Germany implements the AIFM-Directive

On 16 May 2013, the German Parliament (Bundestag) passed the final version of the Alternative Investment Fund Managers Directive Implementation Act ("AIFM-UmsG"). On 7 June 2013, the final version was also approved by the Bundesrat. The final version contains various amendments compared to the version the Government had proposed. However, these changes are of a minor nature given that the overall principles introduced have not been altered. The new law that governs all fund managers and fund product rules is called “Kapitalanlagegesetzbuch” ("KAGB").

Today, broadly speaking, alternative funds are divided into two sectors: the regulated side under the Investment Act and the unregulated side.

The KAGB not only implements the main requirements of the AIFM Directive for both these product groups, i.e. for professional investor fund managers, but also sets out the new rules for retail fund products and their managers. It also makes available the open or closed-ended legal entity forms which can be used for German products. Hence, the KAGB-E expands the scope of mandatory regulation to cover almost all alternative funds.

The big picture is that the final KAGB-E version may be welcomed as forming a suitable basis for the continuation of the German fund managers’ business and their product offerings as developed over several decades comprising of hundreds of billions of EUR of assets under management.

In this context open-ended and closed-ended investment funds as well as their managers and investors will need to work with new definitions and provisions. In contrast to the earlier draft of the KAGB-E (see also Real Estate Tax Services Newsalert No 27 issued in November 2012) the final version results in a number of amendments in the KAGB, as summarised in the following sections

Definition of open-ended and closed-ended investment funds (Investmentvermögen)

The final version of the KAGB-E introduces a legal definition of open-ended investment funds in line with ESMA’s advice. Open-ended investment funds are therefore defined as “Alternative Investment Funds ("AIF"), whose investors or shareholders have the right to redeem their units or shares at least once a year. Minimum holding periods and the possibility of suspension or restriction on the redemption of units or shares are not taken into account. The classification as an open or closed-ended AIF therefore shall be made based on the regular redemption option. Holding periods of units or shares or the company’s ability to temporarily suspend the redemption of units are not considered in this respect.
**Extension of the definition of semi-professional investors**

In addition to the definition of private/retail and professional investors as defined in MiFID, the KAGB identifies the semi-professional investor as a third category, which will be, broadly speaking, treated similarly to professional investors. The level of regulation is thus significantly lighter than for the investors of public AIFs, which solely target private investors.

To be classified as a semi-professional investor, one must meet the cumulative requirements of the KAGB which justify the lower investor protection (including minimum investments of EUR 200,000, declaration of risk awareness and proof of expertise).

Irrespective of the aforementioned conditions, an investor will now always be regarded as a semi-professional one, if he invests a minimum amount of EUR 10 million.

Members of the management and the board of directors of an externally managed investment company are deemed to qualify as semi-professional investors if they are investing in an AIF managed by their own company.

In summary, the Financial Committee’s recommendation leads to an extension of the definition of the term “need for protection” and therefore to an extension of the term “professional investor”.

**Limited KAGB applicability for certain closed-ended public AIF**

In accordance with the government draft bill as of 12 December 2012, the requirements of KAGB have already been reduced for certain sub-threshold AIFMs; AIFMs, which manage special AIFs with assets below the threshold amounts defined in the Directive. Such AIFMs only need to register at the BaFin and comply with the general rules.

Further exemptions will be available to certain internally managed closed-ended public AIFs, if they meet the following conditions: the assets of a closed-ended public AIF managed by an AIFM do not exceed the value of five million euro including leverage and the number of closed-ended AIF investors is limited to a maximum of five individuals.

The same favourable rules shall also apply, if the assets of the closed-ended public AIF managed by the AIFM:

- do not exceed a value of EUR 100 million including leverage;
- the AIF is established in the legal form of a cooperative society;
- the additional payment liability is excluded in the statutes; and
- due to legal regulations (such as the Renewable Energy Sources Act), a minimum income from the usage of the asset value, in which the Fund invests directly or indirectly, is ensured long-term.

This change intends to give those private investors the opportunity for a capital investment in a self-selected context.

**Procedures for the approval of outsourcing**

The portfolio management and risk management of an AIF can only be outsourced to companies which are authorized or registered for the purpose of financial portfolio management and are subject to supervision. The outsourcing must be approved by the BaFin.

According to the Finance Committee’s recommendations, a statutory deadline for the approval process shall be introduced. Therefore, the BaFin has to grant approval within four weeks after receipt of the permit application, if the requirements for the permit are fulfilled.

If the requirements for an effective outsourcing are not fulfilled (e.g. if the outsourcing company is not subject to supervision), the BaFin has to inform the applicant within the four-week period and request the missing documents. In this case it should be noted that the examination period for the BaFin begins anew from the date of the subsequent submission of the documents requested.

The introduction of this deadline leads to a reduction in the uncertainty of the planning for the AIFM.
**Start-up period of risk diversification**

Closed-ended retail AIFs must observe the principles of risk diversification. They are considered risk diversified, if they invest in a minimum of three objects or if they can ensure an economic spread of credit risk by other means.

Hence, the regulations enable the AIF to opt for the possibility to apply the principle of risk diversification during its start-up period, but no later than 18 months after the start of sales and marketing. The investors must be advised of this change in the brochures and other essential investor information.

Fund launchers have more time to make the necessary investments and use a better capital base.

**Start-up period of leverage restriction**

The borrowing of capital and the encumbrance of assets of a domestic closed-ended retail AIF are limited to 60% of the value of the AIF or the market value of the assets of the closed-end public fund.

Similarly, leverage limitations also only need to be adhered to after an initial period of up to 18 months.

The changes respond to the requirements in practice, because there is often an interim financing of owner’s equity during the placement period, in order to be able to acquire an asset before the placement of the AIF.

**Rules for the valuation of real estate assets**

According to the governmental draft of the KAGB, open-ended and closed-ended public funds are only allowed to invest in asset values if they have been previously valued by a qualified external valuer. Following the Finance Committee’s recommendations, the final version of the KAGB stipulates that the asset value must be assessed by two external, independent and qualified valuers, if the investment exceeds EUR 50 million. Each must prepare its own expertise.

The regulation aims for a greater reliability, which is should increase investor protection.

**Transitional rules**

The wording of the specific transitional rules for closed-ended funds has been adapted in the new draft of the wording of Article 61 Para. 3 of the AIFMD. Accordingly, AIFMs do not need permission or registration, if they only manage closed-ended AIFs which will not make any additional investments after 21 July 2012 (so called “older funds”). This means that the AIFM requires a permission or registration, if it administers, in addition to the older funds, either open-ended or closed-ended AIFs that are not older funds.

**Entering into force**

The KAGB becomes effective on 23 July 2013.

**Our view**

The recent changes respond to certain requirements of market participants and therefore meet the needs of the fund industry.

Now the time has come to implement the new operational models and start the authorisation process; for some it will be required immediately after the enactment and for existing AIFMs within the one year transitional period.

The German regulator is working on numerous clarifications of interpretations as to the scope and a general FAQ which, hopefully, will be published very soon.

PwC continues to engage with the Supervisory Authority, trade associations and clients who will be affected across all sectors of the asset management community. In the interim, if you have any questions, please contact your usual PwC contact or any of the people named below.
For more information, please contact your local PwC real estate tax service provider or one of the contacts below.

**Global**

**Uwe Stoschek**
Global Real Estate Tax Leader  
+49 30 2636-5286  
uwe.stoschek@de.pwc.com

**Regional Real Estate Tax Leaders**

**Europe and Africa**

**Angus Johnston**  
Real Estate Tax Leader - EMEA  
+44 207 804 2722  
angus.i.johnston@uk.pwc.com

**Middle East**

**Oliver Reichel**  
Regional Real Estate Tax Leader  
+971 2694 6946  
oliver.reichel@ae.pwc.com

**Central Eastern Europe**

**Glen Lonie**  
Real Estate Tax Leader - CEE  
+420 251 152 619  
glen.lonie@cz.pwc.com

**Americas**

**Paul Ryan**  
US Real Estate Tax Leader  
+1 646-471-8419  
paul.ryan@us.pwc.com

**AsiaPacific**

**KK So**  
Real Estate Tax Leader - AsiaPac  
+852 2289 3789  
kwok.kay.so@hk.pwc.com

**Nationally**

**Germany**

**Uwe Stoschek**  
+49 30 2636-5286  
uwe.stoschek@de.pwc.com

**Regional Real Estate Tax Leaders**

**Europe and Africa**

**Dr. Michael A. Müller**  
+49 30 2636-5572  
mueller.michael@de.pwc.com

**Middle East**

**Helge Dammann**  
+49 30 2636-5222  
helge.dammann@de.pwc.com

**Central Eastern Europe**

**Sven Behrends**  
+49 89 5790-5887  
sven.behrends@de.pwc.com

**Americas**

**Marcel Mies**  
+49 211 981-2294  
marcel.mies@de.pwc.com

**AsiaPacific**

**Josip Oreskovic-Rips**  
+49 69 9585-6255  
josip.oreskovic-rips@de.pwc.com

**Alexander Lehnen**  
+49 40 6378-2136  
alexander.lehnen@de.pwc.com