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LEGAL ASPECTS OF GERMAN HEDGE FUND STRUCTURES



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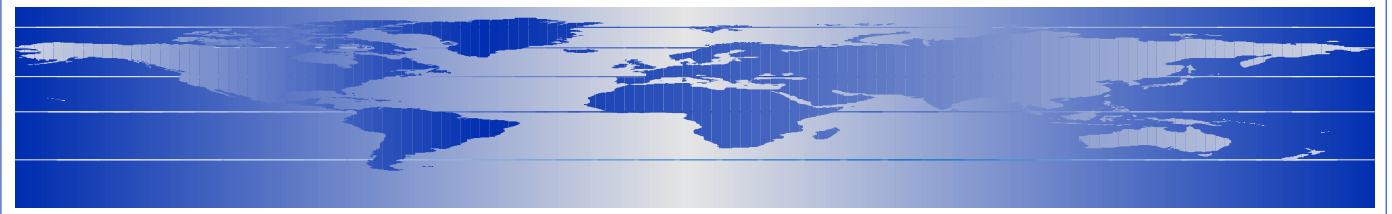
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**Legal Aspects  
of  
German Hedge Fund Structures**

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## I. Introduction

*Increasingly, alternative investments via hedge funds are gaining importance in Germany. Just recently, this subject was taken up in the legal literature, too; this resulted in a higher product transparency. However, German investment law and, particularly, the special division "hedge funds" is still a field dominated by practitioners. First, the present situation shall be outlined. In addition, a description of the current development is given, in which the practical knowledge of the author is included. Finally, the hedge fund regulation intended by the legislator at the beginning of the year 2004 is legally evaluated against this background.*

## II. Part 1: Present Situation

### 1. Background and Terms

#### 1.1. Origin of Hedge Funds

The first hedge fund was established in 1949 by means of an equity fund launched by *Alfred Winslow Jones*.<sup>1</sup> It was based on the idea of acquiring undervalued shares (long position), and selling overvalued shares to the same extent (short position)<sup>2,3</sup>. At first, this hedge fund model was established by Jones as a limited partnership; some years later, it was transformed into a general limited partnership.<sup>4</sup>

Since 1960 the hedge fund industry has increased rapidly based on the bull market. However, this increase could not continue uninterruptedly. Due to the bear markets in 1969-1970 and 1973-1974, numerous hedge funds suffered high losses; the amount of investors decreased significantly.<sup>5</sup> As of 1980, the launching of hedge funds was discussed

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<sup>1</sup> *Eichengreen/Mathieson*, Hedge Funds and Financial Market Dynamics, International Monetary Fund Occasional Paper 4, 1998, p. 5; *Ledermann*, Securities Regulation of Domestic Hedge Funds, Practising Law Institute, Corporate Law and Practice Course Handbook, 2000, p. 401, 406.

<sup>2</sup> "Short sales" means the sale of, e.g., securities, which are not in the seller's portfolio as at the sale. For details see II.1.3.

<sup>3</sup> *Dailey*, Prime Brokerage, in *Hedge Funds: Investment and Portfolio Strategies for the Institutional Investor*, p. 233.; *Crerend*, *Fundamentals of Hedge Fund Investing* 1998, p. 1.

<sup>4</sup> *Crerend*, *Fundamentals of Hedge Fund Investing*, 1998, p. 1; *Pichl*, *Hedge Funds: Eine praxisorientierte Einführung*, 2001, p. 2; *Kayser/Steinmüller*, FR 2002, 1269, 1270. The general limited partnership is comparable to a GmbH & Co. KG under German law.

<sup>5</sup> *Ledermann*, *Domestic Hedge Funds*, 1229 *Practising Law Institute/Corporate Law*, February 2001, p. 769.

again. New hedge funds were established, which diversified their investment strategies in the course of their success. They deviated increasingly from the original purpose of hedge funds, i.e., the hedging of securities.<sup>6</sup> As a result of unstable market fluctuations, hedge funds became subject to intense criticism recently<sup>7</sup> not only in view of the Long Term Capital Management debacle<sup>8</sup>.

## 1.2. Definition of Term

It is not possible to provide a generally applicable definition of the term "hedge fund". Even the term "hedge" in the sense of risk minimization causes more confusion than clarification – especially on the part of the private investors – since it gives the impression of a low-risk investment vehicle.<sup>9</sup> The term "hedge" rather describes different investment strategies aiming at a rapid asset growth irrespective of a certain market trend (absolute return).<sup>10</sup> Upon their investment decisions, the fund managers make use of speculative investment vehicles. *Inter alia*, they carry on arbitrage transactions,<sup>11</sup> use derivatives<sup>12</sup>, take advantage of leverage effects<sup>13</sup> and carry out short sales<sup>14</sup>. For tax optimization purposes, hedge funds are mainly designed as so-called offshore funds. They are preferably incorporated in financial marketplaces short of regulations, for example, the

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<sup>6</sup> Ledermann, (fn. 5), at 769.

<sup>7</sup> The Presidents Working Group on Financial Markets, Report on Hedge Funds, and the Lessons of Long-Term Capital Management, 1999, p. 1; Gatsik (fn. 4), at 597 et sqq.

<sup>8</sup> Long Term Capital Management (LTCM) was a hedge fund, which brought the worldwide financial system near to collapse in 1998. The crisis could only be averted by an escape loan in the amount of 3.6 billions USD; see Beck, Saving Long-Term Capital on Short Deadline, American Law Review, Nov. 1998, p. 28; Gatsik, Hedge Funds: The Ultimate Game of Liar's Poker, Suffolk University Law Review, 2001, p. 591 et sqq.; Lowenstein, When Genius Failed, 2000, p. 20 et sqq.; Steck, Regulierung von US-amerikanischen Investmentgesellschaften (Investment Companies), 2000, p. 190.

<sup>9</sup> Single, ZKredW 2001, 240; Oho/Rommel, BB 2002, 1449.

<sup>10</sup> Luttermann/Backmann, ZIP 2002, 1017; Kayser/Steinmüller (fn. 4), at 1270; Gerke/Mager/Kiehn, ZBB 2002, 479, 480.

<sup>11</sup> A kind of trading, which makes use of minimum price differences in foreign currencies, raw material, or stock prices.

<sup>12</sup> This means forward transactions, the price of which is dependent on the market price of securities, money market vehicles, goods, or precious metal, and on spot exchange rates or units of account as well as interest rates or other income. See Sec. 1 para. 11 German Banking Act (Kreditwesengesetz - "KWG").

<sup>13</sup> Leverage means the use of debt capital for securities transactions or the acquisition of financial instruments, such as future contracts or bonds, whereat the instrument itself serves as security.

<sup>14</sup> For details see below II.1.3.

Cayman Islands and Bermuda.<sup>15</sup> Hedge funds offer the chance to realize a relatively high return independent of the market trend but involve the increased risk of capital losses at the same time.

### 1.3. Investment Strategies

Short sales form part of the most important investment strategies used by hedge funds. A short sale means the sale of securities that are not in the possession of the seller.<sup>16</sup> Shares supposed to be overvalued are lent against payment<sup>17</sup> – e.g., from a large-scale investor – and are exclusively sold in the market. This strategy aims at the later acquisition of similar shares at a lower price, and their subsequent return to the large-scale investor. In this way, a short position is built up. If, on the other hand, the hedge fund manager acquires shares that – from a fundamental point of view – are regarded as promising, then a long position is built up.

Additionally, hedge funds try to make use of inefficiencies in the capital markets.<sup>18</sup> In particular, the utilization of regional price differences between the individual stock exchanges is part of this strategy (arbitrage).

Finally, hedge fund managers speculate in price movements based on special events like mergers, restructurings, takeovers, liquidations, or insolvencies (event-driven).<sup>19</sup>

Against the background of the investment strategies mentioned above – though they do not show the entire range<sup>20</sup> – the legal issues arising in connection with hedge funds shall be discussed in the following.

## 2. Regulation of Hedge Funds

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<sup>15</sup> *Luttermann/Backmann* (fn. 10), 1018; *Paul/Päsler*, Das deutsche Investmentrecht, 2003, margin-no. 141; *Schell*, Private Equity Funds – Business Structures and Operations, 2001, Sec. 1.05, p. 24 et sq.

<sup>16</sup> *Baur*, Investmentgesetze, Part I, 2<sup>nd</sup> edition, 1997, Introduction I, margin-no. 52; *Gerke/Mager/Kiehn* (fn. 10), at 480.

<sup>17</sup> It qualifies as lending in kind according to Sec. 607 para. 1 in connection with Sec. 91 German Civil Code (Bürgerliches Gesetzbuch – "BGB").

<sup>18</sup> *Kayser/Steinmüller* (fn. 4), at 1272; *Gerke/Mager/Kiehn* (fn. 10), at 480.

<sup>19</sup> *Kayser/Steinmüller* (fn. 4), at 1272; *Gerke/Mager/Kiehn* (fn. 10), at 480.

<sup>20</sup> For details see *Gerke/Mager/Kiehn* (fn. 10), at 480 et sq.; *Kayser/Steinmüller* (fn. 4) at 1272 et sq., *Cottier*, Hedge Funds and Managed Funds, 1997, p. 17 et sqq.

## 2.1. Legal Situation in Germany (Status quo)

### 2.1.1 German Investment Companies and Hedge Fund "Sondervermögen"

The legal link for hedge funds in Germany is the Investment Companies Act (*Kapitalanlagegesellschaftsgesetz* – "KAGG"). This law forms the legal basis for the activities performed by German investment companies. Hence, the question arises whether the launching of German hedge funds is permitted *de lege lata* according to the provisions set forth in the KAGG.

Starting point of all considerations is Sec. 1 para. 1 KAGG. According to that, German investment companies (*Kapitalanlagegesellschaften* – "KAGs") are specialized banks, whose business activities aim at the investment of money deposited with them on their own behalf and for the joint account of the investors (unit holders); the investment has to be made in accordance with the principle of risk diversification in assets permitted by law and separated from their own assets, and must have the form of separate assets; on the resulting shareholders' certificates (investment units) have to be issued. If a stock corporation (*Aktiengesellschaft* – "AG") or company with limited liability (*Gesellschaft mit beschränkter Haftung* – "GmbH") is in compliance with the foregoing legal definition, the KAGG is applicable. As a result, the company is subject to supervision by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – "BaFin")<sup>21</sup>. The KAG enjoys, *inter alia*, the legal protection of the firm name<sup>22</sup>, and may profit from the tax benefits set forth in the provisions of Secs. 37n et sqq. KAGG<sup>23</sup> with respect to the separate assets managed by it.

The KAGG is not applicable to companies, which are not totally in compliance with the definition of a KAG.<sup>24</sup> Consequently, they neither

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<sup>21</sup> Pursuant to Sec. 2 para. 1 KAGG, the Federal Financial Supervisory Authority is supervising investment companies and custodian banks according to the provisions set forth in this law and in the German Banking Act.

<sup>22</sup> According to Sec. 7 para. 1 sent. 1 KAGG, only German investment companies, foreign investment companies, management companies, and marketing companies are permitted to use the expression "investment company" or "investment fund" or an expression including these terms solely or in combination with other terms in the firm name, as addition to the firm name, for the description of the business purpose, or for advertising purposes.

<sup>23</sup> *Baur*, (fn. 16), KAGG, Sec. 1, at 10; *Zeller* in Brinkhaus/Scherer, KAGG, 2003, Sec. 1 margin-no. 7.

<sup>24</sup> *Baur*, (fn. 16), KAGG, Sec. 1, margin-no. 4.



benefit from the respective provisions of this law nor are they affected by its restrictions. At the same time, however, this does not prohibit the establishment of companies in Germany, which are used for investment purposes and do not meet the definitions mentioned in Sec. 1 para. 1 KAGG. However, the KAGG is not applied to these companies.

It is only spoken of as a KAG, if the company manages the assets permitted by the KAGG in the form of separate assets enumerated in detail.<sup>25</sup> Thus, the activities performed by a KAG are characterized by the launching of investment funds ("*Sondervermögen*"). Such an investment fund is not a separate legal entity.<sup>26</sup> Just recently the question was brought up whether it is possible to launch hedge fund *Sondervermögen*, or whether at least an analogous application of the KAGG is required.<sup>27</sup>

The assets permitted by law for *Sondervermögen* are mainly regulated in the Special Provisions for Securities Investment Funds set forth in Sec. 8 to Sec. 9e KAGG. In particular, Sec. 9 para. 5 KAGG is decisive. According to that it is not allowed to sell securities not belonging to the *Sondervermögen* as defined by Sec. 6 KAGG as at the date of the transaction's conclusion. In case of hedge funds, however, the flexibility of making short sales is an indispensable prerequisite of the implementation of a "short strategy".

Sec. 9 para. 5 sent. 1 KAGG prohibits KAG from using an investment strategy characteristic of hedge funds<sup>28</sup> due to the fact that in case of a short sale the securities, which shall be the object for sale, are not in the possession of the seller as at the date of the transaction's conclusion. This prohibition is based on the speculative nature of

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<sup>25</sup> The investment has to be made in assets permitted by this law (...) in the form of money market instruments, securities, participation, investment fund unit, mixed securities and real estate or rental assets (*Sondervermögen*); cf. Sec. 1 para. 1 KAGG. See *Köndgen*, in *Bankrechts-Handbuch*, 2<sup>nd</sup> edition, 2001, Volume III, Sec. 113, margin-no. 55.

<sup>26</sup> *Geßler*, WM 1957, Sonderbeilage No. 4, p. 15. For further details see *Köndgen* (fn. 26), at 61 et sqq. It is true that – according to Sec. 9 para. 1 KAGG – a KAG can dispose of the *Sondervermögen* on its own account; the *Sondervermögen*, however, belongs economically to the investors' assets but not to the KAG's assets. The *Sondervermögen* may be in the direct co-ownership of the investors or in the KAG's trustee ownership (Sec. 6 para. 1 sent. 2 KAGG).

<sup>27</sup> *Gerke/Mager/Kiehn* (fn. 10), at 481 et sqq.

<sup>28</sup> In particular, the special provision set forth in Sec. 8f para. 1 KAGG has to be applied to short sales in the field of derivatives; *Scherer* in *Brinkhaus/Scherer*, KAGG, Sec. 8 et sq., margin-no. 1.

securities short sales because they might result in high losses under certain circumstances.<sup>29</sup>

Sec. 9 para. 4 sent. 1 KAGG may additionally restrict the launching of hedge fund Sondervermögen. According to this provision, short-term loans for the joint account of investors (unit holders) may not exceed 10% of the net asset value of the fund. However, financial flexibility is a special feature of hedge funds. Hedge fund managers often make use of debt capital or derivatives to optimize their investments.

Furthermore, relevant restrictions as well as prohibited investments are regulated in Secs. 8 to 8k KAGG. The aim and object of these regulations is the minimization of the investors' risk inherent in the investment fund.

Corresponding regulations are also set forth in the original version of the so-called UCITS-Directive.<sup>30</sup> This Directive was implemented into national law through an amendment of the KAGG. According to Art. 42 UCITS-Directive, short sales are prohibited; according to Art. 36 UCITS-Directive, loans may not exceed a maximum of 15% of the fund assets. This has not been changed fundamentally by the recent amendment of the UCITS-Directive.<sup>31</sup>

### 2.1.2 Optional Regulatory Law

It is true that the launching of hedge fund Sondervermögen in Germany is currently in conflict with the KAGG. But the KAGG is just an optional regulatory law. Hence, it is up to the fund initiator whether he wants his product (fund) to become subject to the regulatory provisions set forth in the KAGG. If so, the KAGG is applied inclusive of all its benefits and disadvantages. In this respect,

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<sup>29</sup> The violation of the prohibition of short sales does not result in the invalidity of the transaction. However, a claim for damages arises for the benefit of the unit holders according to Sec. 823 para. 2 BGB, since Sec. 9 para. 5 KAGG is a protective law as defined by Sec. 823 para. 2 BGB; *Baur*, loc.cit., Sec. 9, margin-no. 35; *Brinkhaus/Scherer*, loc.cit., Sec. 9, margin-no. 31.

<sup>30</sup> Council Directive 85/611/EU of December 20, 1985 for the coordination of the legal and administrative provisions regarding specified undertakings for collective investments in transferable securities (UCITS), ABI No. L 375 of December 31, 1985, p. 3-18.

<sup>31</sup> Directive 2001/108/EU published by the European Parliament and the Council on January 21, 2002 for the amendment of the Council Directive 85/611/EU for the coordination of the legal and administrative provisions regarding specified undertakings for collective investments in transferable securities (UCITS) with respect to the annexes of UCITS ABI. No. L 041 of February 13, 2002, p. 35-42. According to this Directive (so-called product directive), the original restriction of borrowings and the prohibition of short sales remain unchanged. In Article 42 et sq., the latter was extended to securities, money market instruments, derivatives, and other investment vehicles permitted by law.

the legislator has intentionally chosen a legal approach, which – compared internationally – is quite unusual for a regulatory fund law providing for the protection of investors.<sup>32</sup> In the United States, for example, each structure, which – even remotely intended or unintended – acts as a financial intermediary and is considered as an investment vehicle, is subject to the applicable investment fund law (Investment Company Act of 1940).<sup>33</sup> If necessary, unintentional results from regulation are adjusted via exclusions and exemptions.<sup>34</sup> In this way, an extensive investor protection is guaranteed in the investment fund area since fund structures cannot be established in the "grey capital market" against the intention of the legislator or the supervisory authority.

In light of the liberal legal approach of the German KAGG, the additional question arises whether a German hedge fund structure is permitted by present law, which is not regulated by the KAGG. For example, the KAGG does not prohibit the formation of a GmbH that uses hedge fund strategies of all kinds directly itself or indirectly via foreign sub funds.<sup>35</sup> The management and, thus, the fund management would not be subject to regulatory restrictions. The investors may either participate via equity or via securities (e.g., participation rights) issued by the GmbH. Even if there are tax drawbacks deriving from the establishment of such alternative hedge fund structures in Germany in particular cases, this example shows the considerable legal vacuum left by the KAGG with respect to the "unregulated fund area". Whether this is intended in the interest of investor protection can be decided only by the legislator, and may remain undecided here. These alternative hedge fund structures have already been adopted into practice.

In this context the question is left open whether it is necessary to apply the KAGG to these alternative structures analogously. From a legal point of view, this question can only be answered in the affirmative if

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<sup>32</sup> See the written report of the committee for money and loans, BT-Drucksache II/2973 (new), p. 2 et sq.; cf. *von Caemmerer*, Kapitalanlage oder Investmentgesellschaften, JZ 1958, p. 41, 45; *Baur*, Investmentgesetze, Part I, Sec. 1 margin-no. 4, before Sec. 1 margin-no. 16 et sqq.

<sup>33</sup> *Gatsik* (fn. 7), at 605; cf. also 15 U.S.C. Sec. 80a-3(a)(1)(A).

<sup>34</sup> *Gibson*, Is Hedge Fund Regulation Necessary? Temple Law Review, 2000, p. 688 et sqq.; *Gatsik* (fn. 7), at 602 et sqq.; *Dunbar*, Investing Money, 2000, p. 120; *Steck* (fn. 7), at 192.

<sup>35</sup> Just as *Kayser/Steinmüller* (fn. 4), at 1274.

there is a gap in regulation contrary to the legislator's intention.<sup>36</sup> However, such is not the case with regard to the KAGG. As shown above, the legislator has deliberately decided in favor of this liberal legal approach, and has accepted the remaining legal vacuum. Consequently, a hedge fund structure that intentionally does not fall under the definition of the KAGG cannot be regarded as an attempted circumvention.<sup>37</sup> If from now on the legislator wants to cover the alternative hedge fund structures in the interest of investor protection, an amendment of the law would be required. However, the principle amendment of the investment regulation would not only affect hedge funds but, consequently, would also have to be applied to other non-regulated fund structures like, e.g., private equity funds or closed-end real estate funds.

### 2.1.3 Foreign Investment Act

Since many of the existing hedge funds are incorporated in so-called offshore jurisdictions, the German Foreign Investment Act (*Ausland-investmentgesetz* – "AusInvestmG") always has to be taken into account. According to Sec. 1 para. 1 sent. 1 AusInvestmG, units in a fund governed by foreign law, which consists of securities, certified receivables from money loans, cash deposits or real estate and which is invested according to the principle of risk diversification, qualify as foreign investment units. If these units are distributed in Germany by way of a public offering, public advertising, or in a similar way (public sale), the first section of the AusInvestmG is applicable, which includes the provisions on sale and registration. According to Sec. 7 para. 1 AusInvestmG, a foreign investment company has to notify the BaFin of its intention to sell foreign investment units publicly in Germany. A public sale without prior notification is regarded as an administrative offence pursuant to Sec. 21 para. 1 no. 1 AusInvestmG.

But a difference has to be made between public sale and private placement of foreign investment units in Germany. The private placement is not included in the first section of the AusInvestmG. However, the tax regime set forth in the third section of the AusInvestmG is applicable to both public sale and private

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<sup>36</sup> *Canaris*, Die Feststellung von Lücken im Gesetz, 2<sup>nd</sup> edition, 1983, p. 25; *Larenz*, Methodenlehre der Rechtswissenschaft, 3<sup>rd</sup> edition, 1995, p. 373; *Esser*, Grundsatz und Norm in der richterlichen Fortbildung des Rechts, 4<sup>th</sup> edition, 1990, p. 252 et sq.

<sup>37</sup> But see *Gerke/Mager/Kiehn*, ZBB, 479, 482, seeing the risk that the KAGG is analogously applied due to the circumvention of mandatory provisions, but not taking up the dogmatic question of the prerequisites of an analogous application.

placement.<sup>38</sup> The latter may have significant and unexpected effects on the investors. If a foreign investment fund is neither admitted to public sale nor listed on a stock exchange, then this foreign fund qualifies as so-called "black fund" as defined by Sec. 18 para. 3 AusInvestmG. The income from black funds is subject to punitive taxation.<sup>39</sup> The AusInvestmG is principally applicable to the public sale of shares in a foreign investment fund in Germany. In light of Sec. 7 para. 1 AusInvestmG, a foreign investment company has the obligation to notify the BaFin of its intention to sell hedge fund shares publicly in Germany. If the foreign investment company does not comply with the legal requirements, the supervisory authority may prohibit the company from public distributions.

In case of hedge funds, however, a successful notification procedure, which – as experience shows – is time-consuming and complicated already, is impossible.

A restriction affecting hedge funds is, for instance, included in Sec. 2 para. 1 no. 4 AusInvestmG. Accordingly, the public sale of foreign fund shares is only permitted if the fund rules or the articles of the investment company provide for the provision that no transactions for the account of the fund are entered into concerning the sale of securities not belonging to the fund (lit. g). Furthermore, short-term borrowings for the account of funds may not exceed 10% of the net asset value (lit. f).

According to the aforementioned, foreign hedge funds were not admitted to public sale in Germany yet pursuant to the provisions set forth in the AusInvestmG. In spite of this fact, a private placement of foreign hedge fund shares is not forbidden by regulatory law. However, the threat of punitive taxation as per Sec. 18 para. 3 AusInvestmG does principally prevent a private placement, too. For this reason, a new type of private placement became common for some time,<sup>40</sup> which is based on Sec. 1 para. 2 AusInvestmG. Accordingly,

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<sup>38</sup> *Baur*, Investmentgesetze, 2<sup>nd</sup> edition, 1997, Part II, AusInvestmG, Sec. 1, margin-no. 1; *Berger/Scherl*, Aspekte des deutschen internationalen Steuerrechts bei ausländischen Private Equity und Venture Capital Fonds, in: Grother (ed.), Handbuch der internationalen Steuerplanung, 2<sup>nd</sup> edition, 2003, p. 1161.

<sup>39</sup> See generally *Fork*, RIW 2003, 118, 121 et sqq.; *Oho/Rommel* (fn. 9), 1450; *Kayser/Steinmüller* (fn. 4), at 1276.

<sup>40</sup> See, e.g., prospectuses on the admission of shares to the regulated market of the stock exchange in Baden-Württemberg: Alpha-Invest of Unico Asset Management S.A., Luxembourg, January 2003; Partners Group Alternative Strategies PCC Ltd. (Guernsey), January 2003; Aureus Fund (Ireland) plc., September 2002; all of them available at <http://www2.boerse-stuttgart.de/pdf/download.htm>. See for a different opinion *Gerke/Mager/Kiehn* (fn. 10), at fn. 6.

the sales provisions of the AusInvestmG are not applicable to those foreign investment units, which are admitted to the official list or regulated market on a domestic stock exchange, provided that there is no public distribution as defined by Sec. 1 para. 1 AusInvestmG.<sup>41</sup> Even though it seems paradox, in such a case it is justified to speak of a "private placement via the stock exchange".<sup>42</sup> However, the advantage gained from this exception is only shown in the light of Sec. 17 AusInvestmG from the catalog of the applicable tax provisions. This rule affects the so-called "white funds". With respect to taxation, white funds are basically treated as equivalent to domestic investment funds.<sup>43</sup> According to Sec. 17 para. 2 sent. 1 no. 1 AusInvestmG, distributions from these funds are exempted from taxation at the individual investor's level insofar as they include profits from the sale of securities (so-called capital gains).<sup>44</sup> Only foreign funds, which are admitted to public sale in Germany or to the official list or regulated market on a German stock exchange, are allowed to receive this best possible tax status.<sup>45</sup> Since the first alternative – as shown above – is out of the question, the hedge fund industry has taken advantage of the second alternative.<sup>46</sup> However, the private placement via stock exchange is not a strategy suitable for use by each foreign hedge fund. It is true that in times of a bear market the so-called high-net-worth segment<sup>47</sup> is regarded as particularly attractive. But on the one hand, it is necessary to get over legal impediments.<sup>48</sup> On the other hand, it

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<sup>41</sup> See *Berger/Scherl* (fn. 40), at 1164.

<sup>42</sup> *Dittrich*, Die Privatplatzierung im deutschen Kapitalmarktrecht, 1997, p. 56 et sq.

<sup>43</sup> See *Kayser/Steinmüller* (fn. 4), at 1275. For differences see *Fock*, RIW 2003, 118, 121.

<sup>44</sup> See *Brinkhaus* in *Brinkhaus/Scherer*, AusInvestmG, Sec. 17, margin-no. 76 et sq.

<sup>45</sup> Apart from this, the foreign investment company has to appoint a tax representative in Germany (Sec. 17 para. 3 no. 1b AusInvestmG), and has to furnish proof of the tax basis to the Federal Office for Finances (Sec. 17 para. 3 no. 2 AusInvestmG). Experience shows that hedge funds could have practical problems with giving this proof, since foreign hedge funds have various income sources, which mostly are difficult to subsume under German definitions.

<sup>46</sup> See examples shown at fn. 42.

<sup>47</sup> This describes investments made by high-net-worth individuals. Since private placements mostly make intense advice necessary with high distribution costs involved, they are normally concentrated on a few individuals who are able to make significant investments.

<sup>48</sup> An alternative to the direct admission to listing on a German stock exchange worth considering is the so-called dual listing. According to Sec. 35 para. 1 in connection with para. 3 German Stock Exchange Act (Börsengesetz – "BörsG"), securities (here: investment fund shares), which shall be admitted to listing on a domestic stock exchange and a stock exchange in another EU state at the same time or nearly at the same time, may be admitted to listing on the domestic stock exchange by means of mutual recognition under simplified conditions based on the prospectus approved by the foreign admission board. In practice, the listing is usually made via the Irish stock exchange in Dublin, which has specialized in the listing of investment funds. By way of example it shall be pointed to the prospectus

depends on the nature of the income realized by the fund whether the advantages deriving from Sec. 17 AuslInvestmG affect the private investors. In the case of foreign hedge funds, which mainly realize capital gains through the strategies used by them, the private placement via stock exchange is a promising structure already in use,<sup>49</sup> especially since it is accompanied by a certain degree of protection for the future. The legislator will probably not discriminate foreign hedge funds against domestic funds in the planned amendment of the German investment laws, if the foreign hedge funds are listed on a stock exchange and have been set up according to Sec. 1 para. 2 in connection with Sec. 17 AuslInvestmG.

#### **2.1.4 Interim Result**

The launching of hedge fund Sondervermögen is in conflict with the KAGG in its present version. In particular, the prohibition of short sales and the restricted leverage possibility prevent the hedge funds from using core strategies.

For dogmatic reasons, the analogous application of the KAGG to alternative German hedge fund structures is ruled out. Hence, the KAGG provides a legal vacuum for alternative structures in Germany, which are not subject to material regulatory restrictions at present.

At first glance, the AuslInvestmG provides for the protection against the direct public sale of unregulated foreign hedge funds. The registration of offshore funds for public sale in Germany is impossible since the leverage of securities transactions is also restricted and a prohibition is imposed on short sales. Nevertheless, alternative structures could be developed mainly enabling German retail investors – from an economic point of view – to participate in a foreign hedge fund via bearer debentures or participation rights. In addition, the stock exchange listing of foreign hedge funds is a practical way of selling foreign hedge funds shares in Germany at least through a private placement.

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of Aureus Fund (Ireland) plc., ISIN No. IE0031772803, published September 5, 2002 (see fn. 42). In this case, the admission to the regulated market on the Baden-Württemberg stock exchange was mainly based on the English prospectus approved by the Irish admission board.

<sup>49</sup>

But see for a different opinion *Gerke/Mager/Kiehn*, ZBB 2002, p. 479.

### 3. Alternative Structures

In view of the restrictions resulting from the AuslInvestmG, alternative structures are already in use in Germany. At present, even private investors may participate directly in the performance of hedge funds or hedge fund-linked products (indices) via, e.g., so-called certificate structures.<sup>50</sup>

#### 3.1. Term

Index certificates are securities with or without maturity, the value of which is guided by reference assets.<sup>51</sup> From a civil law point of view, these certificates qualify as bearer debentures as defined by Sec. 793 German Civil Code (*Bürgerliches Gesetzbuch* – "BGB"). The issuer (usually a German bank) pays the amount stated in the respective reference asset to the investor either upon maturity or – in case of "open-end certificates" without maturity – at the defined time.<sup>52</sup>

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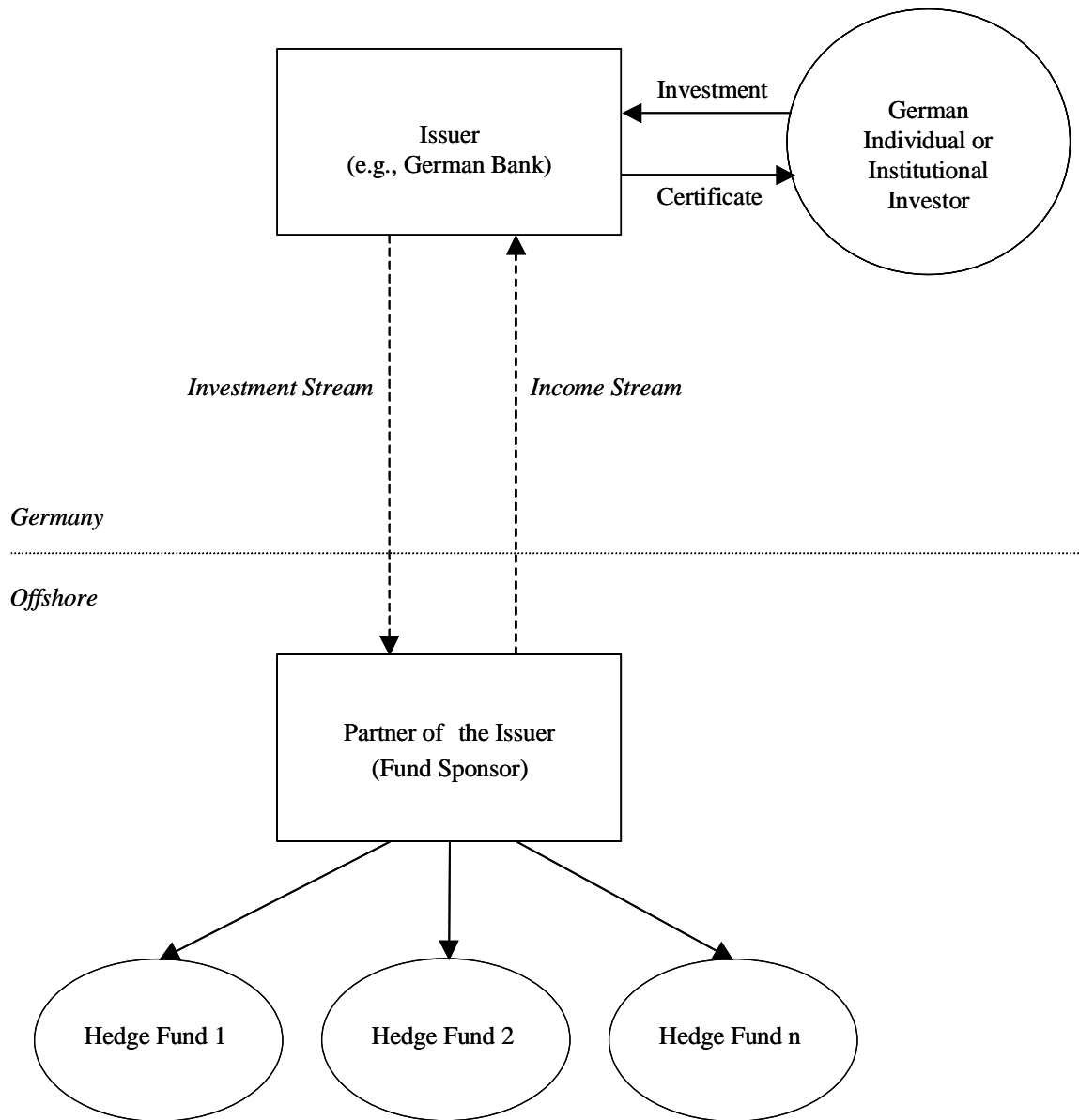
<sup>50</sup> Varieties of these indirect economic participations in foreign hedge funds held by German investors are shown in *Kayser/Steinmüller*, loc.cit., fn. 3, p. 1277.

<sup>51</sup> *Förster/Hertrampf*, *Das Recht der Investmentfonds*, 3<sup>rd</sup> edition, 2001, margin-no. 100.

<sup>52</sup> *Oho/Rommel* (fn. 9), at 1449; *Luttermann/Backmann* (fn. 10), at 1019 et sq.; *Förster/Hertrampf* (fn. 53), at 100.



Example:



### 3.2. Applicability of the AusInvestmG

In this context, the question of the legal qualification of such certificates in light of the AusInvestmG turns out to be extremely complex. The certificates are not only issued – as shown in the example – by domestic banks or their subsidiaries but also by foreign financial intermediaries. Therefore, the AusInvestmG might be applied at the level between issuer and investors or at the level between issuer and reference asset. The answer follows from Sec. 1 para. 1 AusInvestmG once again. Accordingly, only shares in funds governed by foreign law, which consist of (inter alia) securities and are invested according to the principle of risk diversification, qualify as foreign investment units (see above 2.1.3). In view of the index certificates that are issued by a German issuer, the BaFin has adopted the consolidated legal opinion that the AusInvestmG is not applicable. Due to the fact that German investors acquire only "shares" of a German issuer, these index certificates would not qualify as foreign investment units.<sup>53</sup> This opinion sounds plausible but does not answer the question – probably for practical reasons – whether the German issuer itself possibly holds a foreign investment share that qualifies as a black fund with regard to tax.<sup>54</sup> In practical terms, this question could not be answered yet if only because the connection between the issuer and the reference assets is often lacking in transparency. An equity connection between the German issuer and the foreign fund sponsor (e.g., affiliated company) is unlikely. The utilization of a so-called total return swap is more likely and, thus, of greater practical relevance. This is just an economical connection between the German issuer and the foreign partner arranging the reference asset. A total return swap is characterized by two contrary cash flows. On the basis of a contractual agreement, the assets generated by the German issuer are transferred – at least in terms of value – to the foreign partner, where they are allocated to the reference asset. Any surplus as well as liquidation proceeds flow back to the issuer after a specified margin has been deducted. It is true that the total return swap does not qualify as equity within the meaning of corporate law. In light of Sec. 1 para. 1 AusInvestmG, however, a corporate connection is not required by the BaFin. It is of no importance whether (co-) ownership or a contractual claim to participate in specified assets and/or membership rights are granted by the investment unit. In particular, it does not depend on

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<sup>53</sup> See also Oho/Rommel (fn. 9), at 1452, who – with good cause – question the existence of a "share" in this context.

<sup>54</sup> Cf. *Kayser/Steinmüller* (fn. 4), at 1277 et sq.

whether the investment unit is certificated. Accordingly, an investment unit as defined by the AuslInvestmG is a right granting its holder the claim to participate in the material economic chances and risks inherent in certain foreign diversified assets.<sup>55</sup> Hence, it may be left open whether participation under corporate law exists at all. The result of an economic consideration is always decisive,<sup>56</sup> which may cause considerable difficulties in the legal evaluation of facts. In practical terms, the BaFin is guided by a rule of thumb according to which the legal term is met, if the units are granting the German investor the chances ("upside") and risks ("downside") inherent in the foreign diversified assets. With regard to index certificates issued by a German bank, this idea will no longer be followed if only for practical reasons. The market volume of German hedge funds certificates has already developed normative force. However, cases in which a foreign issuer is selling certificates in Germany are not decided by this at the same time. The BaFin may raise the question whether the chances and risks inherent in diversified funds are granted, for instance, by a total return swap depending on its design. In order to answer this question, the BaFin has to investigate the facts itself, or – as far as legally possible – has to require information of the issuer about the connection to the reference assets.

In this context, a current case may be mentioned<sup>57</sup>, in which a Luxembourg stock corporation issues certificates that are sold publicly in Germany. The certificates were admitted to listing on the stock exchange in the corporation's state of residence. In Germany, the certificates were not admitted to listing on the stock exchange but the sale was arranged based on Sec. 15 para. 3 Prospectus Act ("VerkProspG"). According to Sec. 15 para. 3 VerkProspG, an (stock exchange) offering memorandum relating to securities issued by an issuer resident in another Community Member State may be published in Germany if the admission to listing on a German stock exchange has not been applied for.<sup>58</sup> In this context, the question of the legal ranking between VerkProspG and AuslInvestmG arises. The VerkProspG is

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<sup>55</sup> *Brinkaus/Scherer* (fn. 46), Sec. 1, margin-no. 27, including other references.

<sup>56</sup> *Oho/Rommel* (fn. 9), at 1450 et sqq., including other references.

<sup>57</sup> Merrill Lynch, Alternative Investment Index-Zertifikate bezüglich Ferro Absolute Return Index, Information Memorandum published October 30, 2002, WKN 865 008, available at <http://www.certificates.ml.com/DE/home/asp>. See *Frankfurter Allgemeine Sonntagszeitung* April 27, 2003, p. 45.

<sup>58</sup> The administrative procedure is shown in *Assmann/Lenz/Ritz*, VerkProspG, 2001, Sec. 15, margin-no. 21 et sqq.

applicable if securities shall be offered publicly in Germany outside the stock exchange for the first time. According to Sec. 1 para. 1 VerkProspG, the seller of these securities has the obligation to prepare an offering memorandum, and to submit this memorandum to the BaFin for the checking of completeness. Foreign investment units are expressly excluded from the term "securities" as defined by the VerkProspG (Sec. 3 para. 3). The legislator has given the AusInvestmG priority over the VerkProspG since the protection provided for in the AusInvestmG is more special and extensive. If therefore – like in the aforementioned case – the public sale of such bonds is recognized by the BaFin, which is responsible for the execution of both the VerkProspG and the AusInvestmG based on Sec. 15 para. 3 VerkProspG, the applicability of the AusInvestmG is denied incidentally. The reasons for this decision may be left open here. However, this example was recognized and highly appreciated by the hedge fund industry.

### **III. Part 2: Legal Approaches Abroad**

#### **1. Legal Situation in the United States**

In the United States, hedge funds benefit from extensive legal flexibility. Since the near collapse of Long-term Capital Management<sup>59</sup>, serious calls for the regulation of hedge funds have been heard for the first time.<sup>60</sup> In June 2002, the Securities and Exchange Commission (*SEC*) started with the review of the organization and activities of hedge funds and the investigation of the question whether the regulation of hedge funds is required, especially with respect to short selling and leverage.<sup>61</sup>

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<sup>59</sup> Associated Press, Other Hedge Funds May Be In Trouble, SEC Chief Says, *The Buffalo News*, Sept. 30 1998, p. 1C; Eagle Global Value Is Compelled to Begin Liquidation Holdings, *Wall Street Journal*, Oct. 12, 1998, p. C15; *Pacelle*, Vranor's Ellington Management Sells Big Chunks of Hedge Fund's Holdings, *Wall Street Journal*, Oct. 13, 1998, p. A3; Ictus Alternative Investment Fund LTD by Merrill Lynch & Co., Inc., in *Derivatives Litig. Rep.*, Mar. 18, 1999, p. 6; Crescent Porter Hale Foundation by Pryt, No. S078809, in *Derivatives Litig. Rep.*, June 3, 1999, p. 5; *Edwards*, Hedge Funds and the Collapse of Long-Term Capital Management, 13 *J. Econ. Persp.* 1999, 189, 190; *International Harald Tribune*, September 26-27, 1998, p. 1. See also fn. 7.

<sup>60</sup> *Gibson* (fn. 36), at 681; Statement of William H. Donaldson, Chairman U.S. Securities and Exchange Commission, April 10, 2003; Hedge Funds, Congressional Testimony by Federal Document Clearing House, p. 2.

<sup>61</sup> Statement of William H. Donaldson (fn. 61), at 1.

As a rule, hedge funds are not registered under the Federal Securities Laws<sup>62</sup> and are mainly established in offshore jurisdictions.<sup>63</sup> The use of leverage, for example, is therefore not restricted. Consequently, a hedge fund may use a higher degree of leverage as a registered investment company. The provisions set forth in the Investment Company Act of 1940, the Securities Act of 1933, the Investment Advisers Act of 1940 and the Securities Exchange Act of 1934 have principally to be observed. In practice, however, this regulation is avoided by means of exclusions and exceptions.<sup>64</sup>

One of the prerequisites is the sale of hedge fund shares only through private placement.<sup>65</sup> Thus, a public offer via media is ruled out.<sup>66</sup> Moreover, the offer is only addressed to "accredited investors".<sup>67</sup> This term includes individuals having an income of more than 200,000 USD or, together with their spouse, more than 300,000 USD, or who have, by themselves or jointly with their spouse, net assets exceeding 1 mill. USD.<sup>68</sup>

According to the regulation described above, the number of investors is limited to 100.<sup>69</sup> Since the implementation of the National Securities Market Improvement Act<sup>70</sup> in 1996, however, under another statutory exemption, it is sufficient that the investors of hedge funds are "qualified purchasers".<sup>71</sup> This term includes both institutional and private investors. In order to qualify, private investors must have investment assets of at least 5 mill. USD. Investment assets in the amount of 25 mill. USD are required of institutional investors.<sup>72</sup> This exemption is based on the legislator's assumption that high-

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<sup>62</sup> *Rudolf/Burt*, American Law Institute – American Bar Association, November 14-15, 2002, p. 357; *Gibson* (fn. 36), at 688.

<sup>63</sup> *Gibson* (fn. 36), at 683; *Edwards* (fn. 60), at 190.

<sup>64</sup> *Gibson* (fn. 36), at 688; *Dunbar*, *Inventing Money*, 2000, p. 120; *Gatsik* (fn. 7), at 602.

<sup>65</sup> See *Report of The President's Working Group on Financial Markets, Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management*, 1999, p. 11; *Steck* (fn. 7), at 192 et sqq.

<sup>66</sup> 15 U.S.C. Sec. 80a-3(c) (1). According to that, the registration exemption is applied if the number of investors does not exceed 100 and a public offering is not made.

<sup>67</sup> 17 C.F.R. Sec. 230.501(a).

<sup>68</sup> 17 C.F.R. Sec. 230.215.

<sup>69</sup> 15 U.S.C. Sec. 80a-3 (c) (1).

<sup>70</sup> National Securities Markets Improvement Act of 1996. Cf. *Steck* (fn. 7), at 195 et sqq.; *Ledermann* (fn. 1), at 406.

<sup>71</sup> 15 U.S.C. Sec. 80a-3(c)(7). See also Working Group (fn. 66), at C-3.

<sup>72</sup> 15 U.S.C. Sec. 80a-2(a) (51) (A) (i).

net-worth private investors as well as institutional investors are capable of protecting themselves.

## 2. Legal Situation in Luxembourg

In Luxembourg, an official circular<sup>73</sup> on the precise definition of the Investment Act of 1988 forms the specific legal basis of hedge funds. According to that, the launching of hedge funds is principally permitted in Luxembourg. The circular specifies the prerequisites of the pursuit of alternative investment strategies by using derivatives, short sales, and leverage.

The supervisory authority in Luxembourg pays special attention to the sponsors of hedge funds. The professional qualifications and experience of the managers, executives, and advisers are of particular importance.<sup>74</sup>

The circular includes, *inter alia*, provisions on the risk diversification in case of short sales. According to that, a hedge fund may take up, for example, a short position on securities not listed on the stock exchange as far as these securities can easily be liquidated and do not exceed 10% of the hedge fund's net asset value.<sup>75</sup>

In addition, the total liabilities from short sales are not allowed to exceed 50% of the hedge fund's net asset value at any time.<sup>76</sup>

Finally, the offering memorandum has to include the description of the hedge fund as well as the risks inherent in the investment policy.<sup>77</sup> Moreover, the offering memorandum has also to show any specific risk inherent in the investment.<sup>78</sup> A restriction with respect to the investors permitted does principally not exist. Thus, Luxembourg hedge funds may also be designed as retail products.

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<sup>73</sup> Circular of the *Commission de Surveillance du Secteur Financier* (CSSF) 02/80, available at [www.cssf.lu/docs/cssf02\\_80.pdf](http://www.cssf.lu/docs/cssf02_80.pdf).

<sup>74</sup> Cf. Preamble of the circular (fn. 74).

<sup>75</sup> Cf. A.1.a) of the circular (fn. 74).

<sup>76</sup> Cf. A.3. of the circular (fn. 74).

<sup>77</sup> Cf. H.1. of the circular (fn. 74).

<sup>78</sup> Cf. H.2. of the circular (fn. 74).

### 3. Legal Situation in Switzerland

The Swiss Investment Fund Act (*Anlagefondsgesetz* – "AFG")<sup>79</sup> and the implementing provisions included therein are the legal basis for hedge funds in Switzerland.

According to Art. 35 para. 1 AFG, investment funds that are neither securities funds nor real estate investment funds qualify as "other funds". Consequently, the launching of Swiss or foreign<sup>80</sup> hedge funds may be licensed by the Swiss supervisory authority<sup>81</sup> without the strict regulations applicable to usual securities funds having to be met. This results from Art. 35 para. 2 AFG, according to which other funds may also make investments, which are marketable only to a limited extent, are subject to high price fluctuations, show a limited risk diversification, or are more difficult to evaluate (e.g., exchange-traded futures and option contracts or standardized derivative financial vehicles).<sup>82</sup> If investments made by other funds involve a specific risk not comparable to the risk inherent in conventional securities funds, then these funds are spoken of as funds involving a particular risk.<sup>83</sup>

Moreover, the AFG makes special demands on the qualification of the management.<sup>84</sup> For instance, the fund management has to consist of at least two managing directors having adequate professional qualifications and at least five years of professional experience in the area of the planned investments.<sup>85</sup>

Finally – in the interest of investor protection – the particular risk inherent in these funds has to be shown. This risk disclosure clause, which must be approved by the supervisory authority, has to be used in both the offering memorandum and sales promotion.<sup>86</sup>

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<sup>79</sup> Law enacted March 18, 1994, available at [www.admin.ch/ch/d/sr/9/951.31.de.pdf](http://www.admin.ch/ch/d/sr/9/951.31.de.pdf).

<sup>80</sup> Foreign hedge funds are subject to the Investment Fund Act, regardless of their legal form (Art. 44-46 AFG, Art. 55-61 AFV). However, the representative in Switzerland requires a permission and the fund must be admitted.

<sup>81</sup> Eidgenössische Bankenkommision (EBK), [www.ebk.ch](http://www.ebk.ch).

<sup>82</sup> For instance, investment funds as defined by this provision may permanently and unrestrictedly hold liquid funds as far as this is necessary for the achievement of the investment goal, Art. 42, para. 1 AFG.

<sup>83</sup> Art. 36 para. 6 AFG.

<sup>84</sup> Art. 35 para. 4 AFG.

<sup>85</sup> Art. 44 AFV.

<sup>86</sup> Art. 45 AFV.

It is not required that the investors be particularly qualified for participation in a hedge fund.

#### IV. Part 3: Analysis and Prospect for a German Regulation

##### 1. No Substantive Product Regulation

The international hedge fund industry has recognized and greatly appreciated the recent statements made by the Federal Government, according to which a practical regulation of hedge funds in Germany will be prepared in the course of the implementation of the Financial Market Improvement Plan.<sup>87</sup> This is reason enough for a legal evaluation of the planned regulation against the background of present knowledge.

As far as it can be said already here, the Swiss and Luxembourg provisions, *inter alia*, shall serve as models.<sup>88</sup> A substantive product regulation in the form provided presently in the KAGG for conventional investment funds is not to be expected. Consequently, the strict investment restrictions as defined by Secs. 8 et sqq. KAGG will not be applied since otherwise it would not be possible to implement the hedge fund strategies normally used. The legal flexibility left to the hedge funds for short sales and leverage is particularly welcome.<sup>89</sup> Thus, the hedge fund industry may expect high flexibility regarding the organization and management of German hedge funds. This is a point in favor of a competitive legal approach in Germany.

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<sup>87</sup> S. Narat, Handelsblatt March 13, 2003, p. 17; Heeg, Frankfurter Allgemeine Sonntagszeitung March 9, 2003, p. 41; Beck, Frankfurter Allgemeine Zeitung March 4, 2003, p. 21; Busack, Financial Times Deutschland February 27, 2003, p. 22; Sommerfeldt/Zschäpitz, Die Welt February 12, 2003, p. 17; Marschall/Bauer, Financial Times Deutschland March 6, 2003, p. 19; Ruhkamp, Börsenzeitung February 8, 2003, p. 3; Wiegmann, Die Welt March 8, 2003, p. 21; Federal Ministry of Finance, Eckpunktepapier: Der Finanzmarktförderplan 2006, available at [www.bundesfinanzministerium.de/Anlage17309/Eckpunktepapier-Der-Finanzmarktfoerderplan-2006.pdf](http://www.bundesfinanzministerium.de/Anlage17309/Eckpunktepapier-Der-Finanzmarktfoerderplan-2006.pdf); the same, statement to the press: Stärkung des Finanzplatzes Deutschland durch den Finanzmarktförderplan 2006, No. 35/2003, March 6, 2003.

<sup>88</sup> Without author, Börsenzeitung March 6, 2003, p. 8; Busack (fn. 89), at 22; Narat (fn. 88), at 17; Ruhkamp (fn. 88), at 3.

<sup>89</sup> Eckpunktepapier (fn. 88), at 4; Börsenzeitung (fn. 89), at 8; Marschall/Bauer (fn. 88), at 19.



## 2. Quality and Transparency

Following the Swiss regulation<sup>90</sup>, the German legislator will probably demand an adequate standard of professional qualification and experience of the hedge fund management. Proof to that effect must already be furnished at the admission of the hedge fund. This quality standard may only be guaranteed in the long run by a permanent supervision by the BaFin.

Furthermore, it is to be expected that – based on the model of the Swiss regulation – the increased risk inherent in hedge funds has to be disclosed obligatorily in offering documents and advertising.<sup>91</sup> An extensive product transparency is required. In this way, the investors have at least the chance to compare competing hedge funds with one another. If the investors, *inter alia*, get information on investment strategy, investment restrictions, risk diversification, risk management, costs, terms of redemption, and fund management, they have at least a basis for a well informed investment decision. Substantive product regulations can be replaced partly by extensive information requirements.

## 3. Access for Private and Institutional Investors

The legislator intends to grant the access to hedge funds to both private and institutional investors.<sup>92</sup> In principle, German private investors are only allowed to participate in individual hedge funds via funds of funds. Funds of funds *per se* provide a minimum of risk diversification. Luxembourg funds of funds, for example, may not concentrate more than 20% of their net assets on individual hedge funds.<sup>93</sup> Experience shows that the investment via various sub-funds is accompanied by the diversification of investment strategies. This might become a legal prerequisite, too. On the other hand, the direct access to individual hedge funds shall be granted to institutional investors mostly investing substantial amounts. With that, the legislator takes up the idea already used in other jurisdictions according to which large-scale investors are capable of protecting themselves against the exposure to loss. In my opinion, it would make sense if the legislator transferred this idea to wealthy (high-net-worth) private investors as well. In this respect, the U.S. law may serve as model. A minimum investment that is legally fixed would exclude small-scale investors; the actual threshold value is surely worth discussing.

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<sup>90</sup> See above III.3.

<sup>91</sup> Without author, *Börsenzeitung* (fn. 89), at 8.

<sup>92</sup> Eckpunktepapier (fn. 88), at 3; *Busack* (fn. 88), at 22.

<sup>93</sup> Cf. Provision C. of the circular (fn. 74).

#### 4. Legal Forms: KAG and Investment AG

The legal form permitted for German hedge funds will be of crucial importance. At present, a so-called "KAG Light" is under discussion.<sup>94</sup> This means an investment company as defined by Sec. 1 para. 1 KAGG, which – regarding the management of hedge fund Sondervermögen – is subject to regulations less strict than the regulations applicable to the conventional form. Furthermore, it is likely that cuts in the minimum capital resources and the organizational equipment of the "KAG Light" will be made. In addition, the extensive outsourcing of business segments to third parties<sup>95</sup> must be permitted for practical reasons. This applies particularly to the fund management. Only in this way would hedge funds resident in Germany be able to participate in the expertise already available in other countries (e.g., the UK and the United States) via service agreements.

In view of the experience with hedge funds in other countries, however, the German regulation does not have to provide a final answer to the question of the organization form permitted for hedge funds. As, e.g., in Luxembourg, the contractual fund form (KAG model) or the corporate fund form (investment stock corporation) is under discussion. Through the Third Financial Market Promotion Act<sup>96</sup> enacted on April 1, 1998, the German legislator has already included the latter in the KAGG.<sup>97</sup> An investment stock corporation has not been established in Germany yet due to a legal frame not fulfilling the requirements of the practice.<sup>98</sup> Above all, investment stock corporations are discriminated against conventional investment funds with regard to taxes. Unlike the investment funds, investment stock corporations are not exempted from corporation and trade taxes pursuant to Sec. 38 para. 1 sent. 2 KAGG but are treated like a conventional stock corporation. *De lege lata*, this would

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<sup>94</sup> *Ruhkamp* (fn. 88), at 3; *Narat* (fn. 88), at 17.

<sup>95</sup> So-called outsourcing as defined by Sec. 25a para. 2 KWG. See *Zerwas/Hanten*, ZBB 2002, 17 et sqq.; *Steding/Meyer*, BB 2001, 1693 et sqq. See also Circular 11/2001 published by the Federal Financial Supervisory Authority on December 6, 2001, available at [http://www.bakred.de/texte/rundsch/rs11\\_01.htm](http://www.bakred.de/texte/rundsch/rs11_01.htm).

<sup>96</sup> Federal Law Gazette I 1998, p. 529

<sup>97</sup> An investment stock corporation as defined by Sec. 51 KAGG is a closed-end investment fund in the legal form of a stock corporation (AG). The corporate purpose allows investing and managing the company assets in securities and participations according to the principle of risk diversification, in this way aiming at the shareholders' (stock holders/investors) participation in the profit realized from the management of the corporate assets (cf. Sec. 51 para. 3 KAGG); details on investment stock corporations in *Thoma/Steck*, AG 2001, p. 330; *Baur* in *Hellner/Steuer* (ed.), *Bankrecht und Bankpraxis*, Volume 5, margin-no. 9/24; *idem* in: *Assmann/Schütze* (ed.), *Handbuch des Kapitalanlage-rechts*, supplementary volume, 2<sup>nd</sup> edition, Sec. 18, margin-no. 31.

<sup>98</sup> *Thoma/Steck* (fn. 98), at 331 et sqq.

possibly result in a double taxation at the fund's and the investors' level.<sup>99</sup> Moreover, the shares in an investment stock corporation have to be admitted to a domestic stock exchange according to the mandatory provisions set forth in Sec. 61 para. 3 KAGG. This may be time-consuming and costly for the fund initiator. Finally, the establishment of an investment stock corporation with variable nominal capital, which may redeem its own shares if demanded by the investors, has not been permitted yet.<sup>100</sup>

The planned regulation of hedge funds may be useful for helping the investment stock corporation on the road to success by adequate amendments of the law. Experience shows that international hedge funds sponsors make the organization form dependent on the particular case. The more flexibility that is granted by the legislator, the earlier international hedge fund sponsors are willing to establish German hedge funds, the shares of which are also sold beyond the German border. For example, marketability in other countries, in which the contractual fund form is not customary, may be an advantage gained from investment stock corporations. Furthermore, *de lege ferenda* tax advantages may be a point in favor of investment stock corporations operating internationally. For example, the inclusion of corporations – to which the investment stock corporations principally belong – in international double taxation conventions is taken into consideration. According to the aforementioned, the contractual fund form and the corporate fund form should be started on the same legal conditions. After all, the market will decide on which organization form is most suitable for German hedge funds in the particular case.

## 5. Sale

The sales conditions in Germany are the crucial factor in the success of a hedge fund regulation. According to a statement made by the Federal Government, foreign hedge funds will not be discriminated – at least with regard to tax – against domestic hedge funds.<sup>101</sup> On the other hand, the legislator is required to take care of a reliable protection of retail investors, especially as unregulated (offshore) hedge funds – as shown above – have already fought

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<sup>99</sup> Baur (f. 98), at 331 et sqq.

<sup>100</sup> The Luxembourg law allows both, the establishment of open-end investment stock corporations with variable capital stock (SICAV), cf. Art. 24 of the Law on Undertakings for Collective Investment in Transferable Securities of March 30, 1988 (available at [http://www.alfi.lu/html/legal\\_framework/index.html](http://www.alfi.lu/html/legal_framework/index.html)), and the establishment of closed-end investment stock corporations with fixed capital stock (SICAF), cf. Art. 38 of the Law on Undertakings for Collective Investment in Transferable Securities of March 30, 1988. SICAV is chosen by fund initiators more frequently than SICAF.

<sup>101</sup> Eckpunkt Papier (fn. 88), at 3 et sq.; Börsenzeitung March 6, 2003, p. 1.

their way to the German retail market via alternative structures. Since hedge funds are mainly established in unregulated offshore jurisdictions, a balanced regulation is quite difficult. To turn the argument on its head, the already emerging decision of the legislator, according to which the public sale of offshore hedge funds as retail products shall only be permitted in future via funds of funds, implies the prohibition of direct public sales.

But this does not answer the question whether alternative structures via certificates or similar tools, which benefit from the legal vacuum due to an optional regulatory law, are further allowed.<sup>102</sup> If such a legal vacuum remains unchanged, the protective purpose of the new regulation might be at risk. Without incentives, the hedge fund industry will not submit itself voluntarily to regulatory restrictions.

In addition, the question arises whether foreign funds of funds, which are subject to supervision in their state of residence (e.g., in Luxembourg), will be treated as equivalent to German funds of funds for regulatory and tax law purposes. In the event of an affirmative answer, the German legislator would take away the hedge fund initiators' incentive for shifting fund structures of German provenance to Germany. In these circumstances, Germany would be in direct competition with the locations already established as far as the new launching of hedge funds is concerned.

The intention of hedge fund initiators operating internationally is obvious: at the moment, they are only interested in Germany as an additional market. In the twinkling of an eye, Germany cannot be transformed – based on a liberal regulation – into a hedge fund location being internationally acknowledged. But even this is not impossible in the long run. Knowing this situation, it is necessary to give the German private and institutional investors the chance of an alternative investment. A hedge fund regulation should provide for reliable protection, at least of retail investors. The chosen way of imposing extensive information requirements on hedge funds seems to be particularly practical. In the long run, reliable outline conditions for hedge funds may become a locational advantage, which can be decisive in the competition among jurisdictions. In the end, the fund industry resident in Germany would profit from this; this is proved by the experience in other countries.

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<sup>102</sup> See above II.2.1.2.

## V. Result

Since neither German nor foreign hedge funds can be admitted to direct public sale according to German investment law, alternative structures have been developed in the hedge fund industry. Through these structures, even retail investors may participate - at least economically - in the chances and risks inherent in offshore hedge funds without becoming subject to the protection provided for in the German investment law at the same time. Upon the implementation of the Financial Market Improvement Plan, hedge funds will be regulated in Germany, too. In this process, the legislator seems to choose a legal approach that can compete with the established investment fund jurisdictions. On the one hand, institutional as well as private investors shall be permitted to invest in hedge funds. On the other hand, a minimum of investor protection shall be guaranteed by supporting measures. Therefore, in the retail area, an investment will probably be permitted via funds of funds only. The substantive product regulation through, for instance, the restriction of short sales and leverage, is not intended at present. Extensive information requirements imposed on the hedge funds shall compensate for this by taking care of transparency. In this way, investors get a reliable basis for their investment decision. The contractual fund form and investment stock corporations are both considered as organization forms of German hedge funds. Thereby, the legislator would give the fund initiators more flexibility even organizationally. However, amendments of the legal frame for the investment stock corporations are still required.

According to the aforesaid, the legal approach under discussion must be supported even if details still have to be settled in the course of the legislative procedure. For the German investment fund industry, the intended regulation might even turn out as a locational advantage in the long run.

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