
THE ASSET MANAGEMENT REVIEW

FIFTH EDITION

EDITOR
PAUL DICKSON

LAW BUSINESS RESEARCH

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Fifth Edition

Editor
PAUL DICKSON

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PUBLISHER
Gideon Robertson

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Thomas Lee

SENIOR ACCOUNT MANAGERS
Felicity Bown, Joel Woods

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SUBEDITOR
Janina Godowska

CHIEF EXECUTIVE OFFICER
Paul Howarth

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EDITOR'S PREFACE

While the global financial crisis of 2007–2008 may feel like an increasingly distant memory, its effects continue to be felt across the whole of the financial world. Despite significant improvements in the global economic landscape in the intervening years, global growth was hampered in 2015 by various geopolitical factors, including a slowdown of economic activity in China and weakening energy and commodity prices. In the UK, the prospect of the referendum on membership of the EU in June 2016 created an uncertain political environment. The impact of the UK's decision to leave the EU is expected to be significant, in particular for the UK and across the European continent but also more widely.

Nevertheless, the importance of the asset management industry continues to grow. Nowhere is this truer than in the context of pensions, as the global population becomes larger, older and richer, and government initiatives to encourage independent pension provision continue. By way of example, in the UK, changes to the rules governing what retirees can do with their pension benefits are creating new opportunities and challenges for discretionary managers and product providers.

The activities of the financial services industry remain squarely in the public and regulatory eye, and the consequences of this focus are manifest in ongoing regulatory attention around the globe. Regulators are continuing to seek to address perceived systemic risks and preserve market stability through regulation. In Europe, major changes to the regulatory landscape for investment funds were introduced by the Alternative Investment Fund Managers Directive, which has applied in full since July 2014, and more recently by certain changes to the UCITS regime. The next key regulatory milestone in the investment business space – the revisions to the Markets in Financial Instruments package – has been delayed by a year, reflecting the challenges for implementation of such significant and wide-reaching regulatory reforms. In the UK, the Financial Conduct Authority continues to focus on the asset management industry. In 2015, a market review of financial advice was completed, and a wide-ranging market study on the industry and the charges it levies on investors was launched.

It is not only regulators who continue to place additional demands on the financial services industry in the wake of the financial crisis; the need to rebuild trust has led investors to call for greater transparency around investments and risk management from those managing

their funds. Industry bodies have noted further moves away from active management into passive strategies, illustrating the ongoing pressure on management costs. The increasing impact of technology on the industry has also been observed, including developments such as 'smart beta' management strategies and the nascent emergence of automated (or 'robo') advice services.

This continues to be a period of change and uncertainty for the asset management industry, as funds and managers act to comply with regulatory developments and investor requirements and adapt to the changing geopolitical landscape. Although the challenges of regulatory scrutiny and difficult market conditions remain, a return of risk appetite has also evidenced itself. The industry is not in the clear but, prone as it is to innovation and ingenuity, it seems well placed to navigate this challenging and rapidly shifting environment.

The publication of the fifth edition of *The Asset Management Review* is a significant achievement, which would not have been possible without the involvement of the many lawyers and law firms who have contributed their time, knowledge and experience to the book. I would also like to thank Gideon Robertson and his team at Law Business Research for all their efforts in bringing this edition into being.

The world of asset management is increasingly complex, but it is hoped that the fifth edition of *The Asset Management Review* will be a useful and practical companion as we face the challenges and opportunities of the coming year.

Paul Dickson

Slaughter and May

London

September 2016

Chapter 3

AUSTRIA

Roman Hager and Martin Wiedenbauer¹

I OVERVIEW OF RECENT ACTIVITY

In the past year, the asset management market has been in a kind of reshaping mode since the ownership of some of the larger asset managers changed, mainly due to the restructuring of banking groups that were the previous owner of the asset managers. Further, some smaller private banks that are active in wealth management were acquired by new strategic investors.

On the legal side, the implementation of Directive 2014/91/EU of the European Council and European Parliament as of 23 July 2014, amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, introduced amendments to the Investment Fund Act 2011 (InvFG), and the Real Estate Investment Fund Act (ImmoInvFG) offloaded some new requirements and obligations on the shoulders of asset managers.

Further, the Austrian parliament has passed legislation (the Common Reporting Standard Act) for the implementation of Directive 2014/107/EU on mandatory automatic exchange of information in the field of taxation based on the OECD global standard for automatic exchange of financial account information in tax matters, under which the reporting is supposed to start in 2017.

II GENERAL INTRODUCTION TO REGULATORY FRAMEWORK

The key legal sources for the asset management business conducted in Austria are the Banking Act (BWG), the InvFG, the ImmoInvFG, the Securities Supervision Act 2007 (WAG) and the Capital Markets Act, together with further regulations based on these statutes.

¹ Roman Hager is senior counsel and Martin Wiedenbauer is a partner at Wiedenbauer Mutz Winkler & Partner.

These statutes implemented European directives such as Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID I), Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to UCITS, and Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading.

The Alternative Investment Fund Manager Act (AIFMG), which came into effect on 22 July 2013, implemented Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers. The AIFMG established a new regime for asset managers of alternative investment funds (AIFs), which were already regulated pursuant to the InvFG (i.e., special funds pursuant to Section 163 InvFG, other funds pursuant to Section 166 InvFG and pension investment funds pursuant to Section 168 InvFG)² and for managers of AIFs that have not been regulated, such as hedge funds and private equity funds.

i InvFG

The InvFG regulates the establishment, management and marketing of UCITS, special funds, other funds and pension investment funds in Austria.

UCITS

The management and marketing of a UCITS pursuant to the InvFG requires a licence issued by the Financial Market Authority (FMA) according to Section 1 paragraph 1 read in conjunction with Section 13 BWG and in conjunction with Section 5 paragraph 1 InvFG.

The fund manager of a UCITS must be established in the form of a limited liability company (GmbH) or a joint-stock corporation (AG) with a minimum equity of €2.5 million. In the event that the fund assets exceed €250 million, additional Tier I capital must be held by the fund management company. Further licence requirements are the establishment of a supervisory board and the sufficient capability and experience of the management of the fund management company.

The licence application must be filed with the FMA, which must decide within six months of receiving the complete submission of the application whether the licence will be granted or refused. In practice, the licensing process can take longer than six months, as it is up to the regulator to decide whether the application is complete. If it decides that the application is incomplete, this six-month period can be extended.

The InvFG provides requirements for the organisation of the asset manager and the operative management of the fund assets, in particular in relation to:

- a* the appointment of a state commissioner;³

2 The InvFG uses the term 'alternative investment fund' only with reference to special funds, other funds and pension investment funds. The AIFMG has a wider definition of AIFs, covering those under the InvFG but also other AIFs.

3 The Minister of Finance must appoint, for each investment fund manager regulated by the InvFG, a state commissioner and deputy for a maximum term of five years. The state commissioner and his or her deputy act on behalf of and according to the instructions of the FMA.

- b* the depositary bank;
- c* the definition and documentation of internal decision-making processes, and the definition and allocation of responsibilities and competences;
- d* an internal control mechanism;
- e* effective reporting processes;
- f* documentation of transactions;
- g* compliance function;
- h* internal audit function;
- i* risk management;
- j* dealing with conflicts of interests;
- k* delegation of tasks of the investment fund manager company to third parties; and
- l* duty of care and best execution.

Furthermore, the public offering of units of a UCITS in Austria requires the approval of a prospectus and the key investor information by the FMA.

The InvFG sets further rules for UCITS established in Austria concerning the following:

- a* issuance, repurchase and redemption of fund units;
- b* financial reporting;
- c* dividend payments;
- d* liquidation of the UCITS;
- e* mergers; and
- f* investment policies and limits, including the calculation of total exposure and leverage.

Special funds, other funds and pension investment funds

Besides UCITS, the InvFG regulates AIFs in the form of special funds, other funds and pension investment funds.

Special funds pursuant to Section 163 InvFG are funds invested in securities with not more than 10 investors that have joint ownership of the fund. For an individual person who invests in a special fund, the minimum investment is €250,000.

Other funds pursuant to Section 166 InvFG are funds entitled to invest up to 100 per cent of the fund assets into one and the same other investment fund, which must comply with certain criteria.

A pension investment fund pursuant to Section 168 InvFG is a fund that expressly uses the title 'pension investment fund'. It serves for pension plan purposes and is managed according to a long-term investment policy. Pension investment funds are subject to certain investment policies and limits concerning asset types.

A manager of a special fund, other fund or pension investment fund pursuant to the InvFG is subject to the licensing requirement established by the AIFMG.

ii ImmoInvFG

The ImmoInvFG regulates managers of real estate funds and real estate special funds. Investment managers in such funds require a licence pursuant to Section 1(1)(13)(a) BWG read in conjunction with Section 2 ImmoInvFG. Only licensed managers are entitled to

manage real estate funds, and they are restricted from operating any other business not related to real estate. The manager must be established in the form of either a joint-stock corporation or a limited liability company. The licence application is filed with the FMA.

A real estate fund invests in property, property under construction, vacant sites and other property-related rights that are specific for Austrian law (such as third-party land and building rights).

A real estate special fund is a collective investment scheme with not more than 10 investors that are not individual persons. The transfer of the fund participation is subject to the approval of the real estate investment fund manager, who at all times needs to know all the investors. The fund's regulation can provide for different rules on the evaluation dates and information requirements.

A real estate investment fund manager must appoint a depositary bank, which must be approved by the FMA. The depositary bank issues and redeems the fund certificates, and holds in custody all securities and maintains the accounts of the fund.

iii WAG

The WAG implemented MiFID I. Hence, the WAG regulates investment services, including portfolio management on an individual client basis. To provide securities services, a licence according to Section 3 paragraph 2 WAG is required. The investment firm must be established in the legal form of a capital company (i.e., a limited liability company, joint-stock corporation or *Societas Europaea* (a public company registered in accordance with the corporate law of the EU)), or as a cooperative with a minimum equity of €125,000 if portfolio management services are to be provided. The investment firm is not allowed to hold assets or instruments of its clients; this prevents it becoming a debtor of its clients.

On 12 June 2014, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II), which amends MiFID I, was adopted. The reason for the revision of MiFID I was the financial crisis in 2007 revealing the need for improvement of the existing directive in several parts. The national implementation of MiFID II that has been postponed until 3 July 2017 will lead to amendments to the WAG.

iv AIFMG

The AIFMG came into force on 22 July 2013 and implemented Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (AIFMD). Due to Directive 2013/14/EU of the European Parliament and of the Council of 21 May 2013, and to adapt to practical needs of the Austrian investment fund market, some provisions of the AIFMG were amended recently.

The statute regulates alternative investment fund managers (AIFMs) and covers any legal person whose regular business is managing one or more AIF. Beside the AIFMG, the implementation of the AIFMD required amendments in the InvFG and the ImmoInvFG.

Registration requirements

The Austrian legislator used the opportunity granted by the AIFMD to establish a licence requirement for large AIFMs, whereas small AIFMs only require registration.

A small AIFM is:

- a an AIFM that, either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect

holding, manages portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, do not exceed a threshold of €100 million in total; or

- b* an AIFM that, either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manages portfolios of AIFs whose assets under management do not exceed the threshold of €500 million in total when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a five-year period following the date of initial investment in each AIF.

A small AIFM must:

- a* register with the FMA;
- b* provide information about the managed AIFs and the investment policy;
- c* report to the FMA on annual basis or on request the important instruments that it trades, the highest risks and concentration to ensure effective supervision by the FMA;
- d* report to the FMA the establishment of every new AIF by the AIFM; and
- e* confirm that the units of the AIF are not marketed to retail investors.

The FMA has issued Guidelines for the Registration under the AIFMG, which give further guidance regarding the registration obligation, the filing process, requested information and duties of registered AIFMs.⁴

A registered AIFM has to continuously control the thresholds of the managed AIFs, and is obliged to apply for a licence with the FMA within 30 calendar days if the threshold is exceeded on a non-temporary basis (this is deemed to be the case if the excess lasts for more than three months).

Even in the event that the AIFM does not exceed the thresholds that trigger the licence requirement, an AIFM can opt in and submit an application for a licence under the AIFMG.⁵ The licence grants the right to the AIFM to establish and market the AIFs in the European Union (passporting) and, subject to the conditions of Sections 48 and 49 of the AIFMG, to market AIF units to retail investors and qualified retail investors in Austria.

Licence requirements

AIFMs are required to provide, in the case of an internally managed AIF, an initial minimum equity of €300,000, and in the case of an external AIFM, an initial minimum equity of €125,000. Additional amounts of equity must be provided if the value of the portfolios of the AIFs managed by the AIFM exceeds €250 million, and further for fixed common costs and for potential liability risks arising from professional negligence. The latter could be substituted by professional indemnity insurance. Furthermore, the equity should not contain any illiquid or speculative assets.

4 <https://www.fma.gv.at/investmentfonds-und-verwaltungsgesellschaften/aif-verwalte-r-alternativer-investmentfonds/>.

5 Opting in is regulated by the Commission Implementing Regulation (EU) No. 447/2013 of 15 May 2013 establishing the procedure for AIFMs that choose to opt in under Directive 2011/61/EU of the European Parliament and of the Council.

Further licence requirements are the professional experience and reliability of the persons operating the business, as well as the appropriate personal reliability of the persons holding a qualified participation in the AIFM.

Marketing

A substantial part of the AIFMG provides regulation for the marketing of an AIF. The provisions set out complex rules and distinguish between the place of marketing; whether the AIFM is licensed in Austria or in another EU Member State, or if it is a non-EU AIFM;⁶ and whether the AIF is an EU AIF⁷ or a non-EU AIF.⁸ In general, an AIFM that is licensed in Austria is entitled to market EU AIFs to professional investors in Austria and in other EU Member States. Marketing of AIFs to retail investors and qualified retail investors is possible only under the conditions of Sections 48 and 49 AIFMG.

The following AIFs can be marketed to retail investors:

- a* real estate funds according to the ImmoInvFG, provided that the AIFM holds a licence pursuant to Section 1 paragraph 1 read in conjunction with 13a BWG;
- b* special funds, other funds and pension investment funds according to the InvFG, provided that the AIFM holds a licence pursuant to Section 1 paragraph 1 read in conjunction with 13 BWG;
- c* AIFs in real estate, provided that the AIFM holds a licence according to the AIFMG;
- d* managed futures funds subject to the conditions set out in Section 48 paragraphs 7 and 8 AIFMG, provided that that the AIFM holds a licence according to the AIFMG;
- e* private equity umbrella funds subject to the conditions set out in Section 48 paragraphs 8a and 8b AIFMG, provided that the AIFM holds a licence according to the AIFMG; and
- f* funds investing in interests of companies subject to the conditions set out in Section 48 paragraphs 8c and 8d AIFMG, provided that the AIFM holds a licence according to the AIFMG.

The retail investor confirms in writing to the AIFM that he or she is aware of the risks connected to the investment, provided he or she invests in managed futures funds, private equity umbrella funds or funds investing in the interests of companies. The AIFM evaluates the expertise, experience and knowledge of the retail investor and must be persuaded the retail investor is able to assess the risk and the adequacy of the obligation related to the investment.

Further, AIFMs licensed in Austria are entitled to market EU AIFs and manage non-EU AIFs. EU AIFMs and non-EU AIFMs are entitled to market managed EU AIFs and non-EU AIFs to qualified retail investors in Austria, if:

6 A non-EU AIFM is an AIFM that is not an EU AIFM (Section 2 paragraph 1 read in conjunction with 28 AIFMG).

7 An EU AIF is an AIF that is authorised or registered in a Member State under the applicable national law; or an AIF that is not authorised or registered in a Member State, but has its registered office or head office, or both, in a Member State (Section 2 paragraph 1 read in conjunction with 11 AIFMG).

8 A non-EU AIF is an AIF that is not an EU AIF (Section 2 paragraph 1 read in conjunction with 27 AIFMG).

- a* the AIF is authorised to be marketed to professional investors in Austria; and
- b* no leverage or a leverage not exceeding 30 per cent of the AIF's net asset value is employed.

A retail investor is considered a qualified retail investor if, in addition to the confirmation and evaluation requirements similar to the retail investor:

- a* the investor owns minimum net assets, consisting of bank deposits and financial instruments, of €500,000;
- b* the investor invests a minimum of €100,000 in the AIF;
- c* the investment in the AIF is for the sole purpose of diversification and risk spreading; and
- d* the investment in the AIF is not more than 20 per cent of his or her assets in financial instruments according to the WAG.

v Relevant authorities

FMA

The FMA supervises banks, insurance undertakings, pension companies, corporate provision funds, investment firms and investment service providers, investment funds, financial conglomerates and exchange operating companies. It is responsible for the entire federal territory and is not bound by any instructions in the exercising of its duties.

The FMA has, on the basis of explicit delegation by statute, the right to issue regulations that set out certain minimum standards. The regulator also issues guidelines on interpretation and administrative practice, which are important sources for applying the relevant legal provisions.⁹ In the case of certain infringements, the FMA is the competent authority to impose administrative penalties,¹⁰ withdraw licences and undertake other supervisory measures.

State commissioners appointed by the Minister of Finance act on behalf of and according to the instructions of the FMA.¹¹

Austrian Nationalbank (OeNB)

The OeNB is the Austrian central bank and monitors the stability of the financial market at a macro level. It is responsible for the supervision of payment systems and is also involved in the supervision of banks. The OeNB acts in close cooperation with FMA, in particular in relation to banking supervision.

European Securities and Markets Authority (ESMA)

ESMA's role in setting regulations for the supervision of asset managers continues to grow in importance. ESMA may develop and regularly review guidelines for the competent authorities of the Member States on exercising their authorisation powers and on reporting obligations imposed on the competent authorities by the AIFMD. Examples of such acts

9 Guidelines and regulations are available on the FMA website: www.fma.gv.at.

10 For example, see Section 190 InvFG, Section 38 ImmoInvFG, Section 60 AIFMG and Section 94 WAG.

11 See Section 9 InvFG and Section 2 paragraph 10 ImmoInvFG.

include the guidelines on key concepts of the AIFMD,¹² guidelines on sound remuneration policies under the UCITS Directive and AIFMD¹³ and Questions and Answers – Application of the AIFMD.¹⁴

III COMMON ASSET MANAGEMENT STRUCTURES

Besides the above-mentioned forms of UCITS (special funds, other funds, pension investment funds, real estate funds and real estate special funds), other forms of common legal structures include the following.

i GmbHs

The GmbH provisions are rather formalistic and for share transfers and various decisions of the shareholder meeting; in particular, a notarial deed is required for those that effect the share capital, which makes the share (*Geschäftsanteil*) less fungible and capital measures cumbersome and costly. Nevertheless, the GmbH is the favoured form of corporation in Austria because it offers benefits including limited liability, minor capital requirements, a flexible form of corporate governance, the possibility of binding instructions by the shareholders to the management board and minor formalities for founding.

One key characteristic of the GmbH is that the shareholders do not, as a general rule, bear liability to the GmbH's creditors for the GmbH's obligations (separation principle). The GmbH is an incorporated entity with a legal personality independent of that of its shareholders. It may be formed by one or more shareholders.

GmbHs may be used for almost all legal types of businesses, including financial service operations that are subject to licence requirements. The minimum capital requirement for a GmbH (not subject to additional capital requirements stipulated by other regulations) is €35,000, of which half of the share capital has to be paid in cash. GmbHs incorporated after 1 March 2014 may make use of the foundation privilege: the share capital still amounts to €35,000, but the articles of association may provide for limiting the initial contributions to €10,000, of which half has to be paid in cash. This foundation privilege exists for a maximum of 10 years. Within this period, the shareholder's liability is, including in the case of insolvency proceedings, limited to €10,000, but after the foundation privilege expires, the share capital must be increased to €35,000.

The top-level constitutive body of a GmbH is the shareholders meeting. The shareholders appoint the managing directors and conclude an employment agreement with each of them on behalf on the GmbH. They also have the right to adopt resolutions dismissing managing directors and terminating their employment agreements. The shareholders' meeting is entitled to take action in all matters involving the GmbH. In particular, it may prescribe standing orders for the managing directors, issue binding directions and resolve on matters submitted to the shareholders' meeting assembly by the managing directors.

The articles of association can provide for an optional supervisory board that has a controlling function over the managing directors who conduct the day-to-day management. Section 29 GmbHG provides that a supervisory board is mandatory in cases where certain

12 ESMA/2013/600, 24 May 2013.

13 ESMA/2016/411, 31 March 2016.

14 ESMA/2015/1873, 15 December 2015.

size criteria are fulfilled. As long as no legal requirement for the establishment of a supervisory board exists, the organisational structure of a more flexible advisory board can be established, which can assume a closer role to executive management than the shareholders' meeting.

The financial statements of small limited liability companies are required to not be audited by an external auditor.

ii AGs

AGs are less common in Austria than GmbHs, as the cost for their establishment and running are often higher.

As a legal entity, the AG has independent legal personality and possesses rights and obligations of its own, and its shareholders will, as a general matter, bear no liability for the AG's obligations.

The statutory minimum share capital of an AG is €70,000, at least a quarter of which must be paid in at the time of founding the AG. An AG can be founded by a single shareholder; however, in such case, the shareholder must be identified by name in the Commercial Register.

The management board is the constitutive body of the AG that manages and represents the AG, and only individual persons may be appointed to the board. In contrast to a GmbH, the management board of an AG is not subject to direct instructions of the shareholders or the supervisory board. The members of the management board must be appointed for a fixed term of up to five years; however, reappointment is possible.

A supervisory board is mandatory for every AG. The members are elected by the shareholders' assembly for a term of up to five years (three years at the minimum). In certain circumstances, the supervisory board must establish an audit committee pursuant to Section 92 paragraph 4a Joint Stock Corporation Act.

The annual statements of an AG requires an audit by an external auditor.

iii Limited partnerships in the form of a GmbH & Co KG

In certain cases, a GmbH & Co KG may be an interesting option, as it combines the advantages of a partnership with those of a corporate entity. This corporate form limits personal liability, as it is related to a GmbH, which acts as general partner, while the GmbH's shareholders act as the limited partners. As a result, investors in general bear only limited liability to creditors of the partnership both in their capacity as shareholder of the general partner and in their capacity as limited partners.

A GmbH & Co KG may likewise be formed by a single person, who may simultaneously be its managing director.

The reasons why the GmbH & Co KG is sometimes preferred over the GmbH in practice is rooted in tax law: in a typical GmbH & Co KG, in which the GmbH acting as general partner does not have any stake in the capital or profits of the KG and only receives a remuneration for its management activities, all profits will be accrued to the limited partners. Under Austrian tax law, the profits of the limited partners will be taxed at the level of the limited partners, which makes it easier for a group to allocate profits and losses between the group companies. Where the limited partners are non-resident for tax purposes, the tax status of the GmbH & Co KG's profits will depend on the applicable double taxation treaty. Generally, profits arising in the Austrian GmbH & Co KG will have to be reported in Austria by foreign limited partners (limited tax obligation).

A further advantage is the easy form of transfer of the participation of the limited partner, as no legal form (e.g., purchase agreement) is required for the transfer agreement.

IV MAIN SOURCES OF INVESTMENT

The total size of funds is relatively unchanged to previous years at around €170 billion. Of these, €90 billion are invested in AIFs and €78 billion in UCITS.

The total size of real estate funds has grown from around €5 billion to more than €6 billion in just one year.

At the end of the first quarter of 2016, the assets managed by Austrian pension companies stood at €19.6 billion. 95.2 per cent of the assets of the pension companies are held indirectly via investment funds. Broken down into investment classes, debt securities have the largest share of the portfolio, (up to 46.8 per cent of assets), followed by equities with around 25 per cent, while balances held at credit institutions stand at around 16.5 per cent. The remainder is in the form of real estate, loans and credits as well as other assets. After having taken currency hedge transactions into account, around 17.6 per cent of the assets were invested in foreign currencies.

V KEY TRENDS

The Austrian asset management market is in a state of rebuilding, as ownerships in some private banks and asset management companies have changed in the past months. These private banks are targeting private wealthy clients by offering asset management products that distinguish them from the bigger established market players. This focused strategy may source new money for asset management and funds structures.

In addition, in the current low-interest economic environment, all forms of asset management seem to be attractive. However, retail money is still being transferred to low-interest-bearing saving accounts, which is by far the preferred form of investing for retail clients. Institutional investors are required to find intelligent asset management and more attractive forms of investment as they are exposed to return targets that can hardly be achieved by fixed-income investments.

All these aspects might cause new funds to flow to fund structures.

As in other financial markets, digitalisation will most likely have a substantial impact on the asset management industry. Financial technology companies offer portfolio advice enabling clients to invest directly without the need for intermediation by a fund structure. Further, robo-advising could have an even more disruptive effect on human-based asset management.

VI SECTORAL REGULATION

i Insurance

In 2016, the new Austrian Insurance Supervision Act came into force, which brought a total overhaul of the preliminary regulation. This new act implemented Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and

Reinsurance (Solvency II).¹⁵ The previous static system for the determination of the own funds requirement of insurance and reinsurance companies was replaced by a risk-based approach. Qualitative elements such as internal risk management are to be taken into account to a larger extent.

ii Pensions

Pursuant to Section 168 et seq, InvFG, a pension investment fund is a portfolio of assets consisting of liquid financial assets within the meaning of the InvFG. It is divided into equal units represented by securities jointly owned by the unit-holders and formed according to the InvFG, and is, according to the fund rules, designated as a pension investment fund.

Pursuant to Section 171 InvFG, securities may only be acquired for a pension investment fund subject to the following conditions and restrictions:

- a* a maximum of 50 per cent of the fund assets may be invested in securities of issuers having their registered office outside the EEA;
- b* at least 5 per cent of the fund assets must be invested in shares and securities representing participation capital, profit-sharing certificates and income bonds;
- c* at least 30 per cent of the fund assets must be invested in bonds, public notes, convertible bonds, mortgage bonds, municipal bonds and Austrian federal treasury bonds;
- d* up to 10 per cent of the fund assets may be invested in units of real estate funds referred to in Section 1 ImmoInvFG and units in real estate funds managed by a management company with its registered office in the EEA; and
- e* warrants may not be acquired.

iii Real property

The ImmoInvFG provides requirements and restrictions regarding diversifications, participation in real estate companies, valuation of property, liquidity, derivatives and others.

Real estate companies that are not regulated by the ImmoInvFG, and hence are not subject to licence requirements, hold a substantial market share on the Austrian market for collective real estate investments. These companies are mainly structured as joint-stock corporations in which investors hold a common or preferential share; some of these are listed and traded on a regulated market. However, real estate companies could qualify as AIFs; hence, they might be subject to the regulations of the AIFMG.

iv Hedge funds

The AIFMG stipulates rules and regulations for the establishment, management and distribution of hedge funds in Austria.

Hedge fund managers must comply with the registration requirements under Section 1 paragraph 5 AIFMG or the licence requirement under Section 4 AIFMG.

15 Official Journal of the European Union, 17.12.2009, L 335/1.

v Private equity

Private equity funds are subject to the regulation by the AIFMG, thus they have to comply with the organisational, marketing and reporting requirements. They are supervised by the FMA.

VII TAX LAW

Generally (although subject to certain exemptions), a tax rate of 27.5 per cent is charged on income from financial assets according to the Austrian Income Tax Act.

i Taxation of domestic and foreign funds

In general, domestic and foreign funds are treated equally from a tax perspective when the foreign funds comply with all Austrian reporting requirements. However, there are some differences with regard to defining the tax base as well as the taxation itself.

ii Transparency

Funds are treated transparently for tax purposes and therefore no tax is levied on their income and capital gains in Austria, but the income is taxed on the level of the investor. The taxation depends, therefore, on the nature of the income of the fund (e.g., dividends, interest, capital gains) and of the investor (e.g., natural person with a private portfolio, natural person holding the shares as business asset, corporation).

iii Taxation of resident investors in domestic funds

Resident investors are fully liable to taxes with their worldwide income, including income from capital. Dividends resulting from domestic shareholdings are subject to a withholding capital tax of 27.5 per cent when paid to the investment fund. The subsequent distribution by the investment fund is not subject to any withholding tax. This tax deduction is deemed to be a final tax for income tax purposes if the recipient is a natural person or corporation receiving capital income.

Dividends of foreign shareholdings, interest, income from derivatives and realised capital gains are subject to a withholding capital tax (27.5 per cent) when this income is distributed or deemed to be distributed to the investor by the investment fund. Payments to the investment fund are exempted from withholding tax.

iv Taxation of non-resident investors in domestic funds

Non-resident investors are not fully liable to taxes in Austria, but only with particular income. Income from capital will principally be taxed in Austria if the distribution or deemed distribution of the investment fund results from shareholdings or other participation rights, interest secured by domestic property or capital gains, but only insofar as tax has to be withheld. Income from real estate investment funds is only taxable if the real estate is located in Austria.

If the income from capital is not subject to tax in Austria, the capital withholding tax regime still applies but the tax withheld can be refunded. No tax is withheld if the investor proves or makes plausible that he is a non-resident in Austria for tax purposes. Of course, the applicable double tax treaty has to be taken into account.

v Capital gains through sale

Capital gains achieved through a sale of the fund participation are subject to the 27.5 per cent tax rate.

vi Beneficial tax treatment for accumulating funds

Accumulating funds are treated as tax beneficial as only 60 per cent of the capital gains are taken into account as taxable income. A tax rate of 27.5 per cent is applicable on this 60 per cent. If the income deemed to have been distributed is subsequently actually distributed, it is tax-free. However, in case of a sale of the participation funds, the 40 per cent tax free part will be recognised; thus, the beneficial tax treatment has a tax deferral effect.

vii Taxation of the fund managing company

Management companies are subject to corporate income tax at 25 per cent. Services provided by management companies are partly liable to VAT at 20 per cent and partly exempt.

VIII OUTLOOK

The Austrian regulation of asset managers is determined by the European regulations. The main amendments in the near future will be the implementation of MIFID II and further measures on transparency and information obligation driven by tax, and anti-money laundering and terrorism financing regulation.

Further to this, dealing with new technology and digital forms of asset management will be an upcoming challenge for lawmakers, regulatory authorities and asset managers.

Appendix 1

ABOUT THE AUTHORS

ROMAN HAGER

Wiedenbauer Mutz Winkler & Partner

Roman Hager joined WMWP at the beginning of 2016, and before that he worked as a banking and finance and capital market specialist for CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH. He has substantial market experience, having held various positions in the financial industry, including eight years in executive and management positions for banks and asset management firms. Roman graduated in law at the University of Vienna and completed his academic career with a master's of law (LLM) at the London School of Economics. The main focus of his work is in capital markets, banking and finance, private equity, investment funds and restructurings.

MARTIN WIEDENBAUER

Wiedenbauer Mutz Winkler & Partner

Martin Wiedenbauer is a founding partner of WMWP. The main focus of his work is transactions, M&A, private equity and banking and finance. He has special expertise in structuring complex cross-border projects, in particular in the financial industry. Martin graduated in law at the University of Vienna and studied at the ERASMUS University Rotterdam.

WIEDENBAUER MUTZ WINKLER & PARTNER

Neutorgasse 12

1010 Vienna

Austria

Tel: +43 1 512 59 55

Fax: +43 1 512 59 55-20

roman.hager@wmwp.at

martin.wiedenbauer@wmwp.at

www.wmwp.at