

PANORAMIC

# FUND MANAGEMENT

Germany



LEXOLOGY

# Fund Management

Contributing Editors

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## FUND MANAGEMENT REGULATION

### Regulatory framework and authorities

How (in very general terms) 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 Code (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.

For supporting information and publications on the following answers see BaFin – [Law & Regulation](#); and the Federal Ministry of Finance – [Taxation](#).

Law stated - 20 Mai 2024

### Fund administration

Is fund administration (support services provided to funds such as book-keeping, preparing reports, trade settlement, etc) regulated in your jurisdiction?

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

Law stated - 20 Mai 2024

### Authorisation

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 it needs a licence or registration.

Additionally, the European Venture Capital Funds regime and European Social Entrepreneurship Funds regime are directly applicable in Germany, as well as the European

Long-Term Investment Funds (ELTIF) regime. The ELTIF Regime was recently amended by EU legislature (ELTIF 2.0 – see ‘Trends’, 7.1.)

## Registration process for registered managers

### Availability

The registration process is only available to certain small or medium-sized managers, the most important category of which is ‘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 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 (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 it 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 concerning the manager and the managed funds (such as the fund’s limited partnership agreement 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.

BaFin must make its decision for approval within certain statutory deadlines, which begin with the date of receipt of the complete documents required for the approval. The deadline for registration of a sub-threshold manager is two weeks. As it is at the sole discretion of BaFin when the documents required for the approval of the respective licence are complete, the usual time frame for obtaining the registration is two to four weeks in practice.

## 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. However, since August 2021, section 45a of the KAGB requires sub-threshold alternative investment fund managers (AIFMs) to instruct a qualified independent third party (eg, an auditor) as well to audit how funds are being managed and whether the sub-threshold AIFM adheres to applicable notification obligations and anti-money laundering laws. The AIFM must notify BaFin of the appointed auditor.

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.

## Licensing process for fully licensed managers

### Availability

Fund managers that do not qualify for registration or opt out of 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 neither professional nor semi-professional.

### Licensing procedure

The licensing procedure is a fully fledged authorisation process with requirements equivalent to those 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 the manager's organisational structure.

The statutory deadline for BaFin's approval of a fully licensed manager is six months (three months base timeframe plus an extension of up to an additional three months). In practice, however, approval can usually be expected within nine to 12 months (in certain cases even longer) as it is at the sole discretion of BaFin when the documents required for the approval are complete.

## Ongoing issues



The licensing of the manager results in the manager being subject to the entirety of the KAGB, in particular:

- 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.

**Law stated - 20 Mai 2024**

### **Territorial scope of regulation**

**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 for AIFMs in countries where 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.

**Law stated - 20 Mai 2024**

### **Acquisitions**

**Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator? (Restrict your answers to the regulator with responsibility for oversight of fund management. Do not answer with respect to other agencies, such as the merger control authorities.)**

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, prior pre-clearance and coordination with the AIFM is therefore advisable.

**Law stated - 20 Mai 2024**

### **Restrictions on compensation and profit sharing**

**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's Guidelines on Sound Remuneration under the UCITS Directive and the AIFMD.

**Law stated - 20 Mai 2024**

## **FUND MARKETING**

### **Authorisation**

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

The marketing of investment funds requires authorisation by the Federal Financial Supervisory Authority (BaFin) or at least a European marketing passport under the Alternative Investment Fund Managers Directive (AIFMD) or the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive (2009/65/EC) (the 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 – for AIFs – whether the funds are marketed to professional investors, semi-professional investors or retail investors.

## Marketing of UCITS

The marketing of non-German UCITS in 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 UCITS 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 UCITS Directive.

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

## Marketing of EU AIFs by EU AIFMs

A passport is available for the marketing of non-German EU AIFs by EU alternative fund managers (AIFMs) under article 32 of the AIFMD. The AIFMD marketing passport allows for the marketing of EU AIFs to professional and semi-professional investors in Germany.

## EU sub-threshold AIFMs

EU sub-threshold AIFMs may use a simplified marketing notification procedure with BaFin. This notification procedure requires, among other things, 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 or France. As of 1 January 2023, reciprocity was also recognised regarding 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. For non-professional investors, EU member states are free to impose stricter requirements (article 43, paragraph 2 of the AIFMD). Germany has 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.

**Law stated - 20 Mai 2024**

### **Authorisation**

**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.

In 2021, the German parliament passed the Act to Strengthen Germany as a Fund Jurisdiction to improve Germany as a fund jurisdiction. The Act has been effective from 2 August 2021 and implemented the cross-border marketing amendments of the AIFMD (Directive (EU) 2019/1160 on cross-border marketing).

The implementation provides some guidance on the meaning of the term 'pre-marketing'.

Pre-marketing takes place if information presented:

- is not sufficient to allow investors to commit to acquiring units or shares of a particular AIF;
- does not amount to subscription forms or similar documents whether in a draft or a final form; and
- does not amount to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

Where a draft prospectus or offering documents are provided, they must not contain information sufficient to allow investors to make an investment decision and must clearly state that:

- they do not constitute an offer or an invitation to subscribe to units or shares of an AIF; and
- the information presented therein should not be relied upon because it is incomplete and may be subject to change.

In addition, BaFin provides some guidance on pre-marketing activities in its FAQs about the marketing and acquisition of investment funds (the FAQs on Marketing). BaFin revised its FAQs in 2022 and implemented a partly stricter pre-marketing regulation in Germany compared to the prior regulation on pre-marketing. According to the FAQs on Marketing:

- pre-marketing and, in principle, not-yet-marketing is providing information or notices on investment strategies or concepts by an AIFM or third parties appointed by it to potential professional or semi-professional investors domiciled or resident in the European Union or an EEA state with the aim of determining the extent to which the investors are interested in a participation in an AIF or sub-investment assets not yet authorised for cross-border marketing in the investor's country of residence;
- pre-marketing only triggers the obligation to notify and does not require a completed marketing notification procedure. AIFs that are mentioned in pre-marketing information provided by AIFMs (or third parties) on or after 2 August 2021, or whose investment strategies appear in pre-marketing, must complete the relevant marketing notification procedure if units or shares in the AIF are subscribed to within a period of 18 months from the start of pre-marketing; and
- pre-marketing activities do not cross the line to marketing as long as the fund is not yet established (ie, no investor has been admitted to the fund) and only incomplete draft fund documents are distributed or available in Germany. The draft status of the

documents must be clearly indicated. In addition, it must be communicated to the investor that a subscription is currently not possible and no offers for a subscription are sought, and that the documents are still subject to change (eg, in a presentation or correspondence disclaimer).

Unlike the Directive on cross-border marketing, the Act to Strengthen Germany as a Fund Jurisdiction extends the new EU pre-marketing regime to non-EU AIFMs seeking to pre-market in Germany. In line with the Directive, the Act restricts 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.

However, the German pre-marketing regime does not apply to EU sub-threshold AIFMs.

#### Reverse solicitation

Germany recognises reverse solicitation, 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. However, since the implementation of the new regime, the scope for reverse solicitation has become very limited. Any subscription made by an investor within 18 months of the commencement of pre-marketing is considered a result of pre-marketing or marketing activities in Germany. Therefore, pre-marketing activities will preclude the AIFM from being able to rely on reverse solicitation for a period of 18 months.

If the investor is a retail investor, the requirements on reverse solicitation are even less clear. It is therefore advisable to exercise considerable restraint regarding reverse solicitation in connection with retail investors. If a retail investor's initiation is not considered a real case of reverse solicitation, the fund manager would be subject to the more cumbersome retail marketing regime in Germany. Nevertheless, some legal commentators argue in favour of the possibility of reverse solicitation, because the underlying principle of passive freedom to provide services – anchored in European law – is in principle also applicable to retail investors.

In the case of reverse solicitation, the fund manager must have documentary evidence of how the relationship with the investor started and seek a confirmation from the investor that the contact was initiated solely by the investor.

Generally, the requirements for reverse solicitation are fulfilled only in limited instances.

**Law stated - 20 Mai 2024**

### **Territorial scope and restrictions**

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

Marketing of EU AIFs by EU AIFMs

The AIFMD marketing passport allows non-German EU AIFs by EU alternative fund managers (AIFMs) to market EU AIFs to professional and semi-professional investors in Germany (article 32 of the AIFMD).

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

Germany allows the marketing of non-EU AIFs managed by non-EU AIFMs 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 lengthy and costly. BaFin has two months (in some cases even longer) to review once documents have been filed, and as of April 2024 it charges a fee of €1,641 for the review per AIF to be marketed. The set of documents to be submitted to BaFin is quite extensive and includes the private placement memorandum, the fund limited partnership agreement and certain constitutional documents.

There are also some additional requirements not readily discernible from the reading of article 42, which go beyond the minimum requirements of the AIFMD (gold-plating). For instance, Germany requires a 'depository-lite' and 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.

Concerning the depository-lite, the AIFM must appoint a depository to perform the three functions listed in articles 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. 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.

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

Regarding the marketing of AIFs to retail investors, there is a stricter 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.

**Law stated - 20 Mai 2024**

### **Territorial scope and restrictions**

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

A local entity is only involved in the process concerning UCITS (paying and information agent) or if AIFs are marketed to retail investors (paying agent and representative of the AIFM). The role of the local entity is usually performed by a German credit institution.

Local bodies used to be involved in processes concerning UCITS (paying agent and information agent) and in the marketing of AIFs to retail investors (paying agent and representative of the AIFM). However, this practice has been abolished and these tasks can now be performed by entities domiciled outside Germany.

**Law stated - 20 Mai 2024**

### **Commission payments**

**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 the commission needs to be disclosed to the prospective client. In cross-border services without a German branch, the supervision of the German MiFID rules of good conduct is primarily carried out by the home country regulator.

In January 2022, the German Lobbying Register for the Representation of Special Interests regarding the German Bundestag and the Federal Government entered into force. Individuals and legal entities involved in lobbying activities face extensive registration and financial disclosure obligations.

**Law stated - 20 Mai 2024**

## **RETAIL FUNDS**

### **Available vehicles**

**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 Code (KAGB) distinguish between undertakings for collective investment in transferable securities (UCITS), special alternative investment funds (AIFs) and public AIFs. UCITS are funds within the meaning of the Undertakings for Collective Investment in Transferable Securities Directive (2009/65/EC) (the UCITS Directive). Retail funds are UCITS funds and public AIFs. Public AIFs can be

subscribed to by retail investors as well as professional and semi-professional investors. Retail investors are investors that are neither professional nor semi-professional.

#### Arrangements and vehicles for open-ended funds

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

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

A 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 relationship between the fund manager and the investors, in particular the applicable investment restrictions. The investment guidelines of retail funds require the approval of the Federal Financial Supervisory Authority (BaFin).

Investment corporations and limited partnerships are modified according to investment law, but are otherwise established in accordance with the applicable procedures for establishing corporations and partnerships. 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 structures).

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

**Law stated - 20 Mai 2024**

### **Laws and regulations**

#### **What are the key laws and other sets of rules (regulatory and self-regulatory) that govern retail funds?**

The main law governing retail funds is the KAGB. The KAGB is supplemented by several ordinances (ie, 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 its sample investment guidelines.



Law stated - 20 Mai 2024

**Authorisation****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 BaFin approval. In addition, BaFin must approve the selection of the depositary for the respective fund. The approvals are usually obtained in parallel with each other.

Law stated - 20 Mai 2024

**Marketing****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 Industrial Code 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 accordance with article 3 of the same.

Law stated - 20 Mai 2024

**Managers and operators****Are there any special requirements that apply to managers or operators of retail funds?**

The special requirements for retail funds are not applicable to managers. The requirements applicable to managers of retail funds are broadly similar to the requirements for managers of non-retail funds. The main differences between retail and non-retail funds are the stricter statutory investment guidelines (product regulation) and marketing rules.

Also, the special regulations according to which sub-threshold alternative investment fund managers (AIFMs) were allowed to manage retail funds have been abolished. Thus, all AIFMs must be fully licensed to manage retail funds.

## Investment and borrowing restrictions

### 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.

Law stated - 20 Mai 2024

## Tax treatment

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

The German Investment Tax Act generally applies to UCITS and AIFs (both retail 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 or SCA SICAV or Irish PLC) or of a contractual type (eg, a German *Sondervermögen*, Luxembourg *fonds commun de placement*, French FCPI or 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 corporate tax rate). The exemption for dividends (section 8b of the German Corporate Income 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 many investors, but applicable to all funds covered). In particular, distributions from the fund, predetermined tax bases and capital gains realised upon sale or redemption of fund interests are covered. 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. Individuals who hold their investment fund interests as part of their non-business assets are subject to a 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 a personal rate.

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

For mixed funds, half of the applicable partial exemption rate applicable to equity funds is available. For 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. Half of the applicable partial exemption rate applies to trade tax.

**Law stated - 20 Mai 2024**

### **Asset protection**

**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 depositary or custodian for both UCITS and AIFs. The rules for custodians for AIFs implement the rules of article 21 of the AIFMD. Germany has 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 that

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 limited partnership (KG), the KG must have two types of assets: administrative and investment assets. Investment assets are financed by the capital of the investors and are used for making investments. Administrative assets serve to finance the general operations of the investment KG. Administrative assets may not be financed by the investors' capital.

**Law stated - 20 Mai 2024**

## **Governance**

### **What are the main governance requirements for a retail fund formed in your jurisdiction (registration, record-keeping, filings, officers)?**

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

Several governance requirements apply to the manager. 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 (an 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, registration requirements). In addition, the KAGB sets out fund-specific requirements, such as the appointment of at least two executive directors at fund level.

**Law stated - 20 Mai 2024**

## **Reporting**

### **What are the periodic reporting requirements for retail funds?**

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

Law stated - 20 Mai 2024

### **Issue, transfer and redemption of interests**

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

Managers 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.

Law stated - 20 Mai 2024

## **NON-RETAIL POOLED FUNDS**

### **Available vehicles**

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

For 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).

The following fund types are available to a fully licensed manager:

- 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.

The vehicle of choice for registered managers 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.

Law stated - 20 Mai 2024

### **Laws and regulations**

#### **What are the key laws and other sets of rules (regulatory and self-regulatory) that govern non-retail funds?**

The same key rules that apply to managers managing retail funds apply to fully licensed managers managing non-retail funds.

Managers who are only registered benefit from very light regulation. Apart from the limit of €500 million under management without leverage, and €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.

Law stated - 20 Mai 2024

### **Authorisation**

#### **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.

No investment guidelines are necessary for registered managers. 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.

Law stated - 20 Mai 2024

### **Marketing**

#### **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 Industrial Code.

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

Law stated - 20 Mai 2024

### **Ownership restrictions**

#### **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.

Law stated - 20 Mai 2024

### **Managers and operators**

#### **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 regarding funds managed by fully licensed managers.

Only a regulation-lite regime applies to registered managers.

**Law stated - 20 Mai 2024**

## **Tax treatment**

### **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 non-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 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 the end of 2017), there is a look-through approach towards 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 they hold these fund interests as part of their business assets (previously, only indirect participation by investors was allowed).

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.

Law stated - 20 Mai 2024

### **Asset protection**

**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.

Law stated - 20 Mai 2024

### **Governance**

**What are the main governance requirements for a non-retail fund formed in your jurisdiction (registration, record-keeping, filings, officers)?**

The governance requirements for non-retail funds managed by fully licensed managers are similar to those applying to retail funds.

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

Law stated - 20 Mai 2024

### **Reporting**

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

Managers must report annually.

Law stated - 20 Mai 2024

## **SEPARATELY MANAGED ACCOUNTS**

### **Structure**

**How are separately managed accounts (ie, accounts through which investor funds are segregated – not pooled – and the investor owns the underlying assets, which are managed at the investment manager's discretion) 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.



Law stated - 20 Mai 2024

### Key legal issues

What are the key legal issues (eg, standard of care, indemnification) 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 Code (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.

Law stated - 20 Mai 2024

### Regulation

Is the management or marketing of separately managed accounts regulated in your jurisdiction? (If so, how does this operate? Is this the same regime for fund management?)

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.

Law stated - 20 Mai 2024

## GENERAL

### Proposed reforms

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

Growth Opportunities Act

On 30 August 2023, the government presented a draft bill for the Growth Opportunities Act, which, alongside a variety of changes to tax regulations, also provided for changes to the German Investment Tax Act in particular. The draft provides an extension for the exemption threshold for (commercial) income from solar power and charging stations from 10 per cent to 20 per cent. At the same time, the exemption threshold for the reduction under the German Trade Tax Act (GewStG) for income from solar power and charging stations will also be raised from 10 per cent to 20 per cent. Both aspects further promote investments

in renewable energies, as funds are now able to invest a higher proportion in such energy sectors.

As of 1 March 2024, and after a long period of intensive consultation, the Federal Council finally approved the compromise text on the Growth Opportunities Act, which was subsequently published in the Federal Law Gazette.

**Law stated - 20 Mai 2024**

### **Public listing**

**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.

**Law stated - 20 Mai 2024**

### **Overseas vehicles**

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

This is currently not possible in the context of funds.

**Law stated - 20 Mai 2024**

### **Foreign investment**

**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.

**Law stated - 20 Mai 2024**

### **Funds investing in derivatives**

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

UCITS investing in derivatives must comply with requirements on derivatives in accordance with articles 50 and 51 of the UCITS Directive. Requirements for non-UCITS (ie, AIFs) 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 Regulation (EU) 2015/2365 on transparency of securities financing transactions, Regulation (EU) No. 648/2012 on market infrastructure and Regulation (EU) No. 600/2014 on markets in financial instruments.

Law stated - 20 Mai 2024

## UPDATE AND TRENDS

### Recent developments

**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'.**

VAT exemption for all German AIFs

At the end of 2023, the Act on Financing of the Future was finally passed by the German legislature and entered into force on 1 January 2024. The management of all AIFs will now be exempt from VAT under German tax law. German VAT treatment is now in line with the legal situation in other EU member states, such as Luxembourg, eliminating competitive disadvantages for Germany in a consistent continuation of the objective of the Act to Strengthen Germany as a Fund Jurisdiction.

Germany has long been at a disadvantage compared to other EU jurisdictions when it comes to the VAT treatment of fund management fees. Prior to this latest legislative change, the Act to Strengthen Germany as a Fund Jurisdiction had already expanded the VAT exemption for venture capital funds. However, uncertainties remained and have not been fully clarified by the supplement to the German VAT Regulations published by the Federal Ministry of Finance in June 2022.

The new legal framework is welcome and means that the management of AIFs will now be exempt from VAT regardless of the asset class (ie, expanding the exemption from private equity or venture capital funds to also encompass debt funds, real estate funds, infrastructure funds, project development funds, crypto funds, litigation funds, funds of funds and so on). The type of regulation of the AIF or its alternative investment fund manager (AIFM) will no longer be relevant, nor will the qualification of the investors. Accordingly, the management of all AIFs (special AIFs and retail investment funds) managed by fully authorised AIFMs, European Venture Capital Funds (EuVECA) managers and nationally registered sub-threshold AIFMs is now exempt from VAT.

German Act to Modernise the Law on Partnerships (MoPeG)

After the first proposal in April 2020 and a transition period of around 2½ years, a comprehensive reform of the German Law of Partnerships came into force on 1 January 2024. The reform adapts German partnership law to the requirements of modern, diverse economic life, and codifies certain legal developments of the past decades that have already been carried out in case law, legal commentaries and practice. Among other important innovations (eg, a special new register for a standard German partnership), the law also has certain implications for German limited partnerships (eg, the rules governing legal challenges to partnership resolutions).

#### Corporate Income Tax Modernization Act

The Corporate Income Tax Modernization Act entered into force on 1 January 2022. The main development is to offer an irrevocable option for partnerships to be treated as corporates for tax purposes. This effectively results in a third form of tax treatment for alternative investment funds (AIFs) under German tax laws. There is now 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. While new and largely untested, this might help foreign investors to avoid tax declaration obligations in Germany and retain the possible application of the taxation privilege for capital gains under section 8b of the German Corporate Income Tax Act (KStG) for German corporate investors as well as the fund entity itself. This could potentially limit tax leakage at fund level. However, certain withholding tax issues likely make this option less attractive. It remains to be seen if, and in which scenarios, this third option will be adopted in practice.

#### New structuring options for domestic funds

The Act to Strengthen Germany as a Fund Jurisdiction expanded the options available to fund managers for permissible structuring options. The new range of permitted products includes, for instance, a master-feeder structure for closed-ended funds, the introduction of an open-ended infrastructure AIF in the form of a contractual fund and the new option to use a contractual fund, which is opaque for tax purposes and subject to the German Investment Tax Act, as a closed-ended fund vehicle.

#### Return of capital contributions under the KStG

With the Annual Tax Act 2022, the legislator amended section 27, paragraph 8 of the German Corporate Income Tax Act to the effect that foreign corporations outside the EU (third-country corporations) are now expressly able to make a tax-neutral return of contributions. This is in line with the basic idea that the return of capital contribution should generally not be seen as a taxable event. Pursuant to the old version section 27, paragraph 8 of the German Corporate Income Tax Act, only corporations and associations of persons that were subject to unlimited tax liability in another member state of the European Union were able to perform a tax-neutral return of capital contributions to their respective shareholders. While certain case law exists concerning third-country corporations and the relevant criteria accepted by courts to allow for a tax-neutral return of contributions, some German tax authorities have challenged such case law. Thus, the new law provides for greater certainty

and uniformity, albeit at the price of a more formal process. To exclude a return of capital contribution from taxation, the respective domestic shareholders (the German investor of the AIF treated as an indirect shareholder of the respective third-country corporations) will be forced to file a 'separate determination of return of capital contributions' with the Federal Central Tax Office (BZSt), namely, the same filing required for EU corporations under the existing law. The new law modified the deadline for filing with the BZSt and now it must be made by the end of the twelfth month following the fiscal year in which the return of capital contribution took place. Non-domestic AIFs treated as partnerships for German tax purposes must especially be aware of side-letter requests regarding this topic when targeting German investors.

#### Anti-Tax Avoidance Directives

Following the implementation of the first two Anti-Tax Avoidance Directives into German law, the European Commission presented a draft of a new directive on 22 December 2021. This was intended to adapt the Anti-Tax Avoidance Directive and thus prevent the abuse of letterbox companies (shell companies) for tax purposes.

Due to difficulties in reaching a political agreement on ATAD III, the Unshell Directive, which was originally scheduled to come into force in 2024, was provisionally suspended. A majority of EU member states reportedly support a change to the proposal that would see it implemented by way of an amendment to the Directive on Administrative Cooperation (DAC). It remains to be seen whether the original proposal of an ATAD III will be continued at the EU level, or the new regulations implemented as an amendment to the DAC. However, it can be assumed that the substantial requirements for EU company entities will not become less stringent.

#### SFDR and taxonomy regulation

Furthermore, Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR) and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (the Taxonomy Regulation) challenge participants on the financial market to assess the sustainability of their business and investments.

Since 1 January 2022, funds that either seek to contribute to the achievement of an environmental goal (article 9 of the SFDR) or advertise environmental features (article 8 of the SFDR) are subject to further disclosure obligations according to the Taxonomy Regulation. In principle, these funds must disclose to which environmental objectives the respective fund contributes and (what is likely to be even more difficult to implement) to what extent the fund invests in sustainable economic activity within the meaning of the Taxonomy Regulation.

The regulatory technical standards (RTS) for the SFDR and the disclosure obligations of the Taxonomy Regulation were adopted by the European Commission on 6 April 2022 and have been in force from 1 January 2023. The RTS provide templates – similar to Regulation (EU) No. 1286/2014 on key information documents for packaged retail and insurance-based investment products – that the financial market participants, such as fund managers, must use to fulfil their disclosure obligations.

In September 2023 the European Commission started a comprehensive assessment of the SFDR to assess potential shortcomings. The consultation focuses on legal certainty, the usability of the SFDR and its ability to play its part in tackling greenwashing. It remains to be seen if the consultation might lead to significant changes in the disclosure requirements for issuers of financial products.

As at 2024, uncertainty remains as to certain aspects of the application of the SFDR and the Taxonomy Regulation. The Federal Financial Supervisory Authority has not issued guidelines on all aspects of sustainable investment funds, despite publishing a Q&A in September 2022, which most notably clarified the much-debated German translation of 'promote' in article 8 SFDR.

## ELTIF 2.0

Regulation (EU) 2023/606 (the ELTIF 2 Regulation) amending Regulation (EU) 2015/760 of April 2015 on European Long-Term Investment Funds (ELTIFs) entered into force on 10 January 2024, with the goal to open the private capital market to retail investors by, among other things, broadening the scope of eligible assets and investments.

The revised regime will become more attractive for professional investors due to the elimination of portfolio composition, diversification and concentration provisions, for example by raising the leverage limitation of 30 per cent of the fund's capital to 100 per cent for ELTIFs marketed solely to professional investors.

At the same time, the scope of eligible assets and investments has been extended and diversification and borrowing rules have been softened for retail ELTIFs. Among other things, borrowing limits have been raised up to 50 per cent of the ELTIF's NAV and eligible assets must now represent at least 55 per cent of ELTIF's net assets instead of 70 per cent.

Additionally, with regard to indirect strategies, an ELTIF can now be a feeder to another master ELTIF and fund-of-funds structures are now possible with any type of European underlying fund (up to 100 per cent of the assets and a maximum of 20 per cent exposure to the same fund) allowing managers to offer retail investors indirect access to funds that were previously only eligible for professional investors or not available at all.

## Markets in Crypto-Assets Regulation (MiCAR)

The Markets in Crypto-Assets Regulation (MiCAR) entered into force on 20 April 2023 as part of a new regulatory framework for EU crypto-assets. The regulation covers the authorisation and supervision of both issuers of crypto-assets and their service providers. It also covers and defines the corresponding obligations concerning certain tokens (ie, value-referenced tokens – stablecoins, e-money tokens and, as a catch-all, crypto-assets). The main feature of the new legislation is a comprehensive consumer protection regime for the issuance and trading of crypto-assets, such as, in the case of cross-border EU distribution of crypto-assets, notification requirements or the mandatory publication of a prospectus-resembling crypto information sheet (white paper). At the same time, issuers and service providers of crypto-assets are to benefit from an EU passporting regime. While some regulations of the MiCAR have been applicable since June 2023, other provisions will not apply until June or December 2024.

At present, Germany provides a legal framework for crypto commerce under national law as different types of crypto token are classified as financial instruments. However, the legal texts differ in their definition of crypto-assets; changes are thus to be expected for the German market.

## AIFMD II

In November 2021, the EU Commission published a proposal for a directive amending the AIFMD and the UCITS Directive (AIFMD II). Two years later, the final compromise text (Final Text) of the political agreement between representatives of the Council and the EU Parliament was published as the result of trilogue negotiations. As of March 2024, the text has finally been formally approved by both EU institutions and subsequently published in the EU's Official Journal.

The amendments contained in AIFMD II will supplement the existing AIFMD selectively. The key developments under AIFMD II are, among other things:

- a new regulatory regime for loan origination activities;
- additional substance requirements for managers (ie, two senior AIF managers resident in the EU committed full-time);
- introduction of Liquidity Management Tools for open-ended AIFs;
- implementation of the ability of an AIFM to appoint a depositary outside of the home member state of an AIF;
- inclusion of delegation and sub-delegation reporting requirements;
- the extension of ancillary services, enabling AIFMs to now administer benchmarks and credit servicing; and
- additional reporting requirements of AIFs on all fees, charges and expenses.

The adopted amendments will come into force in March, respectively April, 2026.

## Substance requirements

The EU Parliament and the Council saw a need for additions to the substance requirements for alternative investment fund managers (AIFMs). From now on, the competent supervisory authorities must be provided with more detailed information on the AIFMs' human and technical resources during the licensing procedure. It is required that:

- at least two natural persons decide on the management of the AIFM's business who are on a full-time basis either employed by the AIFM or executive members or members of the governing body of the AIFM; and
- they are domiciled, in the sense of having their habitual residence, in the EU. Regardless of this statutory minimum, more resources may be necessary depending on the size and complexity of the AIF.

## Implementation of Liquidity Management Tools

The implementation of the Liquidity Management Tools (LMTs) simplifies liquidity management for open-ended funds. The LMTs contain mandatory rules as to how AIFMs of open-ended funds must ensure sufficient liquidity. It is now necessary to select at least two appropriate tools within the meaning of Annex V of the Amending Directive. The selection should be in line with the investment strategy, liquidity profile and redemption policy.

#### Reporting

The aim is to harmonise different reporting regimes through 'Level 2' measures, which the Commission will adopt at the proposal and elaboration of the European Securities and Markets Authority (ESMA). To better protect investors, the final version of the Amending Directive includes obligations to regularly disclose fees, charges and expenses that are borne by the AIFM and that are subsequently directly or indirectly allocated to the AIF or to any of its investments. AIFMs are also required to disclose all fees and expenses that were borne directly or indirectly by investors on an annual basis.

#### Delegation

A key development in the Final Text is the inclusion of delegation and sub-delegation reporting requirements for alternative AIFMs. In future, the competent national authorities need to be informed by the AIFM about delegation and sub-delegation arrangements as part of licence applications and regulatory reporting requirements. The information to be reported includes the total amount and the percentage of delegated assets under management (AuM), the organisational structure of the delegation and sub-delegation, and details of the delegates and their functions.

#### Loan-originating funds

Some changes provided by the Amending Directive will apply to all AIFs that grant loans, regardless of whether a specific threshold is reached. These include organisational requirements regarding the risk management of the AIFM, the ban on granting loans to governing bodies, a credit limit in relation to certain borrowers and the risk retention of the AIF.

Other, stricter rules will only apply to loan-originating funds (LOF), which are being comprehensively regulated and harmonised for the first time in AIFMD II. A LOF has been defined as an AIF whose investment strategy is primarily aimed at granting loans or where the loans granted by the AIF account for at least 50 per cent of the net asset value of the AIF. LOF should generally be structured as closed-ended funds to avoid maturity mismatches and reduce credit default risks. AIFMs that wish to manage a lending AIF in an open-ended structure must be able to prove to the competent national supervisory authority that the AIF has liquidity management tools that are in line with its investment strategy and ensure fair treatment of investors. In the future, LOFs are subject to a leverage limit of 175 per cent for open-ended funds and 300 per cent for closed-ended funds. This is intended to safeguard the stability and integrity of the financial system. The only exceptions apply to AIFs that exclusively grant shareholder loans.



Given the already rather strict German rules for LOFs, we expect that amendments will only have a limited practical effect on domestic AIFs.

#### Ancillary services

The list of ancillary services that can be provided by AIFMs has been extended by the final version. It now also includes administration of benchmarks, credit servicing and any other function or activity that is already provided by an AIFM in relation to an AIF that it manages, provided that any potential conflicts of interest are appropriately regulated. Contrary to the existing rules, ancillary services such as investment advice may even be provided in future if the AIFM does not engage in discretionary portfolio management.

#### German Secondary Credit Market Act

In December 2023, the German Secondary Credit Market Act – which is the German implementation law in relation to Directive 2021/2167/EC – was published in the German federal gazette. The law is primarily targeting the regulation of certain activities in connection with non-performing loans (NPLs) of banks and other credit institutions. As the law also intends to enable NPLs to be sold to a loan buyer with the necessary risk propensity while establishing an efficient and transparent secondary market for those non-performing loans, it will impact the distribution channels for credit funds.

**Law stated - 20 Mai 2024**