

How to set up in Germany

Alternative Investment Fund Manager (AIFM)

This series is designed to help you understand the benefits and drawbacks of setting up your business in key European jurisdictions. Here, we provide a summary of the key issues and processes involved in setting up in Germany.

Simmons & Simmons has a team of experts, skilled in assisting clients with achieving the correct authorisation to establish their businesses across Europe. We use a series of tools to help streamline the process, making it as efficient, but cost-effective as possible.

What are the pros?

- BaFin is very experienced in dealing with setting up AIFMs
- No material super-equivalent requirements
- Currently no remuneration requirements for AIFM stricter than ESMA remuneration guidance
- Frankfurt and Munich are both well established fund manager locations for German and non-German AIFMs
- Data protection legislation similar to UK

What are the cons?

- Employment law less flexible than in the UK



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Licence/Passport Process

- Information on the application process is available here: [Application Guidance](#)
- The process is iterative and involves provision of supporting documents to the German Federal Financial Supervisory Authority (**Bundesanstalt für Finanzdienstleistungsaufsicht** – “BaFin”)
- There are no standardised application forms
- Some additional supporting documents required; especially formal business plan and ownership structure
- Technically an AIFM can apply for authorisation without having established its first AIF, but the AIFM would need to apply for permission to manage each new AIF
- The application fee is €10,000-40,000, depending on the complexity
- The appointment of a custodian will incur additional fees of between €100-5,000
- It typically takes between 1-2 months to prepare an application before submission
- BaFin has 3 months to review a complete application. The deadline may be extended by up to 3 months
- Recent experience suggests that BaFin will take 6-12 months to review and approve an application
- The application documents need to be submitted in German (although BaFin may be willing to accept English documents on a case-by-case basis).

Conduct of business Prudential rules

- Initial capital of €125,000 in case of an external AIFM and €300,000 in case of an internal AIFM
- Plus additional own funds equal to at least 0.02% of the amount by which the AIFM's AUM exceeds €250 million
- These additional own funds cannot be less than the “fixed overheads requirement” (one quarter of audited annual expenditure)
- Further own funds to cover professional indemnity risks equal to 0.01% of AUM (or appropriate professional indemnity insurance).

Corporate governance

- Persons conducting the business of the AIFM must be of sufficiently good repute and sufficiently experienced
- German AIFMs must have a minimum of two managing directors
- BaFin does not have an “approved persons” regime comparable to that of the UK. However, the regulator’s review places particular focus on the CVs of proposed managing directors and whether they verify the directors’ good repute and experience to conduct the business of the AIFM. This includes a certificate of good conduct (either in Germany or an equivalent abroad)
- BaFin’s review places particular focus on the verification of the ability to ensure sound and prudent management
- Head office and registered office must be in Germany
- There are no requirements for local directors under company law purposes
- No inappropriate close links between AIF and other persons
- The AIFM must also conduct then portfolio management and the risk management
- The AIFM can delegate functions to another country subject to complying with AIFMD delegation rules and in particular the “letter-box entity test”.

Regulatory environment

- Strict compliance with notification requirements is required
- BaFin allows an authorised AIFM to provide “top-up” services such as investment advice, safekeeping of assets and reception and transmission of orders
- The relevant AIF which can be managed by the AIFM has to comply with the respective product restrictions in respect to such AIF; however, in respect to **Spezial-AIFs** in particular in form of a closed-ended structure, such **Spezial-AIF** have only to comply with very limited investment restrictions.

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Tax

- Corporate income tax rate of 15.825% on German taxable income
- A German resident subsidiary is also subject to the trade tax at a rate depending on the municipality in which the corporation is located and differs significantly within a range of about 7% to almost 17% (the trade tax rate for Frankfurt, for example, is 16.1%)
- UK-Germany double tax treaty provides for a 5% withholding tax on dividends. Impact of the Brexit on the application of the EU-Parent-Subsidiary-Directive (0% WHT) has to be considered
- Related party transactions must be conducted considering the OECD arm's length principles. The subsidiary has to document any transfer pricing to any companies holding directly or indirectly at least 25% of the shares in the subsidiary. No formal transfer pricing study is required if the aggregate amount of payments to related parties does not exceed certain thresholds
- The personal income tax rate is progressive, rising to a top rate of up to approx. 47.5 %
- Germany does not levy stamp duty. The VAT rate is 19%
- See also a [comparative table](#) of the main taxes and reliefs relevant to setting up a financial services business.

Employment law

- Remuneration principles specified in AIFMD and further ESMA guidelines, which include payout related rules, but with broad flexibility in regulatory guidance by BaFin
- Currently no remuneration requirements for AIFM stricter than ESMA remuneration guidance
- To the extent applicable the German Act against unfair dismissals sets high requirements for the social justification of a dismissal. Most of the requirements have to be proved by the employer
- Generally, an employee is not entitled to a severance payment if the dismissal is (socially) justified. However, since the requirements for a dismissal are very high in practice most of the cases are settled at court against payment of a severance
- Employees have the right to establish a works council. This is an independent body to represent the employees in discussions with the employer and has certain co-determination rights
- Notice: The statutory notice period for the employer is four weeks to the 15th or the calendar month throughout the first two years of employment, one month to the end of the month until the fifth year of employment and is slowly increased up to a maximum statutory notice period of seven months after tenure of 20 years. However, many employers chose to include a contractual notice period of three month to the end of the calendar month in the employment contracts which is superseded by the contractual notice period after ten years of employment.

Data protection

- Legislation is based on EU directives; EU General Data Protection Regulation will apply from 25 May 2018.

Outsourcing

- The AIFM must be able to justify its entire outsourcing structure based on objective reasons
- Outsourcing does normally not require pre-approval by BaFin; pre-approval is only required when the outsourcing service providers are neither authorised nor registered for the purposes of asset management or financial portfolio management and which are subject to supervision
- The AIFM must be able to demonstrate that the outsourcing service provider a) is sufficiently qualified in view of the tasks delegated to it, b) is able to perform the assigned tasks in an orderly manner, and c) was selected with due care
- The institution remains responsible for any outsourced activity and will be expected to maintain in-house expertise to supervise/manage the outsourced activities
- The AIFM shall be liable for the fault of an outsourcing service provider as if it was its own fault.

Corporate

- German external AIFMs may only be operated as a stock corporation (**Aktiengesellschaft**) (AG), a limited liability company (**Gesellschaft mit beschränkter Haftung**) (GmbH) or a limited partnership whose general partner must be a limited liability company (**Kommanditgesellschaft**). A supervisory board shall be established even if the external AIFM is operated in the form of a limited liability company. If the external AIFM is operated in the form of a limited partnership whose general partner must be a limited liability company, it shall establish an advisory board
- One member of the supervisory board must be independent of the shareholders, companies affiliated with the shareholders and the business associates of the external AIFM
- Incorporation costs are approximately €600-1,000 for a limited liability company and slightly more for other legal vehicles.

Key contacts



Charlotte Stalin
Partner
London
T +44 20 7825 4180
E charlotte.stalin
@simmons-simmons.com



Harald Glander
Partner
Germany
T +49 69 907454 44
E harald.glander
@simmons-simmons.com



Ian Rogers
Partner
France
T +331 53 29 16 22
E ian.rogers
@simmons-simmons.com



Romeo Battigaglia
Partner
Italy
T +3902 72505 471
E romeo.battigaglia
@simmons-simmons.com



María Tomillo
Managing Associate
Spain
T +3491 426 2583
E maria.tomillo
@simmons-simmons.com



Fionán Breathnach
Partner
Ireland
T +3531 266 2111
E fionan.breathnach
@simmons-simmons.com



Louis-Maël Cogis
Partner
Luxembourg
T +352 26 21 16 14
E louis-mael.cogis
@simmons-simmons.com



Rezah Stegeman
Partner
The Netherlands
T +3120 722 2333
E rezah.stegeman
@simmons-simmons.com

simmons-simmons.com
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