

# Distribution of investment funds in Germany

Entering the German market and access to local investors

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# Introduction

The distribution of non-German investment funds to German investors, whether retail and/or professional/institutional, is subject to complex requirements. This article discusses the German rules for fund distribution and our experience advising on the registration and passporting of various EU and non-EU funds. Furthermore, we will discuss how to avoid these registration and passporting requirements (e.g. reverse solicitation and pre-marketing). To this end, we have included FAQs at the start of this document. Definitions within the FAQs follow the definitions in the main part of this briefing.

# 1 FAQs

Since the registration regime became effective in 2013, the Simmons & Simmons Financial Services Team has advised clients on all kinds of registrations of EU or non-EU AIFs for distribution to professional or semi-professional investors in Germany through the passport or registration regimes under Articles 32, 36 and 42 of the Alternative Investment Fund Managers Directive (the [AIFMD](#)) as well as for distribution to retail investors. Owing to the variety of funds we have successfully registered, we have noticed that the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, the [BaFin](#)) conducts thorough and detailed reviews.

Unlike the situation in other EU jurisdictions where sometimes only very limited information and no underlying documents need be filed with the local regulator, thereby allowing fund registrations to be obtained very quickly (perhaps within a few days or even on the same day), the BaFin typically requires six to eight for its review (depending on the fund structure in question). Usually, due to our extensive experience with BaFin's requirements and our good relationship with the competent BaFin departments, there are no or very little follow-up questions which may delay the registration. However, to avoid or at least to minimise such delays, proper preparation of application letters and underlying documents is necessary and highly recommended.

On the other hand, some registration requirements that appeared on their face to be challenging turned out, in practice, to be relatively straightforward. This proves that it is well possible to register offshore fund structures in Germany. In the following section, we consider some frequently asked questions from our clients and share some of our experiences gained since the implementation of the AIFMD in Germany.

## 1.1 What is the position with distribution of a fund structure which has not yet been established?

Registration of a fund will only be required if the fund is already in existence. According to BaFin guidance, a fund (amongst other criteria) is only in existence if (i) it has already been established, or (ii) the fund documents (e.g. fund rules or the articles of association) are in final form (*i.e.*, draft terms and conditions of the fund which still can be negotiated and are therefore not ready for subscription are not sufficient). This means that, should German investors be approached with fund documents that are not ready for subscription (*i.e.*, relevant clauses are still to be discussed with the potential investors), this will not be considered to be distribution of the fund, because the fund is not yet in existence, however, pre-marketing assesses on a case-by-case basis the question whether a marketing registration or pre-marketing notification requirement has been triggered.

## 1.2 What are the German provisions for “Depositary Lite”?

One of the requirements under the German implementation of Articles 36 and 42 of the AIFMD is that the AIFM must appoint for each AIF (as well as its Master AIF, if any) one or more entities to perform the functions set out in Articles 21(7) to (9) of the AIFMD (commonly referred to as Depositary Lite). This applies where the AIF is distributed only to professional investors. In respect of registrations under Article 42 of the AIFMD, the German legislature gold plated the requirements since it also requires EU and non-EU AIFs managed by a non-EU AIFM to appoint a Depositary Lite services provider and therefore the non-EU AIFM must comply with requirements which go beyond the AIFMD.

When distributing the AIF to semi-professional or retail investors, all the requirements in Article 21 of the AIFMD must be fulfilled. It is not necessary for the entities that carry out these functions to be requested, the same country as the AIF or the AIFM. It is, therefore, possible, for instance, that an AIF located in the Cayman Islands could appoint an entity located in the United States to carry out these functions.

Germany has not gold plated the requirements of Depositary Lite. This means that the German Capital Investment Code (*Kapitalanlagegesetzbuch*, the **KAGB**) refers directly to the provisions within the AIFMD; in addition, the European Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 (the **Level-2-Regulation**) is directly applicable. Therefore, only the requirements set forth in the AIFMD and the Level-2-Regulation must be fulfilled to meet the German Depositary Lite requirements. In our experience, previously it was challenging for non-EU AIFMs to find a Depositary Lite service provider (especially in the USA) familiar with the respective Depositary Lite requirements. Over time, however, some providers are now established in the market and, as a result, acceptance of appointment as a Depositary Lite service provider has become a less extensive and time-consuming matter. We are finding, for example, that US custodians which had already been appointed to fulfil certain functions for the non-EU AIF are now generally more familiar with the EU rules and might be willing to extend their services in order to comply with the Depositary Lite regime. However, in our experience, non-EU AIFMs prefer to also appoint a Depositary Lite provider based in the EU to fulfil the Depositary Lite requirements, rather than appointing their US entity.

## 1.3 What documents need to be submitted to the BaFin under Article 42 of the AIFMD?

In an Article 42 application, the BaFin will check if the information provided is sufficient to assess whether the requirements are met. Although the KAGB does not require the submission of final agreements, we have had experiences where BaFin requests (amongst other documents) the final versions of the limited partnership agreements and the agreements concluded with the entity/entities that carry out the Depositary Lite functions.

Without having reviewed the final versions of these agreements most BaFin officers will not approve the application. This is because the BaFin would like to ensure that the documents with which they have been provided will not be subject to further major amendments prior to approval.

## 1.4 What are the legal fees and administrative costs?

For the preparation and submission of an Article 42 application, we usually charge a fixed fee of **EUR 10,000 (net)** per fund to be registered. The exact fee will depend on the individual circumstances, such as the number of funds to be registered, the complexity of the fund structure, and the quality of the information and documents provided.

This does not include the drafting or negotiation of the depositary-lite agreement or the Article 23 AIFMD disclosure supplement. Additional work resulting from BaFin’s questions following the initial submission will be charged on an hourly basis. These fees typically range between EUR 1,000 and EUR 5,000 (net), depending on the scope of the additional questions.

The BaFin charges an application fee for reviewing each registration.

The fee for the registration of each AIF under Article 36 and under Article 42 of the AIFMD currently amounts to EUR 1,641.

In either case, the fee is payable ahead of the application. The BaFin will not consider the application to be complete (and thus the review period mentioned above will not start) until it is provided with proof of such payment.

The annual review of documents and information submitted to the BaFin (*i.e.*, annual report) will trigger an additional administrative fee which amounts to EUR 113 per annum.

## 1.5 Timing under Articles 36/42 registrations

### (A) Article 36 of the AIFMD

- Non-Feeder AIFs: 30 working days to review the application and notify the EU AIFM whether the non-EU AIF may be distributed in Germany;
- Feeder AIFs: Two months where the master AIF is managed by an EU AIFM and five months where the master AIF is managed by a non-EU AIFM.

### (B) Article 42 of the AIFMD

- Non-Feeder AIFs – Professional investors only: two months;
- Non-Feeder AIFs – Professional investors and semi-professional investors: four months;
- Feeder AIFs – Professional investors only: three months (where the master AIF is managed by an EU AIFM) and four months (where the master AIF is managed by a non-EU AIFM);
- Feeder AIFs – Professional investors and semi-professional investors: five months (where the master AIF is managed by an EU AIFM) and eight months (where the master AIF is managed by a non-EU AIFM).

## 1.6 Selling of funds by investors

The sale of own shares or shares in a fund by an investor does not generally constitute a distribution of that fund pursuant to the KAGB. On the other hand, the BaFin is of the view that such sale of own shares should not lead to the circumvention of the requirements on distribution under the KAGB. This would be the case, for example, if an intermediary initially takes the units or shares of a fund on its own books and subsequently distributes them to its customers. Such a scenario would be considered by the BaFin as distribution of the fund and would therefore trigger a licensing requirement in Germany.

## 1.7 Distribution to investors which are already invested into the fund (“top-up subscriptions”)

BaFin is of the view that providing an existing investor with a sales prospectus or other information about the fund will not constitute a distribution of such fund pursuant to the KAGB. In addition, the BaFin does not consider the following as distribution of a fund in Germany:

- statutory publication requirements in the German Federal Gazette; and
- sending information required under the KAGB to an investor already invested in the fund.

## 1.8 What is the BaFin's view regarding distribution to retail investors if an investment management company acts on behalf of that retail investor?

The BaFin has clarified that, in such a case, a fund is being distributed to German retail investors within the meaning of the KAGB. The BaFin is of the view that, where a discretionary portfolio manager purchases shares or units of a fund on behalf of a retail investor, this will constitute distribution of that fund to retail investors because, in this case, the placement of the units or shares is carried out by the investment manager, which is sufficient to qualify as distribution to German retail investors. Consequently, a discretionary manager acting on behalf of a German retail investor may only acquire shares of funds which have been admitted for distribution to German retail investors. It is important to note that this only applies to distribution to retail investors and not to the distribution of funds to professional or semi-professional investors in Germany, unless such distribution is performed on the initiative of the investment management company or by its order.

## 1.9 What post registration disclosures must be made?

Following successful registration of an AIF, the KAGB provides for a disclosure regime and the AIFM should prepare for this ahead of the application (Article 24 of the AIFMD).

Any material changes to the information submitted to BaFin in the initial application must be disclosed to the BaFin.

## 1.10 What activities require the registration of the fund?

Generally, all kinds of distribution activity will qualify as marketing and require passporting or registration of the fund. The KAGB provides two definitions of "distribution", depending to whom the fund is distributed:

- distribution to retail investors is defined as the "direct or indirect offering or placement of units or shares in a fund"; and
- distribution to professional and/or semi-professional investors is defined as "a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares in a fund".

However, specific exemptions exist for certain activities which, as a result, do not qualify as distribution, provided no further distribution within the meaning of the KAGB is carried out. These are:

- publication of the name of the fund without any marketing;
- reference to, or publication of, the NAV and the price determined on an organised market or the redemption and offering price of the shares or units of a fund;
- marketing material for an umbrella fund which is registered for distribution to investors in Germany, but which also contains information about sub-funds not registered for distribution in Germany. For this exemption to apply, however, the marketing material must clearly highlight the sub-funds which are not registered for distribution in Germany and (if the sub-fund is registered for distribution but may only be distributed to certain categories of investors) the categories of investors to which such sub-funds may be distributed;
- reference to or publication of the basis of taxation;
- provision of minimum or additional information required by German law;
- publication of disclosures in accordance with regulatory disclosure requirements or provision of information to investors in a fund in accordance with German regulatory requirements; and
- where an EU UCITS master fund exclusively issues units of one or more German UCITS feeder fund(s).

### 1.11 What is reverse solicitation?

The KAGB expressly excludes unsolicited requests by professional and semi-professional investors from the marketing definition of actively distributing a fund.

An AIFM may accept investments from German-based investors without registering the fund in Germany (so-called reverse solicitation or reverse enquiry). The KAGB explicitly provides for this concept with respect to professional and semi-professional investors. The KAGB is silent about the treatment of retail investors. However, the BaFin has stated (regarding distribution to all investors) that a reaction to an order from an investor is not distribution within the meaning of the KAGB. We, therefore, conclude that reverse solicitation in respect of retail investors will be treated in a similar way to that in respect of professional and semi-professional investors.

The same approach in respect of unsolicited requests applies to AIFs as for UCITS funds.

Since the pre-marketing rules entered effect on 2 August 2021, an investment into a fund based on reverse solicitation is only possible if it is based on genuine reverse solicitation (*i.e.*, if there had not been any prior pre-marketing). This is because the investor's subscription of an AIF or the establishment of an AIF within 18 months after pre-marketing will be regarded as marketing, which requires a respective notification. This applies even if the prospective investor was not explicitly targeted by the pre-marketing, as long as pre-marketing related to the same fund occurred in Germany. This has been confirmed by BaFin guidance as of 5 July 2022.

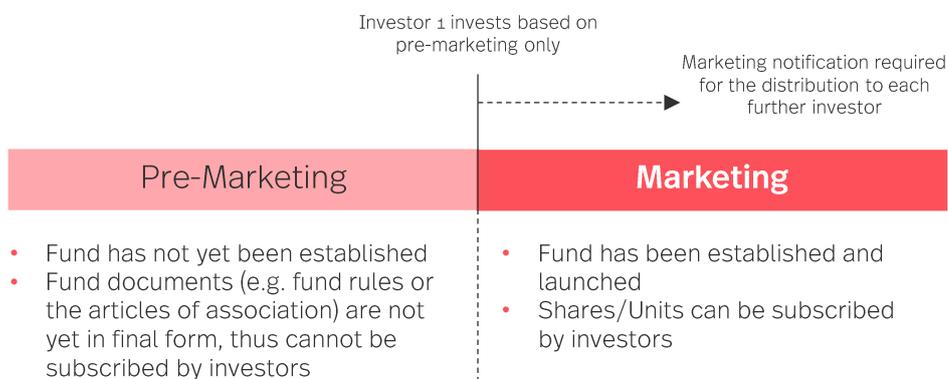
## 2 Rules on pre-marketing and denotification of investment funds

### 2.1 Rules on pre-marketing and definition of pre-marketing

What has changed to previous German regulatory law on pre-marketing and marketing?

Before 2 August 2021, there had not been any statutory law in Germany governing pre-marketing. In Germany, the line between pre-marketing and distribution is drawn both pursuant to Section 293 KAGB, which legally defines marketing, and the BaFin guidance relating to marketing (as depicted in Figure 1 below). In this respect, a marketing notification is only required if the line towards marketing is crossed. The pre-marketing rules require AIFMs to additionally notify any pre-marketing conducted in Germany. Since 2 August 2021, "pre-marketing" of AIFs to semi-professional and professional investors is legally defined in the KAGB for the first time and AIFMs are required to file a pre-marketing notification before the fund is marketed. The marketing notification procedure remains unchanged. Therefore, a marketing notification of a fund is required if the fund is already in existence. According to BaFin guidance, a fund (amongst other criteria) is in existence if (i) it has already been established, or (ii) the fund documents (e.g. fund rules or the articles of association) are in final form (i.e., draft terms and conditions of the fund which still can be negotiated and are therefore not ready for subscription are not sufficient).

Figure 1 : Prior distinction between pre-marketing and marketing under German regulatory law



What comprises "pre-marketing"?

According to the definition of pre-marketing, as implemented into the KAGB, "pre-marketing" means provision of information or communication, direct or indirect, on investment strategies or investment ideas by an AIFM or on its behalf, to potential professional or semi-professional investors domiciled or with a registered office within the territorial scope of the KAGB or to professional investors domiciled or with a registered office in a Member State of the European Union (EU) or another Contracting State to the Agreement on the European Economic Area (EEA) in order to test their interest in an AIF or a compartment which is not yet established, or which is established, but not yet notified for marketing in accordance with distribution rules, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the potential investor to invest in the units or shares of that AIF or compartment.

According to BaFin guidance, "pre-marketing" occurs, if draft investment rules (with gaps to be negotiated) are distributed to investors, or if pre-marketing concerns investment ideas that have passed through the internal review processes of the AIFM and for which the decision has been made to present them to potential investors. General descriptions of the investment spectrum that the AIFM can offer do not have the sufficient level of detail to be qualified as pre-marketing.

The KAGB also specifies which information is prohibited when conducting pre-marketing. This comprises, for example, information that is sufficient to allow investors to take an investment decision and commit to acquiring units or shares of a particular AIF. The same applies to subscription forms or similar documents whether in a draft or a final form. Similarly, constitutional documents, prospectuses, information in accordance with Article 23 of the AIFMD or offering documents of a not-yet-established AIF may not be in final form when conducting pre-marketing. Are both AIFs and UCITS subject to pre-marketing rules?

No. The rules on pre-marketing exclusively concern AIFs, not UCITS.

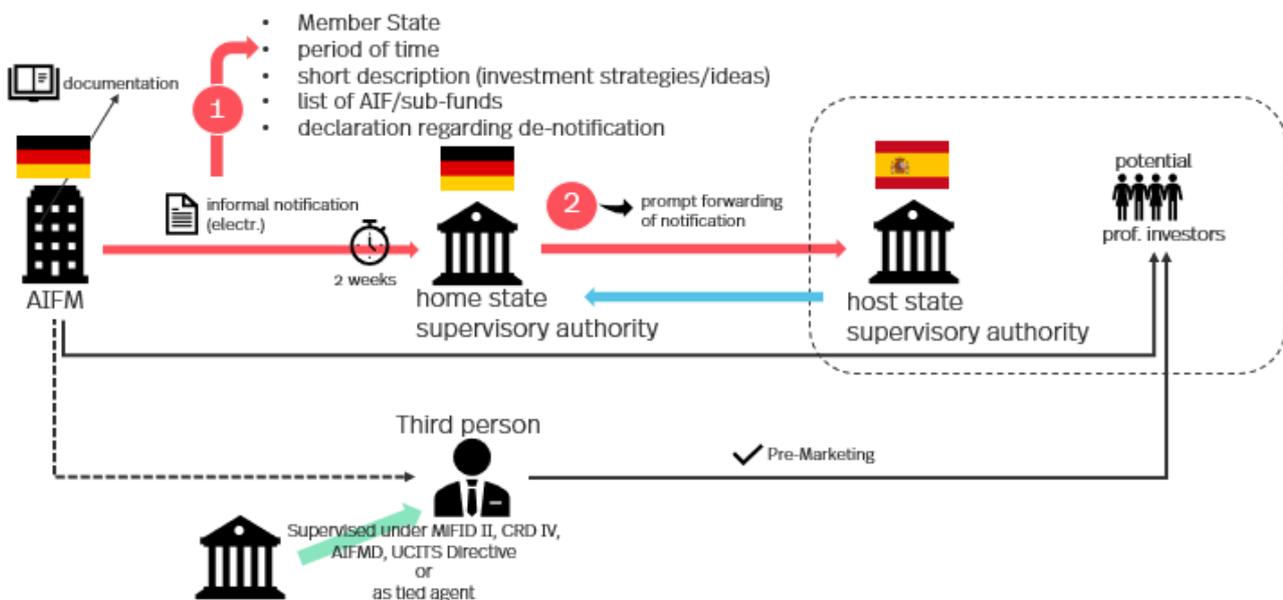
Are both non-EU-AIFMs and EU AIFMs subject to the pre-marketing rules?

Yes. While the pre-marketing definition of Directive (EU) 2019/1160 only considers "EU AIFMs", non-EU-AIFMs are also covered by the definition as implemented in the KAGB. Recital 12 of Directive (EU) 2019/1160 requires that the harmonised rules on pre-marketing to be transposed into national law "should not in any way disadvantage EU AIFMs vis-à-vis non-EU AIFMs". This has been duly considered in the KAGB.

What are EU-AIFMs required to comply with in relation to the rules on pre-marketing?

Since 2 August 2021, EU-AIFMs are required to file a pre-marketing notification within two weeks of the EU-AIFM having begun pre-marketing to its respective home state supervisory authority (Home NCA). Such pre-marketing notification will inform the Home NCA of the commencement of pre-marketing activities and the information depicted in step 1 of Figure 2 below. The Home NCA immediately forwards such pre-marketing notification to the supervisory authority of the host Member State (Host NCA) in which pre-marketing is taking place or has taken place vis-à-vis potential professional investors. If pre-marketing is taking place or has taken place in more than one host Member State, the Home NCA forwards the pre-marketing notification to all relevant Host NCAs. The Host NCA may request additional information on the pre-marketing conducted by the relevant EU-AIFM from the Home NCA. With respect to Germany, violations with respect to the notification period are an administrative offence and can be prosecuted by the BaFin. Figure 2 below depicts the pre-marketing requirements for EU-AIFMs.

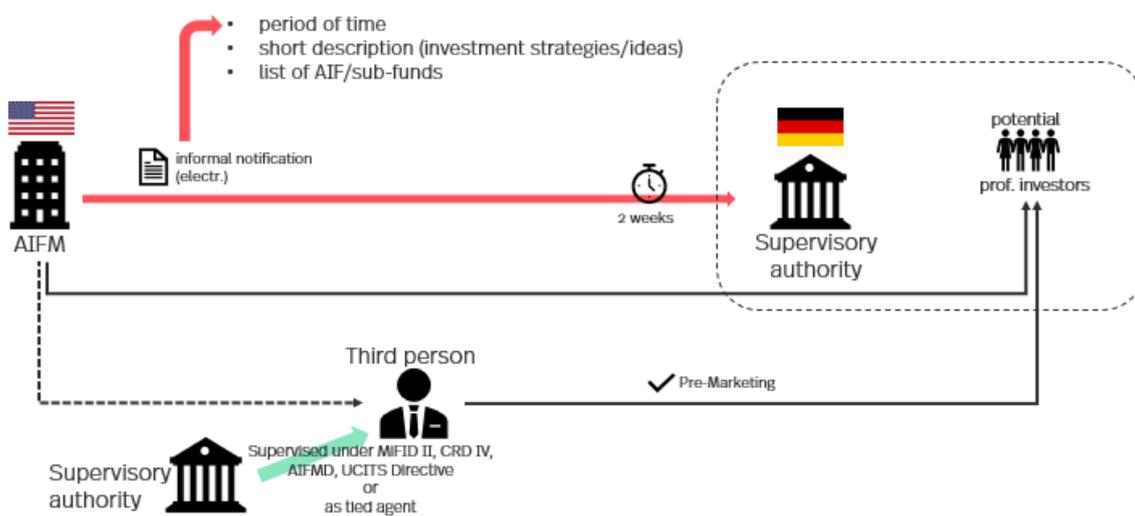
Figure 2: The pre-marketing-notification for EU-AIFMs under Sec. 306b KAGB



### What are non-EU-AIFMs required to comply with in relation to the rules on pre-marketing?

Since 2 August 2021, non-EU-AIFMs are required to file a pre-marketing notification within two weeks of it having begun pre-marketing to such supervisory authority in the EU, in which pre-marketing is taking place or has taken place vis-à-vis potential professional investors. Violations with respect to the notification period of two weeks are an administrative offence and can be prosecuted by the BaFin. Figure 3 below depicts the pre-marketing requirements for non-EU-AIFMs.

Figure 3: The pre-marketing-notification for non-EU-AIFMs under Sec. 306b KAGB



### Who is permitted to conduct pre-marketing activities?

Pre-marketing may only be conducted by the AIFM itself or such third parties that are either authorised under MiFID II, CRD IV, AIFMD or UCITS-Directive or that act as tied agent. Financial investment brokers (*Finanzanlagenvermittler*) which are registered under Section 34f of the German Trade Code (*Gewerbeordnung*) are not listed as authorised third persons. From this follows that financial investment brokers are not authorised to conduct pre-marketing even though the core activity of financial investment brokers is to distribute funds that are registered for distribution with the BaFin.

### Are subscriptions to AIFs permitted on a reverse-solicitation basis?

Generally, yes. According to the legal reasoning of the draft bill relating to the pre-marketing definition, pre-marketing should not lead to the exclusion of reverse solicitation (*i.e.*, the initiative to acquire shares in an investment fund by the potential investor). The legal reasoning continues by stating that the definition is intended to show that the mere advertising of the AIFM's own capabilities must be distinguished from the advertising of a specific investment fund. However, please refer to the below question, which describes that subscriptions on a reverse-solicitation basis are limited if pre-marketing has commenced.

### Are subscriptions permitted on a reverse-solicitation basis if pre-marketing has commenced?

If pre-marketing activities are taking place or have taken place, AIFMs must take into account a lock-up period of 18 months before investors can subscribe on a reverse-solicitation basis. This is because the KAGB deems marketing to have occurred if an investor within 18 months of the start of pre-marketing subscribes to fund units that were subject of pre-marketing. In addition, the KAGB obliges AIFMs to ensure that investors do not acquire units or shares in an AIF through pre-marketing and that investors contacted as part of pre-marketing may only acquire units or shares in that AIF through marketing permitted in Germany. A violation of such obligation will be an administrative offence and can result in prosecution by the BaFin. According to BaFin guidance as of 5 July 2022, even where investors have not been individually contacted as part of pre-marketing of an AIF, but pre-marketing of such AIF has taken place, investors may subscribe only if marketing of such AIF has been successfully notified in Germany.

Will electronic communication apply with respect to (pre-)marketing (de-)notifications? If yes, when will it become applicable?

Yes. As of 1 April 2023, AIFMs (i.e., German AIFMs, EU-AIFMs and non-EU-AIFMs) will be obliged to submit pre-marketing notifications, marketing notifications and marketing de-notifications electronically via an electronic communication procedure provided by the BaFin. Until then, pre-marketing notifications should be submitted via email to Pre-Marketing-MitteilungenKAGB@bafin.de.

## 2.2 Marketing de-notification procedure

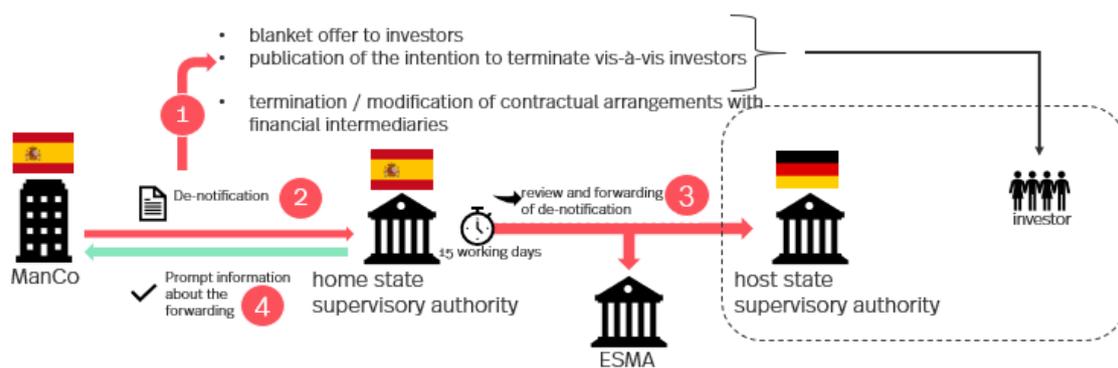
What are the marketing de-notification requirements for EU-AIFMs and EU-UCITS management companies?

In relation to EU-AIFs and EU-UCITS, a harmonised de-notification procedure applies. With respect to a marketing de-notification, EU-AIFMs and EU-UCITS management companies must generally fulfil the following requirements to de-notify a registered fund:

- a blanket offer is made to repurchase or redeem, free of any charges or deductions, all such units held by investors in that Member State, is publicly available for at least 30 working days and is addressed individually to all investors,
- the intention to terminate arrangements made for marketing such units in that Member State is made public, and
- any contractual arrangements with financial intermediaries or delegates are modified or terminated with effect from the date of de-notification.

Figure 4 below depicts the requirements that must be met regarding marketing de-notifications and outlines the flow of transmitted information.

Figure 4: The de-notification for EU-AIFMs/EU-UCITS management companies under Sec. 313a KAGB



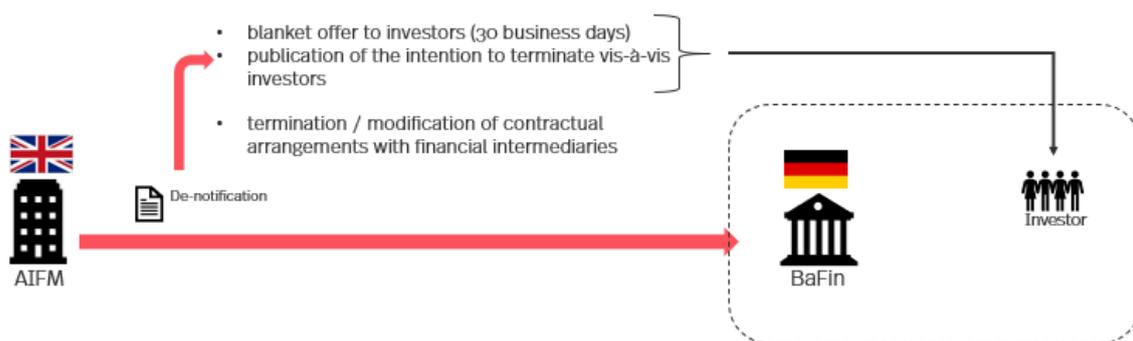
The legal reasoning underlines that the liquidation of the investment fund due to a termination of the management right is not subject to marketing de-notifications. UCITS management companies and EU-AIFMs shall continue to fulfil their information obligations towards those investors who remain invested after a marketing de-notification.

What are the marketing de-notification requirements for non-EU-AIFMs?

The requirements to de-notify a registered fund, for example in Germany, do not differ to the above requirements. However, the non-EU-AIFM must de-notify bilaterally to the supervisory authorities in each host Member States in which it has registered its fund for distribution. The non-EU-AIFMs can therefore not avail of the passporting easement to only de-notify vis-à-vis one single supervisory authority in the EU.

Figure 5 below depicts the requirements that must be met for a non-EU-AIFM to de-notify a registered AIF in Germany.

Figure 5: The de-notification for non-EU AIFMs under Sec. 295a para. 4 KAGB



Even though the rules harmonise de-notification procedures, they increase the administrative burden for non-EU-AIFMs. For example, all that was previously required to de-notify an AIF registered under section 330 KAGB, was to submit to the BaFin a wet ink signature confirmation from the AIFM that marketing of the relevant AIF had been discontinued in Germany and that all investors resident or domiciled in Germany had terminated their investment in the relevant AIF.

## 2.3 Pre-marketing lock-up period of 36 months after de-notification

Is an AIFM permitted to conduct pre-marketing in relation to a previously registered but de-notified AIF or in a relation to such de-notified AIF's comparable investment strategies or investment ideas?

Yes, provided that the AIFM observes the 36-month lock-up period from the time a de-notification has been filed in relation to such AIF or such de-notified AIF's comparable investment strategies or investment ideas. The 36-month lock-up period is a 1:1 implementation by the Directive (EU) 2019/1160.

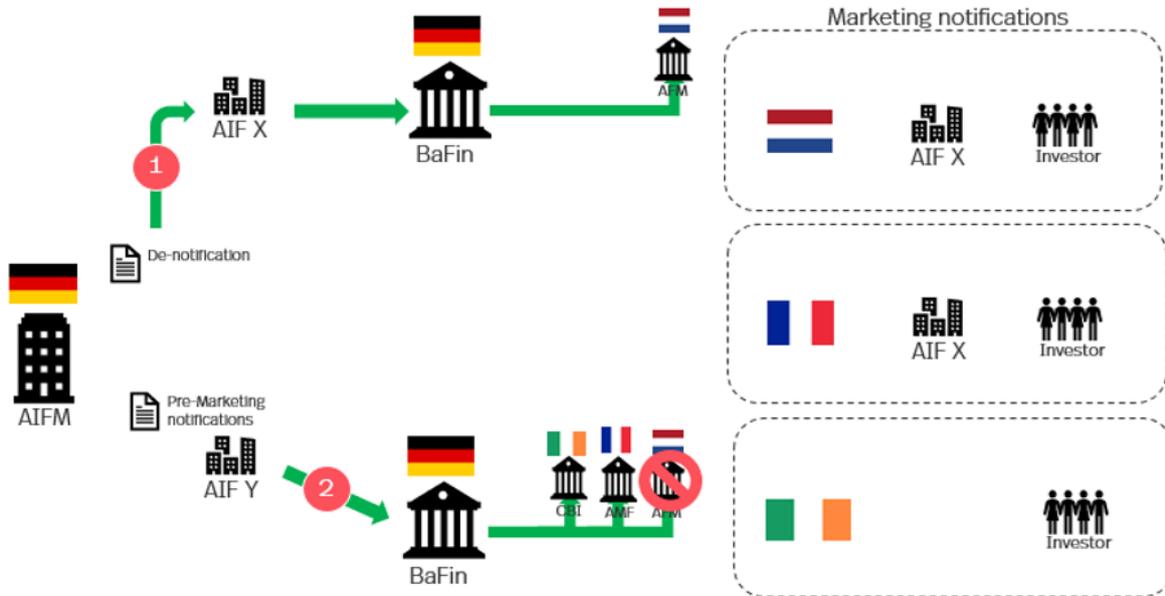
With respect to such lock-up period, what would be a practical approach for an EU-AIFM in relation to a closed-ended PE fund that is registered for distribution in Germany?

To provide an example, an EU-AIFM has registered a closed-ended PE fund (AIF X) for distribution in Germany. At the time, the signing-phase into AIF X has been closed and no further investments are possible, the EU-AIFM intends to de-notify AIF X and, due to the success of AIF X, intends to conduct pre-marketing of a next generation of the fund which follows an investment strategy or investment idea comparable to AIF X (AIF Y).

Considering this example, the practical approach for the EU-AIFM would be, in our view, that AIF X should only be de-notified after pre-marketing of AIF Y has already commenced and after such pre-marketing has been notified to the supervisory authority (while indicating in which other Member States pre-marketing is taking place / has taken place). Otherwise, the 36-month lock-up period applies during which pre-marketing in relation to AIF Y is not permitted. In accordance with the legal wording, the pre-marketing requirements, *i.e.*, *inter alia*, the obligation to state in the pre-marketing notification if AIF Y or its comparable investment strategies or investment ideas has been de-notified within the last 36 months in Germany prior to the start of pre-marketing) must be met at the time of submitting a pre-marketing notification to the Home NCA.

Once the 36-month lock-up period applies, the EU-AIFM is not permitted to conduct pre-marketing of AIF Y during such period but would immediately have to register AIF Y for distribution.

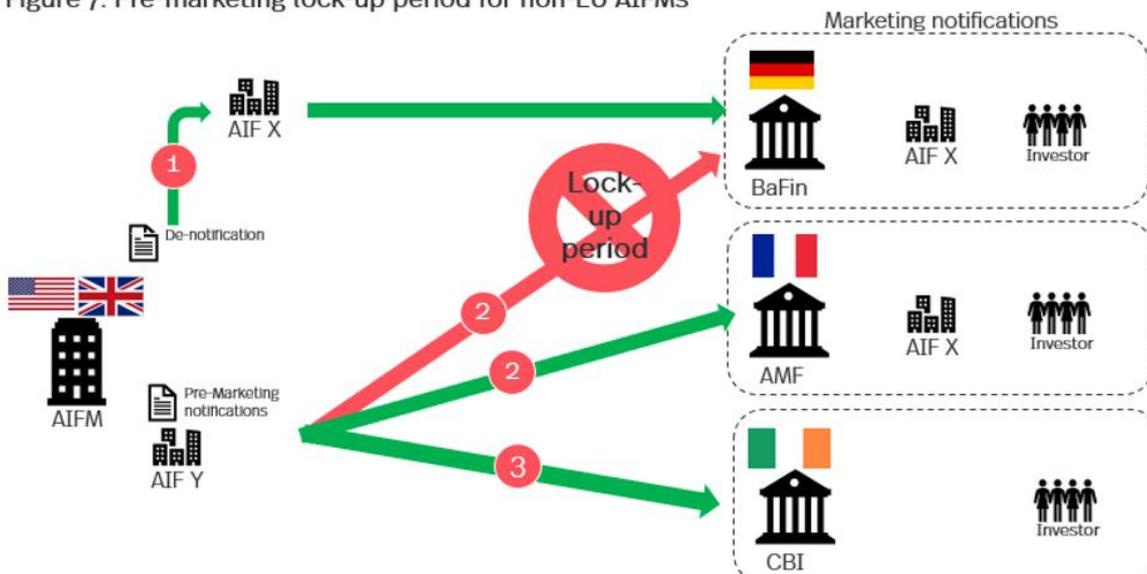
Figure 6: Pre-marketing lock-up period for EU AIFMs



With respect to the lock-up period in relation to the above example, does the practical approach for a non-EU-AIFM differ?

Taking the example above, the practical approach described above also generally applies to non-EU AIFMs. However, it must be considered that the passporting regimes with respect to the pre-marketing notifications, marketing notifications and de-notifications do not apply to non-EU AIFMs. Therefore, non-EU-AIFMs must notify each relevant supervisory authority in the EU bilaterally as depicted in Figure 7 below.

Figure 7: Pre-marketing lock-up period for non-EU AIFMs



## 2.4 Legal fees and administrative costs for pre-marketing notification and de-notification

For the preparation and submission of a pre-marketing notification, we usually charge a fixed fee of **EUR 2,500 (net)** per fund or strategy to be notified. BaFin does not levy a fee for the submission of a pre-marketing notification.

For the de-notification of a fund from distribution to German investors, we usually charge a fixed fee of **EUR 2,500 (net)** per fund. In these cases, BaFin levies an administrative fee of **EUR 284**, payable upon submission of the de-notification.

## 3 Registration of funds for distribution in Germany – requirements and process

For the registration of funds with the BaFin, the KAGB distinguishes between different categories of funds and their potential investors:

- distribution of UCITS to all investors;
- EU AIF managed by EU AIFM: distribution to professional or semi-professional investors (Article 32 Passport);
- non-EU AIF managed by EU AIFM: distribution to professional or semi-professional investors (Article 36 Registration);
- EU AIF and non-EU AIF managed by non-EU AIFM: distribution to professional or semi-professional investors (Article 42 Registration);
- AIF managed by EU AIFM falling under Article 3(2) of the AIFMD: distribution to professional or semi-professional investors; and
- EU AIF or non-EU AIF managed by an EU or non-EU AIFM: distribution to retail investors.

### 3.1 Professional and semi-professional investors

The KAGB defines three categories of investors:

- professional investors;
- semi-professional investors; and
- retail investors.

The definition of the term “professional investors” is identical to the definition under the AIFMD. The KAGB introduces a new investor category named “semi-professional investors”. The reason for the creation of this category is that it will be possible to distribute German Spezial AIFs not only to professional investors but also to semi-professional investors. However, if fund is distributed to semi-professional investors as well as to professional investors, additional registration requirements will apply in relation to the registration of the fund.

In order to qualify as a semi-professional investor, a person must meet, in particular, the following criteria:

- minimum investment of EUR 200,000;
- a written statement that the investor is aware of the risks of his investment;
- relevant know-how/experience; and
- an AIFM or the distribution company designated by the AIFM considers the investor able to make a proper decision and sufficiently aware of the risks involved as well as the investment as appropriate for the investor.

The last two criteria must be confirmed in writing by the AIFM or the distribution company designated by the AIFM.

Any investor investing more than EUR 10,000,000 is also considered to be a semi-professional investor.

In addition, a manager or employee of an AIFM or the distribution company designated by the AIFM investing in an AIF that the AIFM manages qualifies as a semi-professional investor.

Finally, an investor in the legal form of:

- a public-law institution;
- a public-law foundation; or
- a company in which the Federal Republic of Germany or a federal state of Germany holds a majority stake, qualifies as a semi-professional investor if the Federal Republic of Germany or a federal state of Germany has already invested or also invests in the relevant Spezial AIF at the time of the investment of the aforementioned investor categories.

Retail investors are investors that do not qualify as professional or semi-professional investors. For simplification reasons, professional and semi-professional investors will be referred to in this note as “Non-retail Investors” (although the KAGB does not use this term).

## 3.2 What happens if you actively distribute a non-German ...

### (A) ... UCITS

The former private placement regime for “non-public” distribution under the German Investment Act (*Investmentgesetz*) expired on 22 July 2013. All UCITS must since be passported or registered for distribution in Germany. The UCITS passporting process has not changed and involves submission of the relevant notification to the home state regulator of the UCITS management company.

The BaFin has issued a guidance note regarding the requirements for registration and marketing of units of EU UCITS in Germany (the Incoming UCITS-Notification).

Following Brexit, since 1 January 2021, UK UCITS are no longer treated as EU UCITS, as the UK is a third country from the EU law perspective. Therefore, in relation to former UK UCITS, a registration with BaFin as set forth below under (F) is now required.

### (B) ... EU AIF managed by an EU AIFM: Distribution to professional or semi-professional investors (Article 32 Passport)

The AIFMD provides for a passporting regime for this category (Article 32 of the AIFMD) for distribution to professional or semi-professional investors in Germany. To receive a passport, the EU AIFM must apply to its Home NCA (in English). The home state regulator then forwards the notification letter and annexes (together with a statement that the EU AIFM is authorized to manage the relevant AIF) to BaFin after a maximum review period of 20 working days. Distribution is allowed once the home state regulator has informed the AIFM that it has forwarded the notification to the BaFin.

Where the AIF is a Feeder-AIF (managed by an EU AIFM) distribution under the passport is only allowed if the Master-AIF is also an EU/German AIF which is managed by an EU/German AIFM.

The application to the Home NCA (notification letter) must include all information/documents pursuant to Annex IV and Article 23(1) of the AIFMD, *i.e.*, amongst other things:

- the AIF rules or instruments of incorporation;
- identification of the depositary of the AIF;
- a description of the types of assets in which the AIF may invest, the techniques it may employ and all associated risks;
- a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors;
- the latest annual report;
- information about arrangements made for the marketing of AIFs and, where relevant, information on the arrangements established to prevent units or shares in the AIF from being marketed to retail investors, including where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF; and
- if the AIF is a Feeder-AIF: Information on where the Master-AIF and its AIFM are established.

### (C) ... non-EU AIF managed by EU AIFM: Distribution to professional or semi-professional investors (Article 36 Registration)

The AIFMD gives EU/EEA countries the option to allow distribution of non-EU AIF. Germany has made use of this possibility. However, in this situation the EU AIFM is required to apply for registration with BaFin (*i.e.*, not using the AIFMD passporting procedure). The BaFin has a total of 30 working days to review the application and notify the EU AIFM as to whether the non-EU AIF may be distributed in Germany. If the AIF is a Feeder-AIF BaFin has a total of two months (if the Master-AIF is managed by an EU AIFM) or five months (if the Master-AIF is managed by a non-EU AIFM).

According to BaFin guidance, the BaFin requires that the application letter which must contain certain information to be filed in German - the underlying documents which must be attached to the application letter may, however, be in English. In accordance with BaFin guidance, the application letter and attachments shall preferably be submitted via email to [SecureWA5@bafin.de](mailto:SecureWA5@bafin.de)

The BaFin has published a guidance note regarding Article 36 of the AIFMD. The requirements for registration of a non-EU AIF for distribution to professional or semi-professional investors in Germany in this situation are similar to those listed in Article 36(1) and (2) of the AIFMD and include:

- The EU AIFM complies with all the requirements established in the AIFMD except for Article 21 of the AIFMD. The EU AIFM shall ensure that one or more entities are appointed to carry out the duties referred to in Article 21(7) to (9) of the AIFMD. The EU AIFM shall not perform those functions. The EU AIFM has notified BaFin of the identity of the entities responsible for carrying out such duties.
- Appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the home state regulator of the AIFM and the supervisory authorities of the third country where the non-EU AIF is established. BaFin maintains a public list of regulatory authorities from non-EEA countries with which it has entered Memoranda of Understanding (MoUs); this list will be updated. MoUs are currently in place between BaFin and - amongst others - the relevant regulatory authorities in the USA, Switzerland, Guernsey, Cayman Islands and Jersey.
- The third country where the non-EU AIF is established is not listed as a non-cooperative country and territory by FATF.
- Sufficient arrangements are established to prevent distribution to retail investors.

If the AIF is a Feeder-AIF: All the above requirements must also be met by the Master-AIF and its AIFM.

For registration purposes the same information/documents (in German or English) as described above (Annex IV and Article 23(1) of the AIFMD) must be provided to BaFin.

Furthermore, the application must include (in German or English):

- A certification from the home state regulator of the EU AIFM that:
  - when distributing to professional investors only: the EU AIFM and the management of the non-EU AIF comply with the requirements of the AIFMD (except for Article 21 of the AIFMD) and a depositary has been nominated to carry out the functions of Article 21(7) to (9) of the AIFMD, or
  - if the non-EU AIF is also distributed to semi-professional investors: the EU AIFM and the management of the non-EU AIF comply with all requirements of the AIFMD, and
  - in both cases: appropriate cooperation arrangements (as described above) are in place.

- A declaration by the EU AIFM that it will provide the BaFin with:
  - an annual report which must meet the requirements of Article 22 of the AIFMD (annual report) and – when exercising control over non-listed companies – Article 29 of the AIFMD;
  - information about all essential changes of circumstances described in the notification letter or the certification of the home state regulator;
  - information about its business and with documents on request.
- If the AIF is a Feeder-AIF, the following documents/information must also be provided in relation to the Master-AIF and its AIFM:
  - if the Master-AIF is managed by an EU AIFM: The above-mentioned certification must also be made by the home state regulator of the Master AIFM;
  - if the Master-AIF is managed by a non-EU AIFM: all documents in relation to the depositary or the company carrying out the requirements under Article 21(7) to (9) of the AIFMD; and
  - in both cases: all documents listed in Annex IV and Article 23(1) of the AIFMD.

When distributing also to semi-professional investors: the EU AIFM and the management of the AIF must meet all requirements under the AIFMD.

Note on timing of the application: The time to receive the certification(s) from the home state regulator must be taken into account when applying for registration.

**(D) ... EU AIF and non-EU AIF managed by non-EU AIFM: Distribution to professional or semi-professional investors (Article 42 Registration)**

Application for registration with the BaFin is required (*i.e.*, not using the Article 32 AIFMD passporting procedure) as under Article 42 of the AIFMD (for distribution to professional or semi-professional investors in Germany) a different regime applies for the distribution to retail investors. BaFin has a total of two months to review the application and notify the non-EU AIFM as to whether the AIF may be distributed in Germany if the AIF is only to be distributed to professional investors. If it is intended also to distribute the AIF to German semi-professional investors, BaFin has a maximum review period of four months.

If the AIF is a Feeder-AIF, the following review periods apply:

- Distribution to professional investors only:
  - Feeder-AIF whose Master-AIF is managed by an EU AIFM: three months review period;
  - Feeder-AIF whose Master-AIF is managed by a non-EU AIFM: four months review period.
- Distribution also to semi-professional investors:
  - Feeder-AIF whose Master-AIF is managed by an EU AIFM: five months review period;
  - Feeder-AIF whose Master-AIF is managed by a non-EU AIFM: eight months review period.

The registration procedure for this category is the most complex and burdensome as regards distribution to professional or semi-professional investors in Germany. The BaFin must assess if the non-EU AIFM and (if applicable) the management of the non-EU AIF follow the same rules as under the AIFMD. This can be a challenge and depends on where the specific non-EU AIFM and AIF are located.

The requirements are listed in Article 42 of the AIFMD and include:

- When distributing to professional investors only:
  - the non-EU AIFM and the management of the AIF must comply with Articles 22 (annual report), 23 (disclosure to investors) and 24 (reporting obligations to competent authorities) of the AIFMD;
  - the obligation to inform the investors in the fund in accordance with the KAGB is complied with; and
  - the non-EU AIFM has appointed one or more entities that carry out the duties referred to in Article 21(7) to (9) of the AIFMD. This means that for the registration of AIF that are managed by non-EU AIFM a Depositary Lite service provider must be appointed. The reasons set out in the KAGB make it clear that it is the intention to apply the requirements of Article 36(1)(a) of the AIFMD also to non-EU AIFM;
- when distributing also to semi-professional investors: the non-EU AIFM and the management of the AIF must meet all requirements under the AIFMD;
- appropriate cooperation arrangements are in place between BaFin and the supervisory authorities of the third country where the non-EU AIFM is established and the supervisory authorities of the country where the AIF is established;
- the third countries where a non-EU AIF (if applicable) or the non-EU AIFM are established are not listed as non-cooperative countries and territories by FATF;
- sufficient arrangements are established to prevent distribution to retail investors.

For BaFin to verify whether the above requirements are met, BaFin must be provided with the following information/documents together with the notification letter (in German or English):

- documents listed in Annex IV and Article 23(1) of the AIFMD;
- all essential information about the non-EU AIFM and its organs;
- all essential information about the depositary;
- a declaration by the non-EU AIFM that it will:
  - provide BaFin with an annual report which must meet the requirements of Article 22 (annual report) and – when exercising control over non-listed companies – Article 29 of the AIFMD (at the latest six months after the end of the business year and confirmed by an auditor);
  - inform BaFin about all essential changes of circumstances described in the notification letter; and
  - provide BaFin with information about its business and with documents on request and confirmation that it will comply with all notification and information requirements referred to in Article 42(1)(a) of the AIFMD;

- if distribution includes marketing to semi-professional investors: documents corresponding to those listed in Section 22(1) numbers 1 through 9 of the KAGB (all information about the AIFM including its remuneration policy and outsourcing agreements) must be submitted to BaFin;
- if the AIF is a Feeder-AIF and is distributed to professional investors the following documents/information must also be provided in relation to the Master-AIF and its AIFM:
  - documents listed in Annex IV and Article 23(1) of the AIFMD;
  - all essential information about the non-EU AIFM and its organs;
  - all essential information about the depositary;
  - the above-mentioned declaration must also be made in relation to the Master-AIF and its AIFM;
  - if the Feeder-AIF is distributed also to semi-professional investors: A certification by the home state regulator of the Master AIFM (if the Master-AIF is managed by an EU AIFM) or all information about the non-EU AIFM and its organs listed in Section 22(1) numbers 1 through 9 of the KAGB (if the Master-AIF is managed by a non-EU AIFM).

BaFin has published a guidance note regarding Article 42 of the AIFMD. The following aspects are worth noting:

- BaFin has explicitly stated that it wishes to be provided with the executed versions of the depo-lite agreements (*i.e.*, the agreements between the AIFM / AIF and the provider(s) of services under Article 21(7) to (9) of the AIFMD).
- Furthermore, BaFin requests a confirmation by the Depositary Lite service provider(s) that it is / they are performing such functions. This requirement asks the Depositary Lite service provider to explicitly commit to the services under Article 21(7) to (9) of the AIFMD. This will make it difficult to rely on “pre-AIFMD” administration or custodian agreements without amending them in such a way that it is clear that the services provided cover all requirements under Article 21(7) to (9) of the AIFMD and the respective obligations under the Level-2-Regulation.
- In addition, BaFin also requests a declaration by the AIFM that it and the AIF is registered with the competent supervisory authority in the respective home country or have received an authorisation (stating the respective registration number / ID) and that the supervisory authority has rights to be informed and auditing rights vis-à-vis the AIF and/or the AIFM. This is a requirement by BaFin which is not required by law.
- BaFin officially requires that the application letter must contain certain information will be filed in German whereupon the underlying documents which must be attached to the application letter can still be in English.
- In accordance with BaFin guidance, the application letter and attachments shall preferably be submitted via email to [SecureWA57@bafin.de](mailto:SecureWA57@bafin.de).

We suggest that AIFMs from outside the EEA – prior to applying under Article 42 of the AIFMD – assess if these requirements can be/are fulfilled.

Please note that the directive to amend the AFIMD was published in the Official Journal of the European Union on 26 March 2024 but is only coming into force in the EU Member States once implemented (likely not before 2026).

Among the issues agreed was a set of amendments to the marketing regime under Art. 42 AIFMD. Both the non-EU AIFM and the non-EU AIF must not be established in a jurisdiction that the European Commission has designated as having strategic deficiencies in its anti-money laundering or counter-terrorist financing regimes. The same restriction applies to the use of a depositary located in a non-EU jurisdiction. The list of high-risk third countries can be accessed [here](#).

#### (E)... AIF managed by EU AIFM falling under Article 3(2) of the AIFMD: Distribution to professional or semi-professional investors

AIFMs that fall under Article 3(2) of the AIFMD benefit from a less onerous regime regarding distribution and registration. This means that the registration requirements for the AIF that they manage are not as strict as in other cases. The AIF may be distributed once the completed application has been submitted to BaFin. However, the AIF can only be registered for distribution to professional and semi-professional investors in Germany provided that the home state of the AIFM allows the distribution of a corresponding AIF managed by a German AIFM and does not stipulate higher requirements for the German AIF in this situation.

The following documents/information (in German or English) must be provided to BaFin together with the notification letter:

- a certification from the home state regulator of the EU AIFM that it is registered according to the provisions implementing Article 3 of the AIFMD in the home state;
- a declaration by the EU AIFM that it will notify BaFin of any substantial changes to its registration and provide BaFin with proof of these changes;
- upon request from BaFin the EU AIFM must provide BaFin with information/documents regarding its business and any additional information that may be requested by BaFin.

#### (F) ... EU AIF or non-EU AIF managed by an EU or non-EU AIFM: Distribution to retail investors

If the AIF is to be distributed to retail investors the process for registration with BaFin involves several additional, more stringent requirements. If the AIF is managed by an EU AIFM BaFin has a maximum review period of three months. However, if the AIF is managed by a non-EU AIFM BaFin has a total of six months to review the registration documentation.

BaFin has issued a guidance note regarding the application for registration of AIF distributed to retail investors. This guidance note also states further requirements regarding the way AIFs may be marketed and in particular what information must be contained/must not be contained in the prospectus and other information documents.

As already mentioned, distribution to German retail investors is only possible subject to additional requirements which amongst others include the following:

- all documents (prospectus, annual report etc.) must be translated into the German language;
- the AIF and AIFM must have their respective registered office in the same jurisdiction (this means that an AIF located for example in the Cayman Islands and managed by an AIFM in the United States cannot successfully apply for registration for retail distribution);
- the competent authorities of the AIF and the AIFM must be cooperative in a way that is satisfactory to BaFin;
- the AIFM and the management of the AIF must meet all requirements of the AIFMD;
- if the AIFM is a non-EU AIFM and manages a non-EU AIF: An agreement between the third country of the non-EU AIF/AIFM and Germany in accordance with Article 21 of the OECD Model Convention is in place to avoid any double taxation of income and assets of the non-EU AIF;
- if the AIF and its AIFM are located outside the EEA: Appropriate cooperation arrangements are in place between BaFin and the supervisory authorities of the non-EEA country where the non-EU AIFM and the non-EU AIF are established.

Practical example: Distribution to retail investors in Germany is in practice achievable via a Luxembourg structure. The advantage of Luxembourg AIFs is that they can be set-up in the German language; the documents of such an AIF can be drafted in that way that they are comparable to other German special funds (*sonstige Sondervermögen*). We have successfully registered Luxembourg AIF managed by Luxembourg AIFM with BaFin for distribution to retail investors in Germany.

## 4 ESG - impact of SFDR on non-EU AIFMs

### 4.1 General information

The consideration of environmental, social, and governance (ESG) factors by asset managers is not a new phenomenon, but its significance for asset managers, in particular for those domiciled in the EU, is growing. With the recent legislative initiatives in the EU and increased regulatory scrutiny, ESG has become an increasing priority for investors and a key consideration in asset allocation. The recent changes in investor behaviour are in line with the European goals of sustainability.

Following the adoption of the Paris Agreement on climate change and the UN 2030 Agenda for Sustainable Development in 2015, the EU set in motion an ambitious legislative programme to support the transition to a low carbon, more resource-efficient and sustainable economy. The Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (SFDR) is the keystone of the European legislative architecture.

The SFDR was published in the Official Journal on 9 December 2019 and was subsequently amended by Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, itself published in the Official Journal in June 2020. Most of the SFDR disclosure requirements became effective on 10 March 2021.

Under the SFDR, EU AIFMs and UCITS management companies shall, inter alia, disclose ESG-related information in relation to distributed products. The scope of the product-related disclosure obligations depends on the specifics of the respective financial product(s). AIFMs and UCITS management companies must, therefore, determine whether a specific financial product is in or out of scope of enhanced disclosure requirements for ESG-focused financial products set forth in Article 8 et seq. of the SFDR. Where a financial product neither promotes ESG characteristics nor has sustainable investment as its objective, the disclosure requirements are consequently limited.

Further information on the European ESG regulatory framework can be accessed through Simmons & Simmons' [website](#).

### 4.2 Does SFDR apply to non-EU AIFMs?

Yes. Where an AIFM from a third country enters the market of a given Member State by means of a National Private Placement Regime, that AIFM must ensure compliance with the SFDR, including the financial product related provisions. This has been confirmed by the European Commission in a Q&A (cf. European Commission, Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation (Commission Delegated Regulation (EU) 2022/1288), JC 2023 18, 12/1/2024, Part I, answer to question 1, published 14 July 2021)

### 4.3 What are the practical implications for non-EU AIFMs?

As the SFDR is applicable also to non-EU AIFMs in relation to the disclosure of product-level information pursuant to Art. 6 et seq. of the SFDR from 10 March 2021 onwards, such AIFMs must consider whether they must amend their documentation in relation to their registered funds, in particular pre-contractual documentation pursuant to Art. 23 of the AIFMD, accordingly.

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