

IN-DEPTH

# Private Equity

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# Private Equity

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In-Depth: Private Equity (formerly The Private Equity Review) provides an overview of the market climate and regulatory regime for private equity transactions in key jurisdictions worldwide. With a focus on recent trends and developments, it offers practical and informed guidance from local practitioners about how to raise money and close deals.

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# Austria

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## Summary

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## I Introduction

At the time of writing, the most recent available information is for 2022, for which Invest Europe reported that Austrian private equity and venture capital funds raised €461 million – a significant increase compared with the €220 million reported to have been raised in 2021.

The number and volume of Austrian private equity and venture capital funds continue to be well below the European average.

## II Year in review

Overall, indications are that there have not been any significant changes in the Austrian fundraising market as compared with recent years. In particular, there are still comparatively few Austrian funds actively operating.

To counter this trend, the Austrian government, in July 2023, enacted the Venture Capital Fund Act (WKFG), with the aim of establishing Austrian venture capital funds (WKFs) along the lines of a SICAV.<sup>[2]</sup> A WKF is set up in the form of a stock corporation but considered an alternative investment fund (AIF) for regulatory purposes. This means that it will need to be managed by a licensed or registered external alternative investment fund manager (AIFM). A WKF will be able to form sub-funds, which will be considered as separate for corporate and insolvency purposes. Interests in a WKF (which can only be in the form of shares) cannot be marketed to retail investors. Although WKFs are subject to the same restrictions as regards leverage as 'normal' AIFs, they have a wider range of permitted investments, including all forms of participations in companies and partnerships. From a tax perspective, a WKF is a transparent investment fund. It remains to be seen whether this new initiative will lead to a rise in fundraising.

## III Legal framework for fundraising

Since the introduction of the Alternative Investment Fund Managers Act (AIFMG), which implements the Alternative Investment Fund Managers Directive,<sup>[3]</sup> most private equity funds established in Austria will qualify as AIFs under the AIFMG. An AIF is defined as a collective investment undertaking that raises capital from a number of investors to invest it in accordance with a defined investment policy for the benefit of those investors, and that does not use the capital for direct operational purposes. Funds pursuant to the Austrian Investment Funds Act and funds qualifying under the Austrian Real Estate Investment Funds Act are not captured by the AIFMG.

The formation of an AIF requires the prior approval of the Austrian Financial Market Authority (FMA) if the fund is managed by a licensed AIFM. If the fund is managed by a registered AIFM, it has to be registered only with the FMA. AIFMs must obtain a licence if they manage funds with assets of more than €100 million (where leverage is used) or more than €500 million (where no leverage is used); otherwise, only a registration is required.

To obtain a licence under the AIFMG, the manager must fulfil the following requirements.

A licensed AIFM must have minimum capital of €125,000 if it is an external manager of an AIF. If the AIFM is an internal manager of an AIF, the minimum capital requirement is €300,000. In addition, the AIFM must have sufficient equity to cover 25 per cent of its annual running costs. Increased equity requirements apply if the assets under management exceed €250 million; in any case, the maximum capital requirement is €10 million. The persons tasked with the management of the AIFM must be sufficiently experienced and have to pass a 'fit and proper' test if so requested by the FMA.

The AIFM has to appoint at least two individual persons as its managers.

In the application to the FMA, the AIFM must provide information about shareholders holding qualified participations in the AIFM (i.e., shareholdings exceeding 10 per cent), on any closely related entities (i.e., a third party that holds a stake of more than 20 per cent of the AIFM, that controls the AIFM, or that is controlled by the AIFM or in which the AIFM holds a stake of more than 20 per cent) and on its business plan, remuneration, risk management, valuation, internal audit and conflict of interest policies, investment strategies, a description of any competences delegated to third parties and information about the contractual basis pursuant to which it manages its AIFs.

The decision of the FMA regarding the licensing of an AIFM has to be made within three months of the applicant providing all required information. If the AIFM intends to register an AIF as a European long-term investment fund (ELTIF) (see Section III.vi), the AIFM has to apply to the FMA for prior approval.

## **i Vehicles used for private equity funds**

The main vehicles used for private equity funds established in Austria are limited partnerships (LPs), typically with a corporation as the general partner, or corporations, namely limited liability companies (LLCs) and joint stock companies (JSCs). Each of these types of entity has a separate legal personality, but partnerships are transparent for tax purposes.

### **Limited partnerships**

Typically, investors become limited partners in an LP. The general partner is usually an LLC that receives a fee for assuming unlimited liability. In some structures, the general partner manages the partnership; in other structures, a separate management company (usually an LLC) manages the partnership. As private equity funds in most cases fall under the AIFMG, the entity managing the fund must be a legal person licensed or registered as an AIFM under the AIFMG. There are generally no minimum capital requirements for newly incorporated LPs.

### **Corporations**

Investors become shareholders in an LLC or a JSC. An LLC is managed by a managing director; a JSC by a managing board. JSCs are required by law to also have a supervisory board; LLCs are not. Managing directors and members of the managing board must be natural persons; however, as with LPs, corporations can outsource management functions to a management company, which in most cases must be licensed or registered as an

AIFM under the AIFMG. Austrian law has minimum share capital requirements for LLCs (€10,000) and JSCs (€70,000).

In the past, sponsors also structured vehicles in the form of LLCs or JSCs as a medium-sized business financing company (MFG) under the Corporate Income Tax Act (KStG), as this gave rise to several tax benefits. MFGs had to fulfil certain requirements, such as higher capitalisation, participation of public bodies and certain investment restrictions. As those tax benefits no longer apply for vehicles founded after 2012 and ceased to apply in respect of participations held by existing MFGs (founded before 2012) by the end of 2015 (in special circumstances, by the end of 2018), the importance of the MFG has decreased significantly. The tax benefits for MFGs were reintroduced in 2017, but only to a limited extent. In particular, the tax benefits apply only for minority investments in early-stage enterprises.

## ii Key legal terms

In addition to terms imposed by mandatory provisions of Austrian law, in particular the investor protection provisions of the AIFMG for private equity funds classified as AIFs, the key terms of the relationship between the investor and the fund are governed by the partnership agreement (for LPs) or the articles of association and shareholders' agreements (for LLCs and JSCs). The terms of a private equity fund typically subject to negotiation include:

1. investment restrictions, such as target size, concentration limits, geographical limitations, diversification of industries, limits on borrowing and related-party transaction restrictions;
2. limitations on the fund's size and the investors' capital commitments;
3. investment period;
4. key man provisions;
5. provisions permitting the removal of the manager by a qualified majority of investors;
6. remuneration of the manager (i.e., management fee, investment-related fees and carried interest);
7. reinvestments; and
8. exclusivity.

## iii Disclosure of information

In recent years, Austria has seen an increasing number of court proceedings by private investors against managers and promoters of funds to recover losses suffered during the financial crises. These proceedings highlight the importance of full disclosure to investors at the time they invest in a fund.

Managers of funds have to ensure that all documents given to investors, in particular the offering documentation and all advertising material, disclose all facts and circumstances relevant to prospective investors fully and correctly. Additionally, special care should be taken that any opinions and plans disclosed to investors are reasonable and based on

verifiable facts. Special care must also be taken to ensure that the wording of documents is not too complicated or technical; otherwise, there is a risk that this could be seen as insufficient disclosure. Austrian courts do, by and large, take into account the types of investors to which such offering documentation is addressed, and may take a less restrictive position if an offer is solely addressed to institutional investors (as opposed to offers addressed to retail investors).

In the case of insufficient disclosure, managers are faced primarily with damage claims or rescission claims, or a combination of both, by investors; additionally, regulatory sanctions and – in extreme cases – criminal sanctions may apply.

The key items for disclosure vary depending on whether the offer of the fund interest falls under the scope of the Austrian Capital Markets Act or Regulation (EU) 2017/1129 (the EU Prospectus Regulation).<sup>[4]</sup> Typically, the main items for disclosure are:

1. investment strategy;
2. market overview and regulatory environment;
3. key terms of the investment (see above);
4. risk factors;
5. track record of the manager and its executives; and
6. tax matters.

Whether an offer of interests in a private equity fund falls under the scope of the Austrian Capital Markets Act or the EU Prospectus Regulation depends on the type of interest offered. For securities, the EU Prospectus Regulation applies and thus – if no private placement exemption applies – a prospectus complying with the EU prospectus regime must be prepared. If the interest is not securities (such as partnership interests or shares in Austrian LLCs), the offer falls under the scope of the Austrian Capital Markets Act. In this case and if no private placement exemption applies, the issuer must prepare a prospectus complying with the regime of the Austrian Capital Markets Act, except for offers encompassing fund interests with a total value of (1) less than €5 million during a 12-month period, in which case a simplified prospectus can be used, or (2) less than €2 million during a 12-month period, in which case the disclosure obligations of the Alternative Financing Act apply.

To facilitate and harmonise the cross-border distribution of funds, the European Union introduced the cross-border distribution of funds package of measures, mainly composed of Directive (EU) 2019/1160,<sup>[5]</sup> which modifies both the Undertakings for Collective Investment in Transferable Securities Directive (the UCITS Directive)<sup>[6]</sup> and the AIFMD,<sup>[7]</sup> directly effective Regulation 2019/1156<sup>[8]</sup> supplemented by a Commission Implementing Regulation on implementing technical standards and European Securities and Markets Authority guidelines on marketing communications for UCITS and AIFs published on 27 May 2021. Austria was one of the last Member States to implement Directive (EU) 2019/1160 – it entered into force on 11 December 2021.<sup>[9]</sup> The essential changes introduced by the Directive include (1) requirements for and limitations on information used in pre-marketing documentation of an AIFM, among other things, to ensure that it does not constitute 'marketing' as per EU directives and does not enable investors to acquire shares or units in the fund, (2) rules on the services (called 'facilities') to be provided in

other EU Member States that are targeted for marketing of UCITS to investors or AIF units or shares to retail investors in these other EU Member States, (3) clear and uniform rules in alignment with the European Union on the discontinuation of UCITS or AIF marketing activities, and (4) following the German example, rules to strengthen liquidity planning in open-ended real estate funds; for example, introducing certain minimum holding periods prior to a redemption of fund units (for existing funds this applies from 1 January 2027).

#### **iv Solicitation**

The method of solicitation is mainly influenced by regulatory constraints. Most commonly, solicitation is made by way of an information or offering memorandum. Potential key investors are typically contacted at an early stage to gauge their initial interest. Unless there are regulatory constraints (such as in the case of public offers falling under the scope of the Austrian Capital Markets Act or the EU Prospectus Regulation), investors are invited to follow-up meetings or given the opportunity for a limited due diligence. Depending on the size of the fundraising, managers may also appoint third-party promoters to assist in identifying potential investors; in addition, external counsel is retained to prepare the documentation for the fundraising.

#### **Limitations on solicitation**

Offers and sales of interests in private equity funds formed in Austria are subject to the following selling restrictions, which depend on the category of the private equity fund.

For AIFs managed by a licensed AIFM, interests in the fund:

1. may be offered or sold only after the AIF is approved by the FMA; and
2. may be offered or sold to private investors if the prerequisites of Sections 48 and 49 of the AIFMG are met, except if the fund is registered (1) as a European venture capital fund (EuVECA) (see Section III.v) (in this case, it may be offered to private investors subject to certain restrictions – in particular, a minimum investment commitment of €100,000 and a written acknowledgment of the risks associated with the investment by the private investor) or (2) as an ELTIF (see Section III.vi) (in this case, it may be offered to private investors subject to certain restrictions – in particular, an offer is possible only to private investors with an investment portfolio of at least €100,000 after the investor has received appropriate investment advice).

For AIFs managed by a registered AIFM, interests in the fund:

1. may be offered only after the AIF was notified to the FMA; and
2. may not be offered or sold to private investors, except if the fund is registered as a EuVECA (in this case, it may be offered to private investors subject to certain restrictions – in particular, a minimum investment commitment of €100,000 and a written acknowledgment of the risks associated with the investment by the private investor). No ELTIF registration is available for funds managed by registered AIFMs.

For private equity funds falling outside the AIFMG:



1. any public offer of interests requires the publication or approval, or both, of a prospectus by the FMA, unless a private placement exemption applies;
2. the private placement exemption applies, in particular, for offers to qualified investors only, offers with a minimum investment amount of €100,000 and offers to fewer than 150 investors; and
3. even if the private placement exemption applies, the intended offer has to be notified to the issue register maintained by Oesterreichische Kontrollbank AG.

## v Regulation of European venture capital funds

The EuVECA Regulation<sup>[10]</sup> was introduced to create a new pan-European designation for small AIFMs, the EuVECA. Austria-based AIFMs may register an AIF as a EuVECA provided that they comply with the EuVECA Regulation and have supplied certain information with regard to themselves and the relevant AIF to the FMA. The main advantage the AIFM gains by doing so is the option to market the relevant AIF throughout the European Union under the EuVECA designation to certain categories of investors defined in the EuVECA Regulation under an EU-wide passporting regime. Passporting allows a firm authorised under an EU single market directive to market the designated fund to certain qualified investors in another EU Member State, on the basis of its home state authorisation.

The EuVECA Regulation is not compulsory; if an AIFM does not want to use the EuVECA designation, then it does not have to comply with the EuVECA Regulation for a particular fund (or at all). If the AIFM chooses not to use the EuVECA designation, national laws and EU regulations, such as national private placement regimes, apply.

## vi Regulation of European long-term investment funds

The ELTIF Regulation<sup>[11]</sup> was introduced in November 2015 to channel capital raised through AIFs towards European long-term investments in the real economy. Austria-based AIFMs who have received approval to manage ELTIFs may register an EU-based AIF (or a compartment thereof) as an ELTIF, provided that they comply with the authorisation requirements set out in the ELTIF Regulation and submit an application to the FMA. The main advantage of such a registration is the option to market the relevant AIF throughout the European Union under an EU-wide passporting regime similar to the regime under the EuVECA Regulation. Additionally, the designation of an AIF as an ELTIF allows its marketing to high net worth individuals throughout the European Union.

The ELTIF Regulation is not compulsory; if an AIFM does not want to use the ELTIF designation, it does not have to comply with the ELTIF Regulation for a particular fund (or at all). If the AIFM chooses not to use the ELTIF designation, national laws and EU regulations, such as national private placement regimes, apply.

## vii Fiduciary duties to investors

Typically, the scope of the sponsor's fiduciary duties is determined by the AIFMG (under which most private equity funds fall), the constitutional documents of the fund vehicle (supplemented by pertinent rules of law) and other contractual arrangements (if any).

Under the AIFMG, manager must, inter alia, act in the best interests of the investors in the AIF (as well as of the AIF itself) and the integrity of the market. Managers must introduce appropriate procedures to deal with conflicts of interest, to treat investors in an AIF fairly and to use the required diligence in the performance of their duties.

Managers of Austrian private equity funds are most frequently general partners of an LP or fulfil their function based on management agreements with the fund vehicle. Thus, the scope of managers' duties and the extent of their liability in relation to the investors (and the fund vehicle) derive from the partnership agreement (supplemented by the mandatory provisions of the Commercial Code) or, as the case may be, the management agreement.

Unless the private equity fund is an AIF, it is possible to limit the liability of the sponsor in relation to the investors or limit the liability of the fund vehicle by contractual provisions (e.g., to exclude liability for 'ordinary negligence'); however, such contractual provisions would still be subject to judicial review.

## IV Regulation

Private equity funds established as AIFs and their managers are subject to the continuing supervision of the FMA. The FMA has a wide range of inspection and audit rights in respect of both the AIFM and the individual AIFs.

Austrian law distinguishes between AIFMs that require licensing by the FMA and AIFMs that have to register only with the FMA. Licensed AIFMs do not require any additional licences for their management activities for the fund. Registered AIFMs may require a business permit for asset managers.

Investors holding qualified participations in the AIFM (i.e., shareholdings exceeding 10 per cent) must be disclosed to the FMA, but only by licensed AIFMs.

Private equity funds established as AIFs must be registered with the FMA. Private equity funds established as AIFs and managed by a licensed AIFM also require approval by the FMA. Austrian AIFs are also listed in an informal register maintained by the FMA.

Private equity funds not established as AIFs require no special registration, except for the registration with the Companies Register upon incorporation.

If the sponsor also acts as the manager of a fund established as an AIF, it must be registered or, as the case may be, licensed with the FMA. In addition, if the sponsor holds a qualified participation in the fund, this fact must be disclosed to the FMA.

Otherwise, no specific licence requirements exist for the sponsors of a fund.

### i Taxation of the fund

The most common private equity fund vehicle in Austria is a partnership. Different from corporations, Austrian partnerships are typically viewed as transparent for tax purposes,

provided that the partnership's sole activity qualifies as asset management for tax purposes and it is not deemed to operate a business or commercial operation.

Any income derived by the partnership is allocated to its investors and taxed at their level in accordance with the rules of the tax regime applicable to the individual investor.

Since 1 January 2016, Austria has not levied capital duty on equity contributions; however, stamp duty, in particular in relation to guarantees that the formation documentation may entail, is still an area to be considered. In this context, surety agreements (including any form of assumption of a debt as joint debtor) are subject to stamp duty at a rate of 1 per cent of the secured amount provided that the surety is of an accessory nature, which means that the guarantor may avail itself not only of all defences that it has personally against the creditor but also of all defences that the debtors of the secured debt have against the creditors. If the guarantee is of an abstract nature, however, meaning that the guarantor has to pay upon first demand and has recourse only to those defences that arise from the guarantee itself, then the transaction is not subject to stamp duty. Therefore, guarantee wordings explicitly stating that a specific guarantee is intended as an abstract are commonly used.

## ii Taxation of investors

Domestic individual investors are taxed as follows: capital gains are subject to a preferred tax rate of 27.5 per cent; and dividends are subject to withholding tax at a rate of 27.5 per cent.

Domestic corporate investors are taxed as follows: capital gains are taxed at a rate of 25 per cent if they relate to an Austrian resident portfolio company, and may be tax exempt if they relate to a foreign resident portfolio company in which a minimum shareholding of 10 per cent is (indirectly) held for an uninterrupted period of at least one year (KStG, Section 10); and dividends are tax exempt if they relate to an Austrian resident portfolio company or an EU resident portfolio company, and may be tax exempt under certain conditions if they relate to another foreign portfolio company (KStG, Section 10). New provisions in connection with international participations and foreign portfolio shareholdings came into force on 1 January 2019, along with new controlled foreign corporation taxation rules.

Foreign individual investors are taxed as follows: capital gains are taxable (at a rate of 27.5 per cent) only if the percentage of the investor's (weighted) shareholding in the Austrian portfolio company (through the partnership) exceeded 1 per cent at any time during the past five years (note that double tax treaties usually restrict Austria's right to tax such capital gains (Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital (MTC), Article 13, paragraph 5); and dividends are subject to withholding tax at a rate of 27.5 per cent (as of 1 January 2016) (subject to a reduction under applicable double tax treaties).

Foreign corporate investors are taxed as follows: capital gains are taxable (at a rate of 25 per cent) only if the percentage of the investor's (weighted) shareholding in the Austrian portfolio company (through the partnership) exceeded 1 per cent at any time during the past five years (double tax treaties usually restrict Austria's right to tax such capital gains (MTC, Article 13, paragraph 5)); and dividends are subject to withholding tax at a rate of 25 per cent in cases where the exemption for foreign investors that are corporations resident

in an EU Member State is not applicable (but will usually be subject to a reduction under applicable double tax treaties).

### iii Taxation of carried interest

Carried interest, which is defined as the compensation of a partner of an asset management partnership received because of outstanding contributions to the successful management of the investments, is included in the investment income according to the Department of International Taxation of the Ministry of Finance.<sup>[12]</sup> Income qualifying as investment income received by an individual who is subject to unlimited taxation in Austria is taxable in Austria with the special rate of 27.5 per cent. Despite this administrative guideline, a case-by-case analysis is recommended, as the line between self-employed and employee income and investment income is rather unclear.

The management fees received by a partner of an asset management partnership are not subject to value added tax (VAT). According to the Austrian tax authorities, the managing partner of a partnership is not an entrepreneur; the services of a managing partner are supplied in the exercise of a corporate function and not as a result of an exchange of services. If the fund vehicle is a corporation, however, the fees of a managing partner will usually be subject to VAT, unless the manager is employed by the corporation.

## V Outlook and conclusions

Even though the corporate tax rate was reduced from 25 per cent to 24 per cent in 2023, and will be reduced to 23 per cent in 2024, alleviated funds, the fundraising by Austria-based private equity, remains low by European standards for a number of reasons, such as continuing inflation and a more cautious approach by investors owing to overall uncertainties about general economic development.

It remains to be seen whether the introduction of the WKF as a new fund form will meet the aim to increase private capital investments in Austrian funds.

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### Endnotes

- 1 Martin Abram and Clemens Philipp Schindler are partners at Schindler Attorneys. [Back to section](#) ^
- 2 Société d'investissement à capital variable, or investment company with variable capital (also known as an open-ended investment company). [Back to section](#) ^
- 3 Directive 2011/61/EU on Alternative Investment Fund Managers, as amended. Following its review of the scope and functioning of the Alternative Investment Fund Managers Directive (AIFMD), the European Commission on 25 November 2021 published a legislative proposal by which the four different legislative blocs the AIFMD, the European Long-Term Investment Funds Regulation, the European Single Access Point Regulation and the Markets in Financial Instruments Regulation are to be amended. [Back to section](#) ^

- 4 Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. [^ Back to section](#)
- 5 Directive (EU) 2019/1160 amending Directives 2009/65/EC and 2011/61/EU with regard to cross-border distribution of collective investment undertakings. [^ Back to section](#)
- 6 Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). [^ Back to section](#)
- 7 Directive 2011/61/EU on Alternative Investment Fund Managers. [^ Back to section](#)
- 8 Regulation (EU) 2019/1156 on facilitating cross-border distribution of collective investment. [^ Back to section](#)
- 9 Bundesgesetz, mit dem das Alternative Investmentfonds Manager-Gesetz, das Immobilien-Investmentfondsgesetz, das Investmentfondsgesetz 2011 und das Referenzwerte-Vollzugsgesetz geändert werden, BGBl. I Nr. 198/2021. [^ Back to section](#)
- 10 Regulation (EU) No. 345/2013 on European venture capital funds. [^ Back to section](#)
- 11 Regulation (EU) No. 760/2015 on European long-term investment funds. [^ Back to section](#)
- 12 EAS 3280 as of 14 May 2012, EAS 2698 as of 6 February 2006 and BMF 15 December 2008 (BMF 010221/3364-IV/4/2008). [^ Back to section](#)

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