

Fund Management 2019

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Fund Management 2019

Contributing editor**Michelle Moran****K&L Gates LLP**

Lexology Getting The Deal Through is delighted to publish the fifth 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. Our coverage this year includes a new Global Overview and new chapters on France and Thailand.

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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.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Michelle Moran of K&L Gates LLP, the contributing editor, for her assistance in devising and editing this volume.



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Fund management

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 Investments in Transferable Securities (UCITS) Directive (2009/65/EC) and the Alternative Investment Fund Managers Directive (AIFMD).

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

2 Is fund administration regulated in your jurisdiction?

Fund administration is not regulated per se in Germany. The regulation rather depends on whether the specific 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.

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). Special AIFs 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.

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.

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. 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.

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 (ESMA) Guidelines on Sound Remuneration under the UCITS Directive and under the AIFMD.

Fund marketing

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

Overview

The marketing of investment funds requires an authorisation by BaFin or at least a European marketing passport under the AIFMD or under the UCITS Directive. A private placement regime is no longer available in Germany.

The only exception available applies to German-registered sub-threshold managers (see question 3). German-registered sub-threshold managers can market their funds using the private placement exemption available under the German implementation of the EU Prospectus Directive or, as applicable, the private placement exemption available under the Asset Investment Law.

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 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 bit lengthy and costly. BaFin has at least two months (in some cases even longer) for review once the filed documents are complete and BaFin currently (as of 2018) charges a fee of €1,545 (which is a welcome reduction compared to the previous fee of €6,582). 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 of 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 case, 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?

Definition of marketing and pre-marketing

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: (i) the investor has no access to the final documents (PPM, LPA and subscription documents); and (ii) 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).

It remains to be seen what effects the current EU Council proposal on pre-marketing activities (COM (2018) 92 final) will have in the future.

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.

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 position of the local entity is usually performed by a German credit institution.

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

Germany follows the 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

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

The fund-related requirements of the KAGB distinguish between UCITS, special AIFs and public AIFs. UCITS are UCITS funds within the meaning of the 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 (see question 3).

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 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.

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 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.

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

The investment guidelines of retail funds, as well as the marketing of retail funds, need 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.

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;
- 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 (GewO) 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.

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.

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.

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 (see also question 29)).

Revised law (in force since 1 January 2018)

Since 1 January 2018, the new rules under the revised Investment Tax Act have become effective. The scope of application has been slightly reduced as partnerships 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 (only the tax treatment of sub-funds in the case of funds in form of a partnership is still subject to clarification; though a draft guidance by the tax authorities indicates a treatment as a separate fund to which the rules on partnerships apply). 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 or Italian *fondo chiuso*) are now covered by the new law. 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 new 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 (see also question 29).

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 that 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 that hold their investment fund interests as part of their non-business assets;
- 60 per cent for individuals that 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.

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; see question 3).

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 case of an internally managed fund). For instance, a manager can, as a basic rule, not directly act on behalf of a contractual fund. 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 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.

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 (AG, 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.

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.

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

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 AIFs (see question 3).

In the case of a fully licensed manager, the following types are available: contractual fund, investment KG and investment 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 or an investment AG are also available.

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 (see question 13).

Managers who are only registered benefit from very light regulation. With the exception of the requirements mentioned in question 3, non-retail funds managed by sub-threshold managers are, in principle, not regulated.

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 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 (on the assumption that the marketing takes place within the private placement regime of the German prospectus laws; see question 7).

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 (see question 15). An exception applies to funds managed by registered managers. Such funds cannot be marketed by firms with a financial intermediary licence under the GewO.

Non-retail funds may only be marketed to professional or semi-professional investors (for the definition of these, see question 3).

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.

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 (see question 3).

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

The tax treatment of retail funds (see question 18) is generally also applicable to non-retail funds. Certain qualifying retail funds, however, have a second option available.

Revised law (in force since 1 January 2018)

As noted in question 18, funds in the form of a partnership are now outside the scope of the Investment Tax Act. In effect, there is no change compared to the previous law for most non-retail AIFs as they are often structured as limited partnerships. Thus, the new law only applies to non-retail funds if they are structured in a corporate or a contractual form. Under the new law, there is an option for certain qualifying specialised investment funds to opt out of the new '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,

Update and trends

In December 2017, BaFin published a new investment circular with regard to the German Insurance Ordinance. The Insurance Ordinance is relevant for investments by certain non-Solvency II investors, such as local pension funds and small insurance companies. A prior draft had included severe restrictions for investments in non-EU (managed) private equity and debt funds. However, the final version of the circular, while not perfect, contains some helpful clarifications. In particular, the circular explicitly allows the incurring of debt, at least for purposes of bridging of capital calls in the case of directly investing private equity funds. A time limit for such borrowing is also no longer included. Certain limitations apply, though, for private equity fund of funds. Also, the circular clarifies that direct investments in closed private equity funds by 'special funds', which are relevant for institutional investors, remain eligible. Thus, such investors can continue to invest up to 20 per cent of the value of their special funds in private equity funds without hereby burdening the quota for alternative investments. Regarding investments in certain debt funds that invest in non-subordinated debt, certain restrictions, unfortunately, remain in place (geographic limitations, requirement of a fully licensed AIFM and a 7.5 per cent quota for 'alternative investments' rather than 'participation quota').

German lawmakers do not currently intend to extend the MiFID rules for high-frequency trading, commodity position limits or capital adequacy to fund managers. In 2016, Germany expressly regulated the activities of German debt funds and addressed thereby 'shadow banking' concerns.

Regarding the issue of VAT on management fees, there is an update on the legislative side. 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. According to the revised section 4(8)(h) of the German VAT Act, the management of UCITS and of certain AIFs that

are 'comparable' to UCITS, is exempt from VAT. The German legislature did not explicitly stipulate which types of AIF are 'comparable' to UCITS. The German tax authorities have established the criteria that must be fulfilled in order to benefit from the VAT exemption. In addition, open-ended special AIFs will be exempt from VAT without fulfilling the established criteria. The tax authorities also clarified that the administration of closed-ended AIFs would be exempt from VAT, but only if certain previously established cumulative criteria were met. However, this narrow framework with the requirement of a catalogue of cumulative criteria is unsatisfactory – and in our view not in line with the spirit of the ECJ jurisprudence. However, there is hope that this strict interpretation will not stand as the VAT exemption of special AIFs is on the agenda of the EU VAT Committee and courts may take a different view.

A new German federal government was formed based on a coalition agreement dated 7 February 2018. This agreement lays out the plan of the new government for the next four years. It stipulates that the existing flat income tax on interest income will be abolished (in connection with the establishment of an effective automated exchange of information). This relatively brief statement in the coalition agreement raises many questions that will have to be clarified by the legislature (eg, the term 'interest income' is not specified). It also remains unclear whether the currently applicable lump-sum savings allowance will apply to interest income in the future. If this is the case, it must be clarified whether the true income-related expenses can be deducted if the lump sum savings allowance is exceeded. In the case of an investment in an investment fund, it remains to be seen how the taxation of interest income with the personal rate will be ensured. This is unclear as an obligation of investment funds to publish their tax bases no longer exists. Currently, all fund income of a private investor is taxed on the basis of the flat income tax. If the flat income tax on interest income would indeed be abolished, a split between interest income and other income would have to be made. In general, it remains true that the tax landscape is complex and subject to constant change.

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.

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.

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 (see question 20).

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

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

A manager must report annually.

Separately managed accounts

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 specialised portfolio manager.

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 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 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 AIFMD remuneration disclosures of the AIFM.

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 (see question 3).

General

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

Germany is currently considering tightening the rules applicable to financial intermediaries that are licensed merely under the GewO. As explained in question 15, these financial intermediaries are exempt from the MiFID II. Germany is considering applying the MiFID II rules of conduct also to these financial intermediaries as well as placing

them under the federal supervisory authority of BaFin (instead of the current local municipal supervisory authorities).

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.

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

This is currently not possible in the context of funds.

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 OECD or EU-based funds.

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