

The German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*) has stated in an announcement dated 12 May 2015 that it intends to modify its existing administrative practice to permit the granting, restructuring and prolongation of loans by alternative investment funds (AIFs). Actually, section 32 (1) sentence 1 of the German Banking Act (*Kreditwesengesetz – KWG*) states that anyone wishing to conduct banking business or to provide financial services in Germany commercially or on a scale that requires a commercially-organized business undertaking requires a license by BaFin. Banking business includes, inter alia, the lending business (*Kreditgeschäft*), which is defined in section 1 (1) sentence 2 no. 2 of the KWG as “the granting of money loans or acceptance credits” which includes any type of loans, including syndicated loans and/or loans to corporate borrowers. In addition, the restructuring and the prolongation of a loan also qualifies as lending business.

In its announcement dated 12 May 2015, BaFin has revised its administrative view and practice with regard to investment funds. The granting of loans as well as the restructuring and prolongation of loans through AIFs is considered a part of collective asset management, which is thereby permitted under the German Capital Investment Act (*Kapitalanlagegesetzbuch – KAGB*).

Consequently, the KAGB supersedes the KWG as *lex specialis*, and the German legislator needs to amend specific regulations on the granting, restructuring and prolongation of loans through AIFs in the KAGB. As outlined in the BaFin announcement, such entitled AIFs are (i) open-ended special funds (section 282 of the KAGB), (ii) hedge funds (section 283 of the KAGB), and (iii) closed-ended special funds (section 285 of the KAGB). However, in relation to open-ended public real estate funds (section 230 of the KAGB), granting of loans is only permitted to the extent shareholder loans are concerned and UCIT funds will continue to be restricted from conducting lending business.

In addition, loans should only be granted by closed-end special AIFs and not by open-ended special AIFs which are permitted to acquire loans and such AIFs will be permitted to restructure and prolong such loans. AIF management companies (AIFMs) also should not grant any loans to consumers (but this is not excluded) or companies for the account of the AIF if the lending could lead to a conflict of interests. Leverage should only be used to a limited extent. Furthermore, AIFMs must have appropriate risk management systems in place and must invest in assets that can easily be sold to provide minimum liquidity. Therefore, the AIF's risk and liquidity management provided by AIFMs is required to be adequate for the purposes of granting, restructuring and prolonging loans.

The BaFin announcement refers to German AIFs only, but as the provisions of the KAGB prevail over the provisions of the KWG this would lead to the consequence that at least EU-AIFMs, having passported their collective asset management services to BaFin would then also be permitted to originate, restructure and prolong loans for German borrowers. BaFin remains also silent on the applicability of their new practice to non-German AIFs. However, it can be expected that EU and third country AIFs should also be allowed to originate loans to German entities provided such AIF are subject to similar supervision and regulation.

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