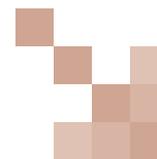


Austria

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RETAIL FUNDS

1. Please give a brief overview of the retail funds market in your jurisdiction. (How developed is the market? Has it been active in the past year?)

Open-end retail funds

Background. The first law for investment funds entered into force in 1963, after the first Austrian investment fund had already been issued in 1956.

Until the 1980s, investing in securities or using the stock market to raise capital was not popular in Austria. Therefore, the corresponding legal framework was not well developed. However, in the 1980s the potential of the Vienna Stock Exchange was discovered and the Austrian financial market experienced a boost.

In 1993, the Austrian parliament passed a new Investment Funds Act (IFA), which was amended several times, often due to developments at EU level, for example:

- Directive 85/611/EEC on undertakings for collective investment in transferable securities (UCITS) (UCITS Directive).
- Directives 2001/107/EC amending UCITS Directive with a view to regulating management companies and simplified prospectuses (UCITS Management Directive) and Directive 2001/108/EC amending UCITS Directive, with regard to investments of UCITS (UCITS Product Directive) (collectively UCITS III).
- Directive 2004/39/EC on markets in financial instruments (MiFID).

Types of funds. There are two distinct types of investment fund, each having different target investor groups:

- Investment funds open to the general public (*Publikum-fonds*).
- Special funds (*Spezialfonds*).

Investment funds open to the public for which a public offer is made fall under the scope of the IFA. These funds are targeted towards both private and institutional investors. Both UCITS and non-UCITS funds are regulated by the IFA.

Special funds were introduced into the IFA in 1998 and are intended to allow institutional investors to adapt investment funds to their particular needs. Special funds are designed for long-

term investments and are limited to a maximum number of ten investors. Only companies can be investors, not natural persons. Certain investor protection provisions applicable to public investment funds such as the obligation to publish a prospectus or to have the fund rules authorised by the FMA do not apply to special funds as institutional investors are considered to have adequate knowledge of the fund. Special funds do not qualify as UCITS funds. This article does not deal with special funds, as they are not retail funds.

All Austrian investment funds are open-end funds. Under section 10(2) of the IFA, investment fund management companies must repurchase the fund's units at any time if the investors wish to redeem them. Investment trusts similar to those existing in the UK or in Germany or closed-end companies marketed in the US for the retail sector do not exist under Austrian law. Therefore, the sections in this article referring to closed-end retail funds are not applicable.

In 1998, two other forms of funds were introduced into Austrian law:

- Funds of funds, which offer a wider asset allocation.
- Pension investment funds intended to encourage private retirement planning.

Index funds replicating indices have also been available since 2004. The index must:

- Be recognised by the Financial Market Authority (FMA).
- Be sufficiently diversified.
- Represent an appropriate benchmark.
- Be published.

Other portfolios of assets defined under section 20a of the IFA, which do not qualify as UCITS funds, are generally less restricted in relation to their choice of assets.

In 2003, the Real Estate Investment Funds Act (REIFA) was introduced so that open-end real estate investment funds fulfilling certain criteria (for example, consisting of certain types of assets listed in the REIFA and owned by a real estate investment company) are now the only funds permitted to be marketed as real estate investment funds. The REIFA has a structure and content similar to the IFA. This article does not deal with the particularities of the REIFA.

Activity. According to figures published by the FMA and the Austrian Association of Investment Fund Companies (*Vereinigung Österreichischer Investmentgesellschaften*) (VÖIG), there are 24 investment fund management companies in Austria.

In 2006, the Austrian domestic investment fund sector grew significantly with a 7.53% increase to a total of EUR167 billion (about US\$241 billion). Of this growth, EUR6.9 billion (about US\$244 billion) related to price gains and EUR8.6 billion (about US\$12.4 billion) to the net inflow of funds. EUR3.8 billion (about US\$5.5 billion) was distributed to investors. Two-thirds of the net inflow of funds from large-scale investors and special funds, and one-third by retail funds. In total, 2,221 funds offered by domestic companies were licensed for sale in Austria.

By October 2007, the total domestic investment fund volume had increased to EUR172.1 billion (about US\$249 billion) and the number of domestic funds to 2,290 (2,171 in December 2006, 1,039 of which were investment funds open to the public and 1,132 special funds). 1,146 funds of the 2,290 domestic funds were UCITS funds.

As of 30 September 2007, altogether 4,835 foreign funds were registered in Austria, of which 4,747 were UCITS funds, 85 non-UCITS funds and three non-UCITS REIFAs.

Closed-end retail funds

Closed-end retail funds do not exist in Austria (*see above, Open-end retail funds*).

2. What are the key statutes, regulations and rules that govern retail funds in your jurisdiction? What regulatory bodies are involved in regulating retail funds?

Open-end retail funds

The key statutes regarding open-end retail funds are the:

- IFA.
- Banking Act (BA).
- Security Supervision Act 2007 (SSA).
- Capital Markets Act (CMA).
- Quality Standards of the Austrian Investment Fund Industry 2005.
- Standard Compliance Code of the Austrian Credit Services Sector 2005.

The FMA is the responsible supervising agency. It supervises both investment fund management companies managing funds and custodian banks issuing and repurchasing unit certificates.

The FMA's task is to both:

- Examine whether the provisions of the IFA, the BA, the SSA and the CMA are complied with.

- Ensure that risks and abuses are identified and prevented.

The FMA has extensive information and control rights. Additionally, the Federal Minister of Finance appoints a state commissioner (and a deputy) for each investment fund management company, who:

- Can attend the general assembly of the company.
- Has a right of appeal against resolutions.
- Can inspect the records of the company.

The bank auditor examines the annual financial statements of the bank and the annual report and, in case of non-compliance with the BA or the IFA, must inform the FMA or the Austrian National Bank.

Closed-end retail funds

Not applicable (*see Question 1, Closed-end retail funds*).

3. Do the retail funds themselves have to be authorised or licensed? If so, what are the main steps involved?

Open-end retail funds

Domestic funds. An investment fund management company requires various authorisations, in particular it must have a special banking licence authorising the company to conduct investment fund business. In addition, each investment fund (with the exception of special funds) requires FMA authorisation.

For an investment fund to be authorised, the FMA must give its consent to the fund rules, which are the basis for the contract entered into between the investment fund management company and the investor. The FMA and VÖIG have published standard fund rules, which are often used in practice. The fund rules must contain information on:

- Whether bearer or registered investment certificates will be issued.
- Which shares, money market instruments and other financial instruments have been chosen as investments for the fund.
- The amount of compensation for the fund's administration.
- When the value of the investment fund certificates is to be ascertained.
- The costs for the custodian bank's services.

If the minimum content requirements are fulfilled and the interests of the investors are deemed protected, the FMA gives its consent in the form of a notification. Without FMA authorisation, the fund rules are null and void. If the fund rules are later altered, the investment fund management company (after gaining the consent of the supervisory board and the custodian bank) must again obtain the FMA's consent.

Before the investment fund management company can issue investment fund certificates, a complete and a simplified prospectus must be published at least one day before the start of distribution. In contrast to the fund rules, the prospectuses are not subject to authorisation and must only be delivered to the Austrian Control Bank on the day of publication. The simplified prospectus is designed to inform the typical private investor about the fund and must contain:

- A brief outline of the fund.
- Investment and economic information.
- Information on the trade of securities and the date of publication.

The complete prospectus is more extensive. The prospectuses must be amended whenever material changes in legal or factual circumstances occur. Any advertisement for an investment fund must contain a reference to the prospectuses.

The investment fund managing company can issue investment fund certificates only after the publication of the prospectuses, which must contain the approved fund rules.

UCITS funds. If an investment fund management company seated in an EU member state intends to sell investment fund certificates in Austria, the single passport principle applies if the provisions of the UCITS Directives are met. To use the single passport principle, the company must deliver a notification to the FMA containing the following:

- A confirmation from the home country authority that the investment fund complies with the criteria of the UCITS Directives.
- A copy of the most recent simplified and complete prospectus containing the latest up-to-date fund rules, the annual report and subsequent half-yearly reports.
- Information on how the certificates are to be marketed in Austria.
- Information on the credit institution that will function as paying agent.

Two months after the date of filing the notification with complete documentation, the investment certificates can be distributed in Austria, if the FMA has not prohibited the distribution because of an incomplete notification or a violation of provisions of Austrian law concerning the manner of distribution. The FMA cannot assess whether or not the requirements of the UCITS Directives have been met, but is bound to the confirmation of the home country.

Foreign investment funds. Funds which are neither Austrian funds nor qualify as UCITS funds are subject to a different regime, if they are both:

- Not admitted to official trading on the Vienna Stock Exchange or on the secondary market.
- Marketed through public offers.

To qualify as a fund, a certain level of risk diversification is required. If this is not met, the certificates offered by the foreign company may qualify as shares under the CMA. For public offers of shares the CMA requires the preparation and authorisation of a prospectus by the FMA or a prospectus auditor.

The foreign investment fund management company must inform the FMA of its intention to offer foreign investment fund certificates to the public in Austria and provide the FMA with detailed information on the fund. The foreign investment fund management company can start marketing only both:

- After four months from the filing of complete notification has expired.
- If the FMA has not raised any objections.

Prospectuses, fund rules and other material must be made available to investors.

Closed-end retail funds

Not applicable (*see Question 1, Closed-end retail funds*).

4. Who can market retail funds?

Open-end retail funds

The following can market investment funds:

- Credit institutions with a banking licence under the BA.
- Investment firms (*Wertpapierfirma*) with a licence under the SSA.

Closed-end retail funds

Not applicable (*see Question 1, Closed-end retail funds*).

5. To whom can retail funds be marketed?

Open-end retail funds

Retail funds can be freely marketed to Austrian retail customers. If the investment fund qualifies as a UCITS, under the principle of free passporting it can also be marketed outside Austria. Outside the EU the investment fund management company must comply with the respective legal provisions regarding foreign investment funds.

Closed-end retail funds

Not applicable (*see Question 5, Closed-end retail funds*).

6. What are the key requirements that apply to managers/operators of retail funds?

Open-end retail funds

Only credit institutions with a banking licence can act as an investment fund management company and a custodian bank.

Under Austrian law there is a strict separation between the management company's functions and the functions of the custodian bank. The investment fund management company's tasks include the following:

- Administrating investment funds, including:
 - administrating the investments;
 - additional administrative actions such as client requests and supervising legal compliance;
 - marketing funds, which refers to all actions promoting investment contracts such as client presentations, advertisements, mailings and consultant activities.
- Consulting services regarding clients' investment options.
- Administrating individual client portfolios at the client's request (for consulting services and portfolio administration a more comprehensive licence is required).

The custodian bank is responsible for:

- Evaluation and price issues.
- Keeping the register of certificate holders.
- Distributing profits.
- Issuing and repurchasing investment fund certificates.
- Maintaining the investment fund certificates.

Closed-end retail funds

Not applicable (see Question 1, Closed-end retail funds).

7. Who holds the portfolio of assets? What regulations are in place for its protection?

Open-end retail funds

The custodian bank's responsibility is to maintain custody of an investment fund's securities. In addition, the custodian bank issues and repurchases the unit certificates and keeps track of the accounts. The requirement for a custodian bank safeguards the investor's interests by strictly separating the management and the depositing functions of the investment fund.

Custodian banks must comply with the IFA, BA, SSA, CMA, and the fund rules and must act in the interests of the certificate holders. They are entrusted to supervise the investment fund management company's compliance with the law.

As the custodian bank carries out supervisory and trustee functions, it must also be a credit institution with a banking licence and have its business seat in Austria or a branch of a foreign credit institution with its business seat in an European Economic Area (EEA) member state. Therefore, custodian banks are, like investment fund management companies, subject to FMA supervision, which is required to regularly examine the bank's compliance with the relevant legal provisions.

Closed-end retail funds

Not applicable (see Question 1, Closed-end retail funds).

8. What are the main legal vehicles used to set up a retail fund and what are the key advantages and disadvantages of using these structures? What are the participants' interests in the fund called (for example, share or unit)?

Open-end retail funds

Investment funds under the IFA are structured as co-ownerships (and not as a trust construction as in many other countries). The assets bundled in the investment fund constitute a portfolio of assets (*Sondervermögen*), of which each unitholder is a co-owner. This means that for physical objects the unitholders are co-owners and for rights they hold a co-right. The investment fund is not a legal entity. In court proceedings, for example, the investment fund management company, as the legal representative of the investment fund, is named as a party.

The participants' interests in the fund are called unit certificates (*Anteilscheine*). They are securities evidencing co-ownership in the assets of the fund and the rights of the unitholders in relation to the investment fund management company and the custodian bank.

Closed-end retail funds

Not applicable (see Question 1, Closed-end retail funds).

9. Describe the investment and borrowing restrictions to which retail funds are subject.

Open-end retail funds

Detailed rules for investment choices of investment funds are set out in section 20 of the IFA. Special rules apply to index funds and other portfolios of assets.

The most important principle involved in the choice of assets for investment funds is that of risk diversification. The fund rules must provide for a maximum amount of cash reserves and can fix a minimum share of the funds' assets invested in bank deposits. The securities and money market instruments used for investment funds must be listed or dealt on a regulated Austrian or EEA member state market or, if the fund rules allow, in a third country. Asset-backed securities are permissible under certain conditions.

Investment restrictions apply to both the object of investment and the issuer; in each single case the fund rules have to be considered. Investment restrictions include the following:

- Generally, securities or money-market instruments of the same issuer can only be acquired using up to 10% of the fund assets. The total value of the issuer's securities and money market instruments (in whose securities more than 5% of the fund's assets are invested) must not exceed 40% of the fund assets.

- Up to 35% of the fund assets can be invested in securities or money market instruments issued or guaranteed by:
 - an EU member state (including its local authorities);
 - a non-EU member state; or
 - public international organisations to which one or more EU member states belong.
- Up to 25% of units in a UCITS funds can be acquired in the same fund.
- Generally, a maximum of 30% of the fund assets can be invested in collective investment undertakings.
- Up to 7.5% of the ordinary shares in the same issuer can be acquired.
- Up to 25% of the fund assets can be used to acquire debt securities of one credit institution.
- Up to 20% can be invested in the securities and money market instruments of the same group of companies.
- Up to 20% can be invested in units of a single investment fund or a single investment fund management company fulfilling the UCITS requirements.
- Deposits, fulfilling certain conditions (for example, repayable on demand, right to be withdrawn, and maturing in no more than 12 months) with one credit institution (which must have its registered office in a member state or be subject to rigid supervision) can amount to 20% of the fund assets, whereby combined investments in one credit institution must be added together and must not exceed the 20% threshold.
- Investments in financial derivative instruments including over-the-counter (OTC) derivatives of one credit institution is also permitted under certain conditions up to an amount of 10% of the fund assets.
- Up to 10% of the fund assets may be invested in securities and money market instruments not listed on regulated markets.
- The investment fund management company cannot generally borrow funds, but if the fund rules so provide it can raise short-term loans (for a maximum of three months) of up to 10% of the assets of the fund.

Closed-end retail funds

Not applicable (*see Question 1, Closed-end retail funds*).

10. Can the manager/operator place any restrictions on the issue and redemption of interests in retail funds?

Open-end retail funds

Investment fund management companies must repurchase the units if the investors wish to redeem them and surrender the unit certificate, the coupons and renewal certificates (*section 10(2), IFA*).

The fund rules cannot restrict the redemption right in a way that makes an exit practically impossible. The custodian bank calculates the redemption price by dividing the overall value of the investment fund by the number of units issued (net asset value). The unitholders are therefore not dependent on market or stock exchange supply and demand, but can exit whenever they wish to.

Payment of the redemption price can only be temporarily suspended if both:

- Suspension lies in the interests of the unitholders.
- There exist extraordinary circumstances, for example if:
 - the stock exchange is closed;
 - a large number of unitholders request redemption so that an ordinary sale of the fund's assets is impossible; or
 - the indicated value of the assets does not correspond to their true value due to the political or economic situation.

The suspension can be dependent on the sale of the fund's assets and on the receiving sale proceeds. The FMA must be notified immediately. There is no obligation to inform the FMA when the redemption moratorium is lifted.

Closed-end retail funds

Not applicable (*see Question 1, Closed-end retail funds*).

11. Describe any restrictions on the rights of participants in retail funds to transfer or assign their interests to third parties.

Open-end retail funds

The fund rules must define whether bearer or registered units have been issued. Very often no single units are issued, but only global certificates, in which case the investor is entered into the book of the custodian bank.

Bearer units are transferred by simple physical transfer. Under Austrian law both taking title and taking possession are necessary for a legal transaction to become valid. They can generally be freely transferred to third parties.

If registered units have been issued, a share register must be kept. These units can be freely transferred. Registered units are transferred by endorsement. The company must be notified of the transfer and the unit certificate must be presented to the company so that they can make the necessary adjustments to the share register. The prospectus may provide that the transfer of registered shares is subject to the prior approval of the company.

Closed-end retail funds

Not applicable (*see Question 1, Closed-end retail funds*).

12. Describe the periodic reporting requirements to:

- **Investors.**
- **Regulators.**

Open-end retail funds

- **Investors.** The investment fund management company must prepare an annual report for each financial year and each investment fund, as well as a half-yearly report. The annual report must contain the information set out in Annex B to the IFA, including:
 - a profit and loss statement;
 - a statement of assets and liabilities;
 - the fund rules;
 - a statement regarding changes in the fund assets and the number of units at the beginning and the end of the financial year;
 - essential information enabling investors to make an informed judgment of the results of the investment fund.

The half-yearly report must only contain selected parts of this information and must be published within two months after the end of the reporting period. Both the audited annual report and the half-yearly report must be available in the offices of the investment fund management company and the custodian bank. Additionally, the annual report must be published within four months of the end of the financial year and be handed over on request to the unitholders free of charge. Together with the annual accounts, the management company must publish the managed funds and the amount of assets held by them.

The custodian bank must publish the issue and the repurchase price whenever units are issued or repurchased and at least twice a month.

- **Regulators.** The investment fund management company must deliver the audited annual report to the FMA within four months after expiration of the financial year and the half-yearly report within two months of the end of the reporting period.

Closed-end retail funds

Not applicable (see *Question 1, Closed-end retail funds*).

13. Describe the tax treatment for:

- **Funds.**
- **Resident investors.**
- **Non-resident investors.**

Open-end retail funds

- **Funds.** Investment funds are tax transparent, meaning that taxation takes place at the level of the unitholders only.

- **Resident investors.** Withholding tax at the source is levied on income from investments in domestic and foreign investment funds, if paid out by an Austrian coupon-paying agent (*IFA*). Withholding tax, a type of income tax, is currently 25%.

For profit retaining funds (*thesaurierende Fonds*), even though no actual distributions take place, withholding tax is levied on assumed distributions.

- **Non-resident investors.** Non-resident investors must comply with local taxation provisions. However, they may benefit from any relevant double tax treaty.

Closed-end retail funds

Not applicable (see *Question 1, Closed-end retail funds*).

14. Please summarise any proposals for the reform of retail fund regulation in your jurisdiction.

An amendment to the IFA will soon be discussed by parliament. It has not yet been decided when the amendment will enter into force. The amendment transposes Directive 2007/16/EC implementing the UCITS Directive as regards the clarification of certain definitions, which was adopted on 19 March 2007 and clarifies the eligible assets for UCITS. The amendment also will likely adopt CESR guidelines.

In addition, revised tax guidelines on investment funds (*Investmentfondsrichtlinien 2008*) will enter into force in 2008 and will amend those of 2003.

In relation to foreign UCITS funds applying for distribution in Austria, the two-month waiting period may be changed to three days following suggestions by the European Internal Market and Services Directorate General.

HEDGE FUNDS**15. Please give a brief overview of the hedge funds market in your jurisdiction. (How developed is the market? Has it been active in the past year?)**

Hedge funds are becoming more important as an investment option for credit institutions and are being more intensely marketed to private investors.

According to a study conducted by the FMA, investments in hedge funds increased by nearly 50% in 2005. The capital invested in hedge funds by Austrians amounted to between EUR3.5 billion and EUR4 billion (between about US\$5.1 billion and US\$5.8 billion). Austrian credit institutions placed:

- 67% of their hedge fund investments into offshore funds.
- 7% into onshore funds.
- 26% into EU hedge funds.

According to an FMA study of March 2007, Austrian credit institutions invested EUR2.76 billion (about US\$4 billion) into hedge funds in 2005, which increased to EUR2.97 billion (about US\$4.3 billion)

in 2006. Nearly two-thirds of the investment exposure was attributed to fund of funds hedge funds (FFHFs) (*Dach-Hedge-Fonds*).

Only FFHFs under section 20a of the IFA are permissible. Funds of funds can invest as feeder funds into hedge funds and a maximum of 10% of their assets can be invested into each single hedge fund. The prospectuses of certain FFHFs must contain a warning (which requires approval by the FMA) regarding the fact that they may be subject to large price fluctuations, have a limited risk-spread, or special valuation and repayment conditions.

At present, there are 16 FFHFs open to the public and 67 FFHFs for institutional investors, to which the IFA applies. FFHFs, however, play only a minor role on the Austrian hedge funds market, which is dominated by foreign products or products not regulated by the IFA.

The provisions regulating the marketing of foreign funds apply (see Question 3, *Foreign investment funds*) if the hedge fund fulfils the following requirements (section 24, IFA):

- There is a public offer in Austria.
- The assets are subject to foreign law.
- There is a certain level of risk diversification, assessed on a case-by-case basis.

However, in many cases foreign hedge funds do not fulfil the risk diversification criteria and therefore the IFA provisions do not apply. Instead, the marketing of these funds may fall under the CMA.

In the following questions, only FFHFs are dealt with, as they are presently the only form of Austrian hedge fund regulated by law. FFHFs are not UCITS funds.

16. What are the key statutes and regulations that govern hedge funds in your jurisdiction? What regulatory bodies are involved in regulating hedge funds?

The same legal provisions apply and the same regulatory bodies are involved in the supervision of FFHFs as for traditional investment funds (see Question 2).

17. How are the following areas regulated (if at all) in relation to hedge funds:

- **Risk.**
- **Valuation and pricing.**
- **Systems and controls.**
- **Insider dealing and market abuse.**
- **Transparency.**
- **Money laundering.**

- **Risk.** In relation to risk, the FFHF must comply with provisions set out in paragraph 1(s) in section 20a of the IFA regulating assets eligible for FFHFs.

- **Valuation and pricing.** There are no specific regulations on valuation and pricing.
- **Systems and controls.** There are no regulations specific to FFHFs on systems and controls.
- **Insider dealings and market abuse, transparency and money laundering.** The rules for traditional investment funds regarding insider dealing, market abuse, transparency and money laundering also apply to FFHFs.

18. Who can market hedge funds?

This is the same as for open-end retail funds (see Question 4, *Open-end retail funds*).

19. To whom can hedge funds be marketed?

This is the same as for open-end retail funds (see Question 5, *Open-end retail funds*).

20. Who holds the portfolio of assets? What regulations are in place for its protection?

This is the same as for open-end retail funds (see Question 7, *Open-end retail funds*).

21. Describe the key disclosure or filing requirements (if any) that must be done by the fund (for example, in relation to the prospectus or offering memorandum and side letters).

This is the same as for open-end retail funds (see Questions 3, *Open-end retail funds* and 12, *Open-end retail funds*).

22. What are the key requirements that apply to managers/operators of hedge funds?

This is the same as for open-end retail funds (see Question 6, *Open-end retail funds*).

23. What are the main legal vehicles used to set up a hedge fund and what are the key advantages and disadvantages of using these structures? What are the participants' interests in the fund called (for example, share or unit)?

This is the same as for open-end retail funds (see Question 8, *Open-end retail funds*).

24. What are the advantages and disadvantages of using onshore and offshore structures?

The main advantage of using FFHFs regulated by the IFA for domestic investors is that they are, in contrast to foreign or other hedge funds, subject to the constant supervision of the FMA.

25. Describe the tax treatment for:

- **Funds.**
 - **Resident investors.**
 - **Non-resident investors.**
-

This is the same as for open-end retail funds (see *Question 13, Open-end retail funds*).

26. Can participants redeem their interest? Are there any restrictions on the right of participants to transfer their interests to third parties?

This is the same as for open-end retail funds (see *Question 10, Open-end retail funds and 11, Open-end retail funds*).

27. Please summarise any proposals for the reform of hedge fund regulation in your jurisdiction.

This is the same as for open-end retail funds (see *Question 14, Open-end retail funds*).

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