

## **Yes, We Can (Control Them)! – Regulatory Agencies: Trustees or Agents?**

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## Abstract

This article raises the question over whether there have been changes in the mode of delegation between national executives and national regulatory agencies in the financial sector *caused* by the financial market crisis. Illustrated by the case of Germany, the two following ideal types of delegation are elaborated and applied to the case of the German supervisory authority BaFin: principal-agent theory and trust theory. For the periods before and after the crisis, political influence on the agency is examined and – with its intentions and results – assigned to one of the two ideal types. With this approach the financial market crises cannot be identified as the trigger for changes in the mode of delegation but merely as a kind of catalyst.

## A. Introduction

Until the emergence of the financial market crisis in August 2007, financial market regulation in the European Union was characterised by efforts of national regulatory agencies to establish supervisory regimes for banks, pension funds and insurance companies. As agents of their governments they not only fulfilled supervisory tasks in the member states but also represented national interests at the supranational level. However, at the level of the EU, the agencies did not negotiate as controlled agents, rather, to the contrary, in Lamfalussy committees they were even able to act more or less unimpeded by governmental oversight. However, the recent financial market crisis forced governments to rethink the existing way of delegating tasks to regulatory agencies. In the face of only limited success in preventing the collapse of banking systems, governments announced their intention of improving the supervisory structures and strengthening the agencies. In fact, they are now trying to shift regulatory decisions from the agencies to the political sphere and to reshape the delegated competences. Therefore, the relationship between governments and agencies is changing from a more unconstrained mode of delegation, a *trusteeship*, to a stricter one, a *principal-agent relationship*.

This proposition is well illustrated by considering the example of Germany. This article demonstrates that the Federal Ministry of Finance (BMF; *Bundesministerium der Finanzen*) is trying to increase control over the Federal Financial Supervisory Authority (BaFin; *Bundesanstalt für Finanzdienstleistungsaufsicht*) with the aim of modifying supervision and impinging on supranational developments. BaFin is no longer regarded as a

*trustee*, mandated to act with a free hand in negotiations on regimes like Solvency II. The agency is now becoming a generic *agent* of its principal. However, the question that has to be answered is whether this change in delegation is a direct reaction to the crisis or not. Whilst financial market regulation has not been a predominant policy area for the Federal Government, it had to react rapidly when the crisis came up. Even though it did not strengthen BaFin with additional resources, as one would have expected. Under plans which are being considered, the Federal Government and BMF will not put BaFin in a position of fulfilling tasks better, but are merely focussing on intensifying technical oversight (*Fachaufsicht*) and on enlarging supervisory competences of the agency on a case-by-case basis. Briefly, as one element in response to the crisis, the BMF is trying to control BaFin as an agent by reorganising the agency's management and by insisting on elements of functional supervision. As a second element, BaFin is losing its status as the main authority in regulatory questions, because external experts in law firms are complementing its work.

In this paper it is argued that the crisis did not *cause* several political reactions affecting BaFin, but that the crisis just *promoted* them. To show this and to answer the question on the mode of delegation and the associated changes in dependence on the financial market crisis, this paper is organized as follows. In the first section, two types of delegation are discussed, which are described in terms of the *principal-agent theory* and the *trust theory*. Here it is important to outline not only the criteria characterising each type, but also to point out the respective limitations of control. The second section focuses on BaFin as the main actor in financial market regulation and on the relationship between the BMF and BaFin. In particular, it will be illustrated how the mode of delegation changes over time and which influence the crisis had on the strategies of the government and other political actors. Finally, the last section offers some concluding remarks regarding the role of BaFin in the crisis.

Against this background, the article does not present an empirical study on delegation in financial regulation in the first place, but a conceptual approach which uses empirical findings to elucidate political measures in the aftermath of the financial crisis. Therefore, it can, at best, serve as a basis for further research, where the theoretical framework can be tested systematically.

## B. Types of Delegation

Delegation is a widely discussed issue in political science, economics and other disciplines. In each of these areas, not only are interpersonal relations covered but also relations between institutions. Governments, for example, use delegation to agencies for diverse reasons. These could include, for instance, ensuring a sufficient expertise in decision making, to provide themselves with the possibility of shifting blame for unpopular policies, to increase the efficiency in policy making, or even to enhance the credibility of their commitment.<sup>1</sup>

In the relevant literature, two main versions of the concept of delegation can be found. Many authors use the *principal-agent theory* as a functional description of delegation in the political or economic arena; to a lesser extent the *trust theory* is used to characterise the relationship between actors. However, both concepts are useful tools for a systematic reflection of the premises and consequences of delegation. Given the fact that *agencification* with a variety of different types of agencies disseminates in the European Union and the European member states for years, each relationship should be examined as an individual case and analysed with reference to one of the two delegation modes.<sup>2</sup>

For the purpose of this article, it is useful not to start by highlighting the differences but rather to begin on common ground. One similarity of almost every delegation is that whenever competences are delegated to an outsourced administrative unit, the problem of control crops up.<sup>3</sup> To begin with, depending on the contractual design and the properties of the actors, not only the formal and real autonomy of an agency but also the principal's ability to exercise control can differ. In this notion, delegation to an agent is not the same as to a trustee, because the measures of control and their effec-

<sup>1</sup> P. Keefer & D. Stasavage, 'The Limits of Delegation: Veto Players, Central Bank Independence, and the Credibility of Monetary Policy', 97 *American Political Science Review* (2003) 3, 407, 420.

<sup>2</sup> T. Christensen *et al.*, 'Beyond new Public Management: Agencification and Regulatory Reform in Norway', 24 *Financial Accountability & Management* (2008) 1, 15, 17.

<sup>3</sup> M. Döhler, 'Vom Amt zur Agentur? Organisationsvielfalt, Anpassungsdruck und institutionelle Wandlungsprozesse im deutschen Verwaltungsmodell', in W. Jann & M. Döhler (eds), *Agencies in Westeuropa* (2007), 12, 29 [Döhler, Vom Amt zur Agentur].

tiveness vary significantly.<sup>4</sup> Predicting or explaining political behaviour on the basis of the classification of government agencies according to the ideal types of delegation – to be either an agent or a trustee – is therefore an appealing idea. In order to apply these findings to recent developments in financial market regulation, it is necessary to define the characteristics and implications of the principal-agent and the trust theory first. Therefore, this section does not confine itself to regulatory agencies in financial markets, but serves as a starting point that is applicable to most agencies, including a short description of both approaches.

## I. Principal-Agent Theory

The most common way of describing delegation in social relationships based on the division of labour, which is only briefly dealt with in this section, is the principal-agent theory. It is applied to political, economic or interpersonal relations and follows a rational-choice perspective of human behaviour. When using the principal-agent theory as a starting point, authors usually try to analyse the problem of control in situations where responsiveness of the agent to the preferences of the principal is aspired to. Control problems are usually examined in relationships, which are “based on highly rational and instrumental considerations” where all the actors “pursue their own, often contradictory preferences”.<sup>5</sup> The simple principal-agent relationship arises when one actor (principal) mandates another actor (agent) to act on his (the principal’s) behalf and when the agent agrees to be subject to the principal’s control. Within this relationship, which is constituted by contract, several ingrained problems exist. This is due to the information asymmetries between the principal and its agent. As a rational agent, the agent’s information advantage could either be used to defraud his principal (*moral hazard*) or at least to minimise his own effort (*shirking*).<sup>6</sup> Due to the principal’s lack of information, this becomes possible despite its rational endeavour to control the agent. The principal’s ability to control is therefore limited and necessarily selective by reason of the logic of the division of labour. Thus, an agent is able more or less to use the ample scope which is

<sup>4</sup> K. Alter, ‘Agents or Trustees? International Courts in their Political Context’, 14 *European Journal of International Relations* (2008) 1, 33, 35.

<sup>5</sup> M. Döhler, ‘Institutional Choice and Bureaucratic Autonomy in Germany’, 25 *West European Politics* (2002) 1, 101, 102 [Döhler, Institutional Choice].

<sup>6</sup> F. Gilardi & D. Braun, ‘Delegation aus der Sicht der Prinzipal-Agent-Theorie’, 43 *Politische Vierteljahresschrift* (2002) 1, 147, 147-148.

open to it by virtue of limited control along with incomplete contracting. This problem is known as *agency loss* when applied to principal-agent relationships in general or *bureaucratic drift* in the sphere of public administration.<sup>7</sup> In this sense, government agencies as agents can employ meaningful discretion in “the departure of agency decisions from the position agreed upon by the executive and legislature at the time of delegation and appointment”.<sup>8</sup> This problem for a principal can be anticipated and partly limited by contractual arrangements or ultimately by the dismissal of the agent. The latter option, which is to “[remove] all the authority delegated to the agent” is an option of last resort.<sup>9</sup> As every unplanned termination of a relationship and the substitution by a new one causes expense (*transaction costs*), principals try to prevent hidden actions of agents in the first place.

Following Kiewiet and McCubbins, the problem of agency loss can be countered with “four major classes of [...] measures: (1) contract design, (2) screening and selection mechanisms, (3) monitoring and reporting requirements, and (4) institutional checks”.<sup>10</sup> Referring to this, Busuioc emphasises three types of control for agencies, namely, *ex ante* control, *ongoing* control and *ex post* control.<sup>11</sup>

Both typologies highlight the contract between principal and agent as key to the whole relationship, because the rights and obligations of each partner are laid down in this contract and determine the future relationship. If the principal does not have the same information as the agent at this time (hidden information) the contract can also contain certain sanctions, guarantees and other commitments binding or incentivising the agent. Such contracts are not restricted to individuals but can also exist between collective actors. To illustrate with an example, in the case of government delegation, contracts are equivalent to the constituting law (*Errichtungsgesetz*) of an agency. In this situation, the principal lays down the rules on appointments,

<sup>7</sup> *Id.*, 149.

<sup>8</sup> R. L. Calvert *et al.*, ‘A Theory of Political Control and Agency Discretion’, 33 *American Journal of Political Sciences* (1989) 3, 588, 589.

<sup>9</sup> Eric Rasmusen, ‘A Theory of Trustees, and Other Thoughts’ (1998) available at <http://works.bepress.com/rasmusen/59/> (last visited 15 December 2009), 3.

<sup>10</sup> R. Kiewiet & M. McCubbins, *The Logic of Delegation. Congressional Parties and the Appropriation Process* (1991), 27.

<sup>11</sup> M. Busuioc, ‘Accountability, Control and Independence: The Case of European Agencies’, 15 *European Law Journal* (2009) 5, 599, 607.

budgetary decisions, personnel and rights for final decision making.<sup>12</sup> Complementary to contractual decisions are screening mechanisms and reporting requirements which both fall into the category of ongoing controls. On the one hand, the enhancement of transparency by periodic surveillance and reporting reduces the principal's information gap. On the other hand, however, these mechanisms produce costs for the principal and show the agent that it is – whether justifiably or not – not trusted. As a result, mutual trust in such a relationship proves to be elusive. The fourth measure is finally to exert institutional checks as a form of *ex post* control, which helps to absorb or to amend any defects in the performance of the agent. The principal or even the other actors – at the institutional level, e.g. courts or audit courts – are able to alter or overrule decisions of the agent. This however has a two-fold effect. It not only prevents agency loss but can also provoke a limited degree of pre-emptive obedience due to the shadow of hierarchy and thus affect the agent's professional work.<sup>13</sup>

Finally, as mentioned above, a principal is free to cancel the contract and to abandon the relationship with the agent or even to mandate a new one. The decision to terminate is part of the principal's sole responsibility – or for the agent *vice versa* – and can be chosen regardless of the interests of third parties. As will be shown in the following section, this is one serious difference between principal-agent and trustee delegation.

## II. Trust Theory

Just as in the principal-agent theory, the trust theory too has its origins in business management. Early applications are already found in the works of Berle who used trust for his description of corporate management where managers are the legal trustees of the property of stakeholders.<sup>14</sup> However, trust theory was not confined only to economics and management but spread to other spheres.

For the most part – from the actor's preference to certain control mechanisms – trusteeship is a special form of principal-agent relationship.

<sup>12</sup> D. Coen & M. Thatcher, 'Network governance and Multi-level delegation: European Networks of Regulatory Agencies', 28 *Journal of Public Policy* (2008) 1, 49, 53 [Coen & Thatcher, Network governance and delegation].

<sup>13</sup> A. Héritier & D. Lehmkuhl, 'Introduction. The Shadow of Hierarchy and New Modes of Governance', 28 *Journal of Public Policy* (2008) 1, 1.

<sup>14</sup> A. Berle, 'Corporate Powers as Powers in Trust', 40 *Harvard Law Review* (1931) 7, 1049, 1057.

For example, the trustee and agent have similar preferences but admittedly reverse preference orders. In the principal-agent theory the utility function of the agent is characterised as a simple pursuit of its own benefit. This is more than merely striving for material advantages but covers intangibles, too. However, these are secondary in contrast to the trust theory where they play a crucial role. Rasmusen therefore puts the preferences of trustees into the taxonomy of the “Four P’s of Trustee” which are policy, pride, place and power.<sup>15</sup> While the last two P’s, place and power, mean that the trustee wants to keep his position and a high discretionary power, are shared with agents, the first two P – policy and pride – are not shared in the same way. Given that the trustees believe in this notion, they are more interested in policy-seeking and the realisation of their ideas and values rather than the agents. This is closely interlinked with the trustee’s effort to underpin his reputation for competence.

The similarities between principal-agent and trustee delegation should not be neglected, but it is more relevant at this juncture to emphasise their distinctions. Principal-agent and trustee delegation differ from each other in three main characteristics: (1) the scope of the fiduciary relationship, (2) the content of delegation, and (3) the control over the delegate.<sup>16</sup>

Regarding the first criterion, a trustee has to act on behalf of a third actor, the beneficiary, that is not congruent with the principal. By contrast, in a well-defined scope of duties an agent has to operate solely for the principal’s benefit. Hence, depending on the mode of delegation, different actors are chosen. Whereas a principal will only mandate an agent who has largely the same preferences, in a trusteeship, a trustee with deviating preferences can be chosen if these preferences match those of the beneficiary. Instead of adverse selection in principal-agent theory, one can make the selection according to the highest professional reputation in trust theory. This leads to the conclusion that whenever “the Principal selects the ‘Agent’ because of the authority and legitimacy they bring with them, we have delegation to Trustees”.<sup>17</sup>

The second aspect concerns the scope of delegation. An agent is normally not entrusted with the management of a whole domain as in the case of trusteeship. It is therefore easier to define standards for an agent’s work

<sup>15</sup> Rasmusen, *supra* note 9, 7-8.

<sup>16</sup> C. de Visscher *et al.*, ‘The Lamfalussy Reform in the EU Securities Markets’, 28 *Journal of Public Policy* (2008) 1, 19, 30.

<sup>17</sup> Alter, *supra* note 4, 41.



than for a trustee's, because the latter cannot be bound *ex ante* for any contingency of its large remit.

The most crucial distinction between the modes of delegation is the third characteristic, which touches upon the control exerted by the principal. An agent can be considerably controlled with the help of the above mentioned mechanisms as has been elaborated upon by Kiewiet and McCubbins. But to exercise control over a trustee is more difficult. Not only is the wide autonomy of the trustee an impediment but also, above all, the influence of the beneficiary and the trustee's professionalism restrict the principal's arsenal of sanctions.<sup>18</sup> Once appointed, a trustee can neither be directed against the wishes of the beneficiary, nor be sanctioned just because of a deviation from the principal's ideas. Some authors even go so far as to say that the terms of a trust relationship cannot be altered at all by the principal or the beneficiary.<sup>19</sup>

The consequences of such a mode of delegation are described with lesser rigidity by Alter when she states "that calling an actor a Trustee is [of course] not the same as asserting that a Trustee is 'out there' beyond anyone's influence".<sup>20</sup> Nevertheless, hardly any robust sanctions are applicable and it is a "far more likely political response [...] to circumvent a Trustee whose decisions one does not like; new tasks will be given to other Trustees or Agents and issues will be settled outside of the realm of the Trustee to avoid their interference".<sup>21</sup> This is – among others mentioned in table 1 – a very decisive aspect, which has to be taken into account when political decisions about BaFin are analysed in the following section.

Table 1

	<b>Agent</b>	<b>Trustee</b>
<b>Scope of fiduciary relationship</b>	On behalf of principal	On behalf of beneficiary
<b>Selection criteria</b>	Congruence of preferences; Supposed utility-maximisation for principal	Expertise and reputation; Supposed utility-maximisation for beneficiary
<b>Guiding orientation</b>	Principal's instruction	Professional criteria

<sup>18</sup> *Id.*

<sup>19</sup> J. Driffill, 'Central Banks as Trustees rather than Agents' (2008) available at [http://www3.eeg.uminho.pt/economia/nipe/docs/Actividades\\_Seminarios/2008/Driffill\\_14\\_10\\_2008.pdf](http://www3.eeg.uminho.pt/economia/nipe/docs/Actividades_Seminarios/2008/Driffill_14_10_2008.pdf) (last visited 15 December 2009), 9; Rasmusen, *supra* note 9, 4.

<sup>20</sup> Alter, *supra* note 4, 44.

<sup>21</sup> *Id.*

<b>Content of delegation</b>	Authorisation for single purpose	Authorisation for larger remit; Management of property rights
<b>Control over fiduciary</b>	Principal's instruction	Principal's <u>and</u> beneficiary's request
<b>Agency problem</b>	Shirking; Agency loss	Shirking; Agency loss
<b>Measure of last resort</b>	Re-contracting; Dismissal	Circumvention; Dismissal
<b>Preference order</b>	Power – Place – Pride – Policy	Policy – Pride – Place – Power

### C. German Financial Market Regulation

Generally speaking, regulation can be grouped into risk regulation and market regulation.<sup>22</sup> As the first one deals with protection against material perils such as epidemics or natural disasters, the second aims at the creation and perpetuation or the correction of economic markets. It comprises of, first, the supervision of market participants and second, the implementation of rules with incentives or sanctions.<sup>23</sup> Financial market regulation has been greatly discussed since the collapse of Lehman Brothers in the USA or Hypo Real Estate (HRE) in Germany. Existing supervisory and regulatory arrangements were called into question and supranational as well as national actors are today looking for better solutions. Before examining the political strategies in the aftermath of the financial market crisis, we have to take a closer look at the mechanisms of national regulation. Although it would be interesting to compare the “greatly differing national starting positions” of regulation, this article restricts its focus to the German method of financial market regulation only.<sup>24</sup> Germany is one of the most important financial centres of the EU and can thus serve as an exemplary case for regulatory strategies. Nevertheless, it cannot serve as a blueprint for reforms in supervisory structures in general, as from a global perspective, hardly any determinants or equal strategies of national executives can be observed.<sup>25</sup>

<sup>22</sup> M. Döhler, ‘Regulative Politik und die Transformation der klassischen Verwaltung’, in J. Bogumil *et al.* (eds), *Politik und Verwaltung. Auf dem Weg zu einer postmanagerialen Verwaltungsforschung. Politische Vierteljahresschrift Sonderheft* (2006), 208.

<sup>23</sup> L. Frach, *Finanzaufsicht in Deutschland und Großbritannien* (2007), 22.

<sup>24</sup> A. Busch, *Banking regulation and globalization* (2009), 15.

<sup>25</sup> D. Masciandaro & M. Quintyn, ‘Helping Hand or Grabbing Hand? Supervisory Architecture, Financial Structure and Market View’, IMF Working Paper (2008) WP/08/47, 18.

## I. BaFin as the German Authority

Not only in Germany, but also in a majority of the member states of the European Union, regulatory agencies or supervisory authorities are entrusted with the regulation of financial markets. Some member states decided in favour of sectoral supervision with separated institutions for banks, insurances and securities. Others chose a single supervision system (*Allfinanzaufsicht*) with one integrated supervisory agency for all branches. Examples of the former model are Spain, Italy and Romania, the latter model can be found in Great Britain, Austria and Germany.

In 2002, the German Bundestag passed the *Finanzdienstleistungsaufsichtsgesetz* (FinDAG),<sup>26</sup> which amalgamated the Federal Banking Supervisory Office (*Bundesaufsichtsamt für das Kreditwesen – BAKred*), the Federal Securities Supervisory Office (*Bundesaufsichtsamt für den Wertpapierhandel – BAWe*) and the Federal Insurance Supervisory Office (*Bundesaufsichtsamt für das Versicherungswesen – BAV*) to bring the three branches within the ambit of the newly constituted BaFin.

To a certain extent, the creation of BaFin as a new form of administration followed the *Zeitgeist*, which favours independent and specialised institutions. Principally speaking, BaFin and other integrated supervisory agencies have been established in response to changes in financial markets. The distinction which existed between banks, insurance companies and other business areas have all been blurred since the number of financial conglomerates increased. Subsequently, sectoral supervision was considered to be insufficient due to high transaction costs resulting from duplicated supervision and costly coordination between sectoral agencies.<sup>27</sup>

The organisational structure and the legal status of the new *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) resulted in a change to the traditional typology of German administrative bodies. BaFin has been constructed as a government agency under the aegis of the minister of finance and was given substantial discretion. On the one hand, its legal status as a public-law institution (*Anstalt des öffentlichen Rechts*) avoids placing a burden on the federal budget and the application of complex labour law for its higher ranking positions. It also enables BaFin to act in its own name and

<sup>26</sup> *Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht (Finanzdienstleistungsaufsichtsgesetz)*, 22 April 2002, Bundesgesetzblatt I, 1310.

<sup>27</sup> Frach, *supra* note 23, 26.

under its own responsibility.<sup>28</sup> On the other hand, BaFin is subject to far-reaching control by the BMF, because the tasks performed by it are said to be sovereign functions (*hoheitliche Aufgaben*).<sup>29</sup>

Since financial market regulation has not been a major issue for German politicians during the last few years, it is hard to say whether the construction of BaFin followed political considerations or whether it was a result of bounded rationality where “institutional choices [were] based on no or low preference decisions”.<sup>30</sup> Whichever is considered applicable, before analysing the mode of delegation and political strategies concerning BaFin, a few facts on the organisation should be added without going into too much detail.

The formal structure of BaFin is segmented into four directorates of which three represent the regulatory sectors of the agency. In addition, there are several cross-sectoral departments with tasks which must be coordinated. Each directorate is headed by a director who is a member of the collegial board of directors headed by the president, which has been the case since August 2008, whereas the agency was managed by a presidential structure in the original architecture.<sup>31</sup> The whole agency has about 1,750 employees who are either engaged in the three regulation directorates or in cross-sectoral departments. Staffing, however, has been a problem for the agency for years since it has proved to be hard to find qualified employees since these are also recruited and better paid by banks and insurance companies.<sup>32</sup> With its limited budget and the legal restrictions of wage agreements, BaFin is unable to compete with commercial enterprises. This leads to an interesting detail of BaFin’s organisation, namely, its financing. According to § 13 FinDAG, BaFin is funded by the fees and contributions from the institutions it supervises, so that it is not financed by public means from the federal budget. This can already be used as a significant element for the interpretation of the delegation scheme.

<sup>28</sup> S. Lütz, ‘Der deutsche Finanzsektor im Zeichen von Europäisierung und Internationalisierung’, in V. H. Schneider (ed.), *Entgrenzte Märkte - grenzenlose Bürokratie?* (2002), 144, 153.

<sup>29</sup> Döhler, *Vom Amt zur Agentur*, *supra* note 3, 28.

<sup>30</sup> Döhler, *Institutional Choice*, *supra* note 5, 103.

<sup>31</sup> ‘Satzung der Bundesanstalt für Finanzdienstleistungsaufsicht’ (6 August 2008) available at [http://www.bafin.de/cln\\_161/nn\\_722836/SharedDocs/Aufsichtsrecht/DE/satzung\\_bafin.html](http://www.bafin.de/cln_161/nn_722836/SharedDocs/Aufsichtsrecht/DE/satzung_bafin.html) (last visited 25 August 2009).

<sup>32</sup> F. M. Drost, ‘BaFin droht Personalengpass’ (31 October 2007) available at <http://www.handelsblatt.com/unternehmen/banken-versicherungen/bafin-droht-personalengpass;1344460> (last visited 15 December 2009).

## II. BaFin as Agent or Trustee

Analyzing the formal mode of delegation on the basis of the FinDAG, BaFin is neither a pure agent nor a pure trustee. The situation is quite complex because characteristics of both types can be found in the agency. However, going beyond the mere legal interpretation by also analysing international activities, the claim that BaFin tends to be a trustee can be corroborated. This section therefore focuses on the legal basis of BaFin and on its participation in negotiations on international supervisory regimes in order to identify indications for one of the types of delegation.

### 1. Legal Basis

From the beginning, BaFin was designed as a formal agent of the BMF, as § 2 FinDAG subordinates the agency to ministerial legal and technical oversight (*Rechts- und Fachaufsicht*). While legal oversight covers only ministerial authority to supervise the legality of BaFin's activities, technical oversight is considerably more extensive. As Döhler puts it, it is "a remarkably indeterminate piece of public law that allows ministerial departments to issue instructions on virtually every substantial aspect of agency activities, including the reversal of single decisions".<sup>33</sup> Despite the above mentioned deviations from traditional administrative designs, BaFin is subordinated to this strict kind of oversight which makes it look like a typical agent. The oversight in fact covers all elements of what McNollgast calls "agenda control" and with it the common practice of running an agency at arm's length. However, in an answer to a parliamentary question (*Kleine Anfrage*) of the Green Party, BMF concedes that the implementation of directives is not exercised on a case-to-case basis.<sup>34</sup> As is the case with many agencies within the hierarchy of ministerial bureaucracy, BaFin has some discretionary power that is not under the permanent control of a superior authority. This is certainly not a criterion which distinguishes it from other agencies, as Döhler expresses it as a general insight: "It must be added, however, that the day-to-day work of most agencies is not greatly subject to interference by ministerial instructions. Agencies may be left

<sup>33</sup> Döhler, Institutional Choice, *supra* note 5, 104.

<sup>34</sup> Rolle der Bundesregierung bei der Rechts- und Fachaufsicht der Bundesanstalt für Finanzdienstleistungsaufsicht, Drucksache 16/3253 (06 November 2006), 4.

alone for long periods, either because there is no need for closer inspections, no interest, or no personal capacity.”<sup>35</sup>

Yet, several other features of BaFin confer a status on it that is beyond the mere principal-agent relationship.<sup>36</sup> In defiance of its very formal construction as an agent, it has notable traits of a trustee; this is in line with Majone's conclusion that “a trustee is an agent and something more”.<sup>37</sup> Amongst other things, this “surplus” can be seen in BaFin's funding, mission and political property rights.

First, BaFin is financed by contributions of supervised market participants and not from the BMF's budget. Since funding does not rely on the public but solely on charges for agency acts, it is difficult to use budgetary restrictions as a kind of sanction. The only way for the BMF to influence BaFin's budget is to change the scale of charges and fees according to § 14 (2) FinDAG. Second, BaFin is not committed to act for the benefit of the BMF or the executive in general. In fact, BaFin is obliged to “[operate] only in the public interest. Its primary objective is to guarantee the proper functioning, stability and integrity of the German financial system. Bank customers, insurance policyholders and investors are meant to be able to trust the financial system”.<sup>38</sup> In contrast to a principal-agent relationship, this is characterised by the fact that the agent acts on behalf of the principal, in a trusteeship the agent acts on behalf of one or more beneficiaries. Finally, § 4 FinDAG gave BaFin almost sole responsibility for financial market regulation in Germany with the exception of certain tasks in banking supervision that are fulfilled by the central bank. Thus, practically all political property rights in this area have been transferred to BaFin. To summarise, “[when- ever] property is transferred to [an actor] who is supposed to manage it for the benefit of a third [actor], we have not an agency but a trusteeship relation”.<sup>39</sup> This is supported by central organisational characteristics and even more so by BaFin's participation at the international level.

<sup>35</sup> Döhler, Institutional Choice, *supra* note 5, 116.

<sup>36</sup> M. D. McCubbins, R. G. Noll & B. R. Weingast (“McNollgast”), ‘Political Control of the Bureaucracy’, in P. Newman, *The New Palgrave Dictionary of Economics and Law III* (1998), 50.

<sup>37</sup> G. Majone, ‘Two logics of delegation: Agency and Fiduciary Relations in EU Governance’, 2 *European Union Politics* (2001) 1, 103, 113.

<sup>38</sup> ‘BaFin – Who we are and what we do’ (2008) available at [http://www.bafin.de/cln\\_115/nn\\_720494/SharedDocs/Downloads/EN/Service/Broschueren/080819\\_\\_flyer.html?\\_\\_nnn=true](http://www.bafin.de/cln_115/nn_720494/SharedDocs/Downloads/EN/Service/Broschueren/080819__flyer.html?__nnn=true) (last visited 25 August 2009).

<sup>39</sup> Majone, *supra* note 37, 113.

## 2. International Activities

Apart from national regulatory activities, BaFin has joined a number of international cooperative bodies like the International Association of Insurance Supervisors (IAIS) or the International Organization of Securities Commissions (IOSCO). Therefore, not only the organisational factors mentioned indicate that BaFin is close to being a trustee, but especially its behaviour in policy-making above the national level provides another significant clue. Here, it does not act as the agent of the German government but as a trustee safeguarding the interests of national market participants.<sup>40</sup> It suffices to use two examples for illustration. The role of BaFin in banking and insurance supervision at the supranational and EU-level is marked first by its activities in negotiations on Basel II and Solvency II and second, by its membership in the three level 3 committees (L3L) of the Lamfalussy process.

### a) Basel II

The first negotiations on an international regime where BaFin took part as a German representative were the negotiations during Basel II. This framework of measures and minimum standards for capital adequacy, which have been developed by the Basel Committee on Banking Supervision as an organisation hosted by the Bank for International Settlements (BIS), laid down important requirements for banking activities. With its so called “three pillar” structure, which this article does not intend to elaborate upon, the revised Basel Accord relies on capital adequacy requirements, centralized supervision and market discipline.<sup>41</sup> All these instruments, which have been developed in order to stabilise the international banking business by ensuring the solvency of banks, became part of EU law in 2006.

During the Basel II negotiations, BaFin proved to be a competent party and even “displayed more institutional clout than its predecessor, the BAKred, which had taken part in the negotiation of Basel I in 1988”.<sup>42</sup> Al-

<sup>40</sup> Lütz, *supra* note 28, 153-155.

<sup>41</sup> ‘Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework’ (June 2004) available at <http://www.bis.org/publ/bcbs107.htm> (last visited 8 September 2009).

<sup>42</sup> L. Quaglia, ‘Setting the Pace? Private Financial Interests and European Financial Market Integration’, 10 *British Journal of Politics and International Relations* (2008) 1, 46, 51.

though BaFin was a new agency, it was staffed by experienced personnel of the former public authorities, so that it was able to get to work quite quickly. In this context, it is interesting to note that these employees behaved in two new ways. First, the officials in the Basel II negotiations acted unaccompanied by BMF officials, because the ministry was short of suitable personnel.<sup>43</sup> This fact gave them a new discretionary power which, second, they did not use in order to operate as national representatives but as representatives of a public authority that “acted as [a] self-interest [bureaucracy], trying to pursue [its] institutional preferences, successfully safeguarding [its] competences in this area”.<sup>44</sup> In this sense particularly, the striving to build a reputation is a distinctive feature of a trustee.

Of course, the BMF has nonetheless been formally involved in the Basel II process, but in practice, the ministry did not have a hand in the technical details of the subject.<sup>45</sup> As a consequence of BaFin’s unintended achievement of independence, in 2005 the ministry issued detailed rules for the exercise of the legal and technical oversight over BaFin. These guidelines, which have even been published on the website of BaFin, consist mainly of specifications concerning reporting obligations of the agency.<sup>46</sup> In terms of the delegation theory, this can be interpreted as an attempt to re-contract and to discipline BaFin as an agency which used its leeway as a free trustee and not as a responsive agent. Whether trustee or agent, these “standard monitoring solutions to the principal-agent problem, which include political oversight in the form of hearings [...], are costly and hence imperfect solutions”, because the problem is not a lack of information in the ministry but the assessment of incoming information.<sup>47</sup> Hence, BaFin was able to act in the Solvency II process similarly to the way it acted in Basel II. As long as the ministry’s capacity for oversight does not increase in terms of more ministerial finance professionals, it will not be able to control such a specialist agency like BaFin in a comprehensive way.

<sup>43</sup> Döhler, *Vom Amt zur Agentur*, *supra* note 3, 35.

<sup>44</sup> Quaglia, *supra* note 42, 60.

<sup>45</sup> Döhler, *Vom Amt zur Agentur*, *supra* note 3, 35.

<sup>46</sup> ‘Grundsätze für die Ausübung der Rechts- und Fachaufsicht des BMF über die BaFin’ (17 January 2005) available at [http://www.bafin.de/cln\\_161/nn\\_722836/SharedDocs/Veroeffentlichungen/DE/BaFin/Grundlagen/ga\\_aufsicht\\_bmf.html](http://www.bafin.de/cln_161/nn_722836/SharedDocs/Veroeffentlichungen/DE/BaFin/Grundlagen/ga_aufsicht_bmf.html) (last visited 15 December 2009).

<sup>47</sup> J. R. Macey, ‘Organizational Design and Political Control of Administrative Agencies’, 8 *The Journal of Law, Economics, & Organization* (1992) 1, 93, 94.



## b) Solvency II and Lamfalussy Procedure

The Solvency II negotiations took place under the direction of the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), which is one of the level 3 committees besides the Committee of European Banking Supervisors (CEBS) and the Committee of European Securities Regulators (CESR). The L3L are networks of national regulators which have been established according to a plan of Alexandre Lamfalussy who suggested an improvement of EU law-making procedures in the financial sector. Following the structure of Basel II, the supervision of insurance is also based on the three-pillar approach, which contains quantitative requirements for financial resources, supervisor review with capital evaluations and disclosure requirements with supervisory reporting.<sup>48</sup> Since 2002, the new mode of governance covers all three financial sectors and is called the Lamfalussy procedure.<sup>49</sup> According to this process, the EU institutions adopt framework legislation from the Commission (level 1), which also prepares the implementation measures for this legislation with the help of four specialist committees staffed by national ministry officials (level 2). On level 3, the above-mentioned L3L provide technical advice for the implementation. Against this background, these committees are staffed with high-ranking experts from the national supervisory authorities.

Coen and Thatcher consider L3L to be the most powerful transnational regulatory networks, because they not only help to improve the implementation of EU law, but also, “these networks have [in fact] evolved very quickly beyond what the Commission and the member states envisaged in terms of organization and goals”, so they “appear to be emerging as highly significant actors in the development of European regulation”.<sup>50</sup> This applies first and foremost to CEIOPS and the Solvency II negotiations. The committee did not confine itself to compiling facts for implementation, but instead formulated the rules. Although the Lamfalussy process distinguishes

<sup>48</sup> ‘Solvency and Solvency II – Basic architecture’ (3 July 2009) available at [http://ec.europa.eu/internal\\_market/insurance/solvency/architecture\\_en.htm](http://ec.europa.eu/internal_market/insurance/solvency/architecture_en.htm) (last visited 25 August 2009).

<sup>49</sup> J. M. Braun, ‘Finanzdienstleistungen: Das Lamfalussy-Verfahren – Entstehung und Anwendung in der Praxis’ (July 2008) available at [http://www.europarl.europa.eu/ftu/pdf/de/FTU\\_3.4.3.pdf](http://www.europarl.europa.eu/ftu/pdf/de/FTU_3.4.3.pdf) (last visited 26 August 2009).

<sup>50</sup> Coen & Thatcher, Network governance and delegation, *supra* note 12, 57; D. Coen & M. Thatcher, ‘After delegation: Regulatory Agencies and Network Governance’ (8-10 September 2006) available at [http://regulation.upf.edu/bath-06/22\\_Coen.pdf](http://regulation.upf.edu/bath-06/22_Coen.pdf) (last visited 15 December 2009), 18.

between framework principles at level 1, implementation measures at level 2, and consultation tasks at level 3, CEIOPS did not adhere to this structure in Solvency II. It was the first time that such a committee took higher framework decisions and achieved “the blurring of the boundary between L1 and L2 in the activities of CEIOPS”.<sup>51</sup> Finally, due to their deliberative autonomy, their expertise and their work for the benefit of market participants, there is some evidence that L3L themselves are trustees of the EU member states.<sup>52</sup>

Within these committees, BaFin and other national regulators are largely unaffected by national executives, so they are able to carry out their technical tasks according to professionalised ideas, even though the issues discussed have political relevance.<sup>53</sup> Such a situation makes BaFin a trustee of the BMF in EU negotiations and allows the ministry only slight control by way of monitoring and reporting requirements.

Moreover, the position of BaFin in CEIOPS is exceptional, because BaFin’s chief executive director responsible for insurance supervision, Thomas Steffen, chairs the committee. This personal interconnection weakens BMF’s influence additionally. Since Steffen as a senior representative of BaFin holds a leading position in CEIOPS, he is a crucial member of a committee with certain policy-making powers. On the one hand, the BMF could try to influence the committee via this way, because in “the level 3 committees, the chair plays an important role”<sup>54</sup> and has sole decision-making power, including setting the agenda. On the other hand – and this appears more convincing – Steffen is bound to the way of thinking and acting of the epistemic community of regulators of which he is a member and by whom he was elected.

Personal integrity as well as the reputation of the whole agency is an important factor for BaFin’s work within regulatory networks. The professionalisation of BaFin and its personnel, on the one hand, explains the prior elements of their preferences from a trustee perspective, namely, to ensure the continuation of the agency and to further its reputation.<sup>55</sup> On the other hand, from the principal’s point of view, the same attitudes cause problems,

<sup>51</sup> Visscher *et al.*, *supra* note 16, 40.

<sup>52</sup> *Id.*, 35.

<sup>53</sup> L. Quaglia, ‘Financial Sector Committee Governance in the European Union’, 30 *European Integration* (2008) 4, 563, 572.

<sup>54</sup> *Id.*, 574.

<sup>55</sup> J. H. Knott & G. J. Miller, ‘When Ambition Checks Ambition’, 38 *The American Review of Public Administration* (2008) 4, 387, 403; Macey, *supra* note 47, 96.

because the “result of empowering professionals in an agency is to lose much hierarchical control over that agency”.<sup>56</sup> This happened to BaFin, since the agency was able to emancipate itself from the BMF. Due to this, political actors – as will be outlined in the next passage – tried to revise decisions, which had been made when BaFin was established. It is worth mentioning, that there was no reason for acting equally in other cases of risk regulation like food safety or licensing of drugs. Although there had been plans to re-organise regulation, agencies in these cases were not as independent as BaFin. For example, a decision to replace the Federal Institute for Drugs and Medical Devices (*Bundesinstitut für Arzneimittel und Medizinprodukte, BfArM*) with an independent agency (*Deutsche Arzneimittelagentur, DAMA*) was being considered in 2005. However, this plan was scrapped a few years later, due to the threat of agency capture.

### III. Influence of BMF and Political Actors

Not only in its international activities, but also in its capacity as supervisor, is BaFin interested in maintaining (or even enhancing) its reputation as a highly competent authority. Whenever an agency succeeds in doing this, it can achieve a level of prestige which causes a problem for executives striving for influence, because it is possible “that citizens are willing to turn out governments that abridge [the] independence” of such an agency.<sup>57</sup> Therefore, in order to reduce the power of an agency in general, the government has had to restrain itself owing to the influence of beneficiaries. Even if they are not entirely satisfied in the case of BaFin, they can at least judge its work very favourably. This is particularly due to the fact that not only business associations but even consumers’ associations share this opinion. This is an important factor, which limits political influence.<sup>58</sup>

Not only since the financial market crisis but even before, political actors had more or less ambitious plans for BaFin and national supervision of

<sup>56</sup> Knott & Miller, *supra* note 55, 404.

<sup>57</sup> Keefer & Stasavage, *supra* note 1, 421.

<sup>58</sup> I. Bauer *et al.*, ‘BaFin – Kämpfernaturen gesucht’ (29 April 2003) available at <http://www.ftd.de/politik/deutschland/:ba-fin-kaempfernaturen-gesucht/1051284997416.html> (last visited 15 December 2009); Bundesverband deutscher Banken e.V., ‘Positionspapier: Zur Arbeit, Finanzierung und Beaufsichtigung der Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) anlässlich der Erstellung des BaFin-Erfahrungsberichts der Bundesregierung’ (December 2006) available at [http://www.bankenverband.de/pic/artikelpic/122006/Pp0612\\_ft\\_BaFin-Erfahrungsbericht.pdf](http://www.bankenverband.de/pic/artikelpic/122006/Pp0612_ft_BaFin-Erfahrungsbericht.pdf) (last visited 26 August 2009).

the financial sector. To reiterate certain measures which have already been considered in this article: First, an attempt was made to retrain BaFin with the help of explicit guidelines for legal and technical oversight, since it had gained more discretionary power than intended. Second, the presidential structure was replaced by a collegial structure of management in order to disempower BaFin's president Sanio *de facto*.<sup>59</sup> These two measures had already been pre-announced in vaguer terms in the coalition agreement of the governing parties in 2005.<sup>60</sup> Finally, the ministry of economics (BMWFi) – representing an idea of the conservative party – maintained a permanent threat to divest BaFin of its responsibilities in banking regulation and to transfer them to the central bank.<sup>61</sup>

In fact, apart from the executive, every single party in the German Bundestag in recent debates has its own strategy for the regulation of financial markets and the institutionalisation of supervision. As political actors play an important role in designing institutions in financial market regulation, the preferences of rational vote-seeking politicians and political parties should be taken into consideration. On a theoretical basis, following the economic approach, two kinds of politicians with different preferences can be distinguished. On the one hand, *helping hand* politicians who try to act in the general public interest; on the other hand, *grabbing hand* politicians who try to promote the interests of their clientele within the electorate. With regard to financial market regulation, *helping hand* politicians do not want to be heavily involved in regulatory details and are not in favour of a fragmentation of supervision; *grabbing hand* politicians can be considered as seeking separate power and limiting the power of single authorities.<sup>62</sup>

In practice, these characterisations of political preferences can be observed in the positions of the two main German political parties. The *helping hand* strategy is pursued by the Social Democratic Party (SPD), which

<sup>59</sup> T. Bayer, 'Wie die Bankenaufsicht funktioniert' (29 August 2007) available at <http://www.ftd.de/finanzen/:umstrittene-aufgabenteilung-wie-die-bankenaufsicht-funktioniert/50020617.html> (last visited 15 December 2009).

<sup>60</sup> 'Gemeinsam für Deutschland – mit Mut und Menschlichkeit, Koalitionsvertrag zwischen CDU, CSU und SPD' (11 November 2005) available at [www.cdu.de/doc/pdf/05\\_11\\_11\\_Koalitionsvertrag.pdf](http://www.cdu.de/doc/pdf/05_11_11_Koalitionsvertrag.pdf) (last visited 18 February 2010), 16, 73.

<sup>61</sup> Wirtschaftswoche, 'Bankenkrise: Kabinett berät am Mittwoch über BaFin-Reform' (01 September 2007) available at <http://www.wiwo.de/politik/kabinett-beraet-am-mittwoch-ueber-bafin-reform-224685> (last visited 14 September 2009).

<sup>62</sup> L. D. Pellegrina & D. Masciandaro, 'Politicians, central banks, and the shape of financial supervision architectures', 16 *Journal of Financial Regulation and Compliance* (2008) 4, 290, 292-293.

does not want to change the institutionalisation of supervision fundamentally. The SPD rather focuses on the improvement of supervisory powers for BaFin and leaves the details of dealing with the agency to the SPD-led BMF.<sup>63</sup> In contrast, the Christian Democratic Union (CDU) planned to reshape powers, especially in banking regulation, in favour of the German central bank (*Deutsche Bundesbank*).<sup>64</sup> This illustrates a *grabbing hand* strategy, which tries to strengthen the position of the central bank at BaFin's expense.<sup>65</sup> At the same time, these plans of the CDU can be interpreted as an effort to circumvent the trustee BaFin. After the federal elections in September 2009, the new federal government formed by the CDU and the Free Democratic Party (FDP) stated in their coalition agreement to relocate banking supervision to the German central bank.<sup>66</sup> However, all measures against a trustee are normally hard to implement and can be taken only in cases of misconduct. The financial crisis offered the opportunity to do this.

#### IV. The Crisis as a Window of Opportunity

With the financial market crisis one could have expected that the government would try to strengthen BaFin by eliminating deficits like the personnel shortage. But, in contrast to the announcement that financial market regulation and supervisory authorities should be strengthened, the crisis was used as a window of opportunity to override the trustee in the long term. This attempt can be explained by the experience of increasing independence – perhaps a perceived agency loss – of BaFin and the development of the agency into a trustee. The BMF and other political actors therefore pursue three strategies to achieve their goal.

First, the BMF shifts part of the blame onto BaFin for the HRE collapse and criticises BaFin for having neglected its reporting duty. Such allegations are expected from the parliamentary opposition, but even the minister of finance at that point of time, Peer Steinbrück, aimed his criticism at

<sup>63</sup> 'Sozial und Demokratisch. Anpacken. Für Deutschland, *Das Regierungsprogramm der SPD*' (2009) available at [http://www.spd.de/de/pdf/parteiprogramme/Regierungsprogramm2009\\_LF\\_navi.pdf](http://www.spd.de/de/pdf/parteiprogramme/Regierungsprogramm2009_LF_navi.pdf) (last visited 15 December 2009), 16.

<sup>64</sup> 'Wir haben die Kraft. Gemeinsam für Deutschland. *Regierungsprogramm 2009-2013 von CDU und CSU*' (28 Juni 2009) available at <http://www.cdu.de/doc/pdfc/090628-beschluss-regierungsprogramm-cducsu.pdf> (last visited 15 December 2009), 27.

<sup>65</sup> Pellegrina & Masciandaro, *supra* note 61, 293.

<sup>66</sup> 'Wachstum, Bildung, Zusammenhalt, Koalitionsvertrag zwischen der CDU, CSU und FDP' (26 October 2009) available at [www.cdu.de/doc/pdfc/091026-koalitionsvertrag-cducsu-fdp.pdf](http://www.cdu.de/doc/pdfc/091026-koalitionsvertrag-cducsu-fdp.pdf) (last visited 18 February 2010), 74.

BaFin and its president when interrogated in the parliamentary committee of enquiry on HRE.<sup>67</sup> With this, BaFin lost any political backing and was marked as a – partly – failed agency. Without appreciating its authority, it has been treated as an ordinary administrative unit and not as a competence centre in financial market regulation.<sup>68</sup>

Second, this weakened the reputation of BaFin as a reliable agency that fulfils its tasks carefully. Furthermore, not only did the shifting of blame affect its reputation, but also the assignment of tasks incidental to the HRE committee. In May 2009, the situation reached its peak when BaFin reported that it was nearly paralysed due to the parliamentary committee of enquiry on HRE. The agency had to assist the BMF in preparing for this committee to such an extent that no personnel capacity for day-to-day supervisory business was left.<sup>69</sup> This is in line with Asimov's description that, under such conditions, an agency can fulfil only a few urgent and salient tasks.<sup>70</sup> However, instead of improving the tools at BaFin's disposal, new requirements were introduced. For example, the agency has to review the qualifications of supervisory board members of banks and insurance companies, which seems to consume considerable capacity.<sup>71</sup> Beyond that, the BMF did not support BaFin in this grave situation, but instructed it to reform its internal organisation to meet all its requirements.<sup>72</sup>

Third, the full usage of BaFin's available capacity even provided an argument for the circumvention of BaFin in the policy-making process on financial market laws. Circumvention, as mentioned above, is not only a plan of the conservative party but also the course of action of the government and the BMF. BaFin was not even involved in formulating policy on

<sup>67</sup> M. Dunkel, 'Steinbrück inszeniert sich als Retter' (21 August 2009) available at <http://www.ftd.de/politik/deutschland/:zeuge-im-untersuchungsausschuss-steinbrueck-inszeniert-sich-als-retter/556556.html> (last visited 15 December 2009).

<sup>68</sup> F. Wiebe, 'Eine starke Finanzaufsicht schaffen' (20 August 2009) available at <http://www.handelsblatt.com/meinung/kommentar-politik/eine-starke-finanzaufsicht-schaffen;2447298> (last visited 15 December 2009).

<sup>69</sup> 'Bankenaufsicht lahmgelegt. Kontrolle? Welche Kontrolle?' (18 May 2009) available at <http://www.sueddeutsche.de/finanzen/498/469058/text> (last visited 14 September 2009).

<sup>70</sup> M. Asimov, 'On Pressing McNollgast to the Limits: The Problem of Regulatory Costs', *57 Law and Contemporary Problems* (1994) 1, 127, 135.

<sup>71</sup> D. Delhaes & F. Drost, 'SPD rudert bei Finanzaufsicht zurück', *Handelsblatt* (25 May 2009) 98, 27.

<sup>72</sup> 'Steinbrück ruft BaFin zur Ordnung' (20 May 2009) available at <http://www.handelsblatt.com/politik/deutschland/steinbrueck-ruft-bafin-zur-ordnung;2285093> (last visited 15 December 2009).

certain laws to answer the crisis – e.g. the Financial Market Stabilization Act (FMStG; *Finanzmarktstabilisierungsgesetz*), the Rescue Takeover Act (RettungsG; *Gesetz zur Rettung von Unternehmen zur Stabilisierung des Finanzmarktes*) and the Financial Market and Insurance Oversight Act (*Gesetz zur Stärkung der Finanzmarkt- und der Versicherungsaufsicht*). Instead, the BMF tried to rise to the challenge with the ministry's own resources and some external advice. But due to a significant number of employees with only legal training, it still seems to be true that civil servants of the BMF are unable to cope with the technical details of financial market regulation, as Lütz already stated shortly after the installation of BaFin.<sup>73</sup> Again, the reaction to the severe distortions in financial markets was not to consult BaFin or to develop solutions within the BMF, but instead the formulation of laws on banking regulation has been outsourced to law firms like “Freshfields Bruckhaus Deringer”.<sup>74</sup> In the case of the *Gesetz zur Ergänzung des Kreditwesengesetzes*, the government even appointed the BMWi to carry out this task instead of the BMF that was really responsible. The BMWi, however, also delegated the task of policy formulation to the law firm “Linklaters”.<sup>75</sup>

Overall, one could assume that political actors took advantage of the weaknesses of BaFin with the aim of harming its reputation. From an external perspective, its performance in the fulfilment of its tasks became worse and its reputation impaired; this is either aimed at or at least accepted by the BMF and other actors. Therefore, the financial market crisis should not be seen as a trigger to intensify control over BaFin and to change the mode of delegation from trust to agency. Rather, the crisis can be interpreted as a window of opportunity for political actors to revise former decisions leading to the trustee delegation scheme of BaFin. The behaviour of BMF and conservative political parties cannot be traced back principally to the collapse of the banks and the breakdown of the global financial system, but it is definitely in line with their long-term ambitions.

<sup>73</sup> Lütz, *supra* note 28, 153.

<sup>74</sup> T. Hanke, ‘Outsourcing in Berlin: Die Republik der Anwälte’ (28 May 2009) available at <http://www.handelsblatt.com/meinung/kommentar-politik/outsourcing-in-berlin-die-republik-der-anwaelte;2301327> (last visited 15 December 2009); A. Mihm & J. Jahn, ‘SPD-Minister bezahlen für Anwälte am meisten’ (13 August 2009) available at <http://www.faz.net/s/RubEC1ACFE1EE274C81BCD3621EF555C83C/Doc~EC534790ECBD14C8E8C6FE027F2CB8319~ATpl~Ecommon~Scontent.html> (last visited 12 September 2009).

<sup>75</sup> Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion Bündnis 90/ Die Grünen, Drucksache 16/13983 (04 September 2009).

## D. Conclusion

Strategies for solving the global financial market crises are currently manifold. Not only is the establishment of new international regulatory regimes under discussion, but also the rearrangement of organisational supervisory structures. This directly affects the mode of delegation – principal-agent relation or trusteeship – that characterises the relationship between governments and regulatory agencies.

In relation to the case of Germany, this paper illustrated that BaFin used its legal basis and its integration into international networks to emancipate itself from the BMF as its principal. The agency therefore gained the status of a trustee with large discretionary power; this motivated the BMF to take counter-measures in order to prevent a perceived agency loss. However, such measures are restricted in trusteeships and cannot be expanded without good reason. The financial market crisis however, offered such a reason. With certain measures like the outsourcing of policy formulation or the assignment of additional tasks to BaFin, the executive not only reacted to the crisis but also used the opportunity to treat BaFin as a trustee in a way that is possible only in exceptional cases.

Nonetheless, one can expect that national governments will continue to establish regulatory agencies due to their advantages, especially regarding professionalisation and efficiency. It is important to note that on the other hand, politicians will hardly give away the option of shifting the blame onto a formally independent agency. However, they are also likely to restrict their actual independence as much as possible.