

THE ASSET
MANAGEMENT
REVIEW

SEVENTH EDITION

Editor
Paul Dickson

THE LAWREVIEWS

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CONTENTS

| | |
|--|-----|
| PREFACE..... | vii |
| <i>Paul Dickson</i> | |
| Chapter 1 EUROPEAN OVERVIEW..... | 1 |
| <i>Nick Bonsall</i> | |
| Chapter 2 AUSTRALIA..... | 45 |
| <i>Fadi C Khoury, Kon Mellos and Michael Chaaya</i> | |
| Chapter 3 AUSTRIA..... | 56 |
| <i>Roman Hager and Martin Wiedenbauer</i> | |
| Chapter 4 BELGIUM..... | 69 |
| <i>Tom Van Dyck, Valérie Simonart, Laurence Pinte, Steven Peeters and Karolien Decoene</i> | |
| Chapter 5 BERMUDA..... | 81 |
| <i>Tonesan Amissah and Sally Penrose</i> | |
| Chapter 6 BRAZIL..... | 92 |
| <i>Fernando J Prado Ferreira, José Paulo Pimentel Duarte and Luis Fernando Grando Pismel</i> | |
| Chapter 7 BRITISH VIRGIN ISLANDS..... | 106 |
| <i>Jeffrey Kirk</i> | |
| Chapter 8 CANADA..... | 114 |
| <i>Alix d'Anglejan-Chatillon and Jeffrey Elliott</i> | |
| Chapter 9 CAYMAN ISLANDS..... | 129 |
| <i>Jonathan Green, Tim Coak and Luke Stockdale</i> | |
| Chapter 10 FRANCE..... | 143 |
| <i>Arnaud Pince</i> | |

Contents

| | | |
|------------|--|-----|
| Chapter 11 | GERMANY..... | 157 |
| | <i>Thomas Paul and Christian Schmies</i> | |
| Chapter 12 | HONG KONG | 168 |
| | <i>Jason Webber, Peter Lake and Ben Heron</i> | |
| Chapter 13 | INDIA | 187 |
| | <i>Cyril Shroff and Shagoofa Rashid Khan</i> | |
| Chapter 14 | IRELAND | 201 |
| | <i>Kevin Murphy, Elizabeth Bothwell, David O'Shea, David Kilty and Sarah McCague</i> | |
| Chapter 15 | ISLE OF MAN | 217 |
| | <i>Simon Harding and Katherine Johnson</i> | |
| Chapter 16 | ITALY | 227 |
| | <i>Giuseppe Rumi, Giulio Vece, Benedetta Volpi, Riccardo Ubaldini and Michele Dimonte</i> | |
| Chapter 17 | JAPAN | 245 |
| | <i>Yasuzo Takeno and Fumiharu Hiromoto</i> | |
| Chapter 18 | LUXEMBOURG..... | 263 |
| | <i>Pierre De Backer</i> | |
| Chapter 19 | NETHERLANDS | 282 |
| | <i>Ellen Cramer-de Jong, Godfried Kinnegim, Daphne van der Houwen and Naomi Reijn</i> | |
| Chapter 20 | NORWAY..... | 295 |
| | <i>Peter Hammerich and Markus Heistad</i> | |
| Chapter 21 | PAKISTAN..... | 310 |
| | <i>Haroon Jan Baryalay and Mian Tariq Hassan</i> | |
| Chapter 22 | PORTUGAL..... | 320 |
| | <i>Carlos Costa Andrade, Marta Pontes, Gerard Everaert, Duarte Araújo Martins and Domingos Braga</i> | |
| Chapter 23 | SAUDI ARABIA..... | 333 |
| | <i>Nabil A Issa, James R Stull, Macky O'Sullivan and Sayf Shuqair</i> | |

Contents

| | | |
|------------|--|-----|
| Chapter 24 | SINGAPORE..... | 347 |
| | <i>Amit Dhume, Bill Jamieson and Joy Tan</i> | |
| Chapter 25 | SPAIN..... | 359 |
| | <i>Juan Carlos Machuca Siguero and Anna Viñas Miquel</i> | |
| Chapter 26 | SWITZERLAND..... | 379 |
| | <i>Shelby R du Pasquier and Maria Chiriaeva</i> | |
| Chapter 27 | UNITED ARAB EMIRATES..... | 394 |
| | <i>James R Stull and Macky O'Sullivan</i> | |
| Chapter 28 | UNITED KINGDOM..... | 404 |
| | <i>Paul Dickson</i> | |
| Chapter 29 | UNITED STATES..... | 445 |
| | <i>Jason E Brown, Leigh R Fraser and John M Loder</i> | |
| Appendix 1 | ABOUT THE AUTHORS..... | 467 |
| Appendix 2 | CONTRIBUTING LAW FIRMS' CONTACT DETAILS..... | 489 |

PREFACE

While the global financial crisis of 2007 and 2008 may feel like an increasingly distant memory, its effects continue to be felt across the whole of the financial world. Despite significant improvements in the global economic landscape in the intervening years, global growth has been hampered in recent years by various geopolitical factors, including political uncertainty resulting from the change in administration in the US in 2016 and the rise of populist movements in Europe. As the UK prepares for Brexit, absent any agreement to the contrary currently set to take place in March 2019, political uncertainty remains around the form and extent of any UK–EU deal relating to financial services, and as to whether any transition period (during which UK firms would remain able to access to EU markets on current terms) will be agreed. This has had, and is likely to continue to have, a potentially destabilising effect on the UK asset management sector and its clients. The impact of the UK’s decision to leave the EU is thus already being felt, not only in the UK and across the European continent, but also more widely.

Nevertheless, the importance of the asset management industry continues to grow. Nowhere is this truer than in the context of pensions, as the global population becomes larger, older and richer, and government initiatives to encourage independent pension provision continue. Both industry bodies and legislators are also increasingly interested in pursuing environmental, social and governance goals through private sector finance. For example, the European Commission has proposed a package of measures seeking to introduce sustainable finance into current regulations to make it easier for investors to identify and invest in such projects.

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. In Europe, further significant changes to the regulatory landscape for investment services were introduced by the revised Markets in Financial Instruments Directive regime (known as MiFID II), which has applied since 3 January 2018. In the UK, the Financial Conduct Authority continues to focus on the asset management industry. In 2017, it published its asset management market study on the performance of the asset management market for retail and institutional investors, and is beginning to implement its findings during the course of 2018. In contrast, the Trump administration in the US has signalled a deregulatory agenda, which includes plans to repeal the Wall Street Reform and Consumer Protection Act of 2010 (also known as the Dodd-Frank Act).

It is not only regulators who continue to place additional demands on the financial services industry in the wake of the financial crisis: the need to rebuild trust has led investors

to call for greater transparency around investments and risk management from those managing their funds. Senior managers at investment firms are, through changes to regulatory requirements and expectations as to firm culture, increasing being seen as individually accountable within their spheres of responsibility. Industry bodies have also noted further moves away from active management into passive strategies, illustrating the ongoing pressure on management costs. This may, in itself, be storing up issues for years to come.

The rise of fintech and other technological developments, including cryptocurrencies, data analytics and automated (or ‘robo’) advice services, is also starting to have an impact on the sector, with asset managers looking to invest in new technologies, seeking strategies to minimise disruption by new entrants, or both. While regulators are open to the development of fintech in the asset management sector, they also want to ensure that consumers do not suffer harm as a consequence of innovations. Regulators across various jurisdictions are working together to develop a global sandbox in which firms can test their new technologies. This continues to be a period of change and uncertainty for the asset management industry, as funds and managers act to comply with regulatory developments and investor requirements, and adapt to the changing geopolitical landscape. Although the challenges of regulatory scrutiny and difficult market conditions remain, a return of risk appetite has also evidenced itself and the global value of assets under management continues to increase year on year. 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.

The publication of the seventh edition of *The Asset Management Review* 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 the team at Law Business Research for all their efforts in bringing this edition into being.

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

Paul Dickson

Slaughter and May

London

August 2018

AUSTRIA

Roman Hager and Martin Wiedenbauer¹

I OVERVIEW OF RECENT ACTIVITY

The funds and asset management market in Austria has been proven to be stable in 2017 and 2018.

In the private equity sector, attention and interest are shifting more and more into seed and early stage investments as new business models promise higher gains. An increasing number of investors and asset management professionals are getting involved in the start-up arena. This area has gained a lot of public attention, and politicians have also put support for founders and new businesses on their agenda.

Digitalisation and its effects on the private equity and asset management environment are important aspects to follow not only in Austria but worldwide. The growing opportunities of direct investment via crowd financing and initial coin offerings (ICOs) could put some pressure on the business model of asset and fund managers. On the other hand they also promise certain benefits for asset management, such as reduced transaction costs, better transparency and increased liquidity.

New possible asset classes like virtual currencies, coins and tokens will be scrutinised for a better understanding of whether investment in such instruments is feasible and reasonable. Obviously, substantial legal uncertainties exist in this field that need to be clarified by legislators and authorities.

The Austrian private equity industry is proposing new structures, which should facilitate more efficient fundraising backed by public funds. Further initiatives focusing on closer cooperation between market players in neighbouring countries, in particular in eastern Europe, have started.

II GENERAL INTRODUCTION TO REGULATORY FRAMEWORK

The key legal sources for asset management business conducted in Austria are the Banking Act (BWG), the Investment Fund Act (InvFG), the Real Estate Investment Fund (ImmoInvFG), the Securities Supervision Act 2007 (WAG) and the Capital Markets Act, together with further regulations based on these statutes.

These statutes have implemented European directives such as:

- a Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID I);

¹ Roman Hager and Martin Wiedenbauer are partners at WMWP Rechtsanwälte.

- b* 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 UCITS;
- c* 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; and
- d* Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.

i InvFG

The InvFG regulates the establishment, management and marketing of 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 read in conjunction with Section 13 BWG and in conjunction 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 that 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 an 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.

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;²
- 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;

2 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 of and according to the instructions of the FMA.

- k* delegation of tasks of the investment fund manager company to third parties; and
- l* a 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 AIFs in the form of 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 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.

The implementation of Directive 2014/91/EU of the European Council and European Parliament as of 23 July 2014, amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, introduced amendments to InvFG, and the ImmoInvF has imposed some new requirements and obligations on asset managers.

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(1)(13)(a) BWG read in conjunction 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 to Austrian law (such as third-party land and building rights).

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, holds in custody all securities and maintains the accounts of the fund.

iii WAG

The WAG 2007 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* (a public company registered in accordance with the corporate law of the EU)), 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), which amends MiFID I, was adopted.

Through the national implementation of MiFiD II, the existing WAG 2007 was replaced by the new WAG 2018, which came into force on 3 January 2018.

The changes, *inter alia*, cover the operating of an organised trading facility, the widening of the transparency and information requirements, and the strengthening of the powers of the FMA.

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). The statute regulates alternative investment fund managers (AIFMs) and covers any legal person whose regular business is managing one or more alternative investment funds (AIFs). Besides the coming into force of the AIFMG, the implementation of the AIFMD required amendments to the InvFG and the ImmoInvFG.

Registration requirements

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

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, do not exceed a threshold of €100 million in total; 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 or indirect holding, manages portfolios of AIFs whose assets under management do not exceed

the threshold of €500 million in total 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, on an annual basis or upon 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 Registration under the AIFMG, which give further guidance regarding the registration obligation, the filing process, requested information and duties of registered AIFMs.³

A registered AIFM has to continuously control the thresholds of its managed AIFs, and is obliged to apply for a licence from the FMA within 30 calendar days if the threshold is exceeded on a non-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.⁴ The licence grants the AIFM the right to establish and market AIFs in the European Union (passporting) and, subject to the conditions under Sections 48 and 49 of the AIFMG, to market AIF units to retail investors and qualified retail investors in Austria.

Marketing

A substantial part of the AIFMG provides regulations for 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;⁵ and whether the AIF is an EU AIF⁶ or a non-EU AIF.⁷ 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.

3 <https://www.fma.gv.at/investmentfonds-und-verwaltungsgesellschaften/aif-verwalter-alternativer-investmentfonds/>.

4 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.

5 A non-EU AIFM is an AIFM that is not an EU AIFM (Section 2 Paragraph 1 read in conjunction with 28 AIFMG).

6 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 read in conjunction with 11 AIFMG).

7 A non-EU AIF is an AIF that is not an EU AIF (Section 2 Paragraph 1 read in conjunction with 27 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 read in conjunction with 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 read in conjunction with 13 BWG;
- c* AIFs in real estate, provided that the AIFM holds a licence according to the AIFMG;
- d* managed futures funds subject to the conditions set out in Section 48 Paragraphs 7 and 8 AIFMG, provided that 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 or she is aware of the risks connected to the investment, provided he or she 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 that 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 manage non-EU AIFs. EU AIFMs and non-EU AIFMs are entitled to market managed EU AIFs and non-EU AIFs to qualified retail investors in Austria if the AIFs are authorised to be marketed to professional investors in Austria; and no leverage, or a leverage not exceeding 30 per cent of an 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 consisting of bank deposits and financial instruments of €500,000;
- b* the investor invests a minimum of €100,000 in the AIF;
- c* the investment in the AIF is for the sole purpose of diversification and risk spreading; and
- d* his or her investment in the AIF is not more than 20 per cent of his or her assets in financial instruments according to the WAG.

v Relevant authorities

FMA

The FMA supervises:

- a* banks;
- b* insurance undertakings;
- c* pension companies;
- d* corporate provision funds;
- e* investment firms and investment service providers;
- f* investment funds;

- g* financial conglomerates; and
- h* exchange operating companies.

It is responsible for the entire federal territory, and is not bound by any instructions in the exercising 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 when applying the relevant legal provisions.⁸ In the case of certain infringements, the FMA is the competent authority to impose administrative penalties,⁹ 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.¹⁰

Oesterreichische Nationalbank

Oesterreichische Nationalbank (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 the FMA, in particular in relation to banking supervision.

European authorities

European authorities such as the European Banking Authority and the European Securities and Market Authority are very important, as they give guidance to the local authorities on which the FMA bases its administrative conduct and decisions.

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 GmbHs

The GmbH provisions are rather formalistic and concern share transfers and various decisions of shareholders' meetings; in particular, a notarial deed is required for measures that affect the share capital, which makes shares less fungible and capital measures cumbersome and costly. Further the shares of a GmbH cannot be listed at the Stock Exchange. Nevertheless, the GmbH is the favoured form of corporation in Austria because it offers benefits including:

- a* limited liability;
- b* moderate capital requirements;
- c* a flexible form of corporate governance; and
- d* the possibility of legally binding instructions by the shareholders to the management board.

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

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

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

One key 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). 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.

GmbHs may be used for almost all legal types of businesses, including financial service operations that are subject to licence requirements. The minimum capital 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 provide for limiting 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 limited to €10,000, including in the case of insolvency proceedings, but after the foundation privilege expires the share capital must be increased to €35,000.

The top-level constitutive body of a GmbH is the shareholders' meeting. The shareholders appoint the managing directors and conclude an employment agreement with each of them on behalf of the GmbH. They also have the right to adopt resolutions dismissing managing directors and terminating their employment agreements. The shareholders' meeting 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' meeting assembly by the managing directors.

The articles of association can provide for an optional supervisory board that has a controlling function over the managing directors who conduct the day-to-day management. Section 29 GmbHG provides that a supervisory board is mandatory in cases where certain size criteria are fulfilled. As long as no legal requirement for the establishment of a supervisory board exists, the organisational structure of a more flexible advisory board can be established, which can assume a role closer to executive management than the shareholders' meeting.

ii AGs

AGs are less common in Austria than GmbHs, as their establishment and running costs are often higher.

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 transfer of the shares in an AG is easier than the transfer of the shares in a GmbH. Commonly, the shares are registered with the shareholder register of the company, and any transfer needs to be notified to the company and noted in the 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 or the supervisory board. 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.

The annual statements of an AG require an audit by an external auditor.

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 that 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 shareholders 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 are 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 limited partnership (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 an Austrian GmbH & Co KG will have to be reported in Austria by foreign limited partners (limited tax obligation).

A further advantage is the easy form of transfer of the participation of the limited partner, as no legal form (e.g., purchase agreement) is required for the transfer agreement.

IV MAIN SOURCES OF INVESTMENT

The total volume of assets under management of the funds in Austria is stable and amounts to €183 billion. Of that, €82 billion is invested into UCITS, €93 billion into AIFs and €8 billion into real estate funds.¹¹ Whereas UCITS have experienced some outflows in 2017 and early 2018, special funds have gained additional funds.

V KEY TRENDS

The Austrian asset management market is in a state of rebuilding, as ownership in some private banks and asset management companies has changed in the past few years. These private banks are targeting private wealthy clients by offering asset management products that distinguish them from the bigger established market players. This focused strategy may uncover new money sources for asset management and funds structures.

11 Source: Association of Austrian Investment Companies, VÖIG.

In addition, in the current low-interest economic environment, investments into real estate in particular are deemed to be attractive, which has pushed real estate prices, especially in the cities, to new records. Retail money is still being transferred to low-interest-bearing saving accounts, which is by far the preferred form of investing for retail clients.

As in other financial markets, digitalisation will most likely have a substantial impact on the asset management industry. Financial technology companies offer portfolio advice enabling clients to invest directly without the need for intermediation by a fund structure. Further, robo-advising could have an even more disruptive effect on human-based asset management.

The first ICOs were issued on the Austrian market at the end of 2017. This phenomena is still nascent in Austria, and ICOs are only attractive to a very small group of investors. Legal uncertainties need to be clarified in order to give this new instrument a push.

VI SECTORAL REGULATION

i Insurance

In 2016, the new Austrian Insurance Supervision Act came into force, bringing about a total overhaul of the preliminary regulation. The new Act implemented Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II).¹² The previous static system for the determination of the own funds requirement of insurance and reinsurance companies has been replaced by a risk-based approach. Qualitative elements such as internal risk management are to be taken into account to a larger extent.

ii Pensions

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.

12 Official Journal of the European Union, 17.12.2009, L 335/1.

iii Real property

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

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, and some of which are listed and traded on a regulated market. However, real estate companies could qualify as AIFs; hence, they might be subject to the regulations of the AIFMG.

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.

v Private equity

Private equity funds are subject to regulation by the AIFMG; thus, they have to comply with its organisational, marketing and reporting requirements. They are supervised by the FMA.

VII TAX LAW

Generally (although subject to certain exemptions), a tax rate of 27.5 per cent is charged on income from financial assets according to the Austrian Income Tax Act.

i Taxation of domestic and foreign funds

In general, domestic and foreign funds are treated equally from a tax perspective when foreign funds comply with all Austrian reporting requirements. However, there are some differences with regard to defining the tax base as well as the taxation itself.

ii Transparency

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 at 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 a business asset, corporation).

iii 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 27.5 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 (27.5 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.

iv Taxation of non-resident investors in domestic funds

The Austrian parliament has passed legislation – the Common Reporting Standard Act – for the implementation of Directive 2014/107/EU on mandatory automatic exchange of information in the field of taxation based on the OECD global standard for automatic exchange of financial account information in tax matters.

The EU Taxation Amendment Act 2016 was enacted in 2016. This Act caused some amendments with regard to the taxation of non-resident investors in domestic funds driven by automatic information exchange: the tax treatment differs between investors resident in countries applying automatic information exchange and such countries that do not.

v Capital gains through sales

Capital gains achieved through a sale of the fund participation are subject to the 27.5 per cent tax rate.

vi Beneficial tax treatment for accumulating funds

Accumulating funds are treated as tax-beneficial, as only 60 per cent of the capital gains are taken into account as taxable income. A tax rate of 27.5 per cent is applicable on this 60 per cent. If the income deemed to have been distributed is subsequently actually distributed, it is tax-free. However, in the case of a sale of the participation funds, the 40 per cent tax-free part will be recognised; thus, the beneficial tax treatment has a tax-deferral effect.

vii Taxation of fund managing companies

Management companies are subject to corporate income tax at a rate of 25 per cent. Services provided by management companies are partly liable to VAT at a rate of 20 per cent and partly exempt.

VIII OUTLOOK

On both the national and the international level, several initiatives aim to analyse the potential of digitalisation, such as the European Commission's FinTech action plan, which will help the financial industry make use of rapid advances in technology such as blockchain and other IT applications, and strengthen its cyber-resilience.

Although currently no clear substantive regulation of these new phenomena has been proposed, a workable legal basis has to be put in place not only to control these developments and their risks but also to create the basis for their growth.

These developments will certainly impact the asset management industry, on the one hand offering new tools that will enhance the efficiency of the markets, and on the other opening up opportunities for direct investment while bypassing professional asset management.

Clearly, considerable challenges lie ahead not only for the industry and regulators, but also for legal advisers, in gaining an understanding of the legal implications of new forms of and ways to conduct asset management business.

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