

## **Sections 293, 317–320 and 330 of the Investment Code (*Kapitalanlagegesetzbuch – KAGB*)**

### **Section 293 General provisions**

(1) Marketing is the direct or indirect offering or placement of units or shares of an investment undertaking. The following do not constitute marketing:

1. Where investment undertakings are only mentioned by name,
2. Where only the net asset values and the prices determined on a regulated market or the issue and redemption prices of units or shares of an investment undertaking are mentioned or published,
3. Where sales documentation for an investment undertaking with at least one investment compartment whose units or shares are permitted to be marketed within the jurisdiction of this Code to one, several, or all types of investor within the meaning of section 1 (19) nos. 31 to 33, is used and this sales documentation also contains information about additional investment compartments that are not permitted to be marketed within the jurisdiction of this Code, or that are only permitted to be marketed to another type of investor, if the sales documentation includes a prominent statement in prominent print in each case that the units or shares of the additional investment compartment are not permitted to be marketed within the jurisdiction of this Code or, if they are permitted to be marketed to individual types of investor, the type of investor within the meaning of section 1 (19) nos. 31 to 33 to which they are not permitted to be marketed,
4. Where the bases for taxation are mentioned or published in accordance with section 5 of the Investment Tax Act (*Investmentsteuergesetz*),
5. Where a securities prospectus includes minimum information in accordance with section 7 of the Securities Prospectus Act (*Wertpapierprospektgesetz*) or additional information in accordance with section 268 or section 307, or an investment prospectus includes minimum information in accordance with section 8g of the Prospectus Act (*Verkaufsprospektgesetz*) or section 7 of the Capital Investment Act (*Vermögensanlagengesetz*),
6. Where management companies are merely complying with their statutory publication duties in the Federal Gazette or their regular duties to inform investors already invested in the relevant investment undertaking in accordance with this Code,
7. Where an EU master UCITS only issues units to one or more German UCITS feeder funds,

and no other marketing within the meaning of sentence 1 is performed. Marketing to semi-professional and professional investors is only taken to exist if it is performed at the initiative, or on behalf, of the management company and if it is addressed to semi-professional and professional investors domiciled or with their registered office in Germany or in another member state of the European Union or in a signatory to the Agreement on the European Economic Area. The Federal Financial Supervisory Authority may establish guidelines which it shall use to judge in standard cases if and when marketing within the meaning of sentences 1 and 3 has occurred.

(2) If the provisions of this chapter contain rules governing investment undertakings, these shall also apply *mutatis mutandis* to investment compartments, unless otherwise specified in the provisions of this chapter.

### **Section 317 Admissibility of marketing of EU AIFs or foreign AIFs to retail investors**

(1) Marketing of EU AIFs and foreign AIFs by an EU AIF management company or a foreign AIF management company to retail investors within the jurisdiction of this Code is only admissible if

1. The AIF and its management company are subject to effective public supervision for the protection of investors in the country in which both their registered offices are situated;
2. The competent supervisory authorities of the home country are willing to cooperate to a satisfactory extent with the Federal Financial Supervisory Authority in the latter's experience in accordance with sections 9 and 10;
3. The AIF management company and its management of the notified AIF comply with the requirements of Directive 2011/61/EC;

4. The AIF management company notifies the Federal Financial Supervisory Authority of a German credit institution or a reliable person with the requisite professional qualifications whose registered office or domicile is within the jurisdiction of this Code that acts as its representative and that is suitably equipped to perform the compliance function set out in section 57 (3) sentence 3;
5. A depositary safeguards the AIF's assets in a manner comparable to the provisions of sections 80 to 90;
6. One or more German credit institutions or German branches of credit institutions whose registered office is outside Germany are appointed as paying agents that can be used to channel payments made to or by investors; where payments and credit transfers are channelled via a paying agent, it shall be ensured that the amounts are forwarded to the account mentioned in section 83 (6) or to the investors without undue delay;
7. The fund rules, the articles of association, or the partnership agreement
  - a) comply in the case of open-ended AIFs with the minimum content set out in section 162 and, where applicable,
    - aa) in the case of AIFs comparable to other funds with the information in accordance with section 224 (2),
    - bb) in the case of AIFs comparable to funds of hedge funds with the information in accordance with section 229,
    - cc) in the case of AIFs comparable to real estate funds with the information in accordance with section 256 (2),
  - b) comply in the case of closed-ended AIFs with the minimum content under section 266,
  - c) contain rules that, in the case of open-ended AIFs, ensure that the provisions of sections 192 to 213, or sections 218, 219, or sections 220, 221, 222, or section 225, or sections 230 to 246, 252 to 254, 258 to 260 are complied with and, in the case of closed-ended AIFs, that the provisions contained in sections 261 to 265 are complied with,
  - d) provide that the assets held by the AIF may not be pledged or otherwise encumbered or title thereto transferred or assigned by way of collateral except where loans are taken out for the AIF in accordance with the requirements set out in section 199, section 221 (6) and section 254, where a third party is granted option rights, or where securities repurchase agreements in accordance with section 203 or financial futures, currency futures, swaps, or similar transactions are entered into pursuant to section 197,
  - e) provide in the case of open-ended AIFs with the exception of open-ended real estate investment undertakings that the investors may demand on a daily basis to be paid out the share of the assets attributable to the units or shares, unless provision is made in the case of AIFs comparable to other investment undertakings for rules corresponding to section 223 (1), in the case of AIFs comparable to other investment undertakings with investment opportunities in accordance with section 222 (1) for rules corresponding to section 223 (2), or in the case of AIFs comparable to funds of hedge funds for rules corresponding to section 227,
  - f) provide in the case of investment undertakings comparable to real estate funds for rules corresponding to sections 255, 257,
  - g) provide in the case of closed-ended AIFs that investors may demand at a minimum at the end of the term to be paid out the share of the assets attributable to the units or shares,
  - h) contain rules ensuring that the valuation of the AIF shall be performed in the case of open-ended AIFs in a manner corresponding to sections 168 to 170, 216 and 217, in the case of AIFs comparable to real estate funds in accordance with the special rules contained in sections 248 to 251, and in the case of closed-ended AIFs in a manner corresponding to sections 271 and 272,
  - i) provide for restrictions on advance charging of costs in accordance with section 304 and stipulate that the information in accordance with section 101 (2) no. 4 shall be disclosed in the annual reports and, where appropriate, in the semi-annual reports,
  - j) also rule out the creation of investment compartments and master-feeder structures in the case of closed-ended AIFs;
8. The duties mentioned in section 297 (2) to (7), (9) and (10), sections 299 to 301, 303 (1) and (3) and

in section 318 on notifying parties interested in purchasing, or investors in, units or shares have been duly satisfied.

(2) If the notified AIF is a foreign AIF that is managed by a foreign AIF management company, marketing is only admissible if the following additional requirements are met:

1. Suitable agreements have been reached regarding cooperation between the Federal Financial Supervisory Authority and the supervisory authorities of the third country in which the foreign AIF and the foreign AIF management company have their registered offices; these agreements shall
  - a) serve to monitor systemic risk,
  - b) comply with international standards and with Articles 113 to 115 of Commission Regulation (EU) No. 231/2013, and
  - c) ensure an effective exchange of information that permits the Federal Financial Supervisory Authority to discharge the duties set out in section 5.
2. The home country of the notified AIF is not on the list of non-cooperative countries and territories drawn up by the Financial Action Task Force.
3. The home country of the notified AIF has signed an agreement with the Federal Republic of Germany that fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and that ensures an effective exchange of information in relation to tax matters, including any multilateral tax agreements.

(3) If the notified AIF is a feeder AIF, the following additional requirements shall at a minimum be met in addition to the requirements set out in subsection (1) and, where appropriate, in subsection (2) with respect to the feeder AIF:

1. The master AIF and its management company shall have the same home country as the feeder AIF and its management company,
2. The fund rules, the articles of association, or the partnership agreement for the master AIF shall contain rules ensuring that the provisions of sections 220, 221 and 222 are complied with,
3. The master AIF and its management company shall comply with the preconditions set out in sections 317 to 319 and shall have successfully completed the notification procedure in accordance with section 320,
4. The fund rules or the articles of association of the feeder AIF shall contain the name of the master AIF in whose units or shares at least 85 per cent of the value of the feeder AIF are invested and shall ensure that the investors are protected in a manner that is comparable to the provisions of this Code in respect of master-feeder structures in the area of retail investment undertakings,
5. The agreements provided for in section 175 have been entered into.

#### **Section 318 Prospectus and key investor information for marketing EU AIFs or foreign AIFs to retail investors**

(1) The prospectus of the EU AIF or the foreign AIF shall be dated and shall contain all elements material to the assessment of the units or shares of the EU AIF or the foreign AIF at the time the application is filed. It shall contain at a minimum the information required by section 165 (2) to (7) and (9). The prospectus for a closed-ended AIF may not contain any information in accordance with section 165 (3) no. 2 and subsections (4) to (7), but it shall contain information in accordance with section 269 (2) nos. 2 and 3 and subsection (3), together with a reference to how the units or shares can be transferred and, where appropriate, a reference to any restrictions on their free transferability. The prospectus of a feeder AIF shall, additionally, contain the information in accordance with section 173 (1). Furthermore, the prospectus of an EU AIF or a foreign AIF shall contain information in particular

1. As to the name, legal form, registered office and amount of subscribed and paid-up capital (share capital less outstanding contributions plus reserves) of the EU AIF or the foreign AIF, the AIF management company, the undertaking that has assumed responsibility for the marketing of the units or shares within the jurisdiction of this Code (distributor) and the depositary,
2. As to the name, registered office and address of the representative and the paying agents,
3. As to the requirements and terms and conditions under which investors may require the share of the

assets attributable to the units or shares to be paid out as well as to the entities responsible for this.

Furthermore, the prospectus shall contain express references to the fact that the EU AIF or the foreign AIF and its management company are not subject to governmental supervision by the Federal Financial Supervisory Authority. The Federal Financial Supervisory Authority may require additional information to be included in the prospectus if it has reason to assume that such information is necessary for purchasers.

(2) Moreover, the prospectus of EU AIFs and foreign AIFs that are, in terms of their investment policy, subject to requirements that are comparable to those governing funds of hedge funds in accordance with section 225 (1) and (2) shall contain information corresponding to the information specified in section 228. Moreover, the prospectus of EU AIFs and foreign AIFs that are, in terms of their investment policy, subject to requirements that are comparable to those governing other funds in accordance with sections 220, 221 and 222 shall contain information corresponding to the information specified in section 224 (1). Moreover, the prospectus of EU AIFs and foreign AIFs that are, in terms of their investment policy, subject to requirements that are comparable to those governing real estate funds in accordance with section 230 shall contain information corresponding to the information specified in section 256 (1).

(3) In the case of EU AIF management companies or foreign AIF management companies that are required by Directive 2003/71/EC to publish a prospectus, the minimum information to be included in this prospectus shall be governed by the Securities Prospectus Act and EC Regulation No. 809/2004. If this prospectus also contains the information required under subsections (1) and (2), no additional prospectus shall be required. Subsections (4) and (6) apply *mutatis mutandis*.

(4) Furthermore, the following documents shall be enclosed as annexes to the prospectus:

1. An annual report in accordance with section 299 (1) sentence 1 no. 3, the reporting date for which may not be more than 16 months earlier, and
2. In the case of open-ended AIFs, if the reporting date of the annual report is more than eight months earlier, additionally a semi-annual report in accordance with section 299 (1) sentence 1 no. 4.

(5) Key investor information shall be drawn up for EU AIFs and foreign AIFs. Section 166 (1) to (5) shall apply to open-ended AIFs and open-ended foreign AIFs, and section 270 shall apply to closed-ended EU AIFs and closed-ended foreign AIFs *mutatis mutandis*. The key investor information for EU AIFs and foreign AIFs that correspond to real estate funds under section 166 (6), and for EU AIFs and foreign AIFs that correspond to funds of hedge funds under section 225, shall comply with the requirements set out in section 166 (7).

(6) The key investor information and the significant information contained in the prospectus shall be kept up to date. In the case of closed-ended AIFs with a single marketing phase, this shall only apply for the term of the marketing period.

### **Section 319 Representation of the company, place of jurisdiction for the marketing of EU AIFs or foreign AIFs to retail investors**

(1) The representative represents the EU AIF or foreign AIF in and out of court. The representative is authorised to take receipt of documents intended for the AIF management company and the distributor. Such authority may not be limited.

(2) In the case of actions against EU AIFs or foreign AIFs, AIF management companies, or distributors relating to the marketing of units or shares of EU AIFs or foreign AIFs to retail investors within the jurisdiction of this Code, the court in whose district the representative is domiciled or has its registered office shall have jurisdiction. Such jurisdiction may not be precluded by agreement.

(3) The Federal Financial Supervisory Authority shall publish the names of the representatives and the termination of their appointments in the Federal Gazette. The Federal Financial Supervisory Authority shall be reimbursed for any costs incurred in connection with the publication under sentence 1.

## **Section 320 Notification requirements relating to the intended marketing of EU AIFs or foreign AIFs to retail investors in Germany**

(1) If an EU AIF management company or a foreign AIF management company intends to market to retail investors units or shares of an EU AIF or a foreign AIF managed by it within the jurisdiction of this Code, it shall notify the Federal Financial Supervisory Authority of this. The notification letter shall contain the following information and documentation in the then applicable versions:

1. When providing notification of
  - a) an EU AIF management company or, as from the point in time referred to in section 295 (2) no. 1, a foreign AIF management company, a certificate from the competent authority in the home member state or member state of reference in a language customary in the sphere of international finance to the effect that the AIF management company and its management of the AIF comply with Directive 2011/61/EU,
  - b) a foreign AIF management company before the point in time referred to in section 295 (2) no. 1, information and documentation in accordance with section 22 (1) nos. 1 to 9 and 13;
2. All material information on the representative, the depositary and the paying agent and confirmations by the representative, the depositary and the paying agent that they have assumed these functions; information about the depositary is only required to the extent that it is not covered by the certificate in no. 1 (a);
3. The fund rules, articles of association, or partnership agreement of the EU AIF or foreign AIF, its business plan, which shall also contain the material information about its governing bodies, and the prospectus and key investor information, as well as all other information about the notified AIF available to investors and material information about the distributors that are to market the AIF within the jurisdiction of this Code;
4. The most recent annual report, which shall meet the requirements of section 299 (1) sentence 1 no. 3 and, if the reporting date of the annual report is more than eight months earlier and the fund in question is not a closed-ended AIF, the subsequent semi-annual report, which shall meet the requirements of section 299 (1) sentence 1 no. 4; an auditors' report shall have been issued for the annual report;
5. The adopted annual balance sheet for the last financial year, together with the income statement (annual financial statements) of the management company, for which an auditors' report shall have been issued;
6. Information on the arrangements for marketing the notified AIF;
7. The declaration by the EU AIF management company or the foreign AIF management company that it shall
  - a) submit to the Federal Financial Supervisory Authority the annual financial statements of the management company and the annual report to be published in accordance with section 299 (1) sentence 1 no. 3 no later than six months following the end of each financial year and additionally, in the case of open-ended AIFs, the semi-annual report to be published in accordance with section 299 (1) sentence 1 no. 4 no later than three months after the end of each half financial year; an auditors' report shall have been issued for the annual financial statements and the annual report;
  - b) inform the Federal Financial Supervisory Authority in accordance with subsection (3) of all material changes to facts and circumstances that were provided at the time of notification of the intention to commence marketing or that serve as the basis for the certification from the competent authority in accordance with no. 1 (a), and submit proof of such changes;
  - c) provide information and submit documents on its business activities to the Federal Financial Supervisory Authority on request;
  - d) at the Federal Financial Supervisory Authority's request, restrict the use of leverage to the level required by the Federal Financial Supervisory Authority or cease its use, and
  - e) in the case of a foreign AIF management company, comply with its reporting obligations towards the Federal Financial Supervisory Authority in accordance with section 35;
8. Proof of payment of the notification fee;

9. All material information and documentation showing that the foreign AIF and its management company are subject to effective public supervision for the protection of investors in the country in which they have their registered office;
10. Where appropriate, the agreements for master-feeder structures required in accordance with section 175.

Foreign language documents shall be submitted together with a German translation.

(2) Section 316 (2) and (3) shall apply except that the words “AIF management company” shall be replaced by the words “EU AIF management company or foreign AIF management company” and that the period specified in section 316 (3) sentence 1 for the notification

1. of an EU AIF management company or, as from the point in time referred to in section 295 (2) no. 1 a foreign AIF management company, shall be three months, and
2. of a foreign AIF management company before the point in time referred to in section 295 (2) no. 1 shall be six months.

(3) If the notifying foreign AIF management company within the meaning of subsection (1) (b) has already notified the Federal Financial Supervisory Authority of an AIF to be marketed to retail investors within the jurisdiction of this Code in accordance with subsection (1) sentence 1, the Federal Financial Supervisory Authority shall not, when a further AIF of the same type is notified to it, re-examine whether the preconditions in accordance with section 317 (1) sentence 1 nos. 1 and 3 have been met if the notifying AIF management company warrants in the notification letter that there have been no changes in relation to the requirements in accordance with section 317 (1) sentence 1 nos. 1 and 3 since the last notification. In this case, the information given in section 22 (1) nos. 1 to 9 does not have to be submitted and the period mentioned in subsection (2) no. 2 shall be three months.

(4) Section 316 (4) sentences 1 to 3 shall apply except that the words “AIF management company” shall be replaced by the words “EU AIF management company or foreign AIF management company”. If a planned change is implemented irrespective of section 316 (4) sentences 1 to 3 or if a change caused by unforeseen circumstances leads to the EU AIF management company, the foreign AIF management company or the management of the AIF concerned by the EU AIF management company, or the foreign AIF management company infringing this Code, the Federal Financial Supervisory Authority shall take all necessary measures including expressly prohibiting marketing of the AIF concerned. Section 316 (5) shall apply *mutatis mutandis*.

### **Section 330 Notification requirements for foreign AIF management companies relating to the intended marketing of foreign AIFs or EU AIFs managed by them to semi-professional and professional investors in Germany**

(1) Marketing of units or shares of foreign AIFs or EU AIFs managed by a foreign AIF management company to professional or semi-professional investors within the jurisdiction of this Code is admissible if

1. In the case of marketing to professional investors:
  - a) the foreign AIF management company and the management of the AIF by the foreign AIF management company complies with the requirements of section 35 and, where appropriate, of sections 287 to 292,
  - b) the foreign AIF management company has appointed one or more entities to perform the duties set out in Article 21 (7) to (9) of Directive 2011/61/EU, the foreign AIF management company does not perform these duties itself and it has notified the Federal Financial Supervisory Authority of this entity or entities, and
  - c) the obligations provided for in section 307 (1) and (2), first alternative in conjunction with section 297 (4) and section 308 on notifying parties interested in purchasing units or shares have been duly satisfied;
2. In the case of marketing to semi-professional investors, the foreign AIF management company and its management of the AIF comply with the requirements of Directive 2011/61/EU implemented in this Code;

3. In the case of marketing to semi-professional investors or professional investors
  - a) suitable agreements regarding cooperation between the Federal Financial Supervisory Authority and the competent authorities of the third country in which the foreign AIF management company has its registered office and, where appropriate, the competent authorities of the third country in which the foreign AIF has its registered office and the competent authorities of the EU AIF's home member state; the agreements shall
    - aa) serve to monitor systemic risk,
    - bb) comply with international standards and with Articles 113 to 115 of Commission Regulation (EU) No. 231/2013, and
    - cc) ensure an effective exchange of information that permits the Federal Financial Supervisory Authority to discharge the duties set out in Directive 2011/61/EU;
  - b) neither the third country in which the foreign AIF management company has its registered office nor the third country in which the foreign AIF has its registered office is on the list of non-cooperative countries and territories drawn up by the Financial Action Task Force;
  - c) The arrangements in accordance with section 321 (1) sentence 2 no. 7 are suitable for preventing marketing to retail investors.

If the notified AIF is a feeder AIF, the requirements of subsection (1) sentence 1 no. 1 or 2 and 3 shall also be complied with *mutatis mutandis* by the master AIF and its management company.

(2) If a foreign AIF management company intends to market units or shares of foreign AIFs or EU AIFs managed by it within the jurisdiction of this Code to semi-professional and professional investors, it shall notify the Federal Financial Supervisory Authority of this. Section 321 (1) sentence 2 shall apply *mutatis mutandis*. Furthermore, the following information and documentation shall be supplied along with the notification:

1. All material information about
  - a) the management company of the notified AIF and its governing bodies, and
  - b) the depositary or the entities referred to in subsection (1) sentence 1 no. 1 (b), including the information in accordance with section 22 (1) no. 13;
2. A declaration by the foreign AIF management company that it shall
  - a) submit to the Federal Financial Supervisory Authority the annual report of the AIF, which shall comply with the requirements of Article 22 and, where appropriate, Article 29 of Directive 2011/61/EU, no later than six months following the end of each financial year; an auditors' report shall have been issued for the annual report;
  - b) inform the Federal Financial Supervisory Authority of all material changes to facts and circumstances notified at the time of notification of the intention to commence marketing, and submit proof of such changes;
  - c) provide information and submit documents on its business activities to the Federal Financial Supervisory Authority on request and comply with the notification requirements and duties to inform the Federal Financial Supervisory Authority arising out of subsection (1) sentence 1 no. 1 or 2;
3. In the case of marketing to semi-professional investors, additionally the information and documentation in accordance with section 22 (1) nos. 1 to 9 in relation to the foreign AIF management company;
4. Proof of payment of the notification fee.

(3) If the notified AIF is a feeder AIF,

1. The notification in relation to the master AIF and its management company shall additionally be supplemented by the following information and documentation:
  - a) information and documentation in accordance with subsection (2) sentence 3 no. 1 and section 321 (1) sentence 2, and
  - b) in the case of marketing to semi-professional investors

- aa) information and documentation in accordance with subsection (2) sentence 3 no. 3 in relation to the foreign AIF management company, if the master AIF is managed by a foreign AIF management company, or
- bb) a certificate from the competent authority in its home member state in a language customary in the sphere of international finance to the effect that the EU AIF management company and its management of the master AIF comply with Directive 2011/61/EU, if the master AIF is managed by an EU AIF management company,

and

- 2. The declaration in accordance with subsection (2) sentence 3 no. 2 also covers the master AIF and its management company.

(4) A German translation of foreign-language documents shall be submitted, or the documents shall be submitted in English. Section 316 (2) and (3) shall apply *mutatis mutandis* except that the words "AIF management company" shall be replaced by the words "foreign AIF management company" and that the period specified in section 316 (3) sentence 1 shall be

- 1. In the case of marketing to professional investors:

- a) where the notified AIF is not a feeder AIF: two months,
- b) where the notified AIF is a feeder AIF
  - aa) whose master AIF is not managed by a foreign AIF management company: three months,
  - bb) whose master AIF is managed by a foreign AIF management company: four months,

- 2. In the case of marketing to semi-professional investors:

- a) where the notified AIF is not a feeder AIF: four months,
- b) where the notified AIF is a feeder AIF
  - aa) whose master AIF is not managed by a foreign AIF management company: five months,
  - bb) whose master AIF is managed by a foreign AIF management company: eight months.

(5) If the notifying foreign AIF management company has already notified the Federal Financial Supervisory Authority of an AIF to be marketed to semi-professional investors within the jurisdiction of this Code in accordance with subsection (2) sentence 1, the Federal Financial Supervisory Authority shall not, when a further AIF of the same type is notified to it, re-examine whether the preconditions in accordance with subsection (1) sentence 1 no. 2 have been met (with the exception of Articles 22 and 23 of Directive 2011/61/EU) if the notifying AIF management company warrants in the notification letter that there have been no changes in relation to the information provided in accordance with subsection (2) sentence 3 nos. 1 and 3 since the last notification. In this case, the information given in subsection (2) sentence 3 nos. 1 and 3 is not required and the periods specified in subsection (4) sentence 2 no. 2 for marketing to semi-professional investors shall be shortened by two months in each case.