YPOG Briefing:
AIFMD 2.0 and the Fund Market Strengthening Act: What will change for venture capital and private equity funds in Germany?

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The Alternative Investment Fund Managers Directive (AIFM Directive, or "**AIFMD**") from 2011 was amended in March 2024 by the directive referred to by the industry as "**AIFMD 2.0**". A ministerial draft bill that was published in August 2024 has now been followed on 11 October 2024 by the publication of a draft bill by the German Federal Government for the so-called "**Fund Market Strengthening Act**" (*Fondsmarktstärkungsgesetz*) to transpose the requirements of the AIFMD 2.0 into national law.

The Fund Market Strengthening Act will include various changes to the German Investment Code (KAGB) that will affect both **fully licensed** and **sub-threshold** alternative investment fund managers ("**AIFM**"). In order to avoid competitive disadvantages for German AIFM and additional costs for investors, the draft bill pursues the welcome goal of a 1:1 transposition of the AIFMD 2.0. In addition, various changes are planned that are not prompted by the AIFMD 2.0.

This briefing provides an overview of the most important changes for AIFM managing closed-end special AIFs in the venture capital and private equity sector in Germany. The changes for fully licensed AIFM (such as loan-origination, delegation, managing directors, special representatives and ancillary activities) are presented first. The changes for sub-threshold AIFM follow thereafter. Finally, a brief look at the new marketing restrictions for third-country AIF is included.

What's new for fully licensed AIFM?

Loan origination

The Fund Market Strengthening Act introduces several changes to the loan origination of special AIF and will therefore replace the previous national product regulation in this area.

Who falls within the scope of the new regulations?

In future, there will be two types of AIF for which AIFM must observe the new regulations: Firstly, the type of "loan-originating AIF", and secondly, AIF that simply engage in loan origination, but without being "loan-originating AIF".

The "loan-originating AIF" as credit funds are regulated much more strictly than the AIF that simply engage in loan origination.

What are "loan-originating AIF"?

A loan-originating AIF is defined as an AIF whose investment strategy is mainly to originate loans or whose originated loans have a notional value that represents at least 50 percent of its net asset value.

A venture capital or private equity fund that also originates shareholder loans to the portfolio companies it holds will generally not be considered a loan originating AIF since its investment strategy does not mainly consist of originating loans. However, the new regulations for "loan-originating AIF" may apply if the share of loans exceeds the aforementioned threshold of the net asset value. This calculation should therefore be kept in mind, especially at the beginning of the investment phase and depending on the respective transaction.

What are loans?

Neither the AIFMD 2.0 nor the Fund Market Strengthening Act contain a definition of the term "loan". To ensure the uniform application of laws, we would welcome if BaFin's administrative practice for defining a loan would be based on its own administrative practice for banks. For the banking sector, in principle, recourse is made to the loan agreement of the German Civil Code (BGB), but with recognition of various exceptions, for example, for qualified subordinated loans. It remains to be seen how the term is interpreted in practice.

What are shareholder loans?

A shareholder loan is now defined as a loan granted by an AIF to an undertaking in which it directly or indirectly holds at least 5 percent of the capital or voting rights, provided that the loan cannot be sold to third parties independently of the capital instruments held by the AIF in the same undertaking.

In practice, it is therefore important to ensure that the shareholder loan contains this transfer restriction in order to benefit from the associated reliefs outlined later in this briefing.

What falls under the term "loan origination"?

In addition to the direct origination of a loan by an AIF itself, loan origination is also – simplified – the indirect origination of a loan via a third party or a special purpose vehicle if the AIFM or the AIF is involved in the structuring of the loan or the determination or preliminary agreement of its characteristics before the third party or the special purpose vehicle acquires a loan risk.

This is intended to prevent circumvention of the regulations.

If loan origination via special purpose vehicles is subject to the regulations of the KAGB, these special purpose vehicles should be allowed to originate loans for the AIF outside of the German Banking Act (KWG). However, this conclusion has not been implemented in the current draft bill. In this regard, a clarification in the German Banking Act would be necessary.

Can loan-originating AIF only be closed-end funds?

In principle, loan-originating AIF can only be closed-end funds. However, if the AIFM can prove to BaFin that the liquidity risk management system of an open-end fund is compatible with the investment strategy and interest redemption policy of the AIFM, an open-end fund can also be a loan-originating AIF.

What are the risk management requirements for originating loans?

AIFM that manage AIF that originate loans must implement and regularly review effective strategies, procedures and processes for the assessment of loan risk and the management and monitoring of the loan portfolio. This also applies if the AIF obtains loan risk via third parties.

This is a general requirement that also applies to AIF that are not "loan-originating AIF". This requirement largely corresponds to the risk management requirements for loan origination that already exist in Germany. In future, the Federal Ministry of Finance (*Bundesministerium der Finanzen, BMF*) will in any case be authorized to issue more detailed regulations on risk management by way of an ordinance.

An exception to risk management exists for the origination of shareholder loans if the total notional value of these loans does not exceed 150 percent of the capital of the AIF. As in the EuVECA Regulation, the term "capital of the AIF" refers to the investable capital. This threshold is typically not expected to be exceeded.

What other risk management requirements and restrictions apply when originating loans?

The Fund Market Strengthening Act provides for some restrictions on loan origination by AIF. In the following, we differentiate between AIF that simply engage in loan origination and "loan-originating AIF".

Applicability for AIF that simply engage in loan origination

- **Risk diversification**: If a single borrower is a certain financial undertaking within the meaning of the Solvency II Directive, an AIF or a UCITS, the value of the loans originated by the AIF to this single borrower may not exceed 20 percent of the AIF's investable capital. This limit applies from a date to be determined, at the latest 24 months from the date of the first subscription of interests in the AIF and without prejudice to the conditions laid down in the ELTIF, EuVECA and EuSEF Regulations. The Fund Market Strengthening Act contains further details on the validity of risk diversification. The previous German product regulation was stricter in this respect.
- **Loan prohibitions**: In order to avoid conflicts of interest, the AIF may not originate loans to certain borrowers. In addition to (i) the AIFM and its staff, this also includes (ii) the depositary and its delegates, (iii) AIFM's delegates and their staff and (iv) companies in the AIFM's group of companies, unless the latter are financial undertakings that exclusively finance borrowers that are not mentioned under (i) to (iii).
- **Proceeds and cost transparency**: Proceeds from the loans less any management fees should be allocated in full to the AIF. All costs and expenses in connection with the management of the loan must be disclosed in the pre-contractual Art. 23 AIFMD disclosures (Sec. 307 KAGB).
- **"Originate-to-distribute" prohibition**: The investment strategy of the AIF may not consist of originating loans for the sole purpose of transferring these loans or risks from the origination of loans to third parties.
- **Retention**: The AIFM must generally ensure that 5 percent of each loan originated by the AIF and subsequently transferred to third parties is retained for a period of (i) at least eight

years, (ii) in the case of shorter loan terms, until maturity, or (iii) in the case of consumer loans, irrespective of the term. The draft bill regulates various exceptions to this requirement.

- **Consumer loans**: The draft law makes use of the option provided for in AIFMD 2.0 to prohibit loan origination and the servicing of loans granted to such consumers within the scope of the KAGB. The wording refers to consumers in Germany, so that, for example, it would be possible to originate loans to consumers in other countries.

For "loan-originating AIF"

In addition to the requirements for AIF that simply engage in loan origination, as described above, "loan-originating AIF" must also observe:

- **Leverage**: Upper leverage limits of 300 percent for closed-end funds and 175 percent for open-end funds apply, in each case calculated using the commitment method in accordance with the Delegated Regulation.

  This does not apply to loan-originating AIF that exclusively originate shareholder loans, provided that the total notional value of these loans does not exceed 150 percent of the AIF's investable capital.

  Until now, German law provided for an upper leverage limit of up to 30 percent of investable capital for loan origination. There was previously no leverage limit for shareholder loans, provided that no more than 50 percent of the investable capital was used for these loans.

Transitional provisions

The transitional provisions do not differentiate between loan-originating AIF and AIF that simply engage in loan origination. The provisions uniformly apply to AIF that originate loans.

For AIF that were launched before 15 April 2024, but raise additional capital after this date, a (limited) transitional period is provided until 16 April 2029. The restrictions on loan origination regarding risk diversification, leverage and fund type are deemed to have been complied with. However, if the notional amount of the loan or the leverage of the AIF already exceeds the respective statutory upper limit, this transitional provision only applies if these values are not increased further. Values that are below the respective upper limit may not be increased above the stated limits. For AIF that were launched before 15 April 2024, and do not raise additional capital after 15 April 2024, the aforementioned transitional provision applies for an unlimited period of time.

AIF that have already originated loans before 15 April 2024 can continue to be managed without having to comply with the requirements on general risk management, loan prohibitions for reasons of conflicts of interest, proceeds and cost transparency, the "originate-to-distribute" prohibition and any statutory ordinance of the BMF.

There are no further transitional provisions to the loan origination regulations.

Delegation

The draft bill also results in some changes for delegation cases.

Compliance with the AIFMD

One of the key new requirements is that, when delegating, AIFM must ensure that the performance of the delegated tasks and services complies with the AIFMD irrespective of the regulatory status and location of the delegation company. This can be particularly problematic in delegation cases involving third countries. There is no provision for conflicts with foreign law, but such a provision would be desirable.

Scope of the delegation

It is a welcome clarification that the delegation requirements of the KAGB only relate to the tasks of the AIFM under the KAGB and the (ancillary) services of financial portfolio management, investment advice, investment brokerage, custody and management of investment assets and other services under the KAGB. Delegation under other legislation (such as the German Anti-Money Laundering Act, GWG) is therefore not subject to the requirements of the KAGB.

Disclosure and notification obligations

In addition to specifying the information to be transmitted as part of a license application regarding delegation plans to BaFin, this also concerns the transmission of additional detailed data about the delegation company and the AIFM as part of the reporting obligations to BaFin when delegating portfolio management or risk management. In this regard, information on the personnel and technical resources used by the AIFM for portfolio management and risk management and for monitoring the delegation is particularly important. This extended reporting obligation to BaFin is not set to take effect until 15 April 2027.

An obligation originally included in the ministerial draft bill to report so-called "serious incidents" in existing delegation arrangements that could have a material impact on the AIFM's business activities has been removed in the government draft bill.

Marketing

There is a significant tightening in the area of the commissioning of placement agents. If an AIF is distributed in the own name of one or more distributors in accordance with MiFID II or the IDD (*Insurance Distribution Directive*), the requirements of the KAGB do not apply to delegation situations. In this respect, the contracting parties have the freedom to stipulate additional requirements in the distribution agreement. In other words, the KAGB requirements for delegation now apply to the commissioning of placement agents that are *not* subject to the aforementioned regulations, such as placement agents from third countries.

Conflicts of interest for Service-AIFM

The business of Service-AIFM will be more strictly regulated to the extent that a Service-AIFM must now provide BaFin with detailed explanations and supporting documents in order to demonstrate compliance with the requirements for conflicts of interest regarding the (fund) initiator.

Managing Directors

Regarding the working hours of managing directors, the Fund Market Strengthening Act now requires for the first time that AIFM are managed by at least two managing directors who are employed

by the AIFM on a full-time basis or who manage the business on a full-time basis as a member of the management body and who are resident in the EU. It is hardly understandable that the same requirement was originally supposed to apply to the funds themselves according to the ministerial draft bill. This would not have corresponded to reality and has now been corrected in the government draft bill.

In corporate structures, it can happen that there is an overlap in the persons appointed as managing directors, for example, if the group includes two AIFM. This practice can also be considered permissible under the new requirements after an individual case review.

Appointment of a special commissioner

The possibility of BaFin appointing a special commissioner for a particular reason at the AIFM's expense will also be comprehensively revised in line with banking regulation.

The appointment of the special commissioner should now not only be in connection with the sanctioning of managing directors, but also open up an independent, preventative option for BaFin to act. In the future, special commissioners can also be appointed for specific and limited areas of responsibility alongside the appointed managing directors.

Ancillary activities of fully licensed AIFM

The range of (ancillary) services permitted for AIFM has been significantly enhanced and, as such, is to be welcomed.

Services to third parties on the market

A real innovation is that an AIFM may ultimately perform for the benefit of third parties any function or activity that the AIFM already performs in relation to the AIF it manages, or in relation to services it provides under the ancillary services rules, provided that potential conflicts of interest are adequately addressed.

The recitals to AIFMD 2.0 cite examples of business services in areas such as human resources and IT, as well as the provision of IT services for portfolio and risk management.

This offer to third parties on the market was previously not permitted for AIFM due to the so-called principle of specialty applied by the administration.

Ancillary activities separate from financial portfolio management

Previously, AIFM always had to apply for a license for financial portfolio management in order to provide certain ancillary services, such as investment advice and investment brokerage. The other ancillary services were then "included" in this license. At the same time, the need for a license for financial portfolio management also represented a hurdle due to BaFin's strict administrative practice. In future, for example, the license for investment advice and investment brokerage can be applied for independently of the license for financial portfolio management.

Crypto-asset services

In future, AIFM will also be permitted to provide crypto-asset services in accordance with the Regulation on Markets in Crypto-Assets (MiCAR) to the extent provided for. To do so, however, they

must first undergo the notification procedure provided for this purpose. We strongly recommend examining the impact of MiCAR and the Fund Market Strengthening Act on crypto-business models. The extension of the license to include crypto-asset services is associated with corresponding efforts.

Benchmarks and credit services

Permitted ancillary services are also the management of benchmarks in accordance with the Benchmark Regulation, with the exception of benchmarks used in the AIF managed by the AIFM, and the provision of credit services in accordance with the Secondary Credit Market Act (*Kreditzweitmarktgesetz, KrZwMG*), i.e., services in connection with the processing of non-performing loans.

Requirements for venture capital and private equity AIFMs are being reduced

To date, AIFM that manage venture capital and private equity funds have had to comply with various regulations of the German Securities Trading Act (*WpHG*) regarding their (ancillary) services. However, we expect that these restrictions will be largely abolished in the future according to the current draft bill. The reason for this is that unlisted equity investments typically do not constitute MiFID financial instruments and the application of the provisions of the WpHG for AIFM will, in future, depend on the presence of a MiFID financial instrument.

Information and notification obligations

The Fund Market Strengthening Act provides for an extension of the pre-contractual and regular information obligations towards investors. The new obligations include, among other things, the provision of a list of fees, charges and other costs that may be incurred by the AIFM in connection with the management of the AIF and attributed to that AIF.

Regular reporting to BaFin will also be expanded. For example, a list of the member states in which an AIF is actually marketed must also be included. AIFM are therefore required to review their reporting arrangements in cooperation with their fund administrator, if appointed.

Liquidation of the AIF by the depositary

If the right of the AIFM to manage an AIF expires due to termination of the management, and if this results in liquidation, the ministerial draft bill provided that in future it should only be possible to liquidate the AIF via the depositary. The existing possibility for the partners to appoint a liquidator other than the depositary was originally intended to be abolished. According to the explanation of the ministerial draft bill, this option has not proven itself in practice and creates opportunities to circumvent economically necessary liquidations or at least delay them at the expense of the investors. The government draft bill adopts this reasoning but has moved away from this restriction and retains the possibility of a liquidation by a liquidator other than the depositary, but now limited to the AIFM itself. We consider this to be appropriate.

What's new for sub-threshold AIFM?

Information and notification obligations

When applying for registration, sub-threshold AIFM must provide BaFin with information about the managing directors and, for the first time, the names of the significant shareholders of the sub-threshold AIFM. Furthermore, there is an ongoing obligation to report the appointment or departure of managing directors as well as changes in significant shareholdings. These reporting obligations are designed as subsequent obligations without the prior consent of BaFin. The explicit aim is a better and more effective monitoring of the threshold values and thus a possible license requirement for the sub-threshold AIFM.

Loan origination

The changes to loan origination by AIF outlined above also apply to sub-threshold AIFM.

Ancillary activities of sub-threshold AIFM

As things stand, the draft bill does not provide for any expansion of the permitted ancillary activities of sub-threshold AIFM. This is understandable in principle given the system of the AIFMD 2.0 but is by no means mandatory. Sub-threshold AIFMs are thus at a disadvantage because, unlike fully licensed AIFM, they are not permitted to offer the services described above to third parties on the market. The further development of this critical point during the legislative process remains to be seen.

Annual financial statements and management reports as well as audit for EuVECA managers and EuSEF managers

What already applied to sub-threshold AIFM registered under the KAGB will now also be transferred to EuVECA managers and EuSEF managers: In future, they will be expressly required to prepare annual financial statements and a management report. The German Commercial Code's (*HGB*) size reduction for small corporations does not apply. This will also result in a mandatory audit for these managers.

Managers, who already had dual registration under the KAGB and, for example, the EuVECA Regulation, were already required to commission an audit based on their KAGB registration.

Managers of investment companies of the KAGB

If a sub-threshold AIFM voluntarily opts for one of the legal forms of the KAGB when structuring the AIF (for example the closed-end investment limited partnership), the same requirements will no longer apply to the managers of these AIF as to the managers of an AIF that is managed by a fully licensed AIFM. In addition, the special requirements for the termination of a management agreement and the liquidation of the AIF will no longer apply in future. In our opinion, these simplifications will not have a significant impact on the choice of legal form.

Appointment of a special commissioner

Regarding the appointment of a special commissioner by BaFin, reference can also be made to the information provided above.

Marketing restrictions for third country AIF and third country AIFM

For the marketing of non-EU AIF by EU AIFM or non-EU managers in Germany, new restrictions will apply in future regarding the qualification of the respective third country. In the case of non-EU managers, these requirements apply to both the third country of the non-EU AIF and the third country of the non-EU manager.

The third country (i) must not be a high-risk third country for money laundering and terrorism financing according to the EU Commission List, (ii) must have signed an agreement with the Federal Republic of Germany that fully complies with Art. 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including multilateral agreements on taxation where applicable, and (iii) must not be on the EU list of non-cooperative jurisdictions for tax purposes.

The new requirements may lead to prohibitive restrictions for common fund jurisdictions if, in particular, the requirements from the OECD Model Tax Convention are not provided for in the respective double taxation agreement.

What happens next?

The draft bill has already been forwarded to the Federal Council for consideration. It remains to be seen whether and which adjustments will be made in the further legislative process.

The deadline for the national implementation of the AIFMD 2.0 is 16 April 2026. The changes prompted by the AIFMD 2.0, as described above, will only come into force at that point in time. However, certain amendments, in particular for sub-threshold AIFM with regard to information and notification obligations, are to come into force as early as 1 July 2025.