
THE ASSET MANAGEMENT REVIEW

THIRD EDITION

EDITOR
PAUL DICKSON

LAW BUSINESS RESEARCH

THE ASSET MANAGEMENT REVIEW

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THE ASSET MANAGEMENT REVIEW

Third Edition

Editor
PAUL DICKSON

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EDITOR'S PREFACE

Following several challenging years in the wake of the damage wrought by the global financial crisis, in 2013 markets showed signs that the tentative economic recovery is beginning to take hold. The asset management industry has seen some of the positive effects, with global funds under management at an all-time high. In the private equity sector, 2013 saw the highest aggregate amount of capital raised since 2008 and a record number of private equity buyout deals. With the global population becoming larger, older and richer, as well as government initiatives (such as the UK's automatic enrolment of employees into employer-sponsored pension schemes) potentially increasing funds under management even further, Bank of England Chief Economist Andrew Haldane's suggestion that we are entering an 'age of asset management' seems well justified.

The activities of the financial services industry remain squarely in the public and regulatory eye and the consequences of this focus are manifest in ongoing regulatory attention around the globe. Regulators are continuing to seek to address perceived systemic risks and preserve market stability through regulation, including, in Europe, the revised Markets in Financial Instruments package and the Alternative Investment Fund Managers Directive. Further scrutiny on a global level also appears likely. The Financial Stability Board and the International Organization of Securities Commissions recently consulted on proposed methodologies to identify global systemically important nonbank, non-insurer financial institutions (including investment funds). Industry stakeholders agree that regulatory change – in particular the volume, scope and complexity of new requirements – continues to be one of asset management's greatest challenges.

It is not only regulators who have placed additional demands on the financial services industry in the wake of the financial crisis; a perceived loss of trust has led investors to demand greater transparency around investments and risk management from those managing their funds. Investors and regulators are also demanding greater clarity on fees and commissions charged by fund managers for services provided.

This continues to be a period of change and uncertainty for the asset management industry, as funds and managers act to comply with new regulatory and investor requirements and adapt to the changing geopolitical landscape. There does appear,

however, to be some cause for optimism. Confidence has begun to return across a number of areas and more positive assessments of the global economic outlook, reflected in a strong performance in equity markets over the period, raise the prospect of increased investment and returns. Although the challenges of regulatory scrutiny and difficult market conditions remain, there have also been signs of a return of risk appetite. The industry is not in the clear, but prone as it is to innovation and ingenuity, it seems well placed to navigate this challenging and rapidly shifting environment.

This third edition of *The Asset Management Review* includes coverage of a number of additional jurisdictions, reflecting the global importance of the industry and this practice area. The publication of this edition is a significant achievement, which would not have been possible without the involvement of the many lawyers and law firms who have contributed their time, knowledge and experience to the book. I would also like to thank Gideon Robertson and his team at Law Business Research for all their efforts in bringing the third edition into being.

The world of asset management is increasingly complex, but it is hoped that the third edition of *The Asset Management Review* will continue to be a useful and practical companion as we face the challenges and opportunities of the coming year.

Paul Dickson
Slaughter and May
London
September 2014

Chapter 2

AUSTRIA

Martin Zuffer and Roman Hager¹

I OVERVIEW OF RECENT ACTIVITY

The Austrian investment fund market is further stabilising and recovering from the massive impact of the financial crisis in 2008. Currently, around €152 billion assets are under management² in Austria, which represents an increase of €1.3 billion on the volume managed in 2013.

The current fragile environment has obviously had an impact in many markets worldwide, including investment activities in Austria. The perception of capital markets for investment purposes tends still to be negative, and trust must be re-established to attract additional funds.

II GENERAL INTRODUCTION TO THE REGULATORY FRAMEWORK

The cornerstones of the legal framework for asset management in Austria are the Banking Act (BWG), the Investment Fund Act 2011 (the InvFG), the real estate Investment Fund Act (the ImmoInvFG) the Securities Supervision Act 2007 (WAG) and the Capital Markets Act (KMG) together with further regulations based on these statutes.

These statutes implemented European directives such as Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments (MiFID I), Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities

1 Martin Zuffer is a partner and Roman Hager is a senior lawyer at CMS Reich-Rohrwig Hainz.

2 Source: the Association of Austrian Investment Companies Vereinigung Österreichischer Investmentgesellschaften (VÖIG).

(UCITS), and Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading.

The Alternative Investment Fund Manager Act (the AIFMG), which came into effect on 22 July 2013, implemented Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers. The AIFMG established a new regime for asset managers of alternative investment funds (AIFs) which were already regulated pursuant to the InvFG (i.e., special funds pursuant to Section 163 InvFG, other funds pursuant to Section 166 InvFG and pension investment funds pursuant to Section 168 InvFG)³ and for managers of AIFs that have not been regulated, such as hedge funds and private equity funds.

In the second half of 2014, the Austrian Parliament implemented Directive 2013/14/EU of the European Parliament and of the Council of 21 May 2013 amending, *inter alia*, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of over-reliance on credit ratings by amending the InvFG, the ImmoInvFG and the AIFMG.

i InvFG

The InvFG regulates the establishment, management and marketing of undertakings for collective investments in transferable securities (UCITS), special funds, other funds and pension investment funds in Austria.

UCITS

The management and marketing of a UCITS pursuant to the InvFG requires a licence issued by the Financial Market Authority (FMA) according to Section 1 Paragraph 1 cf 13 BWG in connection with Section 5 Paragraph 1 InvFG.

The fund manager of a UCITS must be established in the form of a limited liability company (GmbH) or a joint-stock corporation (AG) with a minimum equity of €2.5 million. In the event the fund assets exceed €250 million, additional Tier I capital must be held by the fund management company. Further licence requirements are the establishment of a supervisory board and the sufficient capability and experience of the management of the fund management company.

The licence application must be filed with the FMA, which must decide within six months of receiving the complete submission of the application whether the licence will be granted or refused. In practice, the licensing process can take longer than six months, as it is up to the regulator to decide whether the application is complete; if it decides that the application is incomplete, this six-month period can be extended.

3 Note the InvFG uses the term alternative investment fund only with reference to special funds, other funds and pension investment funds. The AIFMG has a wider definition of AIFs, covering those under the InvFG but also other AIFs.

The InvFG provides requirements for the organisation of the asset manager and the operative management of the fund assets, in particular in relation to:

- a* the appointment of a state commissioner;⁴
- b* the depositary bank;
- c* the definition and documentation of internal decision-making processes, and the definition and allocation of responsibilities and competences;
- d* an internal control mechanism;
- e* effective reporting processes;
- f* documentation of transactions;
- g* compliance function;
- h* internal audit function;
- i* risk management;
- j* dealing with conflicts of interests;
- k* delegation of tasks of the investment fund manager company to third parties; and
- l* duty of care and best execution.

Furthermore, the public offering of units of a UCITS in Austria requires the approval of a prospectus and the key investor information by the FMA.

The InvFG sets further rules for UCITS established in Austria concerning the following:

- a* issuance, repurchase and redemption of fund units;
- b* financial reporting;
- c* dividend payments;
- d* liquidation of the UCITS;
- e* mergers; and
- f* investment policies and limits, including the calculation of total exposure and leverage.

Special funds, other funds and pension investment funds

Besides UCITS, the InvFG regulates special funds, other funds and pension investment funds.

Special funds pursuant to Section 163 InvFG are funds invested in securities with not more than 10 investors that have joint ownership of the fund. For an individual person who invests in a special fund, the minimum investment is €250,000.

Other funds pursuant to Section 166 InvFG are funds entitled to invest up to 100 per cent of the fund assets into one and the same other investment fund, which must comply with certain criteria.

A pension investment fund pursuant to Section 168 InvFG is a fund that expressly uses the title pension investment fund; it serves for pension plan purposes and

4 The Minister of Finance must appoint, for each investment fund manager regulated by the InvFG, a state commissioner and deputy for a maximum term of five years. The state commissioner and his or her deputy act on behalf and according to the instructions of the FMA.

is managed according to a long-term investment policy. Pension investment funds are subject to certain investment policies and limits concerning asset types.

A manager of a special fund, other fund or pension investment fund pursuant to the InvFG is subject to the licensing requirement established by the AIFMG.

ii ImmoInvFG

The ImmoInvFG regulates managers of real estate funds and real estate special funds. Investment managers in such funds require a licence pursuant to Section 1 Paragraph 1 cf 13a BWG in connection with Section 2 ImmoInvFG. Only licensed managers are entitled to manage real estate funds, and they are restricted from operating any other business not related to real estate. The manager must be established in the form of either a joint-stock corporation or a limited liability company. The licence application is filed with the FMA.

A real estate fund invests in property, property under construction, vacant sites and other property-related rights that are specific for Austrian law (such as Baurecht and Superädifikate).

A real estate special fund is a collective investment scheme with not more than 10 investors that are not individual persons. The transfer of the fund participation is subject to the approval of the real estate investment fund manager, who at all times needs to know all the investors. The fund's regulation can provide for different rules on the evaluation dates and information requirements.

A real estate investment fund manager must appoint a depositary bank, which must be approved by the FMA. The depositary bank issues and redeems the fund certificates, and holds in custody all securities and maintains the accounts of the fund.

iii WAG

The WAG implemented MiFID I. Hence, the WAG regulates investment services, including portfolio management on an individual client basis. To provide securities services, a licence according to Section 3 Paragraph 2 WAG is required. The investment firm must be established in the legal form of a capital company (i.e., a limited liability company, joint-stock corporation or *Societas Europaea*), or as a cooperative with a minimum equity of €125,000 if portfolio management services are to be provided. The investment firm is not allowed to hold assets or instruments of its clients; this prevents it becoming a debtor of its clients.

On 12 June 2014, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II) was adopted, amending MiFID I. The reason for the revision of MiFID I has been the financial crisis in 2007 revealing the need for improvement of the existing directive in several parts. The MiFID II has to be implemented by 2016 and will lead to amendments to the WAG.

iv AIFMG

The AIFMG came into force on 22 July 2013 and implemented Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (AIFMD). Due to Directive 2013/14/EU of the European Parliament

and of the Council of 21 May 2013, and to adapt to the practical needs of the Austrian investment fund market, some provisions of the AIFMG were recently amended.

The statute regulates alternative investment fund managers (AIFMs) and covers any legal person whose regular business is managing one or more AIFs.

An AIF is a collective investment undertaking, including investment compartments thereof, that:

- a* raises capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- b* does not require authorisation pursuant to Article 5 of Directive 2009/65/EC.⁵

The following are exempted from the applicability of the AIFMG:

- a* holding companies;
- b* institutions for occupational retirement provision, which are covered by Directive 2003/41/EC, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in Article 2(1) of that Directive or the investment managers appointed pursuant to Article 19(1) of that Directive, insofar as they do not manage AIFs;
- c* supranational institutions, such as the European Central Bank, the European Investment Bank, the European Investment Fund, the European development finance institutions and bilateral development banks, the World Bank, the International Monetary Fund and other supranational institutions and similar international organisations, in the event that such institutions or organisations manage AIFs and insofar as those AIFs act in the public interest;
- d* national central banks;
- e* national, regional and local governments, and bodies or other institutions that manage funds supporting social security and pension systems;
- f* employee participation schemes or employee savings schemes; and
- g* securitisation special purpose entities.⁶

Registration requirements

The Austrian legislator used the opportunity granted by the AIFMD to establish a licence requirement applicable only to large AIFMs, whereas small AIFMs require a registration only.

A small AIFM is:

- a* an AIFM that, either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manages portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of €100 million; or
- b* an AIFM that, either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct

5 Section 2 Paragraph 1 of 1 AIFMG.

6 Section 1 Paragraph 3 AIFMG.

or indirect holding, manages portfolios of AIFs whose assets under management in total do not exceed the threshold of €500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a five-year period following the date of initial investment in each AIF.

A small AIFM must:

- a* register with the FMA;
- b* provide information about the managed AIFs and the investment policy;
- c* report to the FMA annually or on request the important instruments that it trades, the highest risks and concentration to ensure effective supervision by the FMA;
- d* report to the FMA the establishment of every new AIF by the AIFM; and
- e* confirm that the units of the AIF are not marketed to retail investors.

The FMA has issued Guidelines for the Registration under the AIFMG, which give further guidance regarding the registration obligation, the filing process, requested information and duties of registered AIFMs.⁷

A registered AIFM has to continuously control the thresholds of the managed AIFs, and is obliged to apply for a licence with the FMA within 30 calendar days if the threshold is exceeded not only on a temporary basis (this is deemed to be the case if the excess lasts for more than three months).

Even in the event that the AIFM does not exceed the thresholds that trigger the licence requirement, an AIFM can opt in and submit an application for a licence under the AIFMG.⁸ The licence grants the right to the AIFM to establish and market the AIFs in the European Union (passporting) and, subject to the conditions of Section 48 and 49 of the AIFMG, to market AIF units to retail investors and qualified retail investors in Austria.

Licence requirements

AIFMs are required to provide, in the case of an internally managed AIF, an initial minimum equity of €300,000, and in the case of an external AIFM, an initial minimum equity of €125,000. Additional amounts of equity must be provided if the value of the portfolios of the AIFs managed by the AIFM exceeds €250 million, and further for fixed common costs and for potential liability risks arising from professional negligence. The latter could be substituted by professional indemnity insurance. Furthermore, the equity shall not contain any illiquid or speculative assets.

⁷ www.fma.gv.at/typo3conf/ext/dam_download/secure.php?u=0&file=11888&t=1406013760&hash=98dc9618281d60d46f6cc58fedb1e648 (in German).

⁸ Opting in is regulated by the Commission Implementing Regulation (EU) No. 447/2013 of 15 May 2013 establishing the procedure for AIFMs that choose to opt in under Directive 2011/61/EU of the European Parliament and of the Council.

Further licence requirements are the professional experience and reliability of the persons operating the business, as well as the appropriate personal reliability of the persons holding a qualified participation in the AIFM.

The AIFMG and the Delegated Regulation (EU) No. 231/2013⁹ provide several operating conditions and organisational requirements, such as:

- a* dealing with conflict of interests;
- b* risk management;
- c* liquidity management;
- d* valuation of the assets of the managed AIF;
- e* delegation;
- f* depositary;
- g* reporting;
- h* compliance function; and
- i* internal audit function.

Marketing

A substantial part of the AIFMG concerns the marketing of an AIF. The provisions set out complex rules and distinguish between the place of marketing; whether the AIFM is licensed in Austria or in another EU Member State, or if it is a non-EU AIFM;¹⁰ and whether the AIF is an EU AIF¹¹ or a non-EU AIF.¹² In general, an AIFM that is licensed in Austria is entitled to market EU AIFs to professional investors in Austria and in other EU Member States. Marketing of AIFs to retail investors and qualified retail investors is possible only under the conditions of Sections 48 and 49 AIFMG.

The following AIFs can be marketed to retail investors:

- a* real estate funds according to the ImmoInvFG, provided that the AIFM holds a licence pursuant to Section 1 Paragraph 1 cf 13a BWG;
- b* special funds, other funds and pension investment funds according to the InvFG, provided that the AIFM holds a licence pursuant to Section 1 Paragraph 1 cf 13 BWG;
- c* AIFs in real estate provided, that the AIFM holds a licence according to the AIFMG; and

9 Commission Delegated Regulation (EU) No. 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision text with EEA relevance.

10 A non-EU AIFM is an AIFM that is not an EU AIFM (Section 2 Paragraph 1 cf 28 AIFMG).

11 An EU AIF is an AIF that is authorised or registered in a Member State under the applicable national law; or an AIF that is not authorised or registered in a Member State, but has its registered office or head office, or both, in a Member State (Section 2 Paragraph 1 cf 11 AIFMG).

12 A non-EU AIF is an AIF that is not an EU AIF (Section 2 Paragraph 1 cf 27 AIFMG).

- d* managed futures funds subject to the conditions set out in Section 48 Paragraphs 7 and 8 AIFMG, provided that the AIFM holds a licence according to the AIFMG;
- e* private equity umbrella funds subject to the conditions set out in Section 48 Paragraphs 8a and 8b AIFMG, provided that the AIFM holds a licence according to the AIFMG; and
- f* funds investing in interests of companies subject to the conditions set out in Section 48 Paragraphs 8c and 8d AIFMG, provided that the AIFM holds a licence according to the AIFMG.

The retail investor confirms in writing to the AIFM that he is aware of the risks connected to the investment, provided he invests in managed futures funds, private equity umbrella funds or funds investing in the interests of companies. The AIFM evaluates the expertise, experience and knowledge of the retail investor and must be persuaded the retail investor is able to assess the risk and the adequacy of the obligation related to the investment.

Further, AIFMs licensed in Austria are entitled to market EU AIFs and managed non-EU AIFs, EU AIFM and non-EU AIFM are entitled to market managed EU AIFs and non-EU AIFs to qualified retail investors in Austria, if:

- a* the AIF is authorised to be marketed to professional investors in Austria; and
- b* no leverage or a leverage not exceeding 30 per cent of the AIF's net asset value is employed.

A retail investor is considered a qualified retail investor, if in addition to the confirmation and evaluation requirements similar to the retail investor:

- a* the investor owns minimum net assets, containing of bank deposits and financial instruments, of €500,000;
- b* the investor invests minimum €100,000 in the AIF;
- c* the investment in the AIF is for the sole purpose of diversification and risk spreading; and
- d* the investment in the AIF is not more than 20 per cent of his assets in financial instruments according to the WAG.

v Relevant authorities

Financial Market Authority (FMA)

The FMA supervises banks, insurance undertakings, pension companies, corporate provision funds, investment firms and investment service providers, investment funds, financial conglomerates and exchange operating companies. It is responsible for the entire federal territory and is not bound by any restrictions on the exercise of its duties.

The FMA has, on the basis of explicit delegation by statute, the right to issue regulations that set out certain minimum standards. The regulator also issues guidelines on interpretation and administrative practice, which are important sources for applying the relevant legal provisions.¹³ In the case of certain infringements, the FMA is the

13 Guidelines and regulations are available on the FMA website: www.fma.gv.at.

competent authority to impose administrative penalties,¹⁴ withdraw licences and undertake other supervisory measures.

State commissioners appointed by the Minister of Finance act on behalf of and according to the instructions of the FMA.¹⁵

The Austrian National Bank (OeNB)

The OeNB is the Austrian central bank and monitors the stability of the financial market at a macro level. It is responsible for the supervision of payment systems and is also involved in the supervision of banks. The OeNB acts in close cooperation with FMA, in particular in relation to banking supervision.

European Securities and Markets Authority (ESMA)

The ESMA's role in setting regulations for the supervision of asset managers continues to become more important. The ESMA may develop and regularly review guidelines for the competent authorities of the Member States on the exercise of their authorisation powers and on the reporting obligations by the competent authorities imposed by the AIFMD. Examples of such acts include the Guidelines on key concepts of the AIFMD¹⁶, Guidelines on sound remuneration policies under the AIFMD¹⁷ and Questions and Answers – Application of the AIFMD.¹⁸

III COMMON ASSET MANAGEMENT STRUCTURES

Besides the above-mentioned forms of UCITS (special funds, other funds, pension investment funds, real estate funds and real estate special funds), other forms of common legal structures include the following:

i Limited Liability Company (GmbH)

The Austrian form of a limited liability company is a common structure because it offers benefits including limited liability, minor capital requirements, a flexible form of corporate governance, the possibility of binding instructions by the shareholders to the management board and minor formalities for founding.

The GmbH is an incorporated entity with a legal personality independent of that of its shareholders. It may be formed by one or more shareholders. One characteristic of the GmbH is that the shareholders do not, as a general rule, bear liability to the GmbH's creditors for the GmbH's obligations (separation principle).

GmbHs may be used for almost all legal types of businesses, including financial service operations that are subject to licence requirements. The minimum capital

14 For example, see Section 190 InvFG, Section 38 ImmoInvFG, Section 60 AIFMG, Section 94 WAG.

15 See Section 9 InvFG and Section 2 Paragraph 10 ImmoInvFG.

16 ESMA/2013/600, 24 May 2013.

17 ESMA/2013/232, 3 July 2013.

18 ESMA/2014/714, 27 June 2014; updated by ESMA/2014/868, 21 July 2014.

requirement for a GmbH (not subject to additional capital requirements stipulated by other regulations) is €35,000, of which half of the share capital has to be paid in cash. GmbHs incorporated after 1 March 2014 may make use of the foundation privilege: the share capital still amounts to €35,000, but the articles of association may limit the initial contributions to €10,000, of which half has to be paid in cash. This foundation privilege exists for a maximum of 10 years. Within this period the shareholder's liability is, also in case of insolvency proceedings, limited to €10,000, but after the foundation privilege expires, the share capital must be increased to €35,000.

Austrian limited liability companies generally have a management board comprising one or more managing directors. The articles of association can provide for an optional supervisory board that has a controlling function; its members are non-executives. Section 29 GmbHG provides that a supervisory board is mandatory in cases where certain criteria are fulfilled.

The top-level constitutive body of a GmbH is the shareholders' assembly. The shareholders appoint the managing directors and conclude an employment agreement with each of them on behalf on the GmbH. They also have the right to adopt resolutions dismissing managing directors and terminating their employment agreements. The shareholders' assembly is entitled to take action in all matters involving the GmbH. In particular, it may prescribe standing orders for the managing directors, issue binding directions and resolve on matters submitted to the shareholders' assembly by the managing directors.

ii Joint stock corporation (AG)

As a legal entity, the AG has independent legal personality and possesses rights and obligations of its own, and its shareholders will, as a general matter, bear no liability for the AG's obligations.

The statutory minimum share capital of an AG is €70,000, at least a quarter of which must be paid in at the time of founding the AG. An AG can be founded by a single shareholder; however, in such case, the shareholder must be identified by name in the Commercial Register.

The management board is the constitutive body of the AG that manages and represents the AG, and only individual persons may be appointed to the board. In contrast to a GmbH, the management board of an AG is not subject to direct instructions of the shareholders. The members of the management board must be appointed for a fixed term of up to five years; however, reappointment is possible.

A supervisory board is mandatory for every AG. The members are elected by the shareholders' assembly for a term of up to five years (three years at the minimum). In certain circumstances, the supervisory board must establish an audit committee pursuant to Section 92 Paragraph 4a Joint Stock Corporation Act.

iii Limited partnerships in the form of a GmbH & Co KG

In certain cases, a GmbH & Co KG may be an interesting option, as it combines the advantages of a partnership with those of a corporate entity. This corporate form limits personal liability, as it is related to a GmbH, which acts as general partner, while the GmbH's shareholders act as the limited partners. As a result, investors in general bear

only limited liability to creditors of the partnership both in their capacity as shareholder of the general partner and in their capacity as limited partners.

A GmbH & Co KG may likewise be formed by a single person, who may simultaneously be its managing director.

The reasons why the GmbH & Co KG is sometimes preferred over the GmbH in practice is rooted in tax law: in a typical GmbH & Co KG, in which the GmbH acting as general partner does not have any stake in the capital or profits of the KG and only receives a remuneration for its management activities, all profits will be accrued to the limited partners. Under Austrian tax law, the profits of the limited partners will be taxed at the level of the limited partners, which makes it easier for a group to allocate profits and losses between the group companies. Where the limited partners are non-resident for tax purposes, the tax status of the GmbH & Co KG's profits will depend on the applicable double taxation treaty. Generally, profits arising in the Austrian GmbH & Co KG will have to be reported in Austria by foreign limited partners (limited tax obligation).

IV MAIN SOURCES OF INVESTMENT

The Austrian investment fund market consists out of around 1,274 Austrian UCITS with a volume of approximately €80 billion and around 847 non-UCITS with a volume of approximately €76 billion.¹⁹ Since the crisis in 2008, statistics show a stable number of volumes invested in UCITS, and a substantial increase in volume in non-UCITS funds that exceeds the volumes in 2006 and 2007. Bond funds (€44.91 billion) dominate the UCITS market, followed by mixed funds (€19.37 billion) and equity funds (€15.31 billion). These investment funds are managed by 24 licensed management companies.

The Austrian real estate fund market's volume is €4.49 billion, which is managed by five management companies licensed under the ImmoInvFG.

V KEY TRENDS

The Austrian investment fund market showed substantial growth in from 2000 to 2006 in both the UCITS and non-UCITS segments. Following a slight decrease of volumes in 2007, the crisis in 2008 hit the market substantially, and in particular the UCITS market in all segments like bond, equity and mixed funds. Funds suffered because of the decrease of values of the assets under management and reduced inflows of new funds. While non-UCITS have shown a strong recovery, UCITS have not been able to increase their volumes since the crisis.

In 2014 the volume managed by mixed funds increased significantly by €2.27 billion, while the volume managed by other funds decreased slightly. Furthermore, the real estate fund market has been growing constantly since 2009.

¹⁹ Source: VÖIG and OeNB as of July 2014, published on the website of the Association of Austrian Investment Companies; www.voeig.at.

With the AIFMG and its amendment coming into effect, changes to the asset management industry are to be applied. The AIFMG covers all non-UCITS, and amends the regulation on non-UCITS already regulated under the InvFG. The licence and registration requirements, and necessary changes in organisation and processes, will cause substantial difficulties and increase the cost base of asset managers.

VI SECTORAL REGULATION

i Insurance

The Austrian Insurance Supervision Act (VAG) sets requirements for insurance companies and certain types of insurance products.

For insurance coverage, only assets as provided in Sections 77 and 78 VAG are deemed to be eligible, such as:

- a* debt securities and other money and capital market instruments;
- b* shares and other participations with variable income;
- c* shares in UCITS and other investment funds;
- d* loans and credits;
- e* real estate and other similar property rights; and
- f* cash held with credit institutions and cash assets.

ii Pension investment funds

Pursuant to Section 168 et seq. InvFG, a pension investment fund is a portfolio of assets consisting of liquid financial assets within the meaning of the InvFG. It is divided into equal units represented by securities jointly owned by the unitholders and formed according to the InvFG, and is, according to the fund rules, designated as a pension investment fund.

Pursuant to Section 171 InvFG, securities may only be acquired for a pension investment fund subject to the following conditions and restrictions:

- a* a maximum of 50 per cent of the fund assets may be invested in securities of issuers having their registered office outside the EEA;
- b* at least 5 per cent of the fund assets must be invested in shares and securities representing participation capital, profit-sharing certificates and income bonds;
- c* at least 30 per cent of the fund assets must be invested in bonds, public notes, convertible bonds, mortgage bonds, municipal bonds and Austrian federal treasury bonds;
- d* up to 10 per cent of the fund assets may be invested in units of real estate funds referred to in Section 1 ImmoInvFG and units in real estate funds managed by a management company with its registered office in the EEA; and
- e* warrants may not be acquired.

iii Real estate companies

The ImmoInvFG provides requirements and restrictions regarding diversifications, participation in real estate companies, valuation of property, liquidity, derivatives and others.

Real estate companies that are not regulated by the ImmoInvFG, and hence are not subject to licence requirements, hold a substantial market share on the Austrian market for collective real estate investments. These companies are mainly structured as joint-stock corporations in which investors hold a common or preferential share; some of these are listed and traded on a regulated market. However, real estate companies could qualify as an AIF; hence, they might be subject to the regulations of the AIFMG.

Whether a real estate company qualifies as an AIF depends on its operational activity and on its defined investment policy. The term ‘operational activity’ corresponds to ‘general commercial or industrial purpose’ as defined in the ESMA Guidelines on key concepts of the AIFMD. Companies of which the main activity is not investing but industrial production should not be considered as AIFs. Whether renting and leasing of real estate is considered an operational activity is still discussed controversially.

Furthermore, the real estate company must have a defined investment policy to qualify as AIF. A business plan or the general purpose of the company as outlined in its statutes should not be considered a defined investment policy.

Whether a real estate company qualifies as an AIF will always depend on the circumstances of the specific case.

iv Hedge funds

The AIFMG stipulates rules and regulations for the establishment, management and distribution of hedge funds in Austria.

Hedge fund managers must comply with the registration requirements under Section 1 Paragraph 5 AIFMG or the licence requirement under Section 4 AIFMG. The general and organisational requirements for licensed managers will cause substantial changes in organisational structures and additional costs. In addition, the reporting requirements to FMA will increase the administrative burden on the organisations. This might increase the pressure for market consolidation.

The AIFMG will also have a major impact on the private equity industry. Typical forms of structures are limited liability companies or limited partnerships, which have been widely unregulated so far and which are now covered by the definition as AIFs under the new law.

As previously discussed in regard of hedge funds, asset managers of private equity funds will also face substantial organisational changes and additional burdens. These will increase the fixed costs base of asset managers, and will put the business models of small and medium-sized companies under pressure.

VII TAX LAW

Generally (although subject to certain exemptions), a tax rate of 25 per cent is charged on income from financial assets according to the Austrian Income Tax Act.

i Taxation of funds

Domestic and foreign funds are in general treated equally from a tax perspective where the foreign funds comply with all Austrian reporting requirements. Otherwise there will be some differences with regard to defining the tax base as well as the taxation itself.

Funds are treated transparently for tax purposes and therefore no tax is levied on their income and capital gains in Austria, but the income is taxed on the level of the investor. The taxation depends therefore on the nature of the income of the fund (e.g. dividends, interest, capital gains) and of the investor (e.g. natural person with a private portfolio, natural person holding the shares as business asset, corporation).

ii Taxation of resident investors in domestic funds

Resident investors are fully liable to taxes on their worldwide income, including income from capital. Dividends resulting from domestic shareholdings are subject to a withholding capital tax of 25 per cent when paid to the investment fund, the subsequent distribution by the investment fund is not subject to any withholding tax. This tax deduction is deemed to be a final tax for income tax purposes if the recipient is a natural person or corporation receiving capital income.

Dividends of foreign shareholdings, interest, income from derivatives and realised capital gains are subject to a withholding capital tax (25 per cent) when this income is distributed or deemed to be distributed to the investor by the investment fund. Payments to the investment fund are exempted from withholding tax.

iii Taxation of non-resident investors in domestic funds

Non-resident investors are not fully liable to taxes in Austria, but only with particular income. Income from capital will principally be taxed in Austria if the distribution or deemed distribution of the investment fund results from shareholdings or other participation rights, interest secured by domestic property, or capital gains, but only insofar as tax has to be withheld. Income from real estate investment funds is only taxable if the real estate is located in Austria.

The income from capital is not subject to tax in Austria. The capital withholding tax regime still applies but the tax withheld can be refunded. No tax is withheld if the investor proves or makes a plausible case that he is a non-resident for tax purposes. Of course, any applicable double tax treaty has to be taken into account.

iv Taxation of the fund managing company

Management companies are subject to corporate income tax at 25 per cent. Services provided by management companies are liable in part to VAT at 20 per cent and in part are exempt.

VIII OUTLOOK

The current regulatory framework is rather tight, and some believe it overburdens market participants. In particular, the new regime for AIFM has some inconsistencies, and covers business entities that were previously rarely regulated and not supervised. The difficulties with the practical application of the AIFMG encouraged representatives of the investment fund industry to request some amendments – in particular regarding the marketing of AIFs in Austria – which were finally implemented into the AIFMG in the summer of 2014. These provisions govern the marketing of AIFs to retail investors and implementing new provisions concerning qualified retail investors.

Nonetheless, investment funds and their managers are still confronted with several legal uncertainties with regard to the AIFMG. To eliminate these uncertainties and to comply with the needs of the investment fund industry, further amendments to the AIFMG and the AIFMD are required.

Obviously the strict marketing regulations for AIF place an additional cost burden on AIFMs. These costs need to be considered by AIFMs before deciding to cover any new country with marketing activities. This is particularly the case for Non-EU AIFMs – which at the moment cannot benefit from the EU passport – as such additional distribution costs might cause the AIFMs not to engage in certain markets with the effect that investors resident in those markets (especially in small markets) may face negative consequences from the absence of such AIF investment opportunities. These constraints certainly lead to a disadvantage for investors in small, undersupplied markets.

Because of the new strict regulations for banks (Basel III) and the scarce capital base of credit institutions in Austria, some concerns have been raised regarding the future funding of businesses and projects, in particular in relation to small and medium-sized enterprises. Fund investors hold liquid funds or are invested in asset classes that do not offer attractive returns, such as bank deposits, and hence are looking for investments with better returns. To bring these needs together, alternative structures are currently being considered, such as collective investment vehicles that are focused on capital provisioning to enterprises.

Supervision is becoming more and more international. Cooperation between national authorities, and the involvement of European authorities such as ESMA, are creating a new playing field for supervised entities and national regulators. Detailed directives limit the discretion of national legislators regarding the implementation of these directives, and directly applicable European regulations harmonise the legal framework within the context of the danger of overburdening small entities in small markets such as Austria.

Appendix 1

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Dr Martin Zuffer is a partner at CMS Reich-Rohrwig Hainz and head of the team for banking and capital markets law. He advises leading corporations, banks and financial institutions in the fields of transactions, as well as regulatory matters on all aspects of banking and capital markets law. During his 13 years of professional experience, he has been in charge of numerous Austrian and international IPOs, secondary offerings and debt issues. Besides banking law and capital market transactions, the focus of his advisory services lies in the areas of corporate law and private equity. He is the author of numerous articles and publications on banking and capital market law.

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Dr Roman Hager has been a senior lawyer at CMS Reich-Rohrwig Hainz since 2013. Before he joined CMS, he gained 15 years of experience in various positions in the financial industry, including eight years in executive and management positions. Dr Hager studied law in Vienna and completed his master's of law (LLM) at the London School of Economics. The main focus of his work is in capital markets, banking and finance, private equity, investment funds and restructurings.

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