

Rechtsanwälte Günther

Partnerschaft

Rechtsanwälte Günther • Postfach 130473 • 20104 Hamburg

Market Forces
c/o Friends of the Earth Australia
PO Box 222

3065 Fitzroy Victoria

Legal Advice
Deutsche Bank AG:
Environmental and Social Policy Framework
Engagement in coal mining activities in Australia

Content

Summary	2
A. Violation of the Deutsche Bank Framework for managing environmental and social risk by engaging in companies developing greenfield thermal coal mining projects	3
I. Facts	3
II. Legal Assessment	6
1. Content of the commitment	6
2. Projects of Whitehaven Coal	7
3. Adani's Carmichael coal project	9
4. Infringement of the Framework	9
B. Potential Legal Risks and Consequences	11
I. Misleading business statements and advertising	11
II. Management of reputational risks – management's duty	14
III. Non-financial reporting	15
IV. Due diligence obligation (LkSG)	16
V. Tort-type remedies	17

Michael Günther *
Hans-Gerd Heide! * (bis 30.06.2020)
Dr. Ulrich Wollenteit *¹
Martin Hack LL.M. (Stockholm) *¹
Clara Goldmann LL.M. (Sydney) *
Dr. Michéle John *
Dr. Dirk Legler LL.M. (Cape Town) *
Dr. Roda Verheyen LL.M. (London) *
Dr. Davina Bruhn *
André Horenburg
John Peters

¹ Fachanwalt für Verwaltungsrecht
* Partner der Partnerschaft
AG Hamburg PR 582

Mittelweg 150
20148 Hamburg
Tel.: 040-278494-0
Fax: 040-278494-99
www.rae-guenther.de

07.07.2022
00617/21 /R //ah
Mitarbeiterin: Jule Drzewiecki
Durchwahl: 040-278494-11
Email: drzewiecki@rae-guenther.de

Buslinie 19, Haltestelle Böttgerstraße • Fern- und S-Bahnhof Dammtor • Parkhaus Brodersweg

Hamburger Sparkasse
IBAN DE84 2005 0550 1022 2503 83
BIC HASPDEHHXXX

Commerzbank AG
IBAN DE22 2008 0000 0400 0262 00
BIC DRESDEFF200

GLS Bank
IBAN DE61 4306 0967 2033 2109 00
BIC GENODEM1GLS

Summary

English

This advice sets out the facts of the suggested involvement of Deutsche Bank AG in companies developing greenfield coal mining projects in Australia. It tests such financial involvement against the 2020 Environmental and Social Policy Framework adopted by Deutsche Bank AG. It finds that direct or indirect financing of companies developing greenfield thermal coal mines would violate Deutsche Bank's policy. This is regardless of the explicit purpose for which the finance is provided, as any funding provided to such companies would free up funds from elsewhere in the company to be allocated towards greenfield thermal coal projects (Part A).

The legal risks induced by such behavior are set out in general terms in Part B. It is suggested that a violation of the framework could result in legal risks and challenges from the following angles: Consumer Protection and Competition Law, general manager's duties to protect against reputational risks, commercial law (Reporting and Transparency requirements), due diligence obligations under new German legislation, and general tort law.

German

In diesem Kurzgutachten wird der Sachverhalt der vorgeschlagenen Beteiligung der Deutsche Bank AG an Kohlebergbauprojekten in Australien dargelegt. Es wird geprüft, ob eine solche finanzielle Beteiligung gegen das von der Deutschen Bank AG verabschiedete Rahmenwerk für den Umgang mit Umwelt- und Sozialrisiken (Environmental and Social Policy Framework 2020) verstieße. Das wird im Ergebnis bejaht für die direkte und indirekte Finanzierung von Unternehmen, die neue Kohlebergbauprojekte entwickeln. Das gilt unabhängig von dem vereinbarten Zweck, für den die Finanzierung bereitgestellt wird. Jede Finanzierung einzelner Unternehmensbereiche würde Mittel freisetzen, die dann für neue Kohleprojekte verwendet werden könnten (Teil A).

Die rechtlichen Risiken, die sich aus einem solchen Verhalten ergeben, werden in Teil B in allgemeiner Form dargelegt. Eine Verletzung der Richtlinie könnte zu rechtlichen Risiken und Herausforderungen unter folgenden Gesichtspunkten führen: Verbraucherschutz- und Wettbewerbsrecht, Pflichten des Geschäftsführers zum Schutz vor Reputationsrisiken, Handelsrecht (Berichts- und Transparenzpflichten), Sorgfaltspflichten nach neuem deutschen Sorgfaltspflichtengesetz, und allgemeines Deliktsrecht.

A. Violation of the Deutsche Bank Framework for managing environmental and social risk by engaging in companies developing greenfield thermal coal mining projects

I. Facts

1.

Deutsche Bank AG is the largest German financial services company (bank) and is based in Frankfurt/Main, Germany. Some subsidiaries – especially in the field of investment banking – are based in London and New York. It is publicly listed (Aktiengesellschaft) and stocks are being traded in Frankfurt (Deutsche Börse AG) and at New York Stock Exchange.

2.

Deutsche Bank has adopted a framework for managing environmental and social risks.¹ In its current version of July 2020, the Bank states the following with regard to coal mining:

Thermal coal mining

Any transaction in coal mining requires enhanced ES review and, potentially, discussion within a regional Reputational Risk Committee.

In addition:

— We will not provide any financing for greenfield thermal coal mining;

— We will not finance new greenfield coal-related infrastructure, regardless if related to new or existing mines;

In 2016 we committed to reducing our coal lending exposure and set a three-year reduction target of 20%. Per end of 2019, we achieved that target and now further commit to phase out coal exposure by 2025 worldwide (including both lending and capital markets).²

Deutsche Bank has stated on social media that it does not directly or indirectly finance any new coal mining projects or related infrastructure since 2016:

... we have had a strict policy on coal power and mining since 2016. Since then, we do not directly or indirectly finance the construction of new coal-fired power plants or new mining projects for the extraction of coal, nor the related infrastructure.³

¹ Deutsche Bank, Environmental and Social Policy Framework, July 2020, <https://www.db.com/files/documents/db-es-policy-framework-english.pdf> (22.03.2022).

² Deutsche Bank, Environmental and Social Policy Framework, July 2020, p 9.

³ <https://www.linkedin.com/feed/update/urn:li:activity:6834004348901703680/>

and

We have a strict policy on coal power and mining. Since 2016, we no longer directly or indirectly finance the construction of new coal-fired power plants, coal mining projects, or related infrastructure.⁴

3.

Whitehaven Coal is an Australian-based, publicly listed coal mining company. Whitehaven derives its revenue exclusively from the sale of coal, of which almost 85% is from the sale of thermal coal (i.e. coal burnt to generate electricity).⁵ Whitehaven currently produces coal from four coal mines. Three mines are open-cast (Maules Creek, Tarrawonga and Werris Creek). Narrabri mining is underground.

The company is moving forward with the development of two more open pits (Vickery and Winchester South) and plans to expand the Narrabri underground mine. The planned new Vickery open pit mine is expected to produce about 60-70% coal for steelmaking and the remainder thermal coal.⁶ At the new Winchester South open pit mine, coal for steelmaking is expected to account for up to 60% of the production.⁷ The Narrabri expansion is an extension and expansion of the existing Narrabri coal mine from 2034 to 2044. The Narrabri coal mine expansion would produce mostly thermal coal and smaller quantities (around 5%) of pulverised coal for pulverised coal injection.⁸

On 24 September 2021, the financial news service Debtwire reported that Whitehaven Coal was planning a bond issue to raise debt capital. Preparations for this would be organised by Deutsche Bank, which would also act as bookrunner:

Whitehaven Coal will meet creditors online next week in an ostensibly non-deal roadshow organized by Deutsche Bank, according to three market sources.

A source close to the Australian thermal-coal miner said Whitehaven is aiming to raise funds via a bond issue and that at least one other bank

⁴ <https://twitter.com/DeutscheBank/status/1428271759938236422>

⁵ Whitehaven Coal, [Annual Report](#) (2021) p 63.

⁶ Independent Planning Commission NSW, [Vickery Extension Project SSD 7480 – Statement of Reasons for Decision](#) (12 August 2020) p 49.

⁷ Whitehaven Coal, [Winchester South Project – Environmental Impact Statement](#) (2021) p 2.5.6.

⁸ <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-10269%2120201023T021209.256%20GMT>, page 7. pulverised coal injection (PCI coal) is typically used in furnaces for steelmaking. However, depending on the characteristics of the coal, it can also be used for electricity generation.

*would be joining Deutsche Bank as a bookrunner for any note offering that emerges.*⁹

A bond is a common instrument in financial transactions. It is essentially a fixed-income loan made by an investor to a borrower (here: Whitehaven). Issuing a bond allows companies to raise funds for a specific project or business transaction from a range of stakeholders, as well as for general corporate purposes.

According to an article in German business newspaper *Handelsblatt*, Deutsche Bank is no longer involved in Whitehaven's bond deal.¹⁰ However, the bank has made no public statement on the issue.

Whitehaven Coal also has an AU\$1 billion revolving corporate credit facility syndicated between 12 international banks. This facility was last refinanced in February 2020, with Deutsche Bank contributing AU\$30 million. According to *Refinitiv Eikon*, Deutsche Bank has participated in Whitehaven's syndicated credit facilities since 2013. The current facility matures in July 2023 and Whitehaven has stated its intention to refinance the deal.

4.

In 2014, Deutsche Bank was one of the first banks to take a stand against funding the Adani Group's Carmichael thermal coal project in Australia by rejecting the coal port expansion.¹¹

The Carmichael coal mine and rail project is an up to 60 million tonne per annum thermal coal mine in Australia's Galilee Basin. The mine is beginning small scale operations in 2022. The project also includes an approximately 200 kilometre rail line connecting the mine to the existing rail network which leads to Adani's Abbot Point coal export terminal (now renamed NQXT – North Queensland Export Terminal). The parent company of the Carmichael mine and rail network inside the Adani Group is Adani Enterprises Limited.

Due to the globally controversial nature of the Carmichael coal project, Adani was unable to secure external project finance. This meant Adani funded the construction of the Carmichael mine and rail line with funds from within the Group, mainly via intra/inter-company loans.¹² This method of funding means that all

⁹ Debtwire, Whitehaven Coal to start online NDR for credit investors next week (24 September 2021); see also <https://www.facing-finance.org/de/2021/12/deutsche-banken-finanzieren-weiterhin-klimaschaedliche-kohle/>.

¹⁰ Michael Maisch (Handelsblatt), [Environmental activists criticize conflicts of interest at Deutsche Bank](#) (18 May 2022).

¹¹ J Smyth, [Deutsche Bank refuses to bankroll Barrier Reef port expansion](#), Financial Times (24 May 2014).

¹² M Ludlow, [Adani to self-fund \\$2b Carmichael mine, construction to start before Christmas](#), Australian Financial Review (29 November 2018); C Kruger, [Debt, not coal, delivers \\$388m profit to Adani](#), Sydney Morning Herald (22 July 2021).

financing of any Adani Group entity frees up capital which could then flow to the Carmichael coal project. That is, financing any part of the Adani Group is at danger of indirectly funding the Carmichael mine.

Deutsche Bank has been associated with several deals for Adani Group entities, including Adani Enterprises, the owner of the Carmichael mine and rail network. For example, in July 2021, while Adani was in the process of constructing the Carmichael coal mine and rail network, Deutsche bank participated in a US\$1 billion bridge loan to Adani Enterprises to cover its purchase of the Mumbai International Airport.¹³ It is also part of a group of banks that were working to issue bonds for Adani Enterprises, so it can refinance this bridge loan.¹⁴ In May 2022, Adani described Deutsche Bank as one of its “relationship banks”.¹⁵

5.

Under German and EU law Deutsche Bank is obliged to follow transparency requirements and report publicly on financial and non-financial indicators. This is set out in detail in Sec. 289c et seq. and Sec. 340 et seq. Commercial Code (Handelsgesetzbuch, HGB). Reporting and risk assessment requirements undergo compliance scrutiny under certain conditions under various pieces of EU and German national legislation. Applicable is also the Public Exchange Act (Börsengesetz, BörsG) which allows the public authority (BAFIN) to *inter alia* control the accuracy of information provided by market participants (Sec. 3 BörsG).

Deutsche Bank AG also falls under the new German legislation about corporate due diligence (Act on Corporate Due Dilligence Obligations for the Prevention of Human Rights Violations in Supply Chains – Lieferkettensorgfaltsgesetz, LkSG) and can be subject to claims on the basis of Unfair Competition and consumer protection legislation.

II. Legal Assessment

1. Content of the commitment

In its Environmental and Social (ES) Policy Framework Deutsche Bank has committed "not to provide financing for new coal mines" and "not to finance coal-related infrastructure, regardless of whether the infrastructure is associated with a new or existing coal mine".

¹³ Market Forces, [Deutsche Bank, JP Morgan and Standard Chartered break promise and loan US\\$1 billion to Adani coal miner](#) (19 August 2021).

¹⁴ B Kalesh and S Ghosh, [Adani Seeks \\$1 Billion in Bonds to Refinance Mumbai Airport Debt](#), Bloomberg (22 December 2021).

¹⁵ [Adani to become India's No. 2 cement maker with \\$10.5 billion Holcim deal](#), Reuters (17 May 2022).

The term financing includes both lending and capital market transactions, as the Framework makes explicitly clear:

... and now further commit to phase out coal exposure by 2025 worldwide (including both lending and capital markets).¹⁶

The commitment applies to all direct and indirect financing. It is not limited to the area of project finance.

The Framework explicitly mentions the wide range of products and services offered by the bank, including in corporate investment banking, which require the bank to understand the environmental and social risks of a sector, client or transaction.¹⁷ The Framework is meant to systematically assess the resulting reputational and financial risks for the bank. The ES assessments provided for in the Framework are explicitly not only to be carried out for project financing, but also for non-project financing. In the latter case, the ES risk management systems of the clients, as well as their environmental and performance record, must also be assessed.¹⁸ [Capital market] transactions for corporate financing are also explicitly mentioned.¹⁹

Where regulations of the Framework are intended to affect only certain forms of financing, the term is explicitly restricted. For example, the Sec. on "oil and gas" contains the addition:

Financing means lending and capital market where the majority of use of proceeds is linked to the outlined above projects.

The section "Thermal coal mining" does not contain such a restriction.

Deutsche Bank itself has confirmed this in 2021, stating on several occasions that it does not directly or indirectly finance any new coal mining projects or associated infrastructure since 2016.

2. Projects of Whitehaven Coal

The Deutsche Bank Commitment covers "greenfield thermal coal mining". Also covered is "new greenfield coal-related infrastructure, regardless if related to new or existing mines". "Greenfield" is not legally defined, but is generally understood to mean a mine that has not yet been constructed. This can be contrasted with a "brownfield" coal mine, which would imply an expansion of an existing coal mine.

16 Deutsche Bank, Environmental and Social Policy Framework, July 2020, p 9.

17 Deutsche Bank, Environmental and Social Policy Framework, July 2020, p 1.

18 Deutsche Bank, Environmental and Social Policy Framework, July 2020, p 5.

19 Deutsche Bank, Environmental and Social Policy Framework, July 2020, p 10.

At least some of the projects currently being pursued by Whitehaven Coal fall under the "greenfield" heading.

The *Vickery Extension Project* was approved on 15 September 2021. Although it is described as an extension project, the project falls under the funding prohibitions of the Framework. Whitehaven first received a permit for the Vickery coal mine in 2014. Although initial physical work had taken place on site based on the 2014 permit, coal production and thus physical environmental impacts had not begun in 2020.²⁰ The competent licensing authority therefore considered the project to be a new project in the legal sense and therefore designated the current legal situation as decisive:

*While the Commission recognises that the Applicant has an Approved Project, in a de facto sense the Project site functions as a greenfield coal development. It believes that special attention should be paid to ensuring that any proposed water monitoring and management conforms to 2018 expectations rather than those deemed applicable and acceptable for the Approved Project in 2014.*²¹

The new project enlarges the area concerned and increases the peak annual output from 4.5 to 10 million tons. As the relevant approving authority considers the project to be a new project in the legal sense, the proposed Vickery opencast mine is also to be classified as a "new thermal coal mine" and "greenfield" within the meaning of the Framework.

In addition, the *Vickery Extension Project* involves new coal-related infrastructure. Part of the project is the construction of a coal handling and preparation plant as well as a rail loading facility including rail sidings. This will create a central hub to be used by other Whitehaven mines.²² This is "coal-related infrastructure" in the sense of the Framework. With regard to infrastructure, the Framework explicitly states that it does not matter whether the new infrastructure is connected to an existing or a new coal mine.

²⁰ New South Wales Government, Independent Planning Commission, Vickery Extension Project SSD 7480, Statement of Reasons for Decision, 12. August 2020, para. 11-19, <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2020/03/vickery-extension-project/determination/vickery-extension-project--statement-of-reasons.pdf>.

²¹ New South Wales Government, Independent Planning Commission, Vickery Extension Project SSD 7480, Issues Report, 30. April 2019, para. 96, <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/vickery-extension-project/issues-report/20190430-vickery-extension-project--issues-report.pdf>.

²² New South Wales Government, Independent Planning Commission, Vickery Extension Project SSD 7480, Statement of Reasons for Decision, 12. August 2020, para. 12, 16, <https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2020/03/vickery-extension-project/determination/vickery-extension-project--statement-of-reasons.pdf>.

The proposed *Winchester South Project* involves the development of an entirely new opencast coal mine covering a total area of 7,130 ha.²³ Metallurgical coal as well as steam coal will be produced. Extensive infrastructure is also planned at the site. Among other things, the construction of a new coal handling and processing plant, an access road, a rail connection and further infrastructure for dewatering such as pipelines etc. are planned.²⁴ The Winchester South Project therefore includes both a new coal mine and coal-related infrastructure as defined in the Framework.

3. Adani's Carmichael coal project

The Carmichael coal mine and rail project involves an up to 60 million tonne²⁵ per annum greenfield thermal coal mine and approximately 200 kilometre rail line linking the mine to the existing rail network which leads to Adani's Abbot Point coal export terminal (now renamed NQXT – North Queensland Export Terminal). The parent company of the Carmichael mine and rail network inside the Adani Group is Adani Enterprises Limited. Adani Enterprises also has a number of greenfield thermal coal projects in India.²⁶

The mine is the first coal project in the previously untapped Galilee Basin, one of the world's largest untapped reserves of thermal coal. Carmichael is paving the way for several more proposed Galilee Basin mines.²⁷ It has been estimated that burning all the coal from six proposed Galilee Basin mines would produce 24 gigatonnes of CO₂ emissions (GtCO₂), equivalent to 5.7% of the entire remaining carbon budget for the Paris Agreement's 1.5°C goal (420 GtCO₂).^{28 29}

4. Infringement of the Framework

Direct or indirect financing of Whitehaven's Vickery and Winchester South projects, or Adani Enterprises' Carmichael coal mine and rail project through lending, bonds involvement or participation in capital market fundraising would infringe the Framework directly. This conclusion would also apply to any financing by Deutsche Bank of other companies developing greenfield thermal coal mines.

²³ <https://whitehavencoal.com.au/wp-content/uploads/2021/08/01.-Executive-Summary.pdf>, ES-1.

²⁴ Whitehaven Coal, Winchester South Project, Environmental Impact Assessment, Executive Summary, ES-5, <https://whitehavencoal.com.au/wp-content/uploads/2021/08/01.-Executive-Summary.pdf>.

²⁵ J Robertson, Adani executive Lucas Dow talks up bigger coal mine in leaked video at LNP fundraising event, Australian Broadcasting Corporation (19 March 2019).

²⁶ Adani Enterprises Ltd, FY 22 and Q4 22 Earnings Presentation, slide 32.

²⁷ J Burt, Adani could be 'ice-breaker' for six more proposed Galilee Basin mines, resources body says, Australian Broadcasting Corporation (12 June 2019).

²⁸ The Sky's Limit: WHY THE PARIS CLIMATE GOALS REQUIRE A MANAGED DECLINE OF FOSSIL FUEL PRODUCTION, OilChange International, (September 2016).

²⁹ Special Report: Global Warming of 1.5C. Summary for Policymakers, IPCC (2018).

Given its open wording and clear intent, it does not matter whether the finance has a specific project reference or not. Since the Framework also prohibits indirect financing, the raising of substantial funds for *any* other purpose (e.g. a general corporate loan, or financing for an otherwise unrelated asset/activity) would also be a violation, as it would free up capital from elsewhere in the company to be allocated towards greenfield thermal coal mines.

Whitehaven Coal is a company that operates exclusively in the coal mining sector. It is publicly known to be pursuing two extensive and costly projects, the new Vickery and Winchester South mines, which Deutsche Bank is not permitted to finance indirectly under its Framework.

In view of Whitehaven's planned extensive capital expenditure on the aforementioned coal mine and infrastructure projects and Adani Enterprise's development of the Carmichael coal mine and rail project, Deutsche Bank must assume that at least part of any funds raised for general corporate purposes for either company could be used to finance the problematic projects.

Even if Whitehaven Coal or Adani Enterprises stated that the funds raised would be used for other purposes, or even if there were a restriction on the use of the funds, this would not mean that the financing was compatible with the Framework.

Even if the funds raised were to be used for other purposes, it is obvious that this would save Whitehaven Coal and Adani Enterprises expenses that it would otherwise have had to meet with its own funds. To the extent that Whitehaven Coal uses these own funds as a result to finance the Vickery and Winchester projects, or Adani Enterprises uses them to finance Carmichael, this would be considered indirect financing of the projects by Deutsche Bank.

In Deutsche Bank's view, the Framework serves to ensure partnership and responsible dealings with all stakeholders.³⁰ It also serves the express purpose of ensuring that Deutsche Bank addresses the environmental and social impacts of its business activities.³¹ However, the only decisive factor for the interests of stakeholders and the environmental and social impacts of business activities is whether or not Deutsche Bank's business activities result in or contribute to new coal mines and coal-related infrastructure and thus to climate-damaging behaviour. Determination of an infringement depends solely on an economic consideration. Anything else would be inconsistent with Deutsche Bank's commitment to "the highest level of integrity" in its approach to environmental and social risks.³²

³⁰ Deutsche Bank, Environmental and Social Policy Framework, July 2020, p 1.

³¹ Deutsche Bank, Environmental and Social Policy Framework, July 2020, p 1.

³² Deutsche Bank, Environmental and Social Policy Framework, July 2020, p 1.

Therefore, if Deutsche Bank were to participate as bookrunner in a bond issue to raise funds for Whitehaven Coal, or otherwise engage financially with either Whitehaven or Adani Enterprises, it would be in breach of its Framework for managing environmental and social risks.

B. Potential Legal Risks and Consequences

A breach of the environmental and social risk management Framework may be legally relevant in various respects. Of the many possible consequences, only a few will be highlighted here.

It should be noted that the question of the role of voluntary commitments is increasingly debated in company law. In times where obligations regarding climate change and environmental protection stretch from risk management, reporting, incorporation of ES principles in business conduct, due diligence obligations under German and EU law, and finally, to tort, Deutsche Bank AG should be unable to conduct a compliance review which does not explicitly scrutinise compliance with its own voluntary commitments and statements. Legal consequences of false statements and reports are more likely than no legal consequences, as it might have been the case years ago.

I. Misleading business statements and advertising

It has been proposed that consumer associations enforce breaches of accounting and disclosure obligations with regard to climate change under the chapeau of competition law.³³

Sec. 3 German Act against Unfair Competition (UWG)³⁴ outlaws unfair commercial practices, both from the perspective of competitors and consumers.

Sec. 5 UWG specifies this prohibition with regard to misleading commercial practice, which is defined as unfair if it possibly causes the consumer or generally any other market participant to take a transactional decision that they would not otherwise have taken (Sec 3 II UWG). Anyone engaging in such illegal commercial practice can be subject to an injunction claim and, in the event of the risk of reoccurrence, to cease and desist (Sec. 8 I UWG). Those market participants – which are “in addition to competitors and consumers, any person who supplies or demands goods or services” (Sec. 2 I No. 2 UWG) – would have standing in court as well as trade associations and consumer protection associations (see also *infra c.*).

³³ Meier, GRUR 2019, 581; cf. also Harte-Bavendamm/Henning-Bodewig/Keller, 5. Aufl. 2021, UWG Sec. 2 Rn. 33.

³⁴ English translation of the UWG: https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.pdf.

The German UWG is to be applied and interpreted in line with the European Directive 2005/29/EC concerning unfair business-to-consumer commercial practices, the ‘Unfair Commercial Practices Directive’.³⁵

1. Commercial practice

According to Sec. 2 I No. 1 UWG, a commercial practice is "any conduct by a person for the benefit of that person's or a third party's business before, during or after the conclusion of a business transaction, if this conduct is objectively connected with promoting the sale or the procurement of goods or services, or with the conclusion or the performance of a contract concerning goods or services".

The aforementioned connection is to be interpreted broadly and legally exists already if the commercial conduct is objectively aiming at influencing any business decision regarding this company. It does not have to be directly linked to a certain transaction as general ‘image advertising’ falls under this clause too.³⁶

2. Mislead

In terms of Sec 5 I 2 UWG, a commercial practice is misleading “if it contains **false statements** or **other information suited to deception**”. Untrue statements are statements whose actual content does not correspond to the objective (abstract) truth.³⁷ This definition is extended by Sec 5a applying to business conduct on the consumer market.³⁸ It acts deliberately also against the omission of material information. Misleading is not only the deception (see Art. 6 I UCP RL), but also the withholding of essential, supplementing information that the consumer needs to make an informed decision (see Art. 7 I UCP RL), especially in the context of environmental engagement or environmental implications of the services or goods being offered.³⁹

False statements regarding “the main characteristics of the goods or services, such as (...) nature, execution, benefits, risks, composition, accessories, method or (...) the results to be expected from their use” (Sec 5 I No. 1 UWG), “the nature, attributes or rights of the entrepreneur such as (...) the extent of his commitments, affiliation or connections, awards or distinctions” (Sec. 5 I No. 3

³⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>.

³⁶ BGH GRUR 2013, 1259 Rn. 17 with reference to Art. 2 lit. a regulation 2006/113/EG.

³⁷ Translated from MüKoUWG/Brammsen, 3. Aufl. 2022, UWG Sec. 16 Rn. 51.

³⁸ Harte-Bavendamm/Henning-Bodewig/Dreyer, 5. Aufl. 2021, UWG Sec. 5 Rn. 137.

³⁹ “According to Article 6 of the UCP RL, consumers must be able to trust environmental claims made by traders. For environmental claims not to be misleading, they must be true, must not contain false information and must be clear, specific, precise and unambiguous”; Köhler/Bornkamm/Feddersen/Bornkamm/Feddersen, 40. Aufl. 2022, UWG Sec. 5 Rn. 5.2 Translated from Amtsblatt EU, C 526/76, Sec. 4.1.1.3, p. 76 (<https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=OJ:C:2021:526:FULL&from=EN>).

UWG) as well as “compliance with a code of conduct”⁴⁰ by which the entrepreneur has undertaken to be bound when he makes reference to such commitment” (Sec 5 I No. 6 UWG) are considered misleading.

Under these definitions, justiciability of the conduct of Deutsche Bank, i.e. claiming to abstain from financing greenfield coal mines while actually engaging in such practices seems likely. Relying on and infringing its own Framework for managing environmental and social risks not only a proclamation which is misleading and needs further explanation but might even contain false statement, if the company states that it adheres to the Framework.

The Deutsche Bank Framework and claims are indeed widespread in social media and the internet and must be classified as environmental (image) advertising. Therefore the rules for the consumer market apply (Sec. 5a UWG) in addition to the general provisions (Sec. 3, 5 UWG).

Even if Deutsche Bank’s role in bond issuing would not be not infringing its Framework clause regarding greenfield coal mines, the clause itself would be misleading under Sec. 5a UWG; according to judgement of the German Civil High Court the wording would then be illegally set in (too) general and abstract terms.⁴¹

Furthermore, if the clause is understood to not fully prohibit financial involvement in green field mining, Deutsche Bank is likely to provide false justiciable information.

There is a broad range of fairly strict decisions regarding CO2 and climate claims (and greenhouse gas neutrality claims) in German competition law jurisprudence, requiring transparent information about the company’s climate management if they use such statements in public relations.

Furthermore it is worth noting that the EU is preparing a regulation on “green claims” sanctioning greenwashing which has been announced to be released in draft format in mid 2022.⁴²

3. Legal consequences

The UWG enables applications for elimination/injunctions (Sec. 8). This action requires the risk of recurrence, thus the serious and tangible possibility that the

⁴⁰ A code of conduct is “an agreement or set of rules which defines the conduct of entrepreneurs who have undertaken to be bound by the code in relation to business sectors or individual commercial practices, without such obligations having been imposed by statutory or administrative provisions” (Sec. 2 I No. 5 UWG).

⁴¹ BGH GRUR 1991, 546.

⁴² https://ec.europa.eu/environment/eussd/smgp/initiative_on_green_claims.htm.

specific act of infringement will be committed again in the same or essentially similar manner. The danger of repetition must still exist at the time of the last hearing.⁴³

According to Sec. 8 III No. 3 UWG, a claim requires that qualified entities take the claim. Such entities are officially recognized on the basis of the Injunctive Relief Act (Unterlassungsklagengesetz, UKlaG). These are mainly associations with a focus in consumer's rights.⁴⁴ Entities can also claim from outside Germany if they are listed in the Commission's list pursuant to Article 4 (3) of Directive 2009/22/EC on injunctions for the protection of consumer interests.⁴⁵

II. Management of reputational risks – management's duty

1. Content of Duties

In its management decisions, the executive board of a public limited company is obliged to consider the reputation of the company in order to avoid so-called reputational damage.⁴⁶ Part of the management duties according to Sec. 76 para. 1, Sec. 93 et seq. of the German Stock Corporation Act (Aktiengesetz) is therefore also the duty to manage reputational risks.

The Environmental and Social Policy Framework is set not only to adhere to regulation but serves the necessary reputation management.⁴⁷ In particular, a company's inadequate handling of social and environmental issues from the public's point of view can lead to a serious loss of reputation.

The financing of the coal industry by Deutsche Bank has already been the subject of several critical reports.⁴⁸ Coal financing in violation of its own rules would therefore be likely to lead to critical reporting and an associated loss of reputation.

43 Translated from MüKoUWG, UWG Sec. 13 Rn. 176, beck-online.

Addition: a competition infringement gives rise to a rebuttable presumption of the risk of repetition, which also includes essentially identical infringing acts, so that the creditor only has to present and prove the infringement. The debtor must disprove the presumption of the risk of repetition.

44 Sec. 4 II UKlaG - e.g. BUND und dt. Umwelthilfe are listed, see https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Verbraucherschutz/Liste_qualifizierter_Einrichtungen.pdf?__blob=publicationFile&v=32.

45 OJ L 110, 1.5.2009, p. 30).

46 See MüKoAktG/Spindler, 5. Aufl. 2019, AktG Sec. 76 Rn. 114.

47 Deutsche Bank, non-financial report 2021, p 35.

48 See Tagesschau.de 16.02.2022, <https://www.tagesschau.de/wirtschaft/finanzen/kohlefirmen-finanzierung-101.html>, Handelsblatt.com 10.08.2021, <https://www.handelsblatt.com/technik/thespark/kohlebranche-langsamer-ausstieg-deutsche-banken-finanzieren-noch-immer-viele-klimasuender/27488694.html>.

Within the framework of management duties and, at a subordinate level, within the framework of labour law duties, compliance with the framework is therefore necessary for management.

2. Legal consequences

Management Duties can be enforced by shareholders (Sec.117 et sec. AktG) or by executive boards (Sec. Sec. 93 AktG), depending on the exact structure of the company and the level of infringement. Liability is not limited. Claims with the aim to correct or change business conduct, which are legally possible under the same stipulations, are rare and mostly unsuccessful given the wide margin of discretion of the executive functions in a limited company.

III. Non-financial reporting

1. Content of Duties

Within the framework of the non-financial statement pursuant to Sec. 289c of the German Commercial Code (HGB), Deutsche Bank must, among other things, address how it manages the environmental risks associated with its business relationships and services, Sec. 289c para. 2 no. 1 in conjunction with para. 3 nos. 3 and 4. Para. 3 Nos. 3 and 4 HGB. These obligations are supplemented by Sec. 340 et seq. HGB. The concepts followed by the bank, including due diligence processes and the results of these concepts, must also be **presented** to the public, Sec. 289c para. 3 nos. 1 and 2 HGB.

The non-financial report therefore also describes climate risks in Deutsche Bank's business processes, its governance and risk management strategy and processes for climate risks.⁴⁹ Due to the increased potential of negative ES impacts of the mining industry, also from Deutsche Bank's point of view, the non-financial report also explicitly highlights as Deutsche Bank's position and minimum standard "No financing of ... new thermal coal mining or associated infrastructure".⁵⁰ The bank's internal sustainability department (Group Sustainability) monitors compliance with the ES guidelines.

The principles of clarity and truth also apply to non-financial reporting. These accounting duties of due diligence, which also result from the matter itself, are affirmed by law through Sec. 238 para. 1, 2 as well as Sec. 243 HGB. The latter provision in particular requires the annual financial statements to be prepared in accordance with generally accepted accounting principles, including the principles of truth and fairness, materiality and completeness, which are repeated in various other parts of the law and are also internationally recognised accounting

⁴⁹ Deutsche Bank, non-financial report 2021, p 35 – 46.

⁵⁰ Deutsche Bank, non-financial report 2021/2021, p 45.

principles (see also, for example, Sec. 264, 289 para. 1 sentence 1 HGB - true and fair view principle).

In the case of the reportable results of the applied concepts according to Sec. 289c para. 3 no. 2 HGB, the status of the achievement of objectives and the implementation of the planned measures must be **reported**.⁵¹ In the case of climate-related information, the ecological and social materiality must be assessed with regard to the private target group of civil society, among others.⁵² Due to this and against the background of the principles of truthfulness and completeness, findings on violations of the minimum standards and voluntary commitments stated in the non-financial report should be subject to reporting requirements.

Further, it would be legally inadmissible to state in future as part of the non-financial reporting as a position and minimum standard of the Deutsche Bank that the bank does not finance any new thermal coal mining and the corresponding infrastructure if this does not correspond to reality.

2. Legal consequences

The possibilities to enforce these duties under the UWG and UKlagG described above under 1) above apply to the financial and non-financial reports.

Reporting obligations are increasingly recognised as protective laws in the sense of Sec. 823 para. 2 of the German Civil Code, which means that violations of them can also trigger claims for damages.⁵³

Inaccurate presentations in the non-financial report may be punishable under Sec. 331 HGB. Other violations of the mandatory contents of the non-financial statement are subject to fines, Sec. 340n para 1 no. 3 HGB.

IV. Due diligence obligation (LkSG)

1. Content of Duties

Germany's new law on value chain responsibilities (LkSG)⁵⁴, created to effectively implement the UN Guiding Principles on Business and Human Rights of 2011, applies to Deutsche Bank. On the basis of Sec. 1 it applies (as of 1st January 2023) to enterprises that have their central administration in Germany and

⁵¹ BeckOGK/Kleindiek, 15.11.2020, HGB Sec. 289c Rn. 75.

⁵² Communication from the Commission — Guidelines on non-financial reporting: Supplement on reporting climate-related information (2019/C 209/01).

⁵³ Cf. Meier, GRUR 2019, 581 with further references.

⁵⁴ For an English edition see: <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html>.

that normally have at least 3000 employees. Deutsche Bank has (2021) more than 82.000 employees worldwide.

The core obligations are listed in Sec. 3 and include: the establishment of a risk management system (Sec. 4) to identify, prevent or minimise the risks of human rights violations and damage to the environment, laying down preventive measures (Sec. 6 (4) and taking remedial measures (Sec. 7 (1-3). Enterprises are obliged to provide regular reports.

The obligations apply to the enterprise's own business, to the actions of a contractual partner and to the actions of other (indirect) suppliers.

The engagement in new mining could fall under the prohibition of causing any harmful soil change, water pollution or excessive water consumption under Sec. 2 (9) if it is also an infringement of a protected human right's based legal position.

2. Legal consequences

Sec. 12 et. seq. set out a regime of enforcement through a dedicated authority, the Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA). Many kinds of measures including fines can be authorised under this regime.

V. Tort-type remedies

Inappropriate handling of climate risks by Deutsche Bank may give rise to claims for damages by third parties.⁵⁵

Deliberate action against climate protection-related guidelines such as the Framework for Managing Environmental and Social Risks can be an independent or additional connecting factor for the assumption of a breach of substantive due diligence obligations and thus justify corresponding liability (Sec. 823 German Civil Code). Cases against enterprises applying for future emission reductions across the value chains are ongoing in several EU countries, including Germany.

Attorney at Law
Dr. Roda Verheyen

Attorney at Law
André Horenburg

⁵⁵ Deutsche Bank, Climate change liability risk, <https://www.deutsche-bank.de/ms/results-finanzwissen-fuer-unternehmen/geschaeftsstrategie/08-2021-haftungsrisiko-klimawandel.html>; Deutsche Bank, non-financial report, p 37. On CO2 reduction obligations of private companies based on tort law, cf. also Verheyen/Franke ZUR 2021, 624.