

Fund Management 2021

Contributing editor
Oliver Rochman



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

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Oliver Rochman

Morgan, Lewis & Bockius LLP

Lexology Getting The Deal Through is delighted to publish the seventh edition of *Fund Management*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Contents

Global overview	3	Luxembourg	76
Oliver Rochman Morgan, Lewis & Bockius LLP		Marc Meyers and Veronica Aroutiunian Loyens & Loeff	
Cayman Islands	4	Portugal	85
Gary Smith Loeb Smith Attorneys		Pedro Simões Coelho, Ricardo Seabra Moura and Carlos Couto VdA	
France	11	Sweden	93
Arnaud Pince De Pardieu Brocas Maffei		Fredrik Wilkens, Emma Stuart-Beck, Henrik Schön, Lave Nilsson and Anton Sjökvist Advokatfirman Vinge KB	
Germany	20	Switzerland	101
Tarek Mardini and Sebastian Käßlinger POELLATH		Urs Hofer and Alexander Eichhorn Walder Wyss Ltd	
Greece	30	Taiwan	112
Michael Tsibris and Giannis Koumettis Souridakis Tsibris Law Partnership		Victor I Chang and Stephanie Peng LCS & Partners	
Hong Kong	38	Thailand	118
Vivien Teu and Christina Suen Dentons Hong Kong		Rachitporn Manawes, James Lawden and Poomruthai Singhanat Weerawong, Chinnavat & Partners Ltd	
Ireland	47	United Kingdom	124
Sarah Cassidy and Shane Geraghty Dillon Eustace		Kate Habershon, Oliver Rochman, William Yonge, Steven Lightstone and Monika Rzesniowiecka Morgan, Lewis & Bockius LLP	
Japan	56	United States	136
Kiyomi Kikuchi and Takehiro Fujita TMI Associates		David Freese, Jarrod Huffman, Christine Lombardo, Beau Yanoshik, Ruohe Liu and Ellen Weinstein Morgan, Lewis & Bockius LLP	
Lebanon	64		
Rita Papadopoulou Abou Jaoude & Associates Law Firm			

Germany

Tarek Mardini and Sebastian Käßplinger

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FUND MANAGEMENT REGULATION

Regulatory framework and authorities

- 1 | How is fund management regulated in your jurisdiction?
Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Fund management is regulated in Germany by the German Capital Investment Act (KAGB). The KAGB implements the EU Undertakings for Collective Investment in Transferable Securities (UCITS) Directive (2009/65/EC) and the Alternative Investment Fund Managers Directive (AIFMD).

The Federal Financial Supervisory Authority (BaFin) is responsible for regulating funds, fund managers and those marketing funds.

See BaFin – Law & Regulation; and Federal Ministry of Finance – Taxation.

Fund administration

- 2 | Is fund administration regulated in your jurisdiction?

Fund administration is not regulated per se in Germany. The regulation depends on whether the particular services fall within a specifically regulated environment.

As a rule, general assistance in fund administration is not regulated, such as the preparation of reports or distribution notices.

Certain administrative services are regulated by professional services laws. Before offering bookkeeping services on the market, a minimum of three years' professional experience is required. Trade settlement is typically licensable as the financial service of the execution of orders on behalf of clients or the banking activity of trading on behalf of others.

Authorisation

- 3 | What is the authorisation or licensing process for funds?
What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

Regulation of funds is primarily exercised through regulation of managers. It requires that the manager is either fully licensed or registered with BaFin under the KAGB. If a fund is internally managed, then the fund itself needs a licence or registration.

Registered managers: registration process

Availability

The registration process is only available to certain small or medium-sized managers. The most important category of these small to medium-sized managers is known as 'sub-threshold managers' under the AIFMD and KAGB. In practice, most German fund managers fall within this category.

Sub-threshold managers, under the KAGB, are managers with assets under management of not more than €100 million (in the case of leverage) or not more than €500 million (no leverage) and who only manage special alternative investment funds (special AIFs). These are AIFs whose interests or shares may only be acquired according to the fund documents by professional investors or semi-professional investors (ie, non-retail funds).

Professional investors are defined in the AIFMD and in the Markets in Financial Instruments Directive II (MiFID II). A semi-professional investor is a person who:

- commits to invest at least €200,000;
- confirms in writing that he or she is aware of the risks; and
- has the expertise, experience and knowledge to participate in the investment opportunity. This must be assessed and confirmed by the manager.

In addition, senior management, risk-takers and other staff of the manager within the meaning of article 13 of the AIFMD are considered semi-professional. A person with a minimum commitment of €10 million is also considered semi-professional.

Besides the requirements mentioned above, special AIFs managed by sub-threshold managers are in principle not regulated.

Registration procedure

The registration procedure is comparatively simple. It requires the submission of an informal registration request together with certain 'corporate' documents on the manager and the managed funds (such as the fund's limited partnership agreement (LPA) and the manager's articles of association). In addition to being a special AIF, the fund may not require the investors to pay in additional capital beyond the investor's original commitment.

Ongoing issues

An advantage of the registration is that only a few provisions of the KAGB apply to a 'registered-only' manager, mainly the provisions on the registration requirements, ongoing reporting requirements and the general supervisory powers of BaFin. However, fund-specific requirements do not apply to 'registered-only' managers and their funds. In particular, the depositary requirements and marketing requirements, as well as the additional requirements of the KAGB for fully licensed managers, do not apply.

On the downside, the registration restricts the manager to the type of funds and investors for which the registration was obtained (ie, only special AIFs and professional or semi-professional investors). Furthermore, a registered manager does not benefit from the European marketing passport under the AIFMD. A registered manager can, however, opt in to become a fully licensed manager.

Fully licensed manager: licensing process

Availability

Fund managers who do not qualify for a registration or who opt out of a registration must apply for a full fund-management licence with BaFin under the KAGB.

A full fund-management licence opens the door for a manager to market funds to retail investors as well as to the marketing passport under the AIFMD or UCITS Directive. Retail investors are investors who are neither professional nor semi-professional investors.

Licensing procedure

The licensing procedure is a fully fledged authorisation process with requirements equivalent to the requirements for granting permission under article 8 of the AIFMD or article 6 of the UCITS Directive. The licensing procedure checks requirements, such as sufficient initial capital or own funds, sufficiently good repute of the directors and shareholders, and organisational structure of the manager.

Ongoing issues

The licensing of the manager results in the manager being subject to the entirety of the KAGB. This means, in particular, the following:

- the required appointment of a depositary for the funds;
- access to setting up contractual funds;
- adherence to the corporate governance rules for funds set up as investment corporations or investment limited partnerships (investment KGs);
- adherence to the fund-related requirements of the KAGB;
- adherence to the marketing rules of the KAGB;
- access to the marketing passport under the AIFMD or UCITS Directive;
- access to the managing passport under the AIFMD or UCITS Directive; and
- adherence to the reporting requirements of the KAGB.

Territorial scope of regulation

- 4 | **What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?**

EU fund managers

EU fund managers are allowed to perform fund management services under the passport regime of the AIFMD or UCITS Directive. In addition, EU fund managers may use the EU passport regime to provide other services and ancillary services (such as investment advice or discretionary individual portfolio management).

Non-EU managers

Non-EU managers are currently not allowed to perform fund management services in Germany. This will change with regard to alternative investment fund managers (AIFMs) in those countries for which the passporting regime under the AIFMD for third-country managers will eventually become effective.

Non-EU managers can provide regulated services outside of fund management (such as investment advice or discretionary individual portfolio management), but only if there is an existing relationship with a German client or if the relationship is established at the initiative of the German client.

Acquisitions

- 5 | **Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?**

The acquisition of a material stake in a UCITS management company requires prior clearance by BaFin. The threshold for a material stake is 10 per cent of the capital or voting rights of the management company. The threshold also applies in the case of an indirect acquisition (eg, through acquiring a controlling stake in a financial holding company).

There is no prior clearance procedure with BaFin for the acquisition of a material stake in an AIFM placed on the potential acquirer. However, BaFin can take measures if shareholders with a material stake are not of sufficiently good repute or are otherwise not reliable enough to hold a stake in an AIFM. In practice, a prior pre-clearance and coordination with the AIFM is therefore advisable.

Restrictions on compensation and profit sharing

- 6 | **Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?**

Germany follows the remuneration requirements of the European Securities and Markets Authority Guidelines on Sound Remuneration under the UCITS Directive and under the AIFMD.

FUND MARKETING

Authorisation

- 7 | **Does the marketing of investment funds in your jurisdiction require authorisation?**

The marketing of investment funds requires an authorisation by the Federal Financial Supervisory Authority (BaFin) or at least a European marketing passport under the Alternative Investment Fund Managers Directive (AIFMD) or under the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive (2009/65/EC) (UCITS Directive). A private placement regime is no longer available in Germany.

The only exception available applies to German-registered sub-threshold managers. German-registered sub-threshold managers can market their funds on a private placement basis.

The German funds marketing regime distinguishes between domestic funds, EU funds and non-EU funds, as well as between domestic fund managers, EU fund managers and non-EU fund managers. It further distinguishes between UCITS and alternative investment funds (AIFs), as well as – with regard to AIFs – whether the funds are marketed to professional investors, semi-professional investors or retail investors.

Marketing of UCITS

With regard to the marketing in Germany of non-German UCITS, Germany follows the passporting regime of the UCITS Directive. In addition to the standard notification procedure, the marketing of UCITS must comply with the German implementation of the UCITS passporting rules (articles 91 to 95 of the Directive). For instance, there must be a financial institution in Germany for making payments to unitholders, repurchasing or redeeming units and for making available the information that UCITS are required to provide under Chapter IX of the Directive.

UCITS can be marketed under the passport to professional, semi-professional and retail investors.

Marketing of EU AIFs by EU AIFMs

With regard to the marketing of non-German EU AIFs by EU AIFMs, the AIFMD marketing passport of article 32 of the AIFMD is available. The AIFMD marketing passport allows for the marketing of EU AIFs to professional and semi-professional investors in Germany.

Marketing of non-EU AIFs or EU AIFs by non-EU AIFMs

With regard to the marketing of non-EU AIFs managed by non-EU AIFMs, Germany allows for marketing under the regime of article 42 of the AIFMD to professional investors. The same regime applies to the marketing of EU AIFs managed by non-EU AIFMs to professional investors. Germany also applies the article 42 regime to non-EU sub-threshold managers.

Germany has implemented the article 42 regime in a rather cumbersome way. Compared with some other EU member states, the process is a lengthy and costly. The Federal Financial Supervisory Authority (BaFin) has at least two months (in some cases even longer) for review once the filed documents are complete and BaFin currently (as of 2021) charges a fee of €1,545. The set of documents to be submitted to BaFin is quite extensive and includes the private placement memorandum (PPM), the fund LPA and certain constitutional documents.

There also some additional requirements (gold-plating) not readily discernible from the reading of article 42. For instance, Germany also applies the article 42 regime to non-EU sub-threshold managers.

To ensure that the article 42 requirement of cooperation agreements between the relevant competent authorities is effective, BaFin requires, as part of the marketing authorisation procedure, an express declaration from the non-EU AIFM that:

- the non-EU AIFM is registered with the competent authority with which BaFin has entered into a cooperation agreement or that the non-EU AIFM is registered in another register to which the competent authority has access; and
- the competent authority has information rights in relation to the non-EU AIFM.

Most importantly, Germany introduced the additional requirement of a 'depository-lite'. The AIFM must appoint a depository who performs the three depository functions of article 21(7) to 21(9) of the AIFMD, namely, cash monitoring, safekeeping of assets and a general oversight over the AIFM and the AIF. The depository can be located outside Germany. The final draft of the depository agreement, together with a depository confirmation, must be submitted to BaFin.

The article 42 regime is also available for marketing to semi-professional investors. However, in such cases, the non-EU AIFM and the management of the AIF must fully comply with the AIFMD.

EU sub-threshold AIFMs

EU sub-threshold AIFMs may use a simplified marketing notification procedure with BaFin. This notification procedure requires, among other things, a confirmation of the registration status of the AIFM in its home member state and reciprocity. 'Reciprocity' means that the home member state must allow the marketing of AIFs managed by a German sub-threshold manager without imposing stricter requirements than Germany. Such reciprocity is currently recognised, for instance, with regard to the UK and Luxembourg, but not with regard to Austria, Denmark, France or the Netherlands.

Marketing of EU AIFs or non-EU AIFs to retail investors

The AIFMD deals only with the marketing of AIFs to professional investors. With regard to non-professional investors, the member states of the EU are free to impose stricter requirements (article 43, paragraph 2 AIFMD). Germany therefore introduced a strict retail marketing regime for EU and non-EU AIFs. The regime is based on the retail marketing regime of German AIFs. It requires full AIFMD compliance as well as

full compliance with the German Products Regulation. Because of these strict requirements, marketing an AIF to retail investors only makes sense if the relevant AIF is already set up with German retail investors in mind. A 're-tailoring' of an existing AIF is cost-prohibitive.

8 | What marketing activities require authorisation?

The key trigger of an authorisation is the term 'marketing'. Marketing means the direct or indirect offering or placement of units or shares in an investment fund.

Marketing must therefore relate to units or shares in an investment fund. BaFin concludes that marketing, in particular, takes place with regard to a fund if:

- the fund has been established (ie, first closing with investors); or
- the terms of the fund are ready to be sent for acceptance to investors.

Consequently, there is no marketing if the fund has not yet had a closing with investors and only incomplete fund terms are distributed. This means that, in practice, marketing might start rather early in the investor relationship process.

However, marketing must also include an offering or placement. The term 'offering' includes offers to subscribe, as well as the sending out of invitations to potential investors to make an offer to subscribe. The 'placement' alternative is, in practice, already included in the offering mechanism. Therefore, marketing can only occur if the investor has a legal basis for a subscription or for making an offer to subscribe. Accordingly, an activity should still be pre-marketing (even if the investment fund has had a closing with certain investors) if: (1) the investor has no access to the final documents (PPM, LPA and subscription documents); and (2) it is made clear that the fund manager is not currently seeking subscriptions and that offers to subscribe will only be possible following BaFin marketing approval on the basis of the final documents (eg, in a disclaimer in the documents).

The German parliament is currently in the process of passing a draft law to improve Germany as a fund jurisdiction (Funds-Jurisdiction Strengthening Act (FSG)). The FSG will implement the cross-border marketing amendments of the AIFMD (Directive (EU) 2019/1160, Cross-Border-Marketing Directive). The new regime will lead to a partly stricter pre-marketing regulation in Germany compared to the current regulation on pre-marketing. Unlike the Cross-Border Marketing Directive, the new FSG will extend the new EU pre-marketing regime to non-EU AIFMs seeking to pre-market in Germany. In line with the Directive, the FSG will restrict the firms entitled to pre-market on behalf of the AIFM to Markets in Financial Instruments Directive (MiFID) investment firms, AIFMs and UCITS management companies. The new pre-marketing regime will start in Germany on 2 August 2021.

Reverse solicitation

Germany recognises a reverse solicitation concept, albeit in a rather strict form. It requires that the offer or placement is genuinely initiated by the investor. In addition, the prospective investor must be a professional or semi-professional investor. The exact scope of the reverse solicitation concept as understood by BaFin is still not clear.

If the investor is a retail investor, the requirements on reverse solicitation are even less clear. In general, reverse solicitation will not work with regard to retail investors and the fund manager would be subject to the more cumbersome retail marketing regime in Germany.

In any case of reverse solicitation, the fund manager should have documentary evidence of how the relationship with the investor started and seek a confirmation from the investor that the contact has been initiated solely by the investor. Generally, the requirements for reverse solicitation will be fulfilled only in limited instances.

Territorial scope and restrictions

- 9 | What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

The German marketing regime described above applies to any inbound marketing in Germany.

- 10 | If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

A local entity must only be involved with regard to UCITS (paying and information agent) and in the case of marketing AIFs to retail investors (paying agent and representative of the AIFM). The role of the local entity is usually performed by a German credit institution.

Commission payments

- 11 | What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

Germany follows the Markets in Financial Instruments Directive (MiFID) inducement rules on commission payments received by intermediaries. In practice, this means that such commission needs to be disclosed to the prospective client. With regard to cross-border services without a German branch, the supervision of the German MiFID rules of good conduct is primarily with the home country regulator.

RETAIL FUNDS

Available vehicles

- 12 | What are the main legal vehicles used to set up a retail fund? How are they formed?

The fund-related requirements of the German Capital Investment Act (KAGB) distinguish between undertakings for collective investment in transferable securities (UCITS), special alternative investment funds (AIFs) and public AIFs. UCITS are UCITS funds within the meaning of the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive (2009/65/EC) (UCITS Directive). Retail funds are UCITS funds and public AIFs. Public AIFs are AIFs that can be subscribed by retail investors (as well as professional and semi-professional investors). Retail investors are investors who are neither professional nor semi-professional investors.

Arrangements and vehicles for open-ended funds

For open-ended funds, the contractual fund and the investment corporation with variable capital structures are available. They can have different classes of units or shares. They can also establish sub-funds (umbrella structure).

The open investment limited partnership structure is only available to semi-professional or professional investors.

The contractual fund is established by the fund manager on a contractual basis with the investor. The contractual fund is a pool of assets separated by statute and contract from the (other) assets of the fund manager. The investment guidelines for contractual funds set out the details of the contractual relationship between the fund manager and the investors, in particular the applicable investment restrictions. The investment guidelines of retail funds require the approval of BaFin.

Investment corporations and the investment limited partnerships are basically corporations and limited partnerships with some modifications for investment law. They are established in accordance with the applicable procedures for establishing corporations and partnerships

(with some modifications because of investment law). In addition to the articles of incorporation or the limited partnership agreement (LPA), separate investment guidelines are necessary.

Vehicles for closed-ended funds

For closed-ended funds, the only available vehicles for retail funds are the investment corporation with fixed capital and the closed-ended investment limited partnership.

Both vehicles can issue different classes of shares or interests, but they cannot establish sub-funds (no umbrella).

In addition to the articles of incorporation and the LPA, separate investment guidelines are necessary.

Laws and regulations

- 13 | What are the key laws and other sets of rules that govern retail funds?

The main law governing retail funds is the KAGB. The KAGB is supplemented by several ordinances (the Derivative Ordinance, the Organisational and Rules of Conduct Ordinance and the Mediation Ordinance). In addition, the Alternative Investment Fund Managers Directive (AIFMD) Level II Regulation applies to retail AIFs.

This set of laws is supplemented by self-regulatory standards, mainly the Rules of Good Conduct issued by the German Investment Funds Association and the Association's sample investment guidelines.

Authorisation

- 14 | Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

The investment guidelines of retail funds and the marketing of retail funds need Federal Financial Supervisory Authority (BaFin) approval. In addition, BaFin has to approve the selection of the depositary for the respective fund. The approvals are usually obtained in parallel with each other.

Marketing

- 15 | Who can market retail funds? To whom can they be marketed?

Retail funds can be marketed to any investor in Germany (regardless of whether the investor is professional, semi-professional or retail).

Retail funds can be marketed only by the following three categories of marketers:

- the fund manager itself can always market its 'own' funds and, if fully licensed (ie, not only registered as a sub-threshold manager), may also market investment funds of other managers;
- Markets in Financial Instruments Directive (MiFID) firms are entitled to market investment funds (provided they have a MiFID licence or passport for investment advice and the transmission or receipt of orders); and
- firms or individuals with a financial intermediary licence under the German Commerce Act may also market retail funds. The financial intermediary licence is a non-MiFID licence and is based on the optional exemption from MiFID II in article 3 of MiFID II.

Managers and operators

- 16 | Are there any special requirements that apply to managers or operators of retail funds?

The special requirements on retail funds are not applicable to managers. The requirements applicable to managers of retail funds are broadly similar to the requirements on managers of non-retail funds. The main

differences between retail and non-retail funds are the stricter statutory investment guidelines (product regulation) and stricter marketing rules.

Investment and borrowing restrictions

17 | What are the investment and borrowing restrictions on retail funds?

Germany offers different types of retail funds (eg, UCITS, real estate funds, fund-of-funds, hedge funds and closed-ended funds). The fund types are based on the UCITS investment and borrowing restrictions as the default rules. The investment and borrowing restrictions are then modified to fit each fund type. For instance, real estate funds may only invest in real estate, but can also invest up to 49 per cent of the net asset value in money-market instruments or investment funds. The borrowing limits are increased for real estate funds from the UCITS' short-term borrowing of 10 per cent of the net asset value to a long-term borrowing for investment of 30 per cent of the net asset value.

Tax treatment

18 | What is the tax treatment of retail funds? Are exemptions available?

The German Investment Tax Act generally applies to UCITS and AIFs (both retail AIFs and special AIFs).

The revised Investment Tax Act has been in effect since 2018. The scope of application has been slightly reduced as partnerships (and their separately treated sub-funds, if any) are no longer covered. Instead, the general rules of German taxation for partnerships are applicable. However, the German tax treatment of such funds effectively remains the same as under the previous law (prior to 2018).

Thus, only funds in the form of a corporation (eg, a German stock corporation, Luxembourg SA/SCA SICAV or Irish PLC) or of a contractual type (eg, a German *Sondervermögen*, Luxembourg *fonds commun de placement*, French FCPI/FCPR, Spanish FCR, or Italian *fondo chiuso*) are now covered by the German Investment Tax Act. Also covered are certain other entities that do not qualify as 'investment funds' under the KAGB (in particular 'single-investor funds'). One major conceptual change is that the principle of 'restricted transparency' has been replaced by a newly introduced opaque tax regime where there are two levels of taxation: the fund and the investors. This tax regime was designed for retail funds, but is applicable to all investment funds (including non-retail funds) that do not satisfy the specific criteria for specialised investment funds under the new law or specialised investment funds that do not use the transparency option.

Under the opaque regime, the fund is now subject to taxation in respect of certain domestic German income (in particular, dividends and real estate income, but not capital gains from the sale of securities unrelated to real estate and unrelated to a permanent establishment in Germany) at fund level (15 per cent tax rate (ie, German corporate tax)). The exemption for dividends (section 8b of the German Corporation Tax Act) is not applicable at fund level even if the relevant threshold (ie, 10 per cent) is exceeded. In addition, German trade tax may be triggered at fund level if it is engaged in trade or business in Germany (subject to a potential exemption if the fund does not engage in 'active entrepreneurial management' in relation to its assets).

At the investor level, there is a lump-sum taxation (which is designed for the needs of retail funds with a large number of investors, but applicable to all funds covered). Distributions from the fund, predetermined tax bases and capital gains realised upon sale or redemption of the fund interests are covered, in particular. The objective of the predetermined tax base is to subject retained income of the investment fund to tax. For individual investors, the actual rate of investor level taxation depends on whether the investor holds the fund interests as part of their

'non-business' or 'business' assets. For individuals that hold their investment fund interests as part of their non-business assets, such items are subject to flat income tax. For individuals who hold their investment fund interests as part of their business assets, principally, the full amount of such items is subject to income tax at their personal rate.

For corporate investors, the full amount of such items is subject to corporation tax. In addition, German trade tax may be triggered. The partial income taxation and the exemption pursuant to section 8b of the German Corporation Tax Act do not apply. In return, investment fund proceeds (ie, distributions, predetermined tax bases and capital gains from dispositions or redemptions) are now subject to partial exemptions depending on the respective fund type. With respect to 'equity funds', the partial exemption is:

- 30 per cent of such proceeds for individuals who hold their investment fund interests as part of their non-business assets;
- 60 per cent for individuals who hold their investment fund interests as part of their business assets; and
- 80 per cent for corporate investors.

With respect to 'mixed funds', half of the applicable partial exemption rate applicable to 'equity funds' is available. With respect to 'real estate funds', the partial exemption is 60 or 80 per cent of the proceeds, depending on whether the fund invests at least 51 per cent of its value in German or non-German real estate and real estate companies. In return, income-related expenses and operating expenses may not be deducted to the extent of the available partial exemption percentage. With regard to trade tax, half of the applicable partial exemption rate applies.

Asset protection

19 | Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Germany requires a depository or custodian for both UCITS and AIFs. The rules for custodians for AIFs implement the rules of article 21 of the AIFMD. Germany made use of the option in article 21(3) of the AIFMD to provide for a special custodian for private equity funds. The requirements for UCITS custodians are based on the UCITS Directive.

A custodian is not required for funds managed by AIFMs who are only registered with BaFin (in particular, sub-threshold managers).

There are rules in place to protect a fund's assets from liability incurred by the manager or by the activities of managing the fund (in the case of an internally managed fund). For instance, a manager can, as a basic rule, not directly act on behalf of a contractual fund and bind such fund directly. Any arrangement a manager enters into on account of a contractual fund is binding only on the manager. The contractual fund will then indemnify the manager, but only to the extent allowed by law and the rules of the contractual fund. The contractual fund is therefore protected from claims of third parties unrelated to the management of the contractual fund. In the case of an internally managed investment limited partnership (KG), the KG must have two types of assets: administrative assets and investment assets. The investment assets are financed by the capital of the investors and are used for making investments. The administrative assets serve to finance the general operations of the investment KG. The administrative assets may not be financed by the investors' capital.

Governance

20 | What are the main governance requirements for a retail fund formed in your jurisdiction?

The governance requirements distinguish between the fund vehicle and the fund manager.

With regard to a manager, several governance requirements apply. An external manager can only be set up in a corporate or corporate-like legal form (stock corporation (AG), limited liability company (GmbH) and GmbH & Co KG). As a result, the basic governance rules of the respective legal form apply (such as registration requirements and rules for shareholders' meetings). To adapt these governance rules to a fund management environment, the KAGB supplements these rules with specific requirements. For instance, the manager must have at least two executive directors (officers) of good repute and with sufficient knowledge. In addition, there must be a supervisory board. Further, the KAGB requires a manager to obey several duties of good conduct, such as a duty of care, a duty to act in the best interests of the funds and the investors, a duty to avoid conflicts of interest and a duty to treat investors fairly. These duties are reinforced by organisational requirements on the manager, such as a duty to have adequate risk management or rules for personal transactions of employees in place.

The governance requirements applicable to the fund manager are the main governance protection rules applicable to contractual funds.

For a fund set up as an investment corporation with fixed or variable capital (investment AG) or an investment KG, the fundamental layer of governance is based on the governance of the legal forms these funds are based on (eg, with regard to registration requirements). In addition, the KAGB sets out fund-specific requirements, such as the appointment of at least two executive directors at the fund level.

Reporting

21 | What are the periodic reporting requirements for retail funds?

A manager must report annually. Semi-annual reports are required for contractual funds and investment AGs with variable capital.

Issue, transfer and redemption of interests

22 | Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

A manager can restrict the issue, transfer and redemption of interests if there is a basis in the fund's investment guidelines. For instance, investment guidelines typically empower the manager to suspend redemption in extraordinary circumstances.

NON-RETAIL POOLED FUNDS

Available vehicles

23 | What are the main legal vehicles used to set up a non-retail fund? How are they formed?

With regard to vehicles used for non-retail funds (ie, professional or semi-professional investors only), Germany distinguishes between funds managed by fully licensed managers and funds managed by registered managers (sub-threshold managers). Non-retail funds are typically called special alternative investment funds (AIFs).

In the case of a fully licensed manager, the following types are available: contractual fund, investment limited partnership (KG) and investment corporation with fixed or variable capital (AG). In our experience, the contractual fund is the most common vehicle used for non-retail investors by fully licensed managers.

In the case of a registered manager, the vehicle of choice is a simple limited partnership with a company with limited liability (GmbH) as the only general partner (GmbH & Co KG). However, the legal forms of an investment KG and an investment AG are also available.

Laws and regulations

24 | What are the key laws and other sets of rules that govern non-retail funds?

With regard to fully licensed managers managing non-retail funds, the same key rules apply to managers managing retail funds.

Managers who are only registered benefit from very light regulation. With the exception of the limit of €500 million under management (without leverage), respectively €100 million under management (with leverage), non-retail funds managed by sub-threshold managers are, in principle, not regulated. In consequence, they can only market the fund to professional and semi-professional investors.

Authorisation

25 | Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

In contrast to retail funds, the investment guidelines of non-retail funds only need to be submitted to the Federal Financial Supervisory Authority (BaFin) without BaFin having to approve the guidelines. The investment guidelines of non-retail funds can either mirror the investment guidelines of retail funds or can be freely specified as long as a fair market value of the assets can be determined. The marketing of non-retail funds requires BaFin approval.

In the case of registered managers, no investment guidelines are necessary and they do not need to be submitted to BaFin. BaFin has established in its practice a requirement to submit a commercial register excerpt of the fund once the fund is established. Once the manager is registered, the marketing of a fund does not need BaFin approval.

Marketing

26 | Who can market non-retail funds? To whom can they be marketed?

Non-retail funds can, in general, be marketed by the same players as retail funds. An exception applies to funds managed by registered managers. Such funds cannot be marketed by firms with a financial intermediary licence under the Commerce Act.

Non-retail funds may only be marketed to professional or semi-professional investors.

Ownership restrictions

27 | Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

Only professional or semi-professional investors may invest in non-retail funds.

Managers and operators

28 | Are there any special requirements that apply to managers or operators of non-retail funds?

The distinction between retail and non-retail lies in stricter investment guidelines and stricter marketing rules, at least with regard to funds managed by fully licensed managers.

With regard to registered managers, only a regulation-lite regime applies.

Tax treatment

29 | What is the tax treatment of non-retail funds? Are any exemptions available?

The tax treatment of retail funds is generally also applicable to non-retail funds. Certain qualifying retail funds, however, have a second option available.

Funds in the form of a partnership are outside the scope of the Investment Tax Act. In effect, there is no change compared to the previous law (prior to 2018) for most non-retail AIFs, as they are often structured as limited partnerships. Thus, the German Investment Tax Act only applies to non-retail funds if they are structured in a corporate or a contractual form. Under this law, there is an option for certain qualifying specialised investment funds to opt out of the 'opaque regime' and, instead, to apply the 'restricted transparency regime' (ie, the tax regime for investment funds under the previous law, which was in force until the end of 2017, but with certain amendments).

Specialised investment funds may only have a maximum of 100 investors (as was the case previously). Unlike the previous law (in force until end of 2017), there is a look-through approach with respect to partnerships as investors (ie, each partner of such partnership is counted as one investor of the fund). However, individuals may now invest directly in a specialised investment fund, provided that they hold such fund interests as part of their business assets (previously, only indirect participations of investors were possible).

To qualify as a specialised investment fund, a fund must satisfy certain criteria with respect to regulation, redemption rights, eligible assets and investment restrictions. These are substantially similar to the criteria under the previous law (although certain changes with respect to the definition of 'securities' apply).

If the specialised fund opts to apply the restricted transparency regime, at fund level, there is no taxation for domestic participation income and domestic real estate income. At the investor level, 'special investment income' is subject to tax (ie, distributed income, deemed distributed income and capital gains realised upon the dispositions or redemption of investment fund interests). The flat income tax is not applicable, even if an individual holds its investment fund interests as part of its non-business assets. Foreign withholding tax is still creditable.

Fund manager taxation

A 40 per cent exemption from German income tax applies to the carried interest received by managers of a private equity fund structured as a partnership (including limited partnerships) if certain cumulative criteria are fulfilled (in particular, the fund must qualify for asset management status and the carried interest must be paid only after the investors have had all their invested capital paid back). Otherwise, such income is fully taxable at normal German income tax rates. These rules are generally not affected by the revision of the German Investment Tax Act.

Asset protection

30 | Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

A separate custodian is necessary if the non-retail fund is managed by a fully licensed manager. A custodian is not necessary in the case of a registered manager.

Governance

31 | What are the main governance requirements for a non-retail fund formed in your jurisdiction?

The governance requirements with regard to non-retail funds managed by fully licensed managers are similar to retail funds.

There are no special requirements on the governance of non-retail funds managed by registered managers.

Reporting

32 | What are the periodic reporting requirements for non-retail funds?

A manager must report annually.

SEPARATELY MANAGED ACCOUNTS

Structure

33 | How are separately managed accounts typically structured in your jurisdiction?

Managed accounts are often structured as contractual funds provided by a fully licensed manager as the investment platform. The portfolio management is then typically delegated to a specialist portfolio manager.

Key legal issues

34 | What are the key legal issues to be determined when structuring a separately managed account?

Managing a separate account is usually deemed discretionary portfolio management in Germany. As a result, the Markets in Financial Instruments Directive II (MiFID II) rules of conduct apply. If a sub-delegation structure is used for the managed account, the sub-delegation must comply with delegation rules of the German Capital Investment Act (KAGB). This means that, effectively, the rules of conduct under the KAGB and the other provisions of the KAGB also apply to the delegate manager. Also, the sub-delegate's staff remuneration needs to be included in the Alternative Investment Fund Managers Directive remuneration disclosures of the alternative investment fund manager.

Regulation

35 | Is the management or marketing of separately managed accounts regulated in your jurisdiction?

Managing a separate account is usually deemed discretionary portfolio management in Germany and therefore regulated under the German MiFID II implementation. If the account is managed in the form of a contractual fund, the manager must be a fully licensed manager under the KAGB.

GENERAL

Proposed reforms

36 | Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

The Funds-Jurisdiction Strengthening Act (FSG)

The current draft of the FSG aims to implement practical improvements to the German Capital Investment Act in order to make Germany more attractive as a funds jurisdiction (in addition to implementing the Cross-Border Marketing Directive into German law). This includes, for instance, removing certain impractical rules for German real estate funds. The FSG will allow the set-up of an open-ended non-retail real estate fund as

an investment limited partnership (and not only as a contractual fund). The FSG will further introduce closed-ended contractual funds for non-retail investor as well as infrastructure funds as a new fund category.

The FSG is intended to enter into effect prior to the summer of 2021. The main sticking point among the lawmakers is whether Germany shall give up its hard line on not providing a VAT exemption for funds management in respect of alternative investment funds (AIFs). The latest draft of the FSG suggests expansion of the existing VAT exemption for undertakings for collective investment in transferable securities (UCITS) to also cover venture capital funds.

Public listing

37 | Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

The specific requirements for stock-exchange listing of funds depend on each exchange. For instance, there are exchanges that allow for the trading of closed-ended funds, whereas other exchanges permit only open-ended funds.

Overseas vehicles

38 | Is it possible to redomicile an overseas vehicle in your jurisdiction?

This is currently not possible in the context of funds.

Foreign investment

39 | Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

There are, in general, no special rules applicable. However, some investors, such as German insurance companies, are restricted to a certain extent by regulatory law, when investing in overseas or offshore vehicles, to invest only in certain Organisation for Economic Co-operation and Development or EU-based funds.

Funds investing in derivatives

40 | Are there any special requirements in your jurisdiction relating to funds investing in derivatives?

UCITS investing in derivatives have to comply with requirements on derivatives in accordance with articles 50 and 51 of the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive (2009/65/EC). With regard to non-UCITS (ie, AIFs), the requirements depend on the type of fund. For instance, an open-ended real estate fund may invest in derivatives only for hedging purposes. Other funds, such as special funds, have no restrictions on the use of derivatives except their own investment guidelines. If a fund invests in derivatives, they must in general comply with the Derivatives Regulation. The Derivatives Regulation sets out detailed rules for the use of derivatives and risk measurements. In addition, management companies are subject to the EU-wide regulations on derivatives transactions, such as the Securities Financing Transactions Regulation (Regulation (EU) 2015/2365), European Market Infrastructure Regulation (Regulation (EU) 2012/648) and Markets in Financial Instruments Regulation (Regulation (EU) 2014/600).

UPDATE AND TRENDS

Recent developments

41 | Are there any other current developments or emerging trends in your jurisdiction that should be noted? Please include reference to world-wide regulatory concerns, such as restrictions on foreign ownership in strategic industries, high-frequency trading, commodity position limits, capital adequacy for investment firms and 'shadow banking'.

The German legislator is currently working on the implementation of the Investment Firm Directive (2019/2034/EU) (IFD). The new German law on investment firms (Wertpapierinstitutsgesetz) seeks to lighten the burden of prudential supervision on small and mid-sized investment firms. The new regime has a lighter touch on these firms regarding internal governance, remuneration policies and risk management. In terms of the IFD, small and mid-sized investment firms have, inter alia, total balance assets under €100 million and less than €1.2 billion assets under management. Bigger investment firms fall under the traditional CRR regime. The new law will come into effect on 26 June 2021.

VAT on management fees of AIFs/Act to strengthen Germany as a fund jurisdiction

Until the end of 2017, the management fee payable to the managing partner of an alternative investment fund (AIF) was subject to German VAT (regardless of whether this management fee was structured as a priority profit share), whereas the management fee payable in relation to an undertaking for collective investment in transferable securities (UCITS) was tax exempt. As of 1 January 2018, a new provision under the German VAT Act became effective with the purpose of implementing the European Court of Justice's (ECJ) jurisprudence (in particular the *Fiscale Eenheid* case, No. C-595/13 of December 2015) by 'selectively extending' the scope of application of the relevant VAT exemption for certain AIFs. According to the revised German VAT Act, the management of UCITS and of certain AIFs that are comparable to UCITS is exempt from VAT. The German VAT Act does not stipulate which types of AIF are comparable to UCITS. The German tax authorities have established criteria that must be fulfilled to benefit from the VAT exemption (eg, the AIF must offer shares to the same group of investors and be subject to similar obligations and controls as UCITS). In addition, it has been clarified that open-ended special AIFs will be exempt from VAT without fulfilling the established criteria, whereas the administration of closed-ended AIFs will only be exempt from VAT if certain previously established criteria were cumulatively met. However, the rather narrow framework laid out by the German tax authorities with the requirement of a catalogue of cumulative criteria is unsatisfactory – and in our view not in line with the spirit of ECJ jurisprudence.

As a result of the pending Funds-Jurisdiction Strengthening Act (FSG), the VAT exemption on management fees is expected to be extended for certain types of AIFs (venture capital funds). Even though this development is to be welcomed, it should be noted that the suggested wording is too narrow. The draft law would exclude a number AIF categories (eg, buyout funds, infrastructure funds, private debt funds, real estate funds) from the benefits of the VAT exemption and create potential issues under European state aid rules.

Corporate Income Tax Modernisation Act

The German legislator is currently working on the modernisation of the Corporate Income Tax Act. The main development is to offer an irrevocable option for partnerships to be treated as corporates for tax purposes. This would effectively result in a third form of tax treatment for AIFs under the German tax laws. In addition to the options mentioned above (AIF in the form of a partnership treated after general rules of German taxation for partnerships/AIF formed as a corporation treated as investment fund or

specialised investment fund under the Investment Tax Act), there would be the option to treat an AIF formed as a partnership like a taxable corporate entity without falling within the scope of the German Investment Tax Act. This might be helpful to prevent foreign investors from tax declaration obligations in Germany and to retain the possible application of the taxation privilege for capital gains under section 8b of the German Corporation Tax Act (KStG) for German corporate investors as well as the fund entity itself. This would limit the tax leakage at the fund level. However, certain withholding tax issues would make this option less attractive. As the draft legislation is still at an early stage, it is not yet possible to say whether the amendment will be adopted in the form currently discussed.

Anti Tax Avoidance Directive

On 24 March 2021, the legislator issued a new draft for an Anti Tax Avoidance Directive (ATAD) implementation law. ATAD splits into the ATAD I Directive (EU) 2016/1164 of 12 July 2016 concerning in particular interest barriers, rules on exit taxation, general abuse avoidance rules and CFC rules and the ATAD II Directive (EU) 2017/952 of 29 May 2017 concerning hybrid arrangements. As a result, there will be numerous tightening measures for companies operating cross-border. A positive clarification for AIFs in a corporate form is that the specialised CFC rules do not apply to income received in respect of a foreign intermediate company that is falling within the scope of the Investment Tax Act (section 7(5) AStG – draft law). On the other hand, the draft provides for a limitation of the taxation privilege on capital gains in certain cross-border cases (section 8b of the KStG). It remains to be seen to what extent this will be adopted in the final version of the law.

Reporting of certain cross-border arrangements (DAC 6)

Effective as of 1 January 2020, Germany has implemented Directive (EU) 2018/822 of 25 May 2018 amending the Directive on Administrative Cooperation (DAC 6). As of 1 July 2020, 'cross-border arrangements' must be reported to the German Federal Central Tax Office (BZSt). The new law has implications for private equity funds and their investors. Both a private equity fund itself and its portfolio investments of such fund may, in certain cases, constitute a cross-border arrangement. The reporting obligation is relevant for 'intermediaries' (including fund managers and their legal and tax advisers) as well as for 'relevant taxpayers' (including fund investors). If the fund (or one of its investments) is seen as a cross-border arrangement due to the fulfilment of one of certain 'hallmarks' (in some cases a tax advantage must also be one of the main advantages of the cross-border arrangement, the so-called 'main-benefit test'), the fund manager has to report the arrangement to the BZSt; also, the fund manager has to provide the registration number and disclosure number assigned by the BZSt to the investors. Both numbers must be included in the investors' tax returns. The involved legal or tax advisers can also report to the BZSt on behalf of the fund manager or the investor, provided there is a waiver of their professional privilege of confidentiality. As the new law is drafted in a rather vague fashion and in the light of potential fines for non-reporting, there is a potential risk that the market will take a conservative approach and the legislation might result in 'over-reporting' of fund structures. The German Federal Ministry of Finance (BMF) issued a final version of a circular on 29 March 2021 to give guidance and limit such reporting obligations. For further guidance, the BMF intends to publish a 'white list' of cross-border arrangements that do not have to be reported. It would be appreciated if such white list would contain reporting limitations for 'normal' fund structures.

Investment Tax Act

The German Investment Tax Act has been in place since 2018. Yet, certain areas of interpretation are still not fully resolved. To address this point, the German tax authorities have issued new administrative guidance over the course of the past two years. Mostly, these interpretations have

POELLATH +

Sebastian Käpplinger

sebastian.kaepplinger@pplaw.com

Tarek Mardini

tarek.mardini@pplaw.com

Potsdamer Platz 5
10785 Berlin
Germany
Tel: +49 30 25353 0
Fax: +49 30 25353 999

An der Welle 3
60322 Frankfurt/Main
Germany
Tel: +49 69 247047-0
Fax: +49 69 247047-30

www.pplaw.com

been helpful in addressing and clarifying open issues. However, draft guidance issued in mid-December 2019 raised some new concerns. As drafted, it might have severely restricted the ability of German special investment funds (often set up as managed accounts by certain German institutional investors) to invest in target funds organised as a corporation or in a contractual form. The final version of the circular with respect to special investment funds (section 26 of the Investment Tax Act) was published on 20 January 2021. This version clarifies many points, but has left certain others unresolved. However, overall the final version of the circular is welcome news as investments by German special investment funds in target funds (structured as either corporations or partnerships) are generally possible, in particular if the target funds qualify as 'securities'.

Coronavirus

42 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In the context of the covid-19 crisis and its economic consequences, the German federal government has implemented a range of instruments in order to secure liquidity and financing for start-ups and venture capital companies.

The Stabilisation Fund Act establishes an Economic Stabilisation Fund (ESF) (*Wirtschaftsstabilisierungsfonds*). The target group of the ESF is larger enterprises outside the financial sector whose survival would be threatened, if consequences of the covid-19 pandemic were to have a significant impact on the economy, technological sovereignty, security of supply, critical infrastructure or the labour market. For example, Lufthansa, TUI and FTI Touristik received financial aid. All of the mentioned enterprises are part of the tourism sector. Enterprises of the department store sector also received financial help.

The ESF has two main instruments at its disposal: the provision of guarantees for liabilities incurred by companies from the beginning of the covid-19 crisis until the end of 2021, and participation in recapitalisation operations of companies through a range of financial instruments (silent or open participation, profit-sharing rights, convertible bonds, etc).

In the field of venture capital, the German government has announced a concrete package of measures. Public venture capital investors, such as EIF and High-Tech Gründerfonds, will be provided with additional funds. These funds will be used for financing rounds of start-ups (together with, as usual in this sector, private co-investors).

In addition, the fund investors KfW Capital and EIF are to receive additional resources to take over shares from defaulting fund investors, if necessary. In general, the German government intends to facilitate the financing of start-ups as part of the package of measures.

Parallel to this package, the German government is coordinating the design of a 'Zukunftsfonds' ('future fund') for start-ups. This fund is to support the way out of the crisis for start-ups in the medium term and amounts to €10 billion until 2030.

The German regulatory authority has been working – in line with the European Securities and Markets Authority – flexibly and pragmatically during the pandemic. For example, the Federal Financial Supervisory Authority (BaFin) decided that trading on account of a fund is possible from home and is not restricted to a physical trading desk. With regard to communication, BaFin waived the written form (eg, wet ink) and deems signed PDFs as sufficient.

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