

## Alert Germany 1/2021

### New Supervisory Regime for Investment Firms in force

Geneva, 12.07.2021

## 1. References

### 1.1 Decision

Germany has introduced a new supervisory regime for investment firms (the Gesetz zur Umsetzung der Richtlinie (EU) 2019/2034 über die Beaufsichtigung von Wertpapierinstituten (WpIG) or the "new Law"). With this law, Germany is implementing into national law the Investment Firm Directive (Directive (EU) 2019/2034).

The new Law entered into force on 26 June 2021, on the same day as the Investment Firm Regulation (Regulation (EU) 2019/2033) has entered into force.

### 1.2 Addressees of this Alert

CM PB	CM EAM	CM Products	CM ManCo	CM Life Ins Sol	CM Credits
YES	YES	-	-	-	-

### 1.3 Reference texts

- > Act on the Implementation of Directive (EU) 2019/2034 on the prudential supervision of investment firms (Gesetz zur Umsetzung der Richtlinie (EU) 2019/2034 über die Beaufsichtigung von Wertpapierinstituten (WpIG))
- > Regulation (EU) 2019/2033 on the prudential requirements of investment firms (Investment Firm Regulation, IFR)
- > Directive (EU) 2019/2034 on the prudential supervision of investment firms (Investment Firm Directive, IFD)
- > BaFin, Neue Vorgaben für Wertpapierinstitute and FAQ, available at: <https://www.bafin.de/dok/15966110> (in German)

## 2. Context

The new Law is implementing the Investment Firm Directive (Directive (EU) 2019/2034) into national law.

As a reminder, the European legislator decided to create a separate prudential regime for investment firms covered by Directive 2014/65/EU (MiFID II) and adopted to this effect the Investment Firm Directive (IFD) and the Investment Firm Regulation (IFR). The aim of the new EU prudential regime is to take into account the difference of business models and associated risks between banks on the one hand and investment firms on the other hand and to apply in this sense a more proportionate treatment in the supervision of investment firms in terms of capital and liquidity requirements, requirements limiting concentration risks and reporting and disclosure duties.

## 2.1 New supervisory approach for investment firms

With the new Law and the directly applicable IFR, the regulation and supervision of investment firms has now been removed from the German Banking Act (Kreditwesengesetz, KWG) and a new, separate supervisory regime is introduced, the Wertpapierinstitutsgesetz (WpIG).

The new Law distinguishes between three categories of investment firms:

- > **Large investment firms** (Section 2 (18) WpIG): These are investment firms that do not qualify as CRR credit institutions (and are therefore not supervised by the European Central Bank) but that are nevertheless required (due to their similarities with credit institutions) to apply the CRR based on Art. 1 (2) IFR if their consolidated assets (individually or as part of a group) exceed EUR 15 billion or based on an authorization pursuant to Art. 1 (5) IFR. The German Supervisory Authority BaFin may also classify an investment firm as large investment firm under the conditions of Section 8 WpIG. Aside from the CRR, large investment firms are now governed by the WpIG, in addition to specifically enumerated provisions of the German Banking Act (Section 4 WpIG).
- > **Medium-sized investment firms** (Section 2 (17) WpIG): These are investment firms that do not fulfil the requirements of Art. 12 (1) IFR. These investment firms are governed by the WpIG and the IFR.
- > **Small investment firms** (Section 2 (16) WpIG): These are investment firms that meet all of the requirements of Art. 12 (1) IFR, including:
  - The assets under management are less than EUR 1,2 billion (in German: Milliarden),
  - The client orders handled are less than either EUR 100 million/day for cash trades or EUR 1 billion/day for derivatives,
  - The assets safeguarded and administered, the client money held, the daily trading flow, the net position risk or clearing margin given and the trading counterparty default are all zero,
  - The on- and off-balance-sheet total of the investment firm is less than EUR 100 million,
  - The total annual gross revenue from investment services and activities of the investment firm is than EUR 30 million, calculated as an average on the basis of the annual figures from the two-year period immediately preceding the given financial year.

Small investment firms are subject to a lighter supervisory approach.

## 2.2 Key points of the new Law

The following presents some of the key points of the new Law that are relevant from a cross-border perspective.

- > The new Law applies to any investment firm (in German now called "Wertpapierinstitut") which is defined as a "company that provides investment services alone or in combination with investment ancillary services or ancillary transactions on a commercial basis or in a manner that requires commercially established business operations" (Section 2 (1) WpIG).
  - > For the scope of covered investment services contained in Section 2 (2) WpIG, there are no changes in substance; thus, among others, brokerage activity (Anlagevermittlung),
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## Alert Germany 1/2021

### New Supervisory Regime for Investment Firms in force

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- investment advisory activity (Anlageberatung) or portfolio management (Finanzportfolioverwaltung) continue to be regulated investment services.
- > The authorisation requirement for providing investment services within the meaning of Section 2 (2) Sentence 1 Nr 1 to 10 WpIG, investment ancillary services within the meaning of Section 2 (3) Nr. 1, 2 and 4 WpIG or ancillary transactions (in German: Nebengeschäfte) within the meaning of Section 2 (4) WpIG is now contained in Section 15 WpIG. For banks and investment firms that have been authorized pursuant to Section 32 (1) Banking Act prior to 26 June 2021, the granted authorization continues to be valid.
  - > Tied agents ("vertraglich gebundener Vermittler") are not considered as being investment firms if the responsible investment firm has previously notified the tied agent to BaFin (Section 3 (2) WpIG).

#### 2.3 Implications for cross-border operations

After consultation with our local law firm, we can confirm that the rules and principles governing the promotion and provision of cross-border investment services into Germany as summarized in the BaFin Guidance regarding the licensing for conducting cross-border banking business and/or providing cross-border financial services (dated 1 April 2005 and as amended on 11 March 2019) remain unchanged and valid under the new supervisory regime of the WpIG.

Thus, foreign investment firms may promote or provide their investment services only upon a prospect's or client's request (reverse solicitation) during occasional on-site visits in Germany or via remote means of communication into Germany.

In a similar vein, conduct rules for investment firms continue to be governed by the Securities Trade Act (Wertpapierhandelsgesetz or WpHG) without any changes.

The procedure for the passporting of EEA investment firms wishing to promote their services on the basis of the freedom to provide services is now contained in Section 74 WpIG.

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### 3. Comment

Germany has implemented the new Law in time and, as it seems to date, without significant changes compared to the IFD. The unchanged approach to cross-border promotion or provision of investment services into Germany is of no surprise.

Future statements or positions of BaFin in this respect are not excluded.

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### 4. Practical implication

Compliance functions of foreign investment firms – whether established in a third country or in the EEA – promoting and providing investment services on a cross-border basis into Germany should be aware of the new Law now in effect in Germany and should inform their management accordingly. However, as long as they operate in compliance with the established German cross-border rules, there is no further immediate action required.

## Alert Germany 1/2021

### New Supervisory Regime for Investment Firms in force

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Nevertheless, any future developments, in particular any practice or communication of the German regulator, should be monitored closely.

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We are at your disposal for any questions you may have.

Best Regards,

BRP Bizzozero & Partners SA

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