

# Marketing notification procedures from non-EU/EEA countries

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# Introduction



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- Outcome of Brexit negotiations unclear for the time being
  - EU-passporting regimes according to UCITS Directive and AIFMD in question after Brexit
  - Harmonised AIFMD passporting regime for third country AIFs managed by third country AIFMs not yet applicable
  - AIFMD → National Placement Regime for third country AIFs or third country Asset Management Companies → marketing according to national law until the harmonised regime is applicable
  - Germany accepts marketing of third country AIFs managed by EU-AIFMs or third country AIFMs
  - Precondition: appropriate cooperation arrangements with third country

## 1. What does „marketing“ mean?

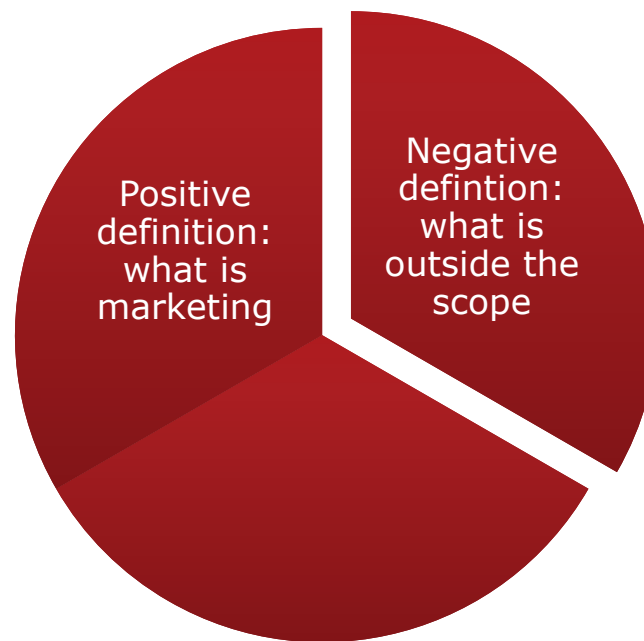
Definitions and administrative practice

## 2. Marketing notification procedures from non-EU countries

Procedure and time-frame - Which one to choose? – Notifications pursuant to sec. 320, 329 and 330 Investment Code – (Ongoing) publication obligations – Change notices to BaFin - AIFMD reporting - Other reporting obligations to BaFin

# What does „marketing“ mean?

- Legal definition of „marketing“ → technique:



# Positive definition of „marketing“



Sec. 293 para 1, 1st sentence German Investment Code („Kapitalanlagegesetzbuch – KAGB“):

„Marketing is the direct or indirect offering or placement of units or shares of an investment undertaking.“

Offering:

- Any offer, not only legally binding offers
- Offer of a specific investment undertaking

Pre-marketing → no marketing

# Negative definition of „marketing“



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- Sec. 293 para 1, 2nd sentence Investment Code: „The following do not constitute marketing“:

For example:

- 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
- 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 the Investment Code

... and no other marketing within the meaning of sentence 1 is performed.

# Negative definition of „marketing“



- Marketing to **professional** and **semi-professional** investors:
  - only 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 registered office in Germany/EU/EEA
  - → reverse solicitation → no marketing

For more information please see FAQ marketing:

„Häufige Fragen zum Vertrieb und Erwerb von Investmentvermögen nach dem KAGB“ on BaFin’s website: [www.bafin.de](http://www.bafin.de)

# Semi-professional investors -1



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- Background
  - Definition: sec. 1 para. 19 Nr. 33 Investment Code
  - Examples:
    - Any investor who commits to invest at least 10 Mio. Euro in any investment undertaking
    - Directors and employees of the management company whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage (risk takers) as long as they invest in the investment undertakings managed by the AIFM



# Semi-professional investors -2



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- Any investor who commits to invest at least 200.000 Euro but additional checks and requirements necessary:
    - Written declaration by investor that he/she is aware of the risks associated with the intended investment on a document separate from the investment contract
    - Assessment by the AMC or the marketing intermediary which level of expertise, experience and knowledge the investor has
    - Conclusion that the investor is in a position to make his/her own investment decision having regard to the type of commitment or investment planned and understands the risks associated and that the investment seems reasonable for the investor in question
    - Written confirmation by the AMC or the intermediary, on the above mentioned assessment and conclusion.

# Marketing notification procedures



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General remarks on terminology:

- EU-AIF → EU/**EEA**-AIF
- EU-AIFM → EU/**EEA**-AIFM
- „foreign ...“ („ausländisch...“) in the Investment Code means **non-EU**...

# Marketing notification Procedure and time-frame



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Notification letter to BaFin including all particulars, declarations, documents and proof of payment of fee



BaFin checks within 20 working-days whether complete

If incomplete → Supplemented notification letter must be sent to BaFin within 6 months → 20-day time-period recommences

If complete → material review → BaFin advises whether marketing may be commenced. Maximum time-frame for material review: depends on type of procedure, for example:

- two months for non-EU AIFs managed by non-EU AIFM marketed to professional investors but
- four months if marketed to semi-professional investors
- six months for any AIFs marketed to retail investors

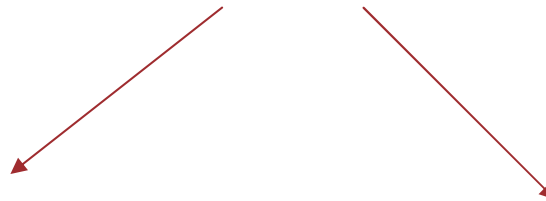
# Marketing Notification procedures

## Which one to choose?



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### Non-EU AIFM (managing EU AIFs or non-EU AIFs) or EU AIFM managing non-EU AIFs



Retail investors

→ sec. 320 Investment Code

Professional or semi-professional  
investors

→ sec. 329 Investment Code

→ sec. 330 Investment Code

# Marketing Notification procedures

## Which one to choose?



### **EU-AIF managing company**

managing third country AIFs



→ sec. 329 Investment Code

### **Non-EU-AIF managing company**

managing third country AIFs or EU-AIFs



→ sec. 330 Investment Code

# Marketing notification procedure by non-EU AIFM, sec. 330 Investment Code



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## Content of notification (overview):

1. All material particulars on the **AIFM**, annual report
  - if AIF is marketed also to semi-professional investors, additionally: all information necessary to reveal that AIFM and the management of AIF complies with AIFMD (sec. 330 para. 2 Nr. 3 in conjunction with sec. 22 para. 1 Nr. 1 to 9 Investment Code)
2. Particulars and description regarding the **AIF**, all information available to the investors, including information document according to Art. 23 AIFMD = sec. 307 Investment Code
3. All material particulars relating to the **depository**
4. **Precautions** taken to prevent marketing to retail investors

# Marketing notification procedure by non-EU AIFM, sec. 330 Investment Code



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## Content of notification (overview):

5. Proof of payment of **fee**
6. **Declaration** by non-EU AIFM that it undertakes to submit to BaFin the annual report, informs BaFin of all material changes and provides BaFin with information on its business activity on request.

→ Guidance Notice 2014 on the marketing of units or shares in a foreign AIF oder 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)

# Marketing notification procedure by non-EU AIFM, sec. 330 Investment Code



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- **Language:**
  - notification letter → in German language,
  - attached documents → in German or English language



# Marketing notification for non-EU AIF managed by EU AIFM, sec. 329 Investment Code



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- Content of notification:

- similar to sec. 330 procedure, but EU AIFM has to comply fully with requirements of AIFMD and needs a confirmation by its home Member State's competent authority that it is authorised

- Guidance note on sec. 329 Investment Code coming soon

# Marketing notification for AIF marketed to retail investors, sec. 320 Investment Code



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## Content of notification (overview):

1. Information on the **AIFM** (in case of non-EU AIFM: all information necessary to reveal that AIFM and the management of AIF complies with AIFMD)
2. Particulars and description regarding the **AIF** including prospectus, fund rules, articles of association or partnership agreement (need to comply with German national law on AIFs) and key investor information
3. Particulars on the **representative**: the representative shall be a domestic credit institution or a reliable qualified person. Function: compliance function together with AIFM
4. Particulars concerning the **marketing intermediaries**

# Marketing notification for AIF marketed to retail investors, sec. 320 Investment Code



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5. Particulars concerning the **depository**
  6. Particulars regarding the **paying agent** (domestic credit institution or branch of a EU- or non-EU credit institution)
  7. A **declaration** by non-EU AIFM that it undertakes to submit to BaFin the financial statements, the annual report, informs BaFin of all material changes and provides BaFin with information on its business activity on request, limits its leverage on request and fulfills reporting obligations according to AIFMD
  8. Proof of payment of **fee**

→ „Merkblatt für Anzeigen beim beabsichtigten Vertrieb von EU-AIF oder ausländischen AIF an Privatanleger in der Bundesrepublik Deutschland nach § 320 Kapitalanlagegesetzbuch (KAGB)

# Marketing notification for AIF marketed to retail investors, sec. 320 Investment Code



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- **Language:**
  - notification letter → in German language,
  - attached documents → in German language
  
  - All publications and advertisements for AIFs marketed to retail investors shall be published in German language, sec. 303 para. 1 Investment Code

# (Ongoing) publication obligations, sec. 299 to 301, Investment Code



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## Marketing to retail investors

### → Publication on website of AIFM

- Prospectus
- Fund rules, articles of association, or partnership agreement
- Annual reports (**in Federal Gazette - „Bundesanzeiger“!**)
- Half-yearly reports (open-ended funds only – **in Federal Gazette!**)
- Issue and redemption prices and net asset value per share or unit
- Information pursuant to sec. 300 para. 1 to 3 (special arrangements with regard to assets due to their illiquid nature, new provisions on liquidity management, etc.)
- Key investor information

# Further publishing and information obligations, sec. 299 para. 5 in conjunction with sec. 298 para. 2 Investment Code

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- Marketing to retail investors
- Publishing of information and specific information to already invested persons by means of a durable medium in the following situations:
  - Redemption of units or shares is interrupted
  - Termination of the management or its liquidation
  - Important changes in fund rules
  - Merger of investment funds
  - Conversion of an investment fund into a feeder fund

# Information obligations concerning , sec. 308 Investment Code



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## **Marketing to semi-professional and professional investors:**

- Information need not to be published but has to be made available to investors:
  - Annual reports on demand of investors including Financial Statements (if required according to Transparency Directive)
  - Information pursuant to sec. 308 para 4 , 2nd sentence in combination with sec. 300 para. 1 to 3 (special arrangements with regard to assets due to their illiquid nature, new provisions on liquidity management, etc.)
  - Any changes in relation to the liability of the depositary → AIFM has to inform investors as soon as possible

# Change notices to BaFin



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## Marketing to retail investors

- Planned changes:

20 working days in advance

- Unplanned changes:

as soon as possible after change took place

## Marketing to professional and semi-professional investors

- No legal time-limit, but BaFin expects:

without unreasonable delay



# AIFMD reporting



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For details on the AIFMD reporting pursuant to Art. 24 AIFMD = sec. 35 Investment Code, please see

Guidance Notice on the reporting obligations of AIF-Management Companies pursuant to section 35 of the German Investment Code (Kapitalanlagegesetzbuch - KAGB)

# Other reporting obligations to BaFin

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- Annual report
- Information on AIFM's business activity (on request)
- In case of sec. 320 procedure (AIF marketed to retail investors): additionally financial statements of AIFM and half-yearly report

Questions?

Thank you for your interest!

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