

Germany



Private Equity (Fund Formation)

Consulting editors

Atif Azher

Simpson Thacher & Bartlett LLP

Quick reference guide enabling side-by-side comparison of local insights, including into choice of vehicle and formation process; regulation, licensing and registration; taxation; selling and investor restrictions; money laundering rules; listing considerations; participation in private equity transactions; compensation and profit-sharing issues; and recent trends.

Generated 13 March 2023

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2023 Law Business Research

Table of contents

FORMATION

- Forms of vehicle**
- Forming a private equity fund vehicle**
- Requirements**
- Access to information**
- Limited liability for third-party investors**
- Fund manager's fiduciary duties**
- Gross negligence**
- Other special issues or requirements**
- Fund sponsor bankruptcy or change of control**

REGULATION, LICENSING AND REGISTRATION

- Principal regulatory bodies**
- Governmental requirements**
- Registration of investment adviser**
- Fund manager requirements**
- Political contributions**
- Use of intermediaries and lobbyist registration**
- Bank participation**

TAXATION

- Tax obligations**
- Local taxation of non-resident investors**
- Local tax authority ruling**
- Organisational taxes**
- Special tax considerations**
- Tax treaties**
- Other significant tax issues**

SELLING RESTRICTIONS AND INVESTORS GENERALLY

- Legal and regulatory restrictions**
- Types of investor**
- Identity of investors**
- Licences and registrations**

Money laundering

EXCHANGE LISTING

Listing

Restriction on transfers of interest

PARTICIPATION IN PRIVATE EQUITY TRANSACTIONS

Legal and regulatory restrictions

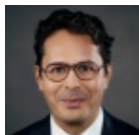
Compensation and profit-sharing

UPDATE AND TRENDS

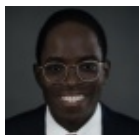
Key developments of the past year

Contributors

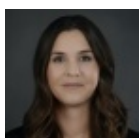
Germany



Tarek Mardini
tarek.mardini@pplaw.com
POELLATH



Matondo Cobe
matondo.cobe@pplaw.com
POELLATH



Antonia Nabavi
antonia.nabavi@pplaw.com
POELLATH

POELLATH+

FORMATION

Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

The most common legal form is a closed-ended fund organised as a German limited partnership (KG) as it is tax-transparent, allows flexible structuring and provides limited liability to investors. KGs have separate legal personality. The general partner (GP) of the KG is personally liable for the debts of the KG. To reduce liability risks, typically a company with limited liability (GmbH) serves as GP (GmbH & Co KG). The investors join as limited partners. The fund manager is typically acting as managing limited partner of the KG. Besides the KG, several other legal forms are available for German private equity funds (eg, investment KG, investment AG, UBG). However, the KG is the market standard (in particular for registered, ie, 'sub-threshold', fund managers).

Law stated - 01 January 2023

Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

The formation of a KG is simple. The KG comes into legal existence with the signing of the limited partnership agreement (LPA) by the GP and the limited partners. To ensure limited liability for investors, the KG and its partners will be registered in the German commercial register. Also, the beneficial owners must be reported to the transparency register. Notarisation of the LPA is not required, but the filing with the commercial register must be effected by a notary. Signatures of investors must be notarised by a notary public (if taking place outside Germany, generally an apostille in accordance with the Hague Convention has to be provided by the notary public). Limited partners in the form of an entity must provide proof of their valid existence and due representation by the signatories. The fees and expenses for the notarisation of filing with the commercial register and the registration fees are fairly small and generally do not exceed €2,000. Filings can usually be effected within two to four weeks. The KG itself has no minimum capital requirements. A minimum registered capital of €25,000 applies to a GmbH serving as GP.

Law stated - 01 January 2023

Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

A separate custodian is necessary if the fund is managed by a fully licensed manager under the KAGB (the German implementation of the Alternative Investment Fund Managers Directive (AIFMD)). A custodian is not necessary in the case of a registered (sub-threshold) manager. A fund in the form of a KG requires a domicile in Germany and must comply with the commercial law requirements regarding book-keeping. The fund manager typically serves as managing limited partner of the fund and also performs corporate secretarial and administrative tasks. A separate administrator is rather uncommon (as opposed to other jurisdictions).

Law stated - 01 January 2023

Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

The records maintained at the commercial registry are public via the internet. This includes the identity of the investors as limited partners and their liability amounts (typically expressed as a small percentage of the capital commitment). Such disclosure can be avoided by interposing a nominee as direct limited partner, to hold and manage its limited partner interest for and on behalf of the investors as beneficiaries. Filing of the partnership agreement is not required, thus the fund terms remain confidential. The partnership is required to file its annual financial statements with the commercial register and to publish them in the electronic Federal Gazette. The articles of association of the GP are filed with the commercial register and are available to the general public. Fines and other enforcement measures can be imposed for failure to make required filings. In 2018, Germany introduced the transparency register under the EU anti-money laundering law. The transparency register must include all beneficial owners unless the beneficial owners are already shown in public documents in the commercial register.

Law stated - 01 January 2023

Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

The investor's liability as limited partner in relation to the partnership is limited to such investor's capital commitment. Liability in relation to third-party creditors of the fund is limited to the liability amount registered with the commercial registry, typically a small percentage of the actual capital commitment. If this amount has been paid into the partnership, then there is no additional liability of such limited partner to third parties. Potentially, there is a risk that a limited partner is treated as GP (ie, fully liable to third parties) for the period of time between its admittance to the partnership and registration of such limited partner with the commercial register (whether when subscribing to a fund in the fundraising process or in the case of a transfer). However, technical solutions are available and common to avoid such risk (eg, making the registration with commercial register a condition precedent for the formal admission to the partnership). Otherwise, there are generally no circumstances in which the limited liability of limited partners would not be respected as a matter of German law.

Law stated - 01 January 2023

Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

A fund manager's fiduciary duties are mainly based on the rules of conduct imposed by the AIFMD. This means a fund manager must act honestly, fairly and with due skill, act in the best interests of the fund and its investors and treat all investors fairly. Further, the fund manager must take all reasonable steps to avoid conflicts of interest where possible. These fiduciary duties cannot be altered by agreement. However, the fund manager and the investor can agree on

higher threshold for the fund manager's liability.

Law stated - 01 January 2023

Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

The management of the fund (ie, the GP, the managing limited partner, or both) must by law apply the standard of care of a prudent business person. In particular, the management must follow the legal requirements for book-keeping, preparing of statutory accounts and filing of tax returns of the fund. In practice, however, partnership agreements typically restrict the liability of the GP and the managing limited partner to gross negligence and wilful misconduct. Some commentators in legal publications dispute, however, whether such a restricted standard of liability can be enforced in court as between the partners of a partnership.

Law stated - 01 January 2023

Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

Fund sponsors need to be aware of the special rules on the taxation of a private equity fund. German regulated investors, such as insurance companies, require a free transferability of their interest in the fund. If the sponsor uses the limited partnership (GmbH & Co KG) as the most common private equity fund vehicle in Germany, investors need to be registered with the commercial register of the KG in order to be shielded from unlimited liability.

There are no specific rules for a conversion of a non-domestic -vehicle into a domestic vehicle. Possible from a legal perspective is redomiciling of a non-domestic vehicle to Germany. This would result in the case of a limited partnership to a conversion of the vehicle into a German limited partnership (GmbH & Co KG). The most material change of such redomiciling will be the fact that the KG and its investors need to be registered with the local commercial register in order to benefit from limited liability. Potential negative tax effects of such conversion or redomiciling have to be analysed in advance on a case-by-case basis.

Law stated - 01 January 2023

Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

There are no legal or regulatory rules directly connecting an event at the fund sponsor level with the private equity fund and its GP and investment adviser. It is possible, though – depending on the group structure – that events such as

bankruptcy, insolvency, change of control or restructuring at the sponsor level will lead to regulatory consequences at the manager level or at the level of the investment adviser. For instance, change of control events in the top holding company of a group will require a notification process to the regulator. Further, a bankruptcy or insolvency of the GP leads to an automatic removal of the GP from the fund and the fund being switched into 'run-down mode'.

In practice, it is common that the fund LPA contains at least change of control provisions with regard to the GP and the fund manager. It is then left to the negotiations with the investors how extensive these provisions are with regard to other events and other entities of the manager group.

Law stated - 01 January 2023

REGULATION, LICENSING AND REGISTRATION

Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

The regulatory body in Germany is the Federal Financial Supervisory Authority (BaFin). The regulation of private equity funds in Germany is based on the Alternative Investment Fund Managers Directive (AIFMD). The regulatory regime is therefore foremost a regulation of the manager and only indirectly a regulation of the fund itself. BaFin has inspection rights towards managers as well as the right to perform an audit. In addition, each fully licensed manager and registered manager must itself have an auditor perform an audit on the manager's regulatory compliance. The registered manager is obliged to have the annual financial statements and management report prepared by an auditor. The auditor also examines, whether the registered manager has fulfilled its obligations under the German Money Laundry Act (GwG) and complied with the provisions of the Capital Investment Code (KAGB). The auditor is obliged to send the report on the audit to BaFin without undue delay after completion of the audit.

As of August 2021, a new provision in the German Investment Code (section 45a KAGB) requires the sub-threshold alternative investment fund manager (AIFM) too to instruct a qualified independent third party (eg. an auditor) to audit how funds are being managed and whether the sub-threshold AIFM adheres to applicable notification obligations and anti-money laundering laws. The AIFM must notify the BaFin of the appointed auditor.

The regulatory reporting requirements are as follows.

Registered managers (AIFMD sub-threshold managers)

Reporting obligations to BaFin:

- annual report of information pursuant Annex IV of delegated regulation (EU) 231/2013 (AIFMD Annex IV Reporting).

Reporting obligations to the German federal bank (Bundesbank):

- monthly report regarding the composition of the fund's assets and the adjustment of the fund's assets as a result of revaluation; and
- quarterly reporting of granted loans of each amount over €1 million.

Fully licensed managers

Reporting obligations to BaFin:

- ad-hoc notifications in the case of material changes (eg, dismissal of a managing director or reduction of own funds);
- annual financial statement of the manager; and
- AIFMD Annex IV Reporting.

Reporting to Bundesbank:

- same as registered managers (see above).

As for the regulatory reporting to investors, half-yearly and yearly reports are mandatory for fully licensed managers. For registered managers, there is no regulatory investor reporting requirement; however, annual reports are required by German commercial law.

Law stated - 01 January 2023

Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

Registered managers (AIFMD sub-threshold managers): registration process

Availability

The registration process is only available to certain small or medium-sized managers. The most important category of these small to medium-sized managers are known as sub-threshold managers under the AIFMD/KAGB. In practice, most German private equity fund managers fall within this category.

Sub-threshold managers under the KAGB are managers with assets under management of not more than €100 million (in the case of leverage) or not more than €500 million (no leverage) and who only manage special alternative investment funds (special AIFs). Special AIFs are AIFs whose interests or shares may only be acquired according to the fund documents by professional investors or semi-professional investors (ie, non-retail funds). Besides the requirements mentioned above, special private equity AIFs managed by sub-threshold managers are in principle not regulated.

An interesting option for a sub-threshold manager in the small to mid-cap market segment is to get additionally registered under the EU venture capital funds (EuVECA) regime to benefit from an EU marketing passport.

Registration procedure

The registration procedure for sub-threshold managers is comparatively simple. It requires the submission of an informal registration request together with certain 'corporate' documents on the manager and the managed funds (eg, the fund's limited partnership agreement and the manager's articles of association). In addition to being a special AIF, the fund may not require the investors to additionally pay in capital beyond the investor's original commitment.

The possible EuVECA registration is in line with the EuVECA requirements on the manager and the fund.

Ongoing issues

An advantage of the registration is that only few provisions of the KAGB apply to a registered-only manager; mainly the provisions on the registration requirements, ongoing reporting requirements and the general supervisory powers of BaFin. However, fund-specific requirements do not apply to registered-only managers and their funds. In particular, the depositary requirements and marketing requirements as well as the additional requirements of the KAGB for fully licensed managers do not apply.

On the downside, the registration restricts the manager to the type of funds and investors for which the registration was obtained (ie, only special AIFs and professional or semi-professional investors). Further, a registered manager does not benefit from the EU marketing passport under the AIFMD. A registered manager can, however, opt in to become a fully licensed manager.

Also, the special regulations according to which sub-threshold AIFM were allowed to manage retail funds have been abolished. Thus, all AIFM must be fully licensed to manage retail funds.

Fully licensed manager: licensing process

Availability

Fund managers who do not qualify for a registration or who opt out of a registration must apply for a full fund-management licence with BaFin under the KAGB. A full fund-management licence opens the door for a manager to market funds to retail investors as well as to the EU marketing passport under the AIFMD.

Licensing procedure

The licensing procedure is a fully fledged authorisation process with requirements equivalent to the requirements for granting permission under article 8 AIFMD. The licensing procedure checks requirements, such as sufficient initial capital or own funds, sufficiently good repute of the directors and shareholders, and organisational structure of the manager.

Ongoing issues

The licensing of the manager results in the manager being subject to the entirety of the KAGB. This means, in particular, the following:

- the required appointment of a depositary for the funds;
- access to setting up contractual funds;
- adherence to the corporate governance rules for funds set up as investment corporations or investment limited partnerships (investment KGs);
- adherence to the fund-related requirements of the KAGB;
- adherence to the marketing rules of the KAGB;
- access to the marketing passport under the AIFMD;
- access to the managing passport under the AIFMD; and
- adherence to the reporting requirements of the KAGB.

Law stated - 01 January 2023

Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

The German regime requires the entity that is conducting the portfolio and risk management of a fund to have a licence as a fund manager under the KAGB/AIFMD. There is no separate registration as an investment adviser. If a separate entity is advising the fund manager, such entity might need a Markets in Financial Instruments (MiFID) licence for investment advice.

Law stated - 01 January 2023

Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

The regulatory requirements differ depending on whether the manager is fully licensed or a registered manager.

A registered manager does not have to meet any regulatory capital requirements or suitability requirements. It is sufficient for the manager to meet the capital requirements under company law (eg, €25,000 for a German company with limited liability (GmbH)). In practice, though, BaFin prefers to see that a registered manager has sufficient substance to be able to manage the fund.

The possible EuVECA registration requirements are in line with the EuVECA requirements on the manager and the fund.

A fully licensed manager must hold at least €125,000 initial capital. In addition, the manager must have additional own funds if the value of the assets under management exceeds €250 million. The additional own funds amount to 0.02 per cent of the value of the investment assets under management that exceeds €250 million. This corresponds to €20,000 per €100 million. Regardless of these calculations, the manager must have own funds amounting to at least 25 per cent of the fixed overhead costs.

A fully licensed manager needs at least two managing directors. The managing directors must be reliable and professionally suitable. The professional suitability is regularly given if the managing director has held a managerial position with a fund manager for at least three years. BaFin assesses the professional suitability individually, however, so the suitability can also be proven with less relevant professional experience.

Law stated - 01 January 2023

Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

There are no such detailed rules or restrictions in Germany (other than the general criminal laws on bribery). This probably reflects the fact that investments of public pension plans and other governmental activities in private equity funds are still rather limited in Germany.

Law stated - 01 January 2023

Use of intermediaries and lobbyist registration

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund's investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

Where applicable, the disclosure requirements under MiFID II apply if intermediaries are used in the marketing of the fund interests. German law treats potential investors as the regulatory client of the MiFID intermediary. This results in the application of the MiFID rules of good conduct and cost-disclosures rules to the relationship between the intermediary and the potential investor.

In January 2022, the German Lobbying Register for the Representation of Special Interests vis-à-vis the German Bundestag and the Federal Government entered into force. Individuals and legal entities involved in lobbying activities face extensive registration and (financial) disclosure obligations.

Law stated - 01 January 2023

Bank participation

Describe any key legal or regulatory developments (including those emerging from the 2008 global financial crisis) that specifically affect banks with respect to investing in or sponsoring private equity funds.

As a consequence of the global financial crisis, credit institutions within the meaning in the Capital Requirements Regulation are prohibited from conducting guarantee and credit business with private equity funds. However, this prohibition only applies if the balance sheet total of the credit institution exceeds a certain threshold. Under the same conditions, credit institutions are also prohibited from conducting proprietary business.

Law stated - 01 January 2023

TAXATION

Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Partnerships

For funds in the form of a partnership (eg, a limited partnership (KG)), the general rules of taxation are applicable (ie, the special tax regime for corporate funds under the German Investment Tax Act, see below, is not applicable). Therefore, if the fund is structured as a partnership that is not engaged in trade or business, it is neither subject to German income tax nor German trade tax (ie, the partnership is treated as 'transparent' for tax purposes). Any income derived by the partnership is immediately allocated to its partners and taxed at the level of the partners in accordance

with the rules of the tax regime applicable to the respective partner. On the other hand, if the fund vehicle qualifies as engaged in a trade or business, the fund itself is still not subject to German income tax, but it is subject to German trade tax.

There are no withholding tax implications at the level of the partnership itself. Withholding tax implications can arise from the underlying investments made by the fund.

Investment funds

Funds in the form of a corporation or of a contractual type are covered by the Investment Tax Act (investment funds). Under the opaque regime, the fund is subject to taxation with respect to certain domestic German income (in particular, dividends and real estate income, but not capital gains from the sale of securities unrelated to real estate and unrelated to a permanent establishment in Germany) at fund level (15 per cent tax rate (ie, German corporate tax)). The exemption for dividends (section 8b of the German Corporation Tax Act) is not applicable at fund level even if the relevant threshold (ie, 10 per cent) is exceeded. In addition, German trade tax may be triggered at fund level if it is engaged in trade or business in Germany (subject to a potential exemption if the fund does not engage in 'active entrepreneurial management' in relation to its assets).

Investment funds are required to withhold tax for the taxable income of their (domestic) investors, but not for the income from the sale of fund units.

In general, there are no tax exemptions at the level of the investment fund. In return, at the level of the investor investment fund proceeds are subject to partial exemptions depending on the respective fund type (equity fund, mixed fund or real estate fund).

At the investor level, there is a lump-sum taxation for investment fund proceeds (ie, distributions, predetermined tax bases and capital gains from dispositions or redemptions). For individual investors, the actual rate of investor level taxation depends on whether the investor holds the fund interests as part of their non-business or business assets. For individuals that hold their investment fund interests as part of their non-business assets, such items are subject to flat income tax. For individuals that hold their investment fund interests as part of their business assets, principally, the full amount of such items is subject to income tax at their personal rate. For corporate investors, the full amount of such items is subject to corporation tax. In addition, German trade tax may be triggered. The partial income taxation and the exemption pursuant to section 8b of the German Corporation Tax Act do not apply. In return, investment fund proceeds are subject to partial exemptions depending on the respective fund type. With respect to equity funds, the partial exemption is:

- 30 per cent of such proceeds for individuals that hold their investment fund interests as part of their non-business assets;
- 60 per cent for individuals that hold their investment fund interests as part of their business assets; and
- 80 per cent for corporate investors.

With respect to mixed funds, half of the applicable partial exemption rate applicable to equity funds is available. With respect to real estate funds, the partial exemption is 60 or 80 per cent of the proceeds, depending on whether the fund invests at least 51 per cent of its value in German or non-German real estate and real estate companies. In return, income-related expenses and operating expenses may not be deducted to the extent of the available partial exemption percentage. With regard to trade tax, half of the applicable partial exemption rate applies.

In addition, if the investment fund qualifies as a specialised investment fund, the fund may opt to be treated transparently for tax purposes. As a result, the fund itself would not be subject to taxation.

Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

In general, non-resident investors of a private equity fund structured as a partnership will be subject to taxes in Germany pursuant to the German general tax rules for non-residents. If the fund is structured as a partnership having asset management status (ie, is not deemed to be in business and not engaged in business activities for German tax purposes), non-resident investors are generally (if holding less than 1 per cent indirect share in such portfolio company) not taxed on capital gains realised by the fund from the sale of a portfolio company and they are not required to file tax returns in Germany. However, income of non-resident investors might be subject to the German withholding tax (eg, with regard to dividend distributions from a portfolio corporation held by the private equity fund). A refund, an exemption or a reduction of withholding tax may depend on certain filing procedures. This may also apply with regard to certain double taxation treaties.

The distributions to a non-resident investor of an investment fund will not be taxable in Germany and will not be subject to withholding tax. As a result, non-resident investors who make German investments via (domestic or foreign) investment funds only have to bear a German tax burden, as far as there is a taxation at fund level (fund input side). The German non-taxation of distributions to non-resident investors (fund output side) is completely independent of which assets the fund holds, in which country the investor is domiciled and whether there a double taxation agreement is applicable.

Law stated - 01 January 2023

Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

It is desirable to obtain a binding ruling from the local tax authorities on the tax classification of the fund to increase the level of comfort of both investors (including foreign investors) and fund managers as the tax status may not be clear (also depending on the investment strategy). If the fund is structured as a partnership, an advanced tax ruling should ideally ensure that the asset management criteria are met from the point of view of the tax administration. For investment funds under the German Investment Tax Act that want to be taxed transparently, it may be desirable to obtain a binding ruling to ensure that the criteria for a specialised investment fund are fulfilled. In certain cases, rulings regarding VAT treatment can be obtained.

There is no special treatment of income from a fund in the form of a partnership. The income is taxed at the level of German-resident investors in accordance with the general rules applicable to the respective investor and the respective type of income. Domestic and foreign investors of investment funds are formally treated equally. However, the partial exemption rates provided in the German Investment Tax Act only benefit German investors, because foreign investors are generally not subject to any tax obligation in Germany at the level of the investment fund investor.

Law stated - 01 January 2023

Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

There are no significant organisational taxes (including no stamp duties) required to be paid with respect to private equity funds organised in Germany.

Law stated - 01 January 2023

Special tax considerations

Describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

Carried interest

The carried interest of a sponsor of an asset managing (ie, non-trading) private equity fund is not subject to German trade tax. In addition, there is a 40 per cent income tax exemption, resulting in an effective rate of income tax of around 28.5 per cent, if certain cumulative criteria are fulfilled (in particular, the fund must qualify for asset management status and the carried interest must be paid only after the investors have had all their invested capital paid back).

Otherwise, such income is potentially generally fully taxable at normal German income tax rates. However, a new decision of the highest German tax court (Bundesfinanzhof), issued in late 2018 and published in mid-2019, clarified the tax treatment of carried interest from business-type fund structures. The court ruled that carried interest received from a business-type private equity fund should be qualified as a (disproportionate) share of income. In other words, the decision rejected the view from the German tax authorities that, in the absence of the applicability of the special legislative rules for carried interest received from 'asset managing' funds, carried interest should be taxed as a (hidden) service fee at normal tax rates. As a consequence of this case law, the partial income applies insofar as the carried interest is comprised of capital gains or dividends. This also applies to private equity funds that are deemed-business or business-tainted only. From the sponsor perspective, this is good news, and results in a more or less uniform tax treatment of carried interest (irrespective of whether the fund is seen as a business-type fund or an asset management-type fund). It remains to be seen whether the tax authorities will accept this position (or initiate a legislative change).

Management fee

In general, the management fee payable to the managing partner of a fund was subject to the German VAT until the end of 2017 (regardless of whether such management fee is structured as a priority profit share). According to the revised German VAT Act as of 2018, the management of Undertakings for the Collective Investment in Transferable Securities (UCITS) and of certain alternative investment funds (AIFs) that are comparable to UCITS, are exempt from VAT. The German VAT Act does not stipulate which types of AIF are comparable to UCITS. The German tax authorities have established criteria that must be fulfilled in order to benefit from the VAT exemption (eg, the AIF has to offer shares to the same group of investors and be subject to similar obligations and controls as UCITS). In addition, it was clarified that open-ended special AIF will be exempt from VAT without fulfilling the established criteria, whereas the administration of closed-ended AIF will only be exempt from VAT if certain previously established criteria were cumulatively met.

Law stated - 01 January 2023

Tax treaties

List any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

Germany has signed tax treaties with most OECD states and with many other states. Because of tax transparency, such treaties generally do not apply to a fund structured as a partnership, but apply directly to its partners. For the specific taxation under a tax treaty, it may be relevant whether the fund qualifies as a commercial or asset-managing partnership and if there is any permanent establishment. If the fund vehicle is structured as a corporation, such tax treaties generally apply to the corporate fund itself. However, each case must be carefully assessed for tax consequences arising from the applicable treaty and the relevant rules in each jurisdiction (eg, whether there is an applicable treaty override).

Law stated - 01 January 2023

Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

Depending on the structure of the fund and its assets, different German tax regimes apply. The structure of the specific investment may have far-reaching tax consequences at the fund level, but also at the investor level (eg, the structure may be relevant for the question whether the income of a foreign investor in a German is taxable (and subject to German tax filings), subject to withholding tax or whether double taxation treaties apply). The German tax landscape is complex and subject to constant change. Thus consulting experienced tax counsel regarding the establishment and investment activities of the fund as well as fund investments by investors is highly recommended.

Law stated - 01 January 2023

SELLING RESTRICTIONS AND INVESTORS GENERALLY

Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

Only funds managed by German registered sub-threshold managers can be marketed on a private placement basis to professional and semi-professional investors in Germany. Also, marketing under the European venture capital funds regime is still rather simple and the regime provides an EU marketing passport. In the case of a fully licensed manager, the marketing of the fund requires Federal Financial Supervisory Authority (BaFin) approval.

Law stated - 01 January 2023

Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

It is possible to form a private equity fund for retail investors. However, market practice is that private equity funds are only formed for participations by semi-professional and professional investors.

Law stated - 01 January 2023

Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

There are no regulatory filing requirements towards BaFin with regard to the identity of the fund investor. A fully licensed manager must notify BaFin of every change of ownership and every change of management with regard to the fund manager. A registered manager does not have these obligations. In the case of funds in the form of a limited partnership (KG), investors and any transfer of interests must be registered in the commercial register.

Law stated - 01 January 2023

Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

In principle, a person who sells financial instruments (including fund interests) needs a Markets in Financial Instruments (MiFID) licence under the Investment Firm Act. However, if the person sells only fund interests of a fund managed by a fully licensed alternative investment fund manager, a simpler licence under the German Trade Act suffices if the respective fund is approved for marketing in Germany. Germany has now adapted this simpler regime to the new MiFID II requirements on such a lighter-touch regime (with effect from August 2020). Unlike in the United Kingdom, German law considers the potential investor to be the regulatory client of the placement agent.

Law stated - 01 January 2023

Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

The German Anti-Money Laundering Act is based on the EU Anti-Money Laundering Directive, and Germany implemented the most recent amendments of that Directive with effect from 2022. Every investor must be identified and the investor's beneficial owner must be disclosed (know-your-customer-process). The obtained documents and information must be stored. In addition, Germany has implemented a transparency register with regard to beneficial

owners in a vehicle. In a typical private equity structure, the aforementioned anti-money laundering requirements do not extend to the members of the sponsor (except for disclosures in the transparency register).

Law stated - 01 January 2023

EXCHANGE LISTING

Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

Private equity funds in Germany are typically structured as limited partnerships (KG). Partnership interests in these funds are not tradable on the stock exchanges. However, there are very few private equity companies structured as a corporation that are listed on the stock exchange. Such listing provides investors with greater liquidity as the shares are publicly traded, thus retail investors may invest. Unlike a fund organised as a partnership, however, a fund organised as a corporation is not transparent, but is subject to German corporate tax at the fund level.

Law stated - 01 January 2023

Restriction on transfers of interest

To what extent can a listed fund restrict transfers of its interests?

According to German listing rules, it is practically impossible to restrict transfers of listed securities.

Law stated - 01 January 2023

PARTICIPATION IN PRIVATE EQUITY TRANSACTIONS

Legal and regulatory restrictions

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

There are no legal or regulatory restrictions for funds managed by German sub-threshold managers to participate in private equity transactions. Fully licensed alternative investment fund managers, however, must comply with the Alternative Investment Fund Managers Directive (AIFMD) anti-asset stripping rules and with the investment-related restrictions of the specific fund category. For instance, open-ended funds may invest only a limited percentage of their assets into unlisted companies.

Law stated - 01 January 2023

Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.



LEXOLOGY

Getting The Deal Through

© Copyright 2006 - 2021 Law Business Research

www.lexology.com/gtdt

18/23

The Federal Financial Supervisory Authority (BaFin) mentioned in an unofficial statement that carry beneficiaries may only be persons that promote the purpose of the fund. In addition, under the European Securities and Markets Authority's remuneration rules, carried interest is deemed to comply with the risk alignment and other requirements of the AIFMD if it is paid only after contributed capital and hurdle payments to the investors (and if there is a clawback). The taking of transactions fees should be disclosed in the fund documents. Typically, transaction fees are deducted from the management fee.

Law stated - 01 January 2023

UPDATE AND TRENDS

Key developments of the past year

What are the most significant recent trends and developments relating to private equity funds in your jurisdiction? What impact do you expect such trends and developments will have on global private equity fundraising and on private equity funds generally?

Act to Strengthen Germany as a Fund Jurisdiction

VAT exemption for venture capital funds

In 2021, the Act to Strengthen Germany as a Fund Jurisdiction came into force. The key change that the legislation makes is the VAT-exemption of management fees for venture capital funds.

Initially, there were concerns with regard to the wording and it was unclear what was meant by venture capital funds, as this term is not defined. Subsequently, in June 2022, the Federal Ministry of Finance published a final version of the long-awaited supplement to the German VAT Regulations and clarified the conditions under which a fund qualifies as a venture capital fund within the meaning of the Act. The definition's linchpin is a minimum capital contribution of at least 50 per cent of the funds aggregated investments in young, innovative growth-companies based in the EU or EEA (target companies) that meet certain requirements (eg, no more than 12 years of establishment of the company). The fund must also demonstrate that it is subject to similar comparative conditions as Collective Investment in Transferable Securities (UCITS) as well as special governmental supervision.

Anti-Tax Avoidance Directives

Following the implementation of the first two Anti-Tax Avoidance Directives (ATAD I and II) into German law, the EU Commission presented a draft of a new directive on 22 December 2021. This is intended to adapt the Anti-Tax Avoidance Directive and thus prevent the abuse of letterbox companies (shell companies) for tax purposes (so-called ATAD III).

Corporate Income Tax Modernisation Act

The Corporate Income Tax Modernisation Act entered into force as of 1 January 2022. The main development is to offer an irrevocable option for partnerships to be treated as corporates for tax purposes. This effectively results in a third form of tax treatment for alternative investment funds (AIFs) under the German tax laws. In addition to the options as regards the form and treatment of an AIF (ie, AIF in the form of a partnership treated under the general rules of German taxation for partnerships/AIF formed as a corporation treated as an investment fund or specialised investment fund under the Investment Tax Act), there is now the option to treat an AIF formed as a partnership like a taxable corporate entity without falling within the scope of the German Investment Tax Act. While new and largely untested yet, this might be helpful to prevent foreign investors from tax declaration obligations in Germany and to retain the possible

application of the taxation privilege for capital gains under section 8b of the German Corporation Tax Act (KStG) for German corporate investors as well as the fund entity itself. This could potentially limit the tax leakage at the fund level. However, certain withholding tax issues likely make this option less attractive. It remains to be seen if, and in which scenarios, this third option will be adopted in practice.

New structuring options for domestic funds

The Act to Strengthen Germany as a Fund Jurisdiction also expanded the options available to fund managers with respect to the permissible structuring options. The new range of permitted products includes, for instance, a master-feeder structure for closed-ended funds, the introduction of an open-ended infrastructure AIF in the form of a contractual fund, as well as the new option to use a contractual fund, which is opaque for tax purposes and subject to the German Investment Tax Act, as a closed-ended fund vehicle.

Other legislative developments include the German implementation of the amendment of the Alternative Investment Fund Managers Directive (AIFMD) regarding pre-marketing rules.

Markets in Crypto-Assets Regulation (MiCAR)

In 2020, the EU Commission proposed a Regulation on Markets in Crypto Assets (MiCAR) as part of a new regulatory framework for EU crypto-assets. The proposal covers the authorisation and supervision of both issuers of crypto-assets and their service providers. It also covers and defines the corresponding obligations concerning certain tokens (ie, value-referenced tokens – so-called stablecoins, e-money tokens and, as a catch-all, crypto-assets). The main feature of the proposal is a comprehensive consumer protection regime for the issuance and trading of crypto assets, such as, in the case of cross-border EU distribution of crypto-assets, notification requirements or the mandatory publication of a prospectus-resembling crypto information sheet (white paper). At the same time, issuers and service providers of crypto-assets are to benefit from an EU passporting regime. MiCAR is expected to enter into force in the first quarter of 2023 with an 18-month transitional period.

At present, Germany provides a legal framework for crypto commerce under national law as different types of crypto token are classified as financial instruments. However, the legal texts differ in their definition of crypto-assets; changes are thus to be expected also for the German market.

Environmental, social and governance: taxonomy regulation

Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment are going to challenge every participant on the financial market to assess the sustainability of their business and investments.

Since January 2022, funds that either seek to contribute to the achievement of an environmental goal (article 9 of the Sustainable Finance Disclosure Regulation (SFDR)) or which advertise environmental features (article 8 of the SFDR), will be subject to further disclosure obligations according to the Taxonomy Regulation. In principle, these funds have to disclose to which environmental objectives the respective fund contributes to and (what is likely to be even more difficult to implement) to what extent the fund invests in sustainable economic activity within the meaning of the Taxonomy Regulation.

During BaFin's annual press conference in May 2022, it was announced that, against the backdrop of the dynamic regulatory, energy and geopolitical situation, it had decided to put guidelines it had planned for sustainable investment funds on hold. Currently, it is unclear which requirements BaFin will still apply in its administrative practice to prevent greenwashing.

BaFin then published a Q&A in September 2022, most notably clarifying the much-debated German translation of 'promote' in article 8 SDFR.

AIFMD review

In November 2021, the EU Commission published a proposal for a directive amending the AIFMD and the UCITS Directive (AIFMD II). The proposal supplements these directives selectively. After consideration, the European Parliament issued its draft report on the proposals in May 2022, and, shortly after, the Council published its Compromise Text. Next in the legislative process will be for the Council, the EU Parliament and the Commission to enter into trilogue negotiations to agree on a final version. The AIFMD II is likely to come into effect at the end of 2024 at the earliest.

Key developments in the Compromise Text are set out below.

'Depository passport'

While the Commission's original proposal stipulated a 'depository passport' regime, where a depository from another member state can be appointed upon application to the competent supervisory authority, the Compromise Text revises this and clarifies that those provisions do not constitute a form of 'depository passport'. It provides that an authorisation to procure depository services located in other member states should not be automatically granted. An AIF needs to demonstrate a lack of depository services in the national depository market and the national depository market of that AIF must satisfy certain conditions.

Introduction of liquidity management tools

This applies to open-ended funds in order to simplify liquidity management, especially in phases of increased unit redemptions.

Reporting

The aim is to harmonise different reporting regimes. Alternative investment fund managers (AIFMs) must assume that reporting will be redesigned in practice (ie, new templates and new reporting items). Significantly, under the proposal, AIFMs will also be required to inform investors about remuneration in relation to the management of the AIF borne by the AIFM and associated companies. Quarterly investor reporting is also proposed.

Outsourcing

The Commission had originally proposed that detailed reporting obligations should be contained in regulatory technical standards (RTS), which would be developed at a later stage. However, the Council has stated that reporting on delegation arrangements needs to be clearly detailed in the text of AIFMD II, while RTS should be limited to setting an appropriate level of standardisation.

A key development in the Compromise Text is the inclusion of delegation reporting within regular supervisory reporting for alternative AIFMs. In future, the European Securities and Markets Authority (ESMA) is to be informed by the national supervisory authorities about outsourcing to third countries in order to prevent post-Brexit circumvention practices. It is also clarified that outsourcing includes all tasks of the AIFM in Annex I of the AIFMD and all ancillary services. In future, there will be a two-year peer review process at the level of ESMA to jointly examine outsourcing. Roughly speaking, the aim is to avoid the emergence of letterbox AIFMs.

It appears, however, that the proposals will not represent fundamental changes to existing global delegation models but rather seek to fine-tune the existing delegation requirements.

Loan-originating funds (LOF)












While Germany has a regulatory regime for domestic LOF in place, there is no uniform European framework so far, which has put German LOF at a disadvantage compared to EU and foreign AIFs managed by EU and foreign AIFMs and marketed in Germany. With the current legislative draft, common rules are introduced for loan-originating AIFs to achieve a level playing field across all member states which handle (direct) lending by AIFs very inconsistently.

The proposal therefore includes (among others) substantive requirements for investment and risk limits.

Given the already rather strict German rules for LOF, we don't expect the currently discussed amendments to have a drastic effect on domestic AIFs.

Law stated - 01 January 2023

Jurisdictions

	Austria	Schindler Attorneys
	British Virgin Islands	Appleby
	Cayman Islands	Stuarts Walker Hersant Humphries
	Germany	POELLATH
	India	Khaitan & Co
	Japan	Nishimura & Asahi
	Luxembourg	Loyens & Loeff
	South Korea	Bae, Kim & Lee LLC
	Spain	Alter Legal
	United Kingdom	Simpson Thacher & Bartlett LLP
	USA	Simpson Thacher & Bartlett LLP