in Munich. He has been advising national and international clients on banking and finance law issues for over ten years, particularly in the area of banking supervisory law (including FinTech and ESG) and compliance matters. He also advises on transactions involving non-performing and performing loans. He also has experience in real estate financing and related real estate law issues.

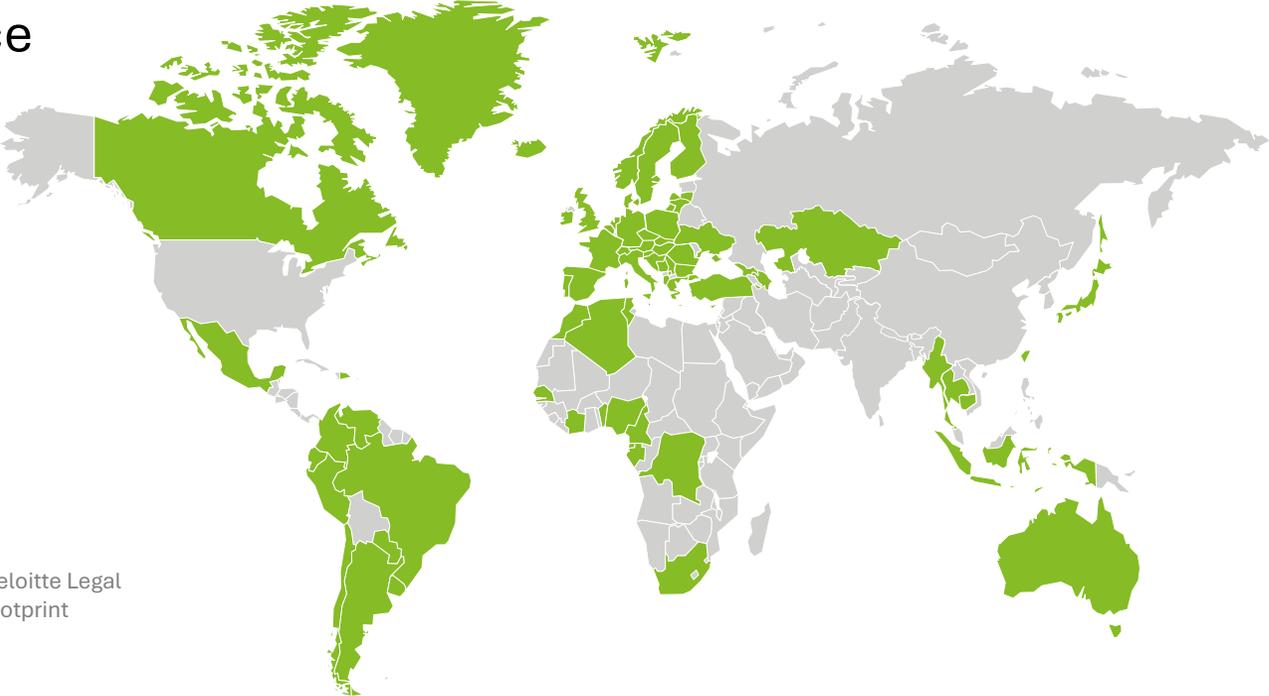
Dr. Reinertshofer is fluent in German, English, Spanish, and French and is a member of the firm's Spanish Desk.

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