

International **Comparative** Legal Guides



Alternative Investment Funds **2021**

A practical cross-border insight into alternative investment funds work

Ninth Edition

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1 Regulatory Framework

1.1 What legislation governs the establishment and operation of Alternative Investment Funds?

The Austrian Alternative Investment Fund Managers Act (“**AIFMG**”) is the main legislation that governs the licensing of Alternative Investment Fund Managers (“**AIFMs**”) and the establishment and operation of Alternative Investment Funds (“**AIFs**”). The AIFMG has implemented Directive 2011/61/EU (“**AIFMD**”).

For AIFMs with a so-called MiFID II top-up licence to provide certain investment services – the individual management of single portfolios, giving investment advice or accepting and transmitting orders relating to financial instruments – certain due diligence provisions of the Austrian Securities Supervision Act 2018 (“**WAG 2018**”), as well as the provisions listed in Art. 1 para. 1 of the Commission Delegated Regulation (EU) No. 2017/565, apply (including keeping records, product governance obligations, prevention of conflicts of interests, obligations to act in the client’s best interest, and reporting obligations). In addition, anti-money laundering provisions in line with the EU Anti Money Laundering Directives apply.

The Austrian Financial Market Authority (“**FMA**”) issued an FAQ regarding the AIFMG (last update as of 23 November 2020; available in German only).

A special form of open-ended real estate fund that can also be distributed to retail investors (subject to additional requirements) is governed by the Real Estate Investment Funds Act (“**ImmoInvFG**”).

Further, Undertakings for the Collective Investment in Transferable Securities (UCITS) managers with an additional licence also may set up an AIF subject to the provisions of the Investment Funds Act (“**InvFG 2011**”).

Of course, in Austria, European venture capital funds may also be established pursuant to the EuVECA Regulation (EU) No. 345/2013.

This chapter focuses on AIFs pursuant to the AIFMG.

1.2 Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

Managing an AIF generally requires a licence from the FMA.

An exemption applies for sub-threshold AIFMs (assets under management of less than EUR 500 million without and EUR 100 million with leverage): they can simply register their services instead of obtaining a licence from the FMA. In general, such registered (sub-threshold) AIFMs are exempted from the AIFMG to a large extent. They cannot obtain an EU passport under the AIFMD.

Investment advisers may, depending on their activities (e.g. investment advice relating to financial instruments), require a licence pursuant to the WAG 2018.

1.3 Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

Each AIF that is marketed by an AIFM must be notified to the FMA. These AIFs are then listed in the funds database of the FMA: <https://webhost.fma.gv.at/FondsSearch>.

Registered AIFMs must notify the FMA promptly of each AIF issued and each commencement of the winding-up of an AIF (Sec. 1, para. 5, no. 5 AIFMG).

Licensed AIFMs must submit an application for approval to the FMA for every AIF they propose to market. The application for approval must include specific documentation and information (e.g. statutes of the AIF, name of the depositary, information pursuant to Sec. 21 AIFMG) as stipulated by Annex 3 of the AIFMG. Within 20 working days of receipt of the complete application, the FMA must decide on the permissibility of the marketing of the AIF. In case of a positive decision, the AIFM can start marketing the AIF from the date of the relevant approval. If any material change in the information provided pursuant to the application process occurs, the FMA must be informed at least one month before the change is implemented in case it is a planned change. In case of an unplanned change, notification must take place immediately after the change has occurred.

1.4 Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity vs. hedge)) and, if so, how?

There is no difference under the AIFMG as to whether the AIFM

manages open-ended or closed-ended AIFs pursuant to the definition given in Commission Delegated Regulation (EU) No. 694/2014.

However, the AIFMG includes some provisions that specifically refer to closed-ended types of AIF (e.g. liquidity management or valuation).

Closed-ended AIFs do not qualify as financial instruments (Sec. 1, para. 7, letter c WAG 2018) but instead qualify as investments (*Veranlagungen*) pursuant to the Austrian Capital Market Act 2019 (“**KMG 2019**”). Consequently, closed-ended AIFs can be distributed by financial advisers with a licence under the Austrian Trade Act (GewO). Open-ended AIFs can only be distributed by credit institutions and investment firms.

It should be noted that the strategy of the AIF is relevant for this question regarding whether the fund may be distributed to retail investors (see question 3.6 below).

1.5 What does the authorisation process involve and how long does the process typically take?

The authorisation process (licensing) of an AIFM with the FMA is rather complex, though the registration of a sub-threshold AIFM is relatively easy.

Basically, the licensing requirements and process follows the requirements of the AIFMD. For AIFMs that already hold a licence to manage AIFs pursuant to the InvFG 2011 or the ImmoInvFG, specific provisions apply.

The FMA must grant the authorisation to the applicant within three months of receipt of the complete application. In practice, AIFMs should expect the licensing procedure to exceed the three-month period.

The applicant must, *inter alia*, provide evidence showing its ability to comply with the conditions of the AIFMG and that it has sufficient initial capital. An internal AIFM must have an initial capital of EUR 300,000 and an external AIFM must have an initial capital of EUR 125,000. The persons managing the business of the AIFM must be sufficiently reliable and have sufficient experience in investment strategies of the AIFs managed by the AIFM (“fit & proper test”). The application must include specific information such as a business plan, the remuneration policy, delegation (sub-delegation), investment policy, information on the depositary, and specific information pursuant to Sec. 21 AIFMG (Art. 23 AIFMD).

Please refer to question 1.3 above regarding the notification of AIFs.

1.6 Are there local residence or other local qualification or substance requirements?

The AIFM must have its registered office and the main management in Austria. Thus, although there are no specific local residence requirements, there are substance requirements in Austria.

1.7 What service providers are required?

There must be a depositary for each AIF managed by an authorised AIFM.

An auditor certified pursuant to Directive 2006/43/EG must audit the annual report.

Further, it is necessary to appoint an external appraiser in case the AIFM cannot conduct the valuation on its own.

1.8 What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?

According to Sec. 33 AIFMG (Art. 33 AIFMD), EU AIFMs approved in another Member State can manage EU AIFs either directly or indirectly through a branch in Austria, provided that the EU AIFM is entitled to manage this type of EU AIF. EU AIFMs must follow the procedure laid out by Sec. 33 AIFMG (Art. 33 AIFMD). The information can be submitted in German or English. The competent authority of the EU AIFM’s home Member State must submit to the FMA a range of documents/information (e.g. business plan and additional information in case of a branch). If the AIFM intends to offer collective portfolio management of an AIF approved in Austria, the EU AIFM must send an application to the FMA (Sec. 29 AIFMG/Art. 31 AIFMD). If the EU AIFM is already managing AIFs of the same type in Austria, it is sufficient to refer to the documents already submitted.

Delegation of fund management to a foreign manager is possible (see Sec. 18 AIFMG). The AIFM must promptly notify the FMA in writing of the delegation. In case of a delegation to an entity from a third country (e.g. the USA or the UK), cooperation must be ensured between the FMA and the supervisory authority responsible for the third country (see question 1.9 below). In case of a delegation of the management or risk management, the AIFM must inform the FMA.

Investment advisers may require a licence under the WAG 2018 or an EU passport.

1.9 What relevant co-operation or information sharing agreements have been entered into with other governments or regulators?

The FMA has entered into several Memoranda of Understanding (“**MoU**”) with regulators of other countries. The list can be found at <https://www.fma.gv.at/en/international-affairs/the-financial-market-authoritys-cooperation-with-the-european-supervisory-authorities-and-sister-supervisory-authorities/>.

So far, no information has been published on when an MoU with the UK will be established.

2 Fund Structures

2.1 What are the principal legal structures used for Alternative Investment Funds?

According to the AIFMG, it is irrelevant whether the AIF is set up as a company, based on a contract, a trust or in any other legal form (Sec. 1, para. 2, no. 2 AIFMG).

AIFs under the AIFMG are often established as a *GmbH & Co KG*. A GmbH & Co KG is comparable to a limited partnership whereby the general partner is a limited liability company. The investors in the AIF are limited partners. Sometimes, a trustee acts as limited partner and holds the participation of investors in escrow.

Further, AIFs under the ImmoInvFG and InvFG 2011 are structured as separate assets that are owned by the investors but do not have legal personality.

2.2 Please describe the limited liability of investors in respect of different legal structures and fund types (e.g. PE funds and LPACs).

The liability of investors depends on the legal structure of the AIF. As outlined above, AIFs are often structured as limited partnerships where the investors are involved as limited partners. Limited partners are only liable up to a certain amount registered in the company register and the liability is reduced to the extent such amount has been paid in. However, the limited partner's liability is revived if distributions are not covered by profits.

If the AIF is structured as a corporation (limited liability company or stock corporation), basically the liability is limited to the paid-in capital (in this case, a claw-back of distributions that have not been covered by profits may also occur).

In case of AIFs structured as agreements under the law of obligations (e.g. structures notes), the liability is limited to the investment of the investors.

The liability of investors in funds under the ImmoInvFG and InvFG 2011 is limited to their investment.

2.3 What are the principal legal structures used for managers and advisers of Alternative Investment Funds?

Most Austrian AIFMs are established as limited liability companies pursuant to the Austrian Limited Liability Company Act (GmbHG). Some Austrian AIFMs are established as stock corporations pursuant to the Austrian Stock Corporation Act (AktG).

The same applies to financial advisors.

2.4 Are there any limits on the manager's ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds?

The definition of open-ended or closed-ended AIFs follows Commission Delegated Regulation (EU) No. 694/2014. An open-ended AIF repurchases or redeems its shares or units with its investors, at the request of any of its shareholders/unitholders, prior to the commencement of its liquidation phase or wind-down. Procedures and frequency are set out in the rules or instruments of incorporation, prospectus or offering documents (see recital 3 of Commission Delegated Regulation (EU) No. 694/2014).

Thus, the possibility to restrict redemption or transfers in open-ended AIFs is very limited and must be in accordance with the provisions of Commission Delegated Regulation (EU) No. 694/2014.

Transfers in closed-ended funds can be restricted.

In case of marketing to retail investors (Sec. 48, para. 10 AIFMG), any temporary suspension of redemption of the share or unit certificates must be reported to the FMA without delay. Such suspension requires extraordinary circumstances. Further, a public announcement must be made to notify the investors when redemption of the shares or unit certificates is both suspended and resumed.

2.5 Are there any legislative restrictions on transfers of investors' interests in Alternative Investment Funds?

Generally, there are no statutory transfer restrictions. However, for funds that may not be distributed to retail investors (see question 3.6), it needs to be ensured that no transfers to such investors are permitted.

The fund rules of special funds according to Sec. 163 InvFG 2011 must stipulate that the transfer of unit certificates of the unitholders require the approval of the management company.

2.6 Are there any other limitations on a manager's ability to manage its funds (e.g. diversification requirements, asset stripping rules)?

The AIFM must manage its funds in accordance with its investment policy.

For AIFs according to the InvFG 2011 and the ImmoInvFG, statutory investment restrictions apply.

If the type of AIF is eligible for marketing to retail investors (see question 3.6 below), the AIFMG stipulates specific investment restrictions based on the specific type of AIF (e.g. an AIF in real estate, *inter alia*, must invest in at least 10 different properties).

The AIFMG stipulates the prohibition of asset stripping. This provision does not apply for registered (sub-threshold) AIFMs. This set of rules is only relevant in case of targets that are not listed on a stock exchange.

3 Marketing

3.1 What legislation governs the production and use of marketing materials?

The AIFMG provides for specific rules for marketing materials only in case of marketing to retail clients (see question 3.6 below). Besides specific warnings, there must be a reference to the prospectus and to the client information document (“KID”). It must be specified in which manner and in which language the prospectus and the KID (which must be in German) may be obtained and made accessible to investors/potential investors.

Advertising must be (i) clearly identifiable as such, (ii) fair, (iii) clear, and (iv) not misleading.

There must not be statements that contradict or diminish the significance of the information contained in the prospectus and the KID. Where there is reference to the historical performance, an indication should be contained that makes clear that the performance record of a fund does not provide any reliable indication as to its future performance.

Cold calling and spam e-mails (or SMS) are prohibited.

Marketing materials for foreign AIFs that are distributed in Austria must include certain disclaimers (e.g. that the AIFM is not supervised by the FMA).

As of 2 August 2021, the “Requirements for marketing communications” according to Art. 4 of Regulation (EU) No. 2019/1156 will be binding and directly applicable in all EU Member States. Consequently, some changes to the AIFMG will follow as well (see section 7 below).

3.2 What are the key content requirements for marketing materials, whether due to legal requirements or customary practice?

Advertising material must be clearly identifiable as such, fair, clear and not misleading. Further, see question 3.1 above.

3.3 Do the marketing or legal documents need to be registered with or approved by the local regulator?

No, there is no requirement for the FMA to approve marketing material.

However, Art. 7 of Regulation (EU) No. 2019/1156 (see question 3.1 above) stipulates “ex-ante verification of marketing communication”. According to Art. 7, para. 3, these provisions also apply to AIFMs that market units or shares of their AIFs to retail investors.

3.4 What restrictions are there on marketing Alternative Investment Funds?

In principle, AIFs can only be marketed to professional investors according to Annex II of the revised version of the Markets in Financial Instruments Directive (“**MiFID II**”). Only certain types of AIFs are eligible for a specific notification procedure for marketing to retail investors. Please refer to question 3.6 below.

As outlined, AIFs can only be marketed subject to registration with the FMA. There is no private placement regime available for AIFs.

3.5 Is the concept of “pre-marketing” (or equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?

The FMA has not issued any guidelines regarding the “pre-marketing” concept. Since the term “marketing” pursuant to the AIFMG is very broad, “pre-marketing” activity is a grey area. Any “pre-marketing” activities should be considered on a case-by-case basis.

The AIFMG will be revised due to the implementation of Regulation (EU) No. 2019/1156 (see section 7 below).

3.6 Can Alternative Investment Funds be marketed to retail investors?

Basically, AIFs can only be marketed to professional investors. Only certain types of AIFs under the AIFMG may be marketed to retail investors (private clients as defined by the WAG 20218/MiFID II) subject to a specific registration procedure with the FMA:

- AIFs that invest in real estate;
- managed futures funds;
- private equity funds; and
- private equity funds of funds.

The AIFMG stipulates specific conditions that each of the above AIFs must meet to be eligible for marketing to retail investors (including specific investment restrictions). Certain types of AIFs (e.g. AIFs in private equity) require a minimum investment of EUR 10,000.

In any case, a UCITS-KID is necessary. It should be noted that, as of 1 January 2022, a PRIIPs-KID will be needed since the grandfathering provision of Art. 32, para. 2 Regulation (EU) No. 1286/2014 PRIIPs-Regulation is only valid until 31 December 2021.

For closed-ended AIFs that are marketed to retail investors, in addition to the registration of the AIF with the FMA, a prospectus pursuant to the KMG 2019 must be published (unless an exemption applies, e.g. a minimum investment of EUR 100,000).

Importantly, EU-AIFs (domiciled outside of Austria) may also be marketed to retail investors in Austria in accordance with Sec. 49 AIFMG (Art. 43 AIFMD). The AIF must be admitted for marketing to retail investors in its home Member State and must be admitted for marketing to professional investors in Austria pursuant to Secs 31 or 47 AIFMG (Arts 32 and 42 AIFMD). Further, the EU-AIF must be materially equivalent to the types of AIF that are admitted for marketing to retail

investors in Austria (as outlined above). In addition to passporting of the EU-AIF, a specific registration procedure with the FMA is required, too.

Further, AIFMs can market the units of an AIF to so-called qualified retail investors in Austria. A qualified retail investor pursuant to the AIFMG must meet several conditions. *Inter alia*, the qualified retail investor must have unencumbered bank balances and financial instruments valued at more than EUR 250,000. In addition, the investor must invest at least EUR 10,000 in the AIF (unless there is no minimum investment requirement for the relevant type of AIF for retail investors).

An AIFM can market an AIF to qualified retail investors if (i) no leverage is used, or (ii) leverage that does not exceed the net asset value of the AIF by more than 30% is used.

Further, real estate funds pursuant to the ImmoInvFG, and AIFs pursuant to the InvFG 2011, may be distributed to retail clients.

3.7 What qualification requirements must be met in relation to prospective investors?

Investors must fall within the definition of a professional investor pursuant to MiFID II (for marketing to retail investors see question 3.6 above). Most institutional investors will qualify *per se* as professional investors (e.g. credit institution investment firms, insurance companies). On request, clients may be treated as professionals if they fulfil certain criteria (Annex II, part II, MiFID II).

3.8 Are there additional restrictions on marketing to public bodies such as government pension funds?

There are no additional restrictions if they qualify as professional investors (which is not always the case). However, public bodies usually must comply with a strict set of investment rules. Therefore, there is only limited possibility to invest in AIFs. Please also refer to question 3.9.

3.9 Are there any restrictions on the participation in Alternative Investments Funds by particular types of investors (whether as sponsors or investors)?

Certain regulated investors (e.g. pension funds, investment funds, credit institutions or insurance undertakings) must comply with specific statutory investment provisions that may limit or exclude the possibility to invest in AIFs. This needs to be assessed on a case-by-case basis.

3.10 Are there any restrictions on the use of intermediaries to assist in the fundraising process?

There are no specific restrictions pursuant to the AIFMG regarding intermediaries. Based on the actual activity of the intermediary, a licence might be required.

4 Investments

4.1 Are there any restrictions on the types of investment activities that can be performed by Alternative Investment Funds?

Basically, there are no restrictions on the types of investment activities that can be performed by AIFs if they are only marketed to professional investors.

4.2 Are there any limitations on the types of investments that can be included in an Alternative Investment Fund's portfolio, whether for diversification reasons or otherwise?

AIFs that are eligible for marketing to retail investors must comply with certain diversification requirements depending on the AIF type (see question 3.6 above).

4.3 Are there any local regulatory requirements which apply to investing in particular investments (e.g. derivatives or loans)?

Specific local regulatory requirements apply in case of AIFs that will be marketed to retail investors (see question 3.6 above). For example, certain AIFs may only hold derivatives for hedging purposes.

We note that lending activities constitute a regulated banking activity pursuant to the Austrian Banking Act (BWG). However, based on an exemption, AIFMs can conduct lending activities as long as they do not exceed the extent of their authorisation in accordance with the AIFMD.

4.4 Are there any restrictions on borrowing by the Alternative Investment Fund?

There are specific information requirements for AIFMs that manage leveraged AIFs (see Sec. 23 AIFMG/Art. 25 AIFMD).

For AIFs that can be marketed to retail investors, specific requirements also apply regarding leverage. For example, AIFs in real estate must only use leverage for the AIF with exposure not exceeding twice the AIF's net asset value, calculated according to the commitment method; AIFs in private equity must not use leverage at all.

4.5 Are there any restrictions on who holds the Alternative Investment Fund's assets?

Yes, a (licensed) AIFM must appoint a depositary for each AIF (Sec. 19 AIFMG/Art. 21 AIFMD). The depositary must either be a credit institution according to the CRR (Regulation (EU) No. 575/2013), an investment firm having its registered office within the EU that is subject to the capital adequacy requirements pursuant to Art. 92 CRR, or another category of institution that is subject to supervision and constant monitoring (further requirements apply).

In most cases, credit institutions are appointed as depositaries.

5 Disclosure of Information

5.1 What disclosure must the Alternative Investment Fund or its manager make to prospective investors, investors, regulators or other parties, including on environmental, social and/or governance factors?

Regulation (EU) No. 2019/2088 ("**Disclosure Regulation**") applies directly in all EU Member States and thus also in Austria.

According to Art. 6, para. 3 Disclosure Regulation, an AIFM must disclose the required information on sustainability risks to investors in the Art. 23 AIFMD document (Sec. 21 AIFMG). The Joint Committee of the three European Supervisory Authorities (EBA, EIOPA and ESMA) on 4 February 2021 published the draft Regulatory Technical Standards ("**RTS**"). The RTS will only apply as of 1 January 2022.

5.2 Are there any requirements to provide details of participants (whether owners, controllers or investors) in Alternative Investment Funds or managers established in your jurisdiction (including details of investors) to any local regulator or record-keeping agency, for example for the purposes of a public (or non-public) register of beneficial owners?

The requirement to register beneficial owners depends on the legal structure of the AIF. Based on the 4th and 5th Anti-Money-Laundering Directives of the EU, Austria has adopted the Austrian Beneficial Owners Register Act ("**WiEReG**"). Entities which have their legal registered office in Austria must register their beneficial owners. Therefore, if the AIFM and/or the AIF is established as such an entity (e.g. a limited liability company or stock corporation), registration of the beneficial owners is required. If no individual qualifies as a beneficial owner pursuant to the WiEReG, a so-called "subsidiary notification" becomes applicable. In this case, the managing directors of the legal entity must be registered as beneficial owners. This will be the usual procedure for AIFs.

If the AIF is only established based on contractual arrangements, there is no requirement to register the investors as beneficial owners since contractually established AIFs are not subject to the WiEReG.

AIFMs must comply with the Financial Markets Anti-Money Laundering Act (FM-GwG). Consequently, they must conduct a KYC check regarding investors.

5.3 What are the reporting requirements to investors or regulators in relation to Alternative Investment Funds or their managers, including on environmental, social and/or governance factors?

Thus far there are no Austrian specific requirements regarding sustainability risks (see question 5.1 above).

The AIFMG stipulates different disclosure requirements. The details also depend on the type of AIF and whether the AIF is permitted for marketing to retail investors.

In any case, an annual report pursuant to Sec. 20 AIFMG (Art. 22 AIFMD) must be provided. The AIFM must comply with the information requirements pursuant to Sec. 21 AIFMG (Art. 23 AIFMD). In addition, Sec. 22 AIFMG (Art. 24 AIFMD) stipulates reporting obligations to the FMA.

In case of an EU-AIF that is passported for marketing into Austria, similar information requirements exist.

5.4 Is the use of side letters restricted?

Austrian law does not generally restrict the use of side letters. However, any such letter must not interfere with the obligations of the AIFM under the AIFMG.

To avoid liability issues, it is generally advisable to disclose the material contents of side letters to other investors prior to their investment, if they could interfere with their interests.

6 Taxation

6.1 What is the tax treatment of the principal forms of Alternative Investment Funds identified in question 2.1?

As outlined in question 2.1 above, there are different principal forms of AIF in Austria. For tax purposes, they are treated as neutral in terms of their legal form. This means that regardless

of the legal form of an AIF either as a partnership or a corporation, taxation must be carried out in accordance with the special provisions of the InvFG 2011. As the AIF is not regarded as a taxable entity, the taxation follows the fiscal transparency principle. This means that the income of the investment fund is allocated directly to the unitholder. Income at the level of the AIF generally retains its character as interest income, dividend income or capital gains for taxation purposes at the level of the unitholder. For taxation purposes, a distinction is made between income actually distributed and deemed distributions (*ausschüttungsgleiche Erträge*). As a result, all fund income is generally taxable, either because it is actually distributed (distributions) or because it is only deemed to have been actually distributed (deemed distributions). The taxation of income of an AIF furthermore depends on whether the tax data of the AIF is reported by a tax representative with the *Oesterreichische Kontrollbank* (“**OeKB**”).

In the case of reinvesting funds (*thesaurierender Fonds*), income is retained and not distributed to the unitholders. For tax purposes, however, this income is treated as if it was distributed to the unitholders once a year after the end of the fund's fiscal year as mentioned above. This income is therefore also referred to as “distribution-equivalent income”. As with distributing funds, this income is taxed at 27.5%. However, only 60% of the capital gains income within the fund are taxed at a rate of 27.5%. This reduces the effective tax burden to 16.5% ($60\% \times 27.5\%$), which has a tax-saving effect in the long term and thus increases returns on investment.

6.2 What is the tax treatment of the principal forms of investment manager/adviser identified in question 2.3?

The tax treatment of the principal forms of the investment manager/adviser does not differ from the general taxation of the legal structure they use. Austrian limited liability companies (GmbHs) or stock corporations (AGs) are both covered by the Austrian Corporate Income Tax Act (KStG) and are deemed to be a taxable entity. The profits are taxed at a rate of 25%.

6.3 Are there any establishment or transfer taxes levied in connection with an investor's participation in an Alternative Investment Fund or the transfer of the investor's interest?

There are no establishment or transfer taxes levied in connection with an investor's participation in an AIF or the transfer of the investor's interest. Gifts *inter vivos* of participations in an AIF under certain circumstances have to be reported to the tax office if the acquirer or donor is a resident of Austria. Transactions in participations as well as the management of an AIF are VAT exempt.

6.4 What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in Alternative Investment Funds?

The taxation of the income of an AIF follows the principle of transparency; therefore income is directly taxed at the level of the investor. As a consequence, non-resident investors of an Austrian AIF are generally not taxable in Austria (unless the fund invests in Austrian assets).

With respect to Austrian resident investors, the income of the AIF is basically treated as if the investors held the assets of the fund directly. Hence, the fund's income needs to be broken down into individual income components, i.e. (i) interest income, (ii) dividend income, and (iii) capital gains.

All data relevant to calculate the taxation of actual and deemed distributions have to be reported by a tax representative of the fund to the OeKB. The report has to take into account the different tax treatment of each class of investors (privately held assets, business assets, corporate assets).

Generally speaking, the following tax treatment applies to funds complying with the reporting obligation:

- If fund participations are held as private assets, the dividend and interest income of the fund is taxed at 27.5%. 60% of the capital gains derived within the fund are taxable at a rate of 27.5%. The remaining 40% of the capital gains are only taxable upon distribution to the investor.
- If an investor holds the fund participation as business assets, again interest and dividends are taxed at 27.5%. 100% of the capital gains are taxed at 27.5%.
- If the fund participation is held by a corporation, all of the fund's income is taxed at the 25% corporate income tax rate regardless of the asset class.
- Austrian pension fund investors benefit from a corporate income tax exemption.

If an AIF does not report its income to the OeKB (due to it having no Austrian tax representative), the taxation is based on a very disadvantageous lump-sum calculation.

The basis for this lump-sum taxation is the higher of the following values in each case:

- 90% of the difference between the unit value (*Rücknahmepreis*) at the beginning and the end of the calendar year; or
- 10% of the last unit value (*Rücknahmepreis*) in the calendar year.

The Austrian custodian bank is required to apply a 27.5% withholding tax on the flat-rate distribution-equivalent income of these non-reporting funds on 31 December of each year.

6.5 Is it necessary or advisable to obtain a tax ruling from the tax or regulatory authorities prior to establishing an Alternative Investment Fund?

Generally speaking, it is not necessary to obtain tax rulings prior to establishing an AIF.

6.6 What steps have been or are being taken to implement the US Foreign Account and Tax Compliance Act 2010 (FATCA) and other similar information reporting regimes such as the OECD's Common Reporting Standard?

The agreement between Austria and the USA on Cooperation for Facilitated Implementation of FATCA was signed in 2014. The present agreement, which corresponds to the U.S. “Model 2”, provides for the authorisation and obligation of Austrian credit institutions and other financial institutions to forward summarised information (aggregate data) on the accounts of U.S. recalcitrant account holders (i.e. customers who do not consent to the disclosure of their accounts to the U.S. tax administration) to the U.S. tax authority (“**IRS**”) instead of an automatic exchange of information by the tax authorities, which would have corresponded to “Model 1”. This aggregated information forms the basis for a subsequent group request to the FATCA partner state (Austria), on the basis of which the competent Austrian authority would forward the required detailed information to the IRS. Such group requests have been expressly declared permissible since the latest commentary extension to Art. 26 of the OECD Model Tax Convention, which was adopted by the OECD Council in July 2012. Under the agreement with Austria, a period of eight months is provided for the response to this group request.

On 1 October 2016, Austria joined the Common Reporting Standard (CRS), the global mechanism of the OECD for the automatic exchange of information (AEOI) in tax matters. From this point onwards, personal data of foreign customers from participating jurisdictions have gradually been reported by the Austrian Federal Ministry of Finance (“**BMF**”) to the competent authorities in their respective jurisdictions. *Vice versa*, the BMF has been receiving such data of persons taxable in Austria who maintain financial accounts abroad.

6.7 What steps are being taken to implement the OECD’s Action Plan on Base Erosion and Profit-Shifting (BEPS), in particular Actions 2 (hybrids) (for example ATAD I and II), 6 (prevention of treaty abuse) (for example, the MLI), and 7 (permanent establishments), insofar as they affect Alternative Investment Funds’ operations?

The MLI was adopted in 2017 and became effective 1 July 2018. The implementation of DAC 6 led to the introduction of a reporting obligation for cross-border tax arrangements. DAC 6 had to be implemented into national law by the end of 2019 and applied to reportable arrangements as of 1 July 2020 (new cases). Since AIFs are treated as tax transparent, there is not much room for BEPs on the level of the AIF itself.

6.8 Are there any tax-advantaged asset classes or structures available? How widely are they deployed?

In the case of reinvesting funds (*thesaurierende Fonds*), income is retained and not distributed to the shareholders. For tax purposes, however, this income is treated as if it was distributed to the shareholders once a year after the end of the fund’s fiscal year. This income is therefore also referred to as “distribution-equivalent income”. As with distributing funds, this income is taxed at 27.5%. However, only 60% of capital gains, i.e. gains from the sale of securities, are taxed within the fund with capital income tax of 27.5%. This reduces the effective tax burden to 16.5% ($60\% \times 27.5\%$), which has a tax-saving effect in the long term and thus promotes a return on investment. However, finally this untaxed portion (40% of capital gains within the fund) increases the capital gain on the level of the unitholder and will then be taxed at a rate of 27.5%.

6.9 Are there any other material tax issues for investors, managers, advisers or AIFs?

The tax position of an investor in an Austrian AIF is mainly dependent upon the personal tax profile. Investors should, therefore, always seek independent tax advice on the tax implications.

6.10 Are there any meaningful tax changes anticipated in the coming 12 months other than as set out at question 6.6 above?

At this point, we do not expect any material changes in the taxation of AIFs in the coming 12 months.

7 Trends and Reforms

7.1 What have been the main trends in the Alternative Investment Funds space in the last 12 months?

Due to Brexit, there is an increased interest in the possibility of reverse solicitation. The FMA has not issued any specific guidance in this regard. However, we would expect the FMA to apply a strict approach based on the public statement of ESMA: “Reminder to firms of the MiFID II rules on ‘reverse solicitation’ in the context of the recent end of the UK transition period” (dated 13 January 2021). There is a possibility that the FMA will focus on reverse solicitation in relation to the UK.

The FMA has issued guidance for Sec. 47 AIFMG (Art. 42 AIFMD). This document (dated 3 November 2020) contains information for non-EU AIFMs regarding the marketing of AIFs in Austria.

Further, loan origination funds have been a topic of practical interest.

7.2 What reforms (if any) in the Alternative Investment Funds space are proposed?

The harmonised concept of pre-marketing (Directive EU No. 2019/1160; Regulation EU No. 2019/1156) will come into effect as of 2 August 2021. A draft ministerial proposal (67/ME) has been published that, *inter alia*, amends Austrian law in line with these provisions.

It is expected that the rules on pre-marketing will favour cross-border distribution. Although the new rules mean more legal certainty, the new framework will be stricter (e.g. no pre-marketing by non-EU AIFMs; no pre-marketing towards retail investors).

It also remains to be seen how the Disclosure Regulation and the RTS will impact the AIF landscape.

No further reforms have been proposed.



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