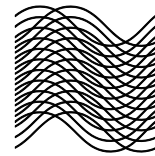


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**Bundesanstalt für
Finanzdienstleistungsaufsicht**



BaFin

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As at: May 2022

Guidance Notice (2022)

on the marketing of units or shares in a foreign AIF or EU AIF managed by a foreign AIF management company to professional or semi-professional investors in the Federal Republic of Germany pursuant to section 330 of the Investment Code (*Kapitalanlagegesetzbuch – KAGB*)

Preliminary remark:

This Guidance Notice sets out the basic features of the notification procedure pursuant to section 330 of the Investment Code (*Kapitalanlagegesetzbuch – KAGB*), and explains the conditions for marketing units or shares in a foreign AIF or EU AIF managed by a foreign AIF management company to professional or semi-professional investors in the Federal Republic of Germany.

The right to make changes and amendments to this Guidance Notice – in particular also on short notice – is reserved.

The marketing of units or shares in foreign AIF or EU AIF managed by foreign AIF management companies to professional or semi-professional investors in the Federal Republic of Germany is governed by the provisions of the KAGB. Pursuant to section 330 of the KAGB¹, the intended marketing of units and shares must be notified to the Federal Financial Supervisory Authority (BaFin).

BaFin reviews whether the particulars and documents transmitted are complete. If the notification is incomplete, BaFin will request the missing particulars and documents to be provided within 20 workdays pursuant to section 330 in conjunction with section 321 (2) in the form of a supplementary notification. The supplementary notification must be submitted to BaFin within six months from remission of the notification or the last

¹ Where the terms "section" or "sections" in the following are used without specific reference to legislation, these shall refer to sections of the KAGB

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supplementary notification; otherwise, commencement of marketing is prohibited (section 321 (2) sentences 4 and 5). A new notification may be made at any time.

Where a marketing exclusively to professional investors is planned, BaFin advises within two months of receipt of the complete notification documents pursuant to section 330 (4) in conjunction with section 316 (3) whether marketing of the AIF specified in the notification letter in the Federal Republic of Germany may be commenced. If marketing to semi-professional investors is (also) intended, a time limit of four months will apply. If the notified AIF is a feeder AIF, the time limit will be extended pursuant to section 330 (4) sentence 2 no. 1.b) and 2.b). If the notifying foreign AIF management company has already notified an AIF for marketing to semi-professional investors in the Federal Republic of Germany pursuant to section 330 (2) sentence 1 and assures in the notification letter that with reference to the particulars provided pursuant to section 330 (2) sentence 3 no. 1 and 3 no changes have occurred since the last notification, the time limits for marketing to semi-professional investors will be shortened by two months in each case.

BaFin may prohibit commencement of marketing within the time limits specified in section 330 (4) in conjunction with section 316 (3) if the AIF management company or the management of the notified AIF by the AIF management company violates the provisions of the KAGB. If BaFin notifies such objections within the time limit specified in section 330 (4), the time limit will be interrupted and will resume upon submission of the amended particulars and documents. If the objections have been removed and BaFin notifies this fact to the AIF management company, marketing of the notified AIF in the Federal Republic of Germany may be commenced as of the date of such notification.

Information on data processing and your rights in the event of audits of senior management or owners of significant holdings in accordance with the KAGB can be found on BaFin's website under the following link:

https://www.bafin.de/DE/DieBaFin/Datenschutz/Informationen_zur_Datenverarbeitung/Informationen_zur_Datenverarbeitung_node.html

General remarks regarding notification procedure

This chapter of the Guidance Notice deals with those particulars and documents which as a rule are required for notifications relating to the intended marketing of units or shares in EU AIF or foreign AIF to professional and semi-professional investors pursuant to section 330. This does not exclude the possibility of additional particulars being provided by the AIF management company or of further particulars and documents being requested by BaFin.

Submission of notice/documents

To the extent possible, notices should be submitted electronically by e-mail. All relevant documents should be attached to the e-mail. If a signature is required, PDF copies of the originals should be attached. Documents may currently still be submitted by post.

The individual particulars must be identified according to the numbering and relevant key words of this Guidance Notice. Where individual items are not relevant, these shall

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nevertheless be included in the notification and identified by the words "not applicable". The same applies where certain information in this Guidance Notice is stated to be not required in certain cases. In cases of doubt, a brief statement of grounds shall be provided together with the respective items. The documents to be submitted will be identified on the top right-hand corner by the appropriate number of the Guidance Notice.

If the particulars on one item are identical to the particulars for another item, a reference to this fact may be provided. The same applies with regard to the documents to be attached.

In the case of self-managing AIF, the particulars and documents required below with reference to the AIF management company apply analogously to the AIF itself. Likewise, obligations imposed by the Guidance Notice and/or the KAGB shall be incumbent on the AIF itself in the absence of any external AIF management company.

The documents must be submitted in the most recent version in each case. Foreign-language documents must be submitted in the form of a German translation or in the English language. Where reference is made in the documents to be submitted to foreign legal provisions, these must be submitted on request.

Notification letters

Notification letters must be written in the German language. The notification must be signed at the end with legally binding effect in the name of the AIF management company by its authorised representatives stating the place and date of execution, with the names of the undersigned to be repeated in typescript. If the notification is remitted not by the AIF management company but by an authorised agent, a power of attorney evidencing the authorisation of the notifier to notify to BaFin the marketing intention and to make and receive all declarations required in this connection must be submitted. It must be stated whether and, if applicable, to what extent the authorised agent, whose name and position must be identified (i.e. at least a natural person), is authorised to make confirmations on behalf of the AIF management company. In particular, it must be stated whether the authorised agent is entitled to perform self-certifications. The power of attorney must be signed by the management vested with power of representation, with the names and titles of the undersigned being identified.

If the **notification is submitted by e-mail** (preferred submission format), then it is to be sent to this e-mail address

secureWA57@bafin.de

Please note the following when submitting notifications electronically:

- a) The size of the e-mail may not exceed 20MB including all attachments; attachments may be included in a ZIP file. If necessary, the information should be broken down and sent in several separate e-mails, in which case this should be noted in the subject line (see d)). It is recommended that large files be announced in advance by e-mail.

As an alternative option, BaFin may be permitted to access a data room via a link, rendering the documents available to be downloaded online. In this case, the volume limit does not apply. If the ability to download documents is set to expire after a limited period, this must be explicitly indicated by stating the expiry date.

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- b) E-mails that exceed the above-mentioned data volume will not be received by BaFin, even if senders receive confirmations to the contrary. BaFin is not alerted to these notifications and cannot process them. All consequences associated with this will be borne by the sender.
- c) The following file types may be used for attachments/downloads: pdf, doc and docx.
- d) The subject line should include
 - the fact that the e-mail relates to a notification pursuant to section 330 of the KAGB;
 - the name of the AIF management company, as well as
 - a serial number in those cases where the notification is sent using several separate e-mails (see a) above).
- e) Questions relating to the electronic transmission of notifications can be addressed to the above-mentioned e-mail address in advance.
- f) If desired, it is possible to arrange to send an encrypted e-mail. Requests to arrange this may also be addressed to the above-mentioned e-mail address.

If the notification is submitted by post, it must be addressed to the following BaFin office:

Bundesanstalt für Finanzdienstleistungsaufsicht
Marie-Curie-Straße 24-28
60439 Frankfurt

If the marketing of units in more than one AIF is to be notified, a separate notification must be remitted for each AIF and the fee pursuant to section 1 no. 18 in conjunction with section 2 (1) of the Special Fees Regulation of the Federal Ministry of Finance in respect of Financial Services Supervision (*Finanzdienstleistungsaufsichtsgebührenverordnung*, "FinDAGebV") of 2 September 2021 and no. 15.1.9.4 the Fee Schedule of this Regulation to be paid. In the case of an umbrella structure, the notification and fee obligation shall extend to each investment compartment. If the documents to be attached to the individual notifications are identical, they need to be submitted only when notifying an investment compartment; in all other respects reference is to be made to the notification to which the respective document is attached. If reference is made to the documents that were submitted in an earlier notification procedure of an investment compartment of the same umbrella structure, the respective investment compartment is to be designated by name. References are possible only when the documents are up-to-date.

The fee pursuant to section 1 no. 18 in conjunction with section 2 (1) of the FinDAGebV and no 15.1.9.4 of the Fee Schedule of this Regulation in the amount of 1,641.00 euros must be paid, stating the identifier

"BaFin, ... (name of AIF to which the notification refers), Notification Fee., section 330 KAGB",

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to the following account:

Recipient: Bundeskasse Trier

Deutsche Bundesbank Filiale Saarbrücken

IBAN: DE 81 5900 0000 0059 0010 20

BIC code: MARK DEF 1590

The name of the AIF must be stated in full in each case unless full reproduction of such name is not possible due to technical restrictions, e.g. limited number of characters reference line in bank transfer form.

When making a transfer it must be ensured that the fee is credited in the full amount and not reduced by banking fees or other charges.

Specific requirements for umbrella structures

Simultaneous existence of investment compartments with and without authorisation for marketing

If, for umbrella structures with at least one investment compartment whose units or shares may be marketed within the scope of the KAGB, sales documents also containing information on additional compartment investments are used that, within the scope of the KAGB, may not be marketed or marketed only to another investor group, it must be pointed out in a conspicuous place in the sales documents, highlighted by means of printing techniques, that the units or shares of the additional investment compartments may not be marketed within the scope of the KAGB or, where they may be marketed only to a specific investor group, to which investment group within the meaning of section 1 (19) no. 31 to 33 they may not be marketed; such additional investment compartments must be designated by name. Such notices as a rule must be included in the documents intended for the investors in Germany.

Updating of documents and change notices

BaFin must be kept informed of all material changes in those circumstances stated with the marketing notification. Proof must be furnished for such change information.

Notifications of change should preferably be sent by e-mail to secureWA57@bafin.de.

To the extent possible, annual reports should also be sent by e-mail to this address (I.2.3.b).

De-notification of arrangements made for the marketing of units or shares in foreign AIF or EU AIF managed by foreign AIF management companies

The de-notification of arrangements made for marketing of units or shares of an AIF marketed in accordance with section 330 is governed by section 295a.

The arrangements made for marketing AIF/investment compartments (of an umbrella scheme) may be de-notified subject to the following conditions:

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BaFin should preferably be notified by e-mail (secureWA57@bafin.de) or post of the de-notification of marketing arrangements pursuant to section 295a (4). Proof of compliance with the requirements pursuant to section 295a (1) must be furnished as part of this notification.

In order to demonstrate fulfilment of the conditions under section 295a (1) sentence 3 no. 1, the notification must state how the blanket offer was publicly available for at least 30 working days, and was addressed, directly or through financial intermediaries, individually to investors whose identity was known. The notification must be accompanied by a copy of the blanket offer. In particular, the publication of the blanket offer in a business or daily newspaper with adequate circulation or in the manner specified in the AIF's fund rules, articles or memorandum of association, including any electronic information media specified therein, shall be deemed to be publicly available; this obligation to provide evidence shall not apply in the case of closed-end AIF or AIF governed by Regulation (EU) 2015/760.

In order to demonstrate fulfilment of the conditions under section 295a (1) sentence 3 no. 2, the notification must state the publicly available medium through which the intention to de-notify the marketing arrangements was made public (including electronic means), which is customary for marketing AIFs and suitable for a typical AIF investor. In particular, the publication of the intention to de-notify marketing arrangements in a business or daily newspaper with adequate circulation or in the manner specified in the AIF's fund rules, articles or memorandum of association, including any electronic information media specified therein, shall be deemed to be generally available.

The requirement pursuant to section 295a (1) sentence 3 no. 3 may be proven by the AIF management company making a binding self-declaration in the notification letter that any new or further direct or indirect offering or placement of the units or shares of the AIF or investment compartment concerned will be terminated no later than the date of the de-notification.

In addition, it must be stated whether German investors are invested in the fund at the time of the de-notification or have invested in the AIF in the past.

The AIF management company may no longer market the affected units or shares as of the de-notification date.

The AIF management company shall not engage in pre-marketing of units of the AIF or investment compartment concerned or engage in similar investment strategies or investment ideas for a period of 36 months from the date of de-notification.

Please refer to the provisions prohibiting marketing pursuant to section 314 (1) no. 11 and (2) in conjunction with section 295a (2) and (4).

Fee for the de-notification of marketing arrangements

A fee shall be charged for the de-notification of marketing arrangements.

The fee pursuant to section 1 no. 18 in conjunction with section 2 (1) of the FinDAGebV and no 15.1.7.1 of the Fee Schedule of this Regulation amount to 284.00 euros. In the case of de-notification of marketing arrangements for investment compartments, it is payable per investment compartment.

The fee shall be transferred to the account listed above for the notification letter.

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Reference:

"BaFin,... (name of the investment fund or investment compartment to which the de-notification relates), AendGeb."

A copy of the proof of payment of the de-notification fee must also be submitted along with the notice of de-notification in addition to the proof to be submitted in general.

The discontinuation of marketing by way of de-notification cannot be processed by BaFin until the required documents and evidence have been submitted in full.

Obligation pursuant to section 295b (3) in conjunction with section 330 (2) sentence 3 no. 2

It is important to note in accordance with section 295b (3) that the duty to update documents and the obligations specified in the declaration pursuant to section 330 (2) sentence 3 no. 2 do not end upon de-notification of marketing arrangements in the Federal Republic of Germany. The AIF management company is not be released from this obligation until all investors resident or domiciled in the Federal Republic of Germany have ended their investment in the AIF. In light of this, a notification of change must be submitted to BaFin as soon as there are no longer any investors in the AIF who are resident of or domiciled in the Federal Republic of Germany.

Please refer to the provisions prohibiting marketing pursuant to section 314 (1) no. 11 and (2) in conjunction with section 295b (3).

Annual fee

The fee pursuant to section 1 no. 18 in conjunction with section 2 (1) of the FinDAGebV and no. 15.1.9.5 of the Fee Schedule of this Regulation in the amount of 113.00 euros must be paid annually for the audit of the particulars and documents which must be submitted each year in accordance with section 330 (2) sentence 3 no. 2 a) and c).

The amount of the fee is determined based on the number of collective investment undertakings (individual funds) and investment compartments (umbrella schemes) managed by the AIF management company pursuant to the AIFM Directive which are authorised for marketing in the Federal Republic of Germany.

Payment falls due on 31 December of any given year.

The fee is assessed annually in a notice.

Obligation pursuant to section 330 (2) sentence 3 no. 2

It is important to note that the obligations specified in the declaration pursuant to section 330 (2) sentence 3 no. 2 do not end upon de-notification of marketing arrangements in the Federal Republic of Germany. The AIF management company is released from this obligation only when all investors residing and/or domiciled in the Federal Republic of Germany have ended their investment in the AIF.

Content of notification pursuant to section 330

I. Marketing to semi-professional and/or professional investors

1. Particulars

- 1.1. All material particulars regarding the management company of the notified AIF and its corporate bodies
 - a) Name or company name, legal form, seat, address, contact/contact person with phone number and e-mail address
 - b) Names of the directors
 - c) Name of the country under whose laws the AIF management company was established
 - d) Name, seat and address of the governmental authority to whose supervision the AIF management company is subject
- 1.2. Particulars regarding the AIF:
 - a) Name of the AIF
 - b) ISIN
 - c) Seat of the AIF
 - d) Name of the country under whose laws it was established
 - e) Legal form of the AIF
 - f) Date of launch
 - g) Financial year
 - h) Open-end or closed-end AIF
 - i) AIF type (hedge fund, private equity, fund of funds, etc.)
- 1.3. All material particulars relating to the depositary of the notified AIF or the agents performing the duties pursuant to Articles 21(7) to (9) of Directive 2011/61/EU
 - a) Name or company name, legal form, seat and address
 - b) Principal activity
 - c) Name of the country under whose laws it was established
 - d) Date or time of assumption of function

- 1.4. Description of the notified AIF and all information available to the investors regarding the notified AIF
- 1.5. Particulars regarding the precautions taken to prevent units or shares of the notified AIF from being marketed to private investors, and/or – if the notification does not cover marketing to these – semi-professional investors

It must be stated in particular whether

- the AIF management company has taken internal precautions to ensure that units or shares in the notified AIF are neither offered to nor placed with the aforementioned investor groups and
- - if marketing is also carried out online – separate, secured sales portals exist for the respective investor groups and
- - if the AIF management company relies on independent companies for the provision of investment services for the notified AIF - the marketing agreements contain an obligation forbidding units or shares of the AIF that is notified for marketing from being offered to or placed with private investors, and/or – if the notification does not cover marketing to these – semi-professional investors and requiring the aforementioned separate, secure sales portals to be established.

The prospectus and all other information documents, including marketing materials, must include a notice in accordance with section 293 (1) sentence 2 no. 3 in prominent print.

- 1.6. Statement as to whether marketing is performed through a branch of the AIF management company in the Federal Republic of Germany and, if so, statement of the address and directors of the branch (cf. section 54 (2) nos. 2 and 3 of the KAGB)

2. Documents

- 2.1. Fund rules, articles or memorandum of association of the notified AIF
- 2.2. Information pursuant to section 307 (1) for the notified AIF
 - a) Description of the investment strategy and the objectives of the AIF
 - b) Description of the type of assets in which the AIF is permitted to invest and of the techniques that it may use as well as all risks associated therewith
 - c) Description of any investment restrictions
 - d) Particulars regarding the seat of any master AIF and the seat of the target investment fund if the AIF is an investment fund of funds
 - e) Description of the circumstances under which the AIF may use leverage, nature and sources of permissible leverage and risks associated therewith, description of other restrictions on the use of

leverage as well as the maximum scope of leverage which the AIF management company may use for the account of the AIF, and of the management of re-use of collateral and assets

- f) Description of the processes whereby the AIF can change its investment strategy or its fund rules or both
- g) Description of the most important legal consequences of the contractual relationship entered into for performing the investment, including information on the courts of competent jurisdiction, the governing law and on whether legal instruments exist that provide for the recognition and enforcement of judgments in the territory in which the AIF has its seat
- h) Identity of the AIF management company, of the depositary of the AIF, of the auditor or other service providers as well as an explanation of their duties as well as the rights of the investors
- i) Description of the way in which the AIF management company satisfies the requirements of section 25 (6) or of Article 9(7) of Directive 2011/61/EU
- j) Description of all management functions delegated by the AIF management company pursuant to Annex I of Directive 2011/61/EU as well as all depositary functions delegated by the depositary; designation of the authorised agent as well as description of all conflicts of interest that might arise from the delegation of duties
- k) Description of the valuation method of the AIF and the calculation methods for valuing assets, including the methods for valuing difficult-to-value assets pursuant to sections 278, 279, 286 or pursuant to Article 19 of Directive 2011/61/EU
- l) Description of the liquidity risk management function of the AIF, including the redemption rights under normal and extraordinary circumstances, and of the existing redemption agreements with the investors
- t) Description of all remuneration, fees and other charges stating the respective maximum amounts which are indirectly or directly borne by the investors
- u) Description of the way in which the AIF management company ensures a fair treatment of the investors, as well as, whenever investors receive preferential treatment or a claim thereto, an explanation
 - (1) of such treatment
 - (2) of the type of investors who receive such treatment and
 - (3) if applicable, of the legal or economic connections between such investors and the AIF or the AIF management company

- m) Description of the methods and conditions for the issue and the sale of units or shares
- v) Statement of the most recent net asset value of the AIF or the most recent market price of the units or shares of the AIF pursuant to sections 278 and 286 (1) or pursuant to Article 19 of Directive 2011/61/EU
- w) Information on the past performance of the AIF, if available
- x) Identity of the prime broker, a description of all material agreements between the AIF management company and its prime brokers including the statement of the way in which related conflicts of interest are resolved and the provision contained in the agreement with the depositary on the possibility of a transfer or re-use of assets of the AIF and information on any existing transfer of liability to the prime broker
- y) Description of when and how the information required pursuant to section 308 (4) sentence 2 in conjunction with section 300 (1) to (3) or Articles 23(4) and (5) of Directive 2011/61/EU is disclosed
- z) The information referred to in Article 14(1) and (2) of Regulation (EU) 2015/2365, the information referred to in Articles 6 to 9 of Regulation (EU) 2019/2088 and the information referred to in Articles 5 to 7 of Regulation (EU) 2020/852
- aa) If swing pricing is provided for, information on its nature (full or partial swing pricing) and functioning as well as on the calculation of the modified net asset value

2.3. Declaration by the foreign AIF management company that it undertakes

- to submit to BaFin the annual report of the AIF, which must satisfy the requirements of Article 22 and, if applicable, of Article 29 of Directive 2011/61/EU, no later than six months from the end of each financial year; the annual report must be issued with an auditor's opinion
- to inform BaFin of all material changes in circumstances that have been stated with the marketing notification, and to furnish proof of the changes stated
- to provide BaFin with information on its business activity on request and to submit documents and where applicable to satisfy vis-à-vis BaFin the duties to report and inform arising from section 330 (1) sentence 1 no. 1 or 2 of the KAGB

- 2.4. Annual report of the AIF which must satisfy the requirements of Article 22 and if applicable of Article 29 of Directive 2011/61/EU and be issued with an auditor's opinion
- 2.5. Current confirmation by the depositary pursuant to section 80 and by the agent(s) performing the duties pursuant to Art. 21(7) to (9) of Directive 2011/61/EU, regarding the assumption of such function
- 2.6. Proof of payment of the fee for the notification
- 2.7. Declaration by the AIF management company, for example in the form of a registration or authorisation (stating the respective registration number/ID if available), that it is registered with the competent supervisory authority with which BaFin has entered into an appropriate agreement within the meaning of section 330 (1) no. 3a of the KAGB **or** that it has been entered in another register to which the competent supervisory authority has access. Moreover, a declaration by the management company that the competent supervisory authority has the right to be informed vis-à-vis the AIF management company.

II. Additional requirements for marketing (also) to semi-professional investors

1. Particulars

- 1.1. Names of the holders of qualifying interests in the AIF management company as well as particulars on the level of their respective interest
- 1.2. Disclosure of those facts indicating a close connection between the AIF management company and other natural or legal persons
- 1.3. Disclosures on remuneration policy and remuneration practice pursuant to section 37
- 1.4. Disclosures on outsourcing agreements pursuant to section 36
- 1.5. Name, seat and address of the governmental authority competent for supervision of the depositary stating in detail, in the event of the seat being in a third country, the nature and scope of the supervision, in particular such that it is to be reviewed pursuant to the provisions decisive for supervision whether the administrative and management bodies (management) possess the experience required for the function, whether the organisation necessary to perform the duties is being kept available and whether minimum capital requirements are prescribed

2. Documents

- 2.1. Proof of own funds
- 2.2. Documents on the assessment of the professional qualification and trustworthiness of the directors of the AIF management company

- 2.3. Documents on the assessment of the trustworthiness of the holders of qualifying interests
- 2.4. Business plan containing, in addition to the organisational structure of the AIF management company, also information on how the AIF management company intends to comply with its duties under the KAGB

III. Additional requirements if the notified AIF is a feeder AIF

1. Particulars

- 1.1. All material particulars regarding the management company of the master AIF and its corporate bodies in accordance with I.1.1.
- 1.2. Particulars regarding the master AIF in accordance with I.1.2.
- 1.3. All material particulars relating to the depositary of the master AIF or the agents performing the duties pursuant to Articles 21(7) to (9) of Directive 2011/61/EU in accordance with I.1.3.
- 1.4. Description of the notified master AIF and all information available to the investors on the master AIF

2. Documents

- 2.1. Fund rules, articles or memorandum of association of the master AIF
- 2.2. The additional information for the master AIF specified in section 307 (1)
- 2.3. Declaration pursuant to I.2.3. also covering the master AIF and its management company
- 2.4. Current confirmation from the depositary of the Master AIF pursuant to section 80 and by the agent(s) performing the duties pursuant to Art. 21 (7) to (9) of Directive 2011/61/EU, regarding the assumption of such function
- 2.5. In the case of marketing also to semi-professional investors

Additionally, particulars and documents pursuant to II. with reference to the foreign AIF management company of the master AIF (if the master AIF is managed by a foreign AIF management company),

or

Certification by the competent authority of the home Member State in the German or the English language that the EU AIF management company and the management of the master AIF by the latter satisfy Directive 2011/61/EU (if the master AIF is management by an EU AIF management company).