



**Questionnaire concerning the implementation of the
BASEL III guidelines and the regulatory framework
for Managers of Alternative Investment Funds**

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National Report

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1. The implementation of the Basel III guidelines

1.1 Is there a basic intend in you country to implement the Basel III guidelines?

Yes, there is. As a member of the European Union, the European legal framework known as the “CRD 4 package” consisting of the Directive No. 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (Capital Requirements Directive – “CRD”) and the Regulation No. 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms (Capital Requirements Regulation – “CRR”), is applicable in Austria. The European CRD 4 package intends to implement the Basel III guidelines proposed by the Basel Committee on Banking Supervision into the European Community acquis. It entered into force on 17 July 2013 and shall apply from 1 January 2014 (with some provisions being phased-in between 2014 and 2019). The CRR is directly applicable in Austria, the CRD needed to be transposed into Austrian national law until 31 December 2013.

1.2 In which stage of the implementation of the Basel III guidelines is your country currently? When will the rules be enacted?

Austria transposed the CRD into national law by an amendment to the Austrian Banking Act (*Bankwesengesetz*) and other related banking laws, which was passed in the Austrian parliament in the plenary session on 5 July 2013 and published in the Austrian Federal Gazette (*Bundesgesetzblatt*) No. I 184/2013 on 7 August 2013. It entered into force on 1 January 2014.

1.3 Is there a delay in the implementation of the Basel III guidelines? If yes, what is the main cause for it?

No, there is no delay.

1.4 Does the national implementation of the Basel III guidelines meet, exceed or undercut the stated minimum standards concerning the below mentioned issues?

The European CRD 4 package intends to fully implement the following minimum standards of the Basel III framework, however, the requirements will be phased in gradually until 2023. The Basel Committee on Banking Supervision conducted a preliminary regulatory consistency assessment of the EU’s legislative proposal for the implementation of Basel III in 2012. The Committee’s examinations were based on the 5th Council’s Presidency’s compromise proposal agreed on 15 May 2012. It concluded that the proposal was largely in compliance with the Basel III framework requirements, but that 2 out of 14 key components were graded to be materially non compliant: the definition of capital and Internal Ratings-based

(IRB) approach for credit risk.¹ It rests to be seen what the committee's final assessment concludes on the compliance of the EU Framework with the Committee's guidelines.

a.) Capital requirements:

According to Art 92 para 1 of the CRR, institutions shall have the following minimum own funds requirements:

- 4.5% Common Equity Tier 1 (as defined by the CRR) capital ratio;
- 6% Tier 1 (as defined by the CRR) capital ratio;
- 8% total capital ratio.

The definitions of capital in the CRR do not completely correspond to the definition of the Basel III guidelines.

b.) Leverage Ratio:

The leverage ratio is calculated as tier 1 capital (the capital measure) divided by on- and off-balance sheet exposures (the exposure measure). It was introduced as a reporting tool which will allow competent authorities to assess the risk of excessive leverage in their respective institutions. It is currently still in the development phase, mandatory disclosure of the leverage ratio to the European Banking Authority (EBA) is expected to start in 2015, upon which the EBA will assess the impact of the leverage ratio as a binding measure and determined whether the 3% proposed by the Basel III framework shall be introduced as a mandatory requirement.

c.) Counter cyclical capital buffer:

A countercyclical capital buffer shall be gradually introduced from 1 January 2016. The Austrian Financial Market Authority (*Finanzmarktaufsicht - FMA*) may put such a buffer requirement in place if it judges a period of excessive credit growth. As of 1 January 2019, the counter cyclical capital buffer shall be 0 to 2.5%.

d.) Capital conservation buffer:

A Capital conservation buffer of 2.5% is to be introduced gradually as of 1 January 2016.

1.5 How many systematically relevant financial institutions are located in your jurisdiction?

According to the last report of the Financial Stability Board in Basel of 11 November 2013, there is no globally systematically relevant financial institution in Austria.²

¹ http://www.bis.org/bcbs/implementation/12_eu.pdf

² https://www.financialstabilityboard.org/publications/r_131111.pdf

The FMA identified 3 Austrian banks which are considered big banks and locally relevant: Erste Group, Raiffeisen Zentralbank and Unicredit Bank Austria.

1.6 How does your country regulate the capital requirements for systematically relevant financial institutions?

In March 2012, the Austrian National Bank (*Österreichische Nationalbank – OeNB*) and the FMA published a supervisory guidance on strengthening the sustainability of the business models of large internationally active Austrian banks with a view to contributing to financial stability both in Austria and in the subsidiaries' host countries. More specifically, the set of measures aims at

- increasing these banks' capital base in the medium and long term,
- achieving a more balanced refinancing structure of exposed subsidiaries, and
- ensuring that banks have in place adequate recovery and resolution plans for potential crisis situations.

It applies to the three “systematically relevant” banks set out in 1.5.

To sustainably strengthen their capital base, banks must implement the new Basel III rules in respect of Common Equity Tier 1 from the beginning of 2013 without making use of any related transitional provisions – with the exception that private and state participation capital subscribed under the bank support package (which is fully loss absorbing) will be fully included in the capital base. The future treatment of this participation capital will be in line with the grandfathering/phasing-out provisions of the CRR. In addition, banks will have to hold an additional Common Equity Tier 1 buffer of up to 3 percentage points from 1 January 2016, depending on the risk inherent in their business model.

The ongoing monitoring and analysis of subsidiaries' net new lending in relation to their local stable funding (Loan-to-Local Stable Funding Ratio, LLSFR) is to help achieve a stronger and more balanced funding structure at subsidiaries. In line with historical evidence, the Austrian supervisors place a particular focus on already exposed subsidiaries whose stock LLSFR exceeds 110%. The results of this monitoring are openly discussed with the competent host and home supervisors in the supervisory college framework with a view to agreeing whether constraining supervisory measures are necessary.

Parent banks must submit adequate recovery and resolution plans to prepare for potential crisis situations and to facilitate the timely, effective and efficient recovery or orderly resolution of an institution.³

³http://www.fma.gv.at/typo3conf/ext/dam_download/secure.php?u=0&file=6815&t=1395688970&hash=e595f9ed046d470af0fec701960c866f

1.7 Do you think that many banks in your country will struggle to meet the requirements of Basel III? Why do you think so?

The Austrian National Bank is confident that Austrian banks in general will be able to meet the criteria. The 3 Austrian big banks, Erste Group, Raiffeisen Zentralbank and Unicredit Bank Austria, have been in compliance with the requirements since 2013. Also, it can be seen in the market that banks have elaborated stricter criteria for the granting of loans and require more equity and security than before. Coming from a traditionally conservative banking business, Austrian banks will therefore most likely be able to meet the criteria. Furthermore, it must be taken into account that there are transition periods which will give banks time to adjust to the new requirements.

2. Regulatory Framework for Managers of Alternative Investment Funds

2.1 Is there any legislation in your jurisdiction concerning Managers of Alternative Investment Funds?

Yes there is.

2.2 Is your jurisdiction member of the EU or the EEA and therefore legally obligated to implement the AIFM directive 2011/61/EU? If yes: Is the implementation of the AIFM directive 2011/61/EU already successfully completed?

Yes, Austria is a member of the European Union, and, thus, obliged to implement the AIFM directive 2011/61/EU. It was successfully implemented by the Act on Alternative Investment Funds Managers (*Alternative Investmentfonds Manager-Gesetz – AIFM-G*), which was published in the Austrian Federal Gazette (Bundesgesetzblatt) No. I 135/2013 on 29 July 2013

2.3 At which point in time was the legislation concerning AIFM enacted?

The AIFM-G entered into force on 22 July 2013.

2.4 What is the name of the competent supervisory authority for Alternative Investment Funds in your country?

In Austria, the relevant authority for Alternative Investment Funds is the Austrian Financial Market Authority (*Finanzmarktaufsicht – FMA*).

2.5 Which minimum-capital does an AIFM require in order to obtain a licence or authorization?

The minimum capital requirements for an AIFM are set out in Art 7 of the AIFM-G. For internally managed AIF, the minimum initial equity capital is EUR 300,000. An AIFM, who is appointed as an external manager of an AIF, must have a minimum initial equity capital of EUR 125,000 available.

Should the value of a managed AIF-portfolio exceed 250 million Euro, the AIFM is required to bring in additional equity, namely, 2% of the value by which the value of the managed portfolio exceeds 250 million Euro. However, the maximum required amount of initial and additional equity capital does not exceed 10 million Euro.⁴

In any case and notwithstanding the requirements under Art 7 para 3 AIFM-G on additional equity capital, the AIFM needs to comply with the capital requirements of Art 9 para 5 of the Act on Securities Supervision (*Wertpapieraufsichtsgesetz – WAG*), that is with the capital requirements of Art 92 of the CRR and maintain equity capital of at least 25% of the fixed general costs from the last financial statement.

2.6 How long is the duration of authorisation process to obtain an AIFM-Licence?

According to Art 6 para 5 of the AIFM-G the FMA has to decide on a licence application within 3 months from filing the application or within 3 months, or, if the application was not complete, within 3 months from filing of all missing relevant documents. In particularly complex cases, the FMA can extend this 3-month-period for another 3 months.

The licence must be issued in writing and can contain limitations or conditions.

In order that the licencing process moves expediently, it is essential to provide full documentation to the FMA from the start and disclose all relevant information upon request as soon as possible. In practice most proceedings are delayed because the application is incomplete or requests for disclosure by the FMA are not handled well.

2.7 What are the key elements of the authorisation process?

A licence is issued if the following conditions are fulfilled:

- Evidence could successfully be produced that the AIFM has the ability to comply with the regulatory requirements set out in the AIFM-G;
- The AIFM fulfils the minimum capital requirements in accordance with Art 7 of the AIFM-G;
- The individuals, who manage the operations of the AIFM, are sufficiently reliable and possess sufficient experience with regard to investment strategies of the AIFM; the operations needs to be managed by at least two individuals;
- The owners of the AIFM or anyone who holds a qualified shareholding (at least 10%) are fit and proper; and
- The AIFM is registered in Austria and has its main administration in Austria.

⁴ Art 7 para 3 AIFM-G.

An applicant must not only provide documentation and information on these aspects, but also a business plan, a policy for the remuneration of its employees and directors and for external AIFM information on the AIF they intend to manage.

2.8 Is it mandatory for AIFM to have a local residence in your jurisdiction?

An AIFM under the AIFM-G is by definition a corporate entity. To obtain an Austrian license under the AIFM-G, the AIFM needs to have its seat and business administration in Austria.

However, principally EU-AIFM can passport to Austria and Non-EU-AIFM can apply for authorization to operate in Austria. A Non-EU-AIFM will, however, need a legal representative with its seat in Austria.

2.9 Does the legislation distinguish between different types of AIFM? What are the key differences between them?

The AIFM-G distinguishes between internally and externally managed AIF.

An AIF is considered internally managed when the management functions are performed by the governing body or any other internal resource of the AIF, that is when the AIF permits internal management and where the AIF's governing body chooses not to appoint an external AIFM.

An AIF is externally managed when an external legal person has been appointed as manager by or on behalf of the AIF, which through such appointment is responsible for managing the AIF.

Main difference in the licensing process is the capital requirements (see question 2.5. above) and the information to be provided for internal and external AIFMs.

There are some small AIFM, which do not require a license under the AIFM-G but only registration with the FMA, where the cumulative AIFs under management fall below a threshold of 100 million Euro and for AIFMs that manage only unleveraged AIFs that do not grant investors redemption rights during a period of 5 years where the cumulative AIFs under management fall below a threshold of 500 million Euro.

2.10 Are there any legislative restrictions regarding legal structures of AIFM?

AIFMs need to be a corporate entity, however, there is no requirement as to a specific form. AIFMs can therefore be limited liability companies, stock corporations or personal partnerships.

2.11 If you are a member of the EU or EEA, can AIFM in your country obtain an EEA/EU Passport which enables to distribute AIFs to professional investors?

Yes, they can.

Once an AIFM obtained a license from the FMA, it is entitled upon notification to the FMA to manage or market funds to professional investors throughout the EU (see Art 30 of the AIFM-G). The notification to the FMA must contain certain documentation and information specified in annex 4 to the AIFM-G. Within 20 days after verification by the FMA that the documentation is complete, the FMA will submit the notification and documents to the respective competent authority of the member state in which the AIFM intends to distribute its AIFs, and inform the AIFM that the notification and documents were submitted accordingly. From the date of this information by the FMA, the AIFM is entitled to commence its distribution in that Member State.

2.12 Do AIF themselves require to be licensed or authorised by a competent supervisory authority?

The definition of AIFs is very wide. An AIF under the AIFM-G is every organism for collective investments, which collects capital from several investors, in order to invest it for the benefit of the investors according to an investment strategy determined by the AIFM, and which does not require a license under Art 5 of the EU-Directive 2009/65/EG (regarding undertakings for collective investment in transferable securities (UCITS)). The UCITS-Directive was transposed into Austrian law by the Act on Investment Funds 2011 (*Investmentfondsgesetz 2011 – InvFG 2011*).

Whether an organism qualifies as an AIF is determined on a case by case basis by the FMA, mainly on the basis of its structure and content, not the form of the organism. The guidelines on key concepts of the AIFM-Directive of European Securities and Markets Authority (ESMA) of 13 August 2013⁵ will also be applied by the FMA. If it is not clear from a self-assessment, whether an organism falls in the scope of application of the AIFM-G, there is a possibility to apply for a notice of assessment to the FMA.

Every AIF, which an Austrian licensed AIFM intends to distribute, requires an authorisation by the FMA in accordance with Art 29 para 2 of the AIFM-G. An AIFM, which does not need a license, but where registration is sufficient (see above 2.9.) only needs to notify the set up of an AIF.

2.13 How are AIFs categorized and what is the authorisation or licence requirement for each category?

See above 2.12.

2.14 How long does the process of authorisation or licensing of AIFs take?

The FMA is required to decide on the authorization of the distribution of an AIF within 20 days of receipt of the application for authorization or, if the application

⁵ http://www.esma.europa.eu/system/files/2013-611_guidelines_on_key_concepts_of_the_aifmd_-_en.pdf

was incomplete, within 20 days upon completion of the application. The FMA is entitled to prohibit distribution of an AIF, if the management of the AIF by the AIFM or the AIFM does not correspond to the regulatory requirements of the AIFM-G or the AIFM-Directive or any related legislation. In case of a positive decision, the AIFM is entitled to start distribution of the AIF from the date of the authorization.

2.15 Are there certain legal structures for AIFs? Please name them.

There is no specific legal structure for an AIF. AIF can have various structures. Whether an organism is considered an AIF is determined on a case to case basis.

2.16 What are the key differences with reference to the authorisation and marketing of AIFs that are distributed to retail investors and those only distributed to professional investors?

Austria has "opted in" for the option provided for in Article 43 of the AIFM-Directive and allows for marketing to retail investors (Art 48 of the AIFM-G). This possibility, however, is limited to the following fund structures and subject to additional notification requirements:

- units of real estate funds according to the Act on Real Estate Investment Funds (*Immobilien-Investmentfondsgesetz – ImmoInvFG*).
- AIF according to Chapter 3, Section 1 of the InvFG 2011,
- AIF in real estate according to Art. 48 para. 1 subpara. 3 AIFM-G,
- AIF according to Art. 48 subpara. 7 AIFMG or
- the AIF is an AIF that is materially equivalent to an UCITS of the UCITS-Directive but is managed by a non EU-AIFM.

2.17 Are there any special requirements for leveraged AIFs?

AIFMs shall set a maximum level of leverage which they may employ on behalf of each AIF they manage as well as the extent of the right to reuse collateral or guarantee that could be granted under the leveraging arrangement, taking into account, inter alia:

- the type of the AIF;
- the investment strategy of the AIF;
- the sources of leverage of the AIF;
- any other interlinkage or relevant relationships with other financial services institutions, which could pose systemic risk;
- the need to limit the exposure to any single counterparty;
- the extent to which the leverage is collateralised;
- the asset-liability ratio;

- the scale, nature and extent of the activity of the AIFM on the markets concerned.

2.18 Are there any special regulations with regard to private investors or semi-professional investors?

See 2.16.

Also, there are special rules for Family Offices – these do not fall under the scope of the AIFM-G.

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