



Federal Act on Venture Capital Funds (WKFG; Wagniskapitalfondsgesetz)

Venture Capital Funds Act (WKFG)

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TEXT

Subject matter and purpose

Article 1. This Federal Act defines the requirements that apply for venture capital funds, in particular with regard to permissible investments, information, accounting and supervision, as well as the conditions under which Alternative Investment Fund managers shall be allowed to establish and distribute venture capital funds.

Definition of terms

Article 2. For the purposes of this Federal Act, the following definitions apply:

1. “alternative investment fund” (AIF) means a collective investment undertaking pursuant to Article 2 para. 1 no. 1 of the Alternative Investment Fund Managers Act (AIFMG; *Alternative Investmentfonds Manager-Gesetz*) published in Federal Law Gazette I no. 135/2013;
2. “venture capital fund” (VCF) means an AIF consisting of venture capital investments pursuant to Article 5, broken down into equal units that are evidenced by securities pursuant to Article 10 (shares of the Venture Capital Stock Company – WK-AG);
3. “alternative investment fund manager” (AIFM) means an AIFM that is authorised to manage AIFs pursuant to Article 6 AIFMG or is registered pursuant to Article 3a AIFMG.

Applicable provisions

Article 3. (1) Unless determined otherwise in this Federal Act, the provisions of the AIFMG shall apply.

(2) For AIFMs that are registered pursuant to Article 3a AIFMG, in addition to the applicable provisions of the AIFMG that apply pursuant to Article 1 para. 5 and § 3a AIFMG, Articles 2, 16, 21 para. 1 nos. 1 to 4 and 6 to 16 and paras. 2 to 5 as well as Article 22 para. 1, para. 2 nos. 1 to 4, paras. 3 to 5 and 9 AIFMG shall apply accordingly in relation to the VCF. Furthermore, the fourth to sixth sentences of Article 9 para. 3, Articles 17 to 20 and 29 as well as Section 2 of Part 9 of the AIFMG shall apply in relation to the VCF, provided that this is stipulated in Articles 4, 5, 7, 8, 15, 17, 18 and 21 of this Federal Act, for AIFMs that are registered pursuant to Article 3a AIFMG.

Venture capital funds

Article 4. (1) Venture capital funds (VCFs) must fulfil the following conditions:

1. The VCF must be managed by an AIFM;
2. the VCF shall only be allowed to be established in the form of a closed-ended type pursuant to Delegated Regulation (EU) No 694/2014;
3. the VCF shall only be allowed to acquire investments pursuant to Article 5 taking into consideration the diversification of risk;

4. the VCF shall be established with the legal form of a stock company pursuant to Article 9;
 5. the VCF's articles of association shall contain the contents listed in Article 11;
 6. A depositary pursuant to Article 19 AIFMG shall be appointed for the VCF, irrespective of the whether the VCF is managed by an AIFM that is authorised to manage AIFs pursuant to Article 6 AIFMG or is registered pursuant to Article 3a AIFMG;
 7. the lifespan of the VCF must be between five and twenty years, and must be determined in the fund rules;
 8. the calendar year shall form the financial year of the WKF.
- (2) The AIFM shall notify the FMA about the establishment of a VCF. Proof of the conditions pursuant to para. 1 being observed and the fund rules are to be attached to the notification.
- (3) The FMA shall prohibit the distribution of the VCF, if
1. the conditions set forth in para. 1 or the other applicable conditions set forth in the AIFMG are not observed, or
 2. the fund rules fail to meet the requirements set forth in Article 16.
- (4) The procedure pursuant to Article 29 AIFMG shall apply as appropriate to the VCF's notification to the FMA pursuant to para. 2 and the FMA's prohibition pursuant to para. 3.

Investment terms

Article 5. (1) The VCF's investments shall be selected taking into account the distribution of risks, and the justified interests of the investors shall not be allowed to be breached.

(2) Only the following assets shall be allowed to be purchased for the VCF:

1. Balances held with credit institutions pursuant to Article 1a para. 1 no. 1 of the Austrian Banking Act (BWG; *Bankwesengesetz*), published in Federal Law Gazette No. 532/1993;
2. Shares issued by a stock company that at the time of purchase are not listed or traded on a regulated market pursuant to Article 1 no. 2 of the Stock Exchange Act 2018 (*BörseG 2018; Börsegesetz 2018*), published in Federal Law Gazette I No. 107/2017;
3. Shares in a limited liability company (*Gesellschaft mit beschränkter Haftung*);
4. Shares in partnerships, especially as a limited partner;
5. participating interests in partnerships under civil law (*Gesellschaften bürgerlichen Rechts*);
6. participating interests as a silent partner;
7. debt securities and participation rights pursuant to Article 174 of the Stock Corporation Act (*AktG; Aktiengesetz*) published in Federal Law Gazette No. 98/1965;
8. Financial instruments of legal entities in which participating interests pursuant to nos. 2 to 6 could be justified, including the granting of loans;
9. Units in AIFs that invest at least 50 percent of the net asset value in participating interests pursuant to nos. 2 to 5;

10. liquid financial investments pursuant to Article 67 of the Investment Funds Act of 2011 (InvFG 2011; *Investmentfondsgesetz 2011*), published in Federal Law Gazette I No. 77/2011;

(3) Assets pursuant to para. 2 no. 10 that do not fall under para. 2 nos. 1 to 9, shall only be allowed to be purchased up to a maximum of 30 % of the net asset value pursuant to Article 17 AIFMG of the asset pool.

Derivative products

Article 6. The acquisition of the derivative products pursuant to Article 73 InvFG 2011 for a VCF shall obtain be permissible for hedging of asset items of the asset pool.

Restrictions on disposal

Article 7. The WK-AG, the AIFM or the depositary shall not be allowed to borrow for the account of the VCF's asset pool, unless stipulated otherwise in the fund rules. Where the WK-AG's circle of shareholders consists of persons, who are classified as qualified retail clients, then borrowing shall not be allowed to exceed 30 % of the net asset value pursuant to Article 17 AIFMG of the asset pool.

Valuation

Article 8. (1) The valuation of the assets must occur in accordance with Article 17 AIFMG.

(2) For every balance sheet date, the valuation must be performed by an external valuer pursuant to Article 17 para. 4 no. 1 AIFMG.

(3) The AIFM shall notify the FMA without delay about the external valuer following their appointment.

(4) The external valuer shall provide the investors and the FMA with information about the valuation and their calculations upon request.

Legal form and applicable regulations

Article 9. (1) A VCF shall only be allowed to be established in the legal form of a stock company.

(2) The company name of the stock company must contain the designation "*Wagniskapital-Aktiengesellschaft*" or the abbreviation "WK-AG". The company name of a WK-AG with sub-pools of assets pursuant to Article 17 must also contain the additional designation "*mit Teilgesellschaftsvermögen*" or an easy-to-understand abbreviation of this designation.

(3) The provisions of the AktG shall apply to the WK-AG, unless stated otherwise in this Federal Act and in the AIFMG.

Shares

Article 10. (1) Shares in the WK-AG shall be registered shares and shall only be allowed to be issued if the issue price has been paid in full. The issue price covers the lowest issue price pursuant to

Article 8a para. 1 AktG, as well as the addition amount in the event of the shares being issued for a higher amount than the minimum issue price.

(2) Receiving of contributions in kind shall not be permitted for the issuance of shares in the WK-AG with the exception of assets pursuant to Article 5 para. 2 nos. 2 to 6.

(3) Amounts paid on the basis of a legal obligation as an additional amount above the lowest issue price of the shares pursuant to Article 8a para. 1 AktG and any other additional amount pursuant to the second sentence of para. 1 to the WK-AG, do not constitute part of the issue price pursuant to the second sentence of para. 1, and are therefore not subject to the obligation to pay in full pursuant to the first sentence of para. 1. They are considered as amounts in accordance with Article 229 para. 2 no. 5 of the Austrian Commercial Code (UGB; *Unternehmensgesetzbuch*).

(4) If a shareholder is obliged to pay amounts pursuant to para. 3, then the shareholder may only transfer the shares entrusted to them to the WK-AG if the purchaser takes over this obligation.

(5) With the consent of the supervisory board, the management board may make advance payments in relation to the expected net profit to the shareholders during the course of the financial year in accordance with the following conditions:

11. an interim balance sheet is to be drawn up for every such advance payment;
12. every advance payment must be covered based on the result for the current financial year reported on the basis of the interim balance sheet plus any profit brought forward and minus any loss brought forward.

(6) Shares in the WK-AG shall only be allowed to be acquired by professional investors pursuant to Article 2 para. 1 no. 33 AIFMG or qualified retail clients pursuant to Article 2 para. 1 no. 42 AIFMG.

(7) Taking into consideration the specifications contained in the Regulation issued by the FMA pursuant to para. 8 the WK-AG's shares may be broken down in accordance with various defining features, especially with regard to the usage of earnings, the entry charge, the management fee, minimum investment amount, currency, or a combination of the aforementioned features (unit classes). Shares in a unit class have the same defining features. The costs of introducing new unit classes for an existing WK-AG must be charged into the unit prices of the new unit class. The value of the unit shall be calculated separately for every unit class.

(8) The FMA may issue a Regulation containing more detailed provisions regarding the accounting representation, accounting and determination of the value of unit classes.

Articles of association

Article 11. (1) The purpose of business of the WK-AG defined by way of articles of association must be restricted to the investment and management of its funds in accordance with a defined investment strategy taking into consideration the diversification of risk for collective investment in accordance with the investment provisions pursuant to Article 5, the fund rules pursuant to Article 16 and obligations pursuant to Articles 24 to 28 AIFMG for the benefit of the shareholders. The

articles of association must stipulate the appointment of an AIFM for sole management of the company's assets, excluding the possibility of self-management.

(2) The minimum nominal amount of share capital shall be based on Article 7 AktG and must be fully paid in.

(3) A WK-AG, which forms sub-pools of assets, shall include a note in its articles of association that special fund rules apply for sub-pools of assets.

(4) The articles of association of a WK-AG, which forms sub-pools of assets, may state that a sub-pool of assets may be liquidated by means of a management board resolution and with the consent of the supervisory board.

(5) In all cases in which the articles of association of the WK-AG are published, handed out or otherwise made available, reference must be made to the respective fund rules pursuant to Article 16, and these shall also be published, handed out or made available otherwise.

Management Board

Article 12. (1) The management board of a WK-AG shall consist of at least two natural persons. It is obliged:

13. to conduct its activity with the required expert knowledge, diligence and conscientiousness in the best interests of the assets that it manages and of the integrity of the market, and

14. to make every effort to avoid conflicts of interest, and where such conflicts of interest are unable to be avoided, to disclose them.

(2) The personal financial situations of the members of the management board shall be required to be in good order, and they must also be of good personal repute. The members of the management board shall prove that they have the necessary suitability and experience in particular in the fields of finance and account to perform their managerial function. The appointment and withdrawal of members of the management board shall be notified to the FMA without delay.

(3) The members of the management board shall not be allowed to perform any gainful activity for the depositary.

Supervisory Board

Article 13. The personal financial situations of the members of the supervisory board shall be required to be in good order and prove that they possess the necessary level of personal reputation and technical suitability to ensure that the interests of the shareholders are maintained. The appointment and withdrawal of members of the supervisory board shall be notified to the FMA without delay.

Prohibition of trading for Management Board and Supervisory Board

Article 14. Members of the management board or the supervisory board of the WK-AG as well as the persons who actually conduct the AIFM's business, shall neither be allowed to sell assets to the

WK-AG nor to acquire them from the WK-AG. The purchasing and selling of shares of the WK-AG by the members of the management board, supervisory board and persons who actually conduct the AIFM's business is permissible.

Management

Article 15. (1) The WK-AG shall appoint an AIFM for its management. An AIFM must guarantee its responsibility for managing the WK-AG at all times.

(2) In addition to performing general management activities, the AIFM shall also in particular be responsible for the investment of and management of the WK-AG's funds. The appointment of the AIFM shall neither be considered as outsourcing as defined in Article 18 AIFMG nor as a contract as defined in Article 238 AktG. Decision-making and participation rights of the WK-AG's management board and supervisory board under the AktG or the articles of association shall not apply, where such rights are contradictory to the AIFM's rights and obligations associated with the orderly management of the VCF. The WK-AG's management board and supervisory board shall however monitor the AIFM with regard to the latter's orderly performance of its management activity. In the event that an AIFM has proven itself not to be suitable for the management of the VCF, because it has breached the associated obligations pursuant to this Federal Act or the applicable regulations in accordance with this federal act, and the management board has become aware of this, then the WK-AG's management board shall take the necessary action to terminate management by this AIFM pursuant to para. 5 and to appoint a suitable AIFM. The management board may not refer to its own lack of knowledge about the unsuitability of the AIFM due to such circumstances that it ought to have recognised due its monitoring duties.

(3) Where shares have entered circulation without the issue price of the share pursuant to Article 10 para. 1 second sentence having been received by the WK-AG, then the AIFM shall pay the shortfall amount to the WK-AG from its own assets.

(4) The AIFM shall be authorised to terminate the management of the VCF towards the WK-AG for an important reason, subject to the observance of a six-month notice period for termination. The fund rules may stipulate a longer notice period for termination. The AIFM shall inform the shareholder without delay about the termination by means of a durable medium. The AIFM shall notify the FMA about the termination without delay.

(5) The WK-AG shall be authorised to terminate the management of the VCF towards the AIFM even where no important reason prevails, subject to the observance of a three-month notice period for termination. The AIFM shall inform the shareholder without delay about the termination by means of a durable medium. The AIFM shall notify the FMA about the termination without delay.

(6) In the event of a termination pursuant to para. 4 or 5, the right to manage and right of disposal of the asset pool shall be transferred to the depositary, provided that the WK-AG has not appointed another AIFM and has not notified the FMA about this appointment.

(7) Where the right to manage and right of disposal of the asset pool has been transferred to the depositary, then the depositary shall liquidate the asset pool without delay and distribute the residue to the shareholders. The fourth to sixth sentences of Article 9 para. 3 AIFMG shall apply accordingly.

Fund rules

Article 16. (1) Fund rules are to be drawn up by the WK-AG for every VCF, which determine the legal relationship of the shareholders to the WK-AG and to the AIFM.

(2) The fund rules shall be required to at least contain the following information:

1. the lifespan;
2. the remuneration that the AIFM receives for the management of the VCF on an annual basis;
3. the remuneration that the depositary receives on an annual basis;
4. other costs to be borne by the VCF;
5. issuing of shares;
6. shareholders' rights;
7. ongoing information about the shareholders;
8. valuation rules for the invested assets;
9. unit classes pursuant to Article 10 para. 7 and their features;
10. investment guidelines;
11. rules on borrowing;
12. rules for liquidating the VCF;
13. termination of management;
14. transferring of management.

(3) The lifespan of the VCF pursuant to para. 2 no. 1 shall be stated as a clear and specific number in the fund rules. The fund rules may however authorise the management board to extend the lifespan of the VCF. Provided that the fund rules contain such an authorisation, then they shall also state the conditions for performing this authorisation. The total lifespan of the VCF shall not be allowed to exceed the maximum lifespan pursuant to Article 4 para. 1 no. 7.

(4) Every amendment to the fund rules shall be announced in at least one of the ways listed in Article 17 para. 7 second sentence nos. 1 to 3. In addition, the shareholders shall be informed about every amendment of the funds' rules by the AIFM by means of a durable medium.

Sub-pools of assets

Article 17. (1) The WK-AG may form sub-pools of assets. The formation of new sub-pools of assets by the management board requires the consent of the supervisory board, but not however the approval of the general meeting. For the purposes of Articles 5 to 8 sub-pools of assets shall be considered as separate VCFs. The same AIFM and the same depositary pursuant to Article 19 AIFMG shall be appointed for sub-pools of assets.

(2) The sub-pools of assets are separate from one another in terms of laws relating to assets and liabilities. With regard to the relationship of the shareholders towards one another, every sub-pool of assets will be treated as a separate asset pool. The rights of shareholders and creditors with regard to a sub-pool of assets, especially its formation, management, transfer and liquidation, shall be limited to the assets of this sub-pool of assets. Only the sub-pool of assets shall be liable for the liabilities incurred on the individual sub-pool of assets. This segregation in terms of laws relating to assets and liabilities shall also apply in the case of the insolvency of the WK-AG and the liquidation of a sub-pool of assets.

(3) If the WK-AG with sub-pools of assets is only active in legal communication for one or more sub-pools of assets, then it is obliged to disclose this and to refer to the segregation of sub-pools of assets under liability law.

(4) The costs for the formation of new sub-pools of assets shall only be allowed to be charged into the unit prices of the new sub-pools of assets. The value of the unit shall be calculated separately for every sub-pool of assets.

(5) Fund rules shall be drawn up for every sub-pool of assets. The fund rules must at least contain the information listed in Article 16 para 2. The AIFM shall notify the FMA about the formation of a sub-pool of assets. Proof of the conditions pursuant to Article 4 para. 1 nos. 1 to 3 and 6 to 8 being observed and the fund rules are to be attached to the notification. Every amendment to the fund rules shall be announced in at least one of the ways listed in Article 17 para. 7 second sentence nos. 1 to 3. In addition, the shareholders shall be informed about every amendment of the funds' rules by the AIFM by means of a durable medium.

(6) The FMA shall prohibit the distribution of shares of a sub-pools of assets, if in the formation of the sub-pool of assets the conditions pursuant to Article 4 para. 1 nos. 1 to 3 and 6 to 8 or the otherwise applicable conditions of the AIFMG are not observed, or where the fund rules of the sub-pool of assets do not meet the requirements pursuant to Article 16 para. 2. The procedure pursuant to Article 29 AIFMG shall apply as appropriate to the sub-pool of assets' notification to the FMA pursuant to para. 5 and the FMA's prohibition pursuant to para. 6.

(7) A resolution by the management board to liquidate as defined in Article 11 para. 4 will become effective six months after its announcement. The resolution on liquidation may be announced by the following means:

1. in at least one newspaper with nationwide circulation, or
2. by making it available to the shareholders in printed form free of charge from the AIFM's registered office, or
3. in electronic form on the AIFM's website.

In addition to the announcement of the resolution of liquidation pursuant to the second sentence of para. 7, the shareholders shall also be informed about the resolution on liquidation by the AIFM by means of a durable medium. In the event of liquidation, the rights of management and disposal over the sub-pool of assets shall be transferred to the depositary. The depositary shall liquidate the sub-pool of assets without delay and distributed to the respective shareholders. The fourth to sixth

sentences of Article 9 para. 3 AIFMG shall apply accordingly. The WK-AG shall notify the management board's resolution on liquidation to the FMA.

(8) The FMA may issue a Regulation containing more detailed provisions regarding the accounting representation, accounting and determination of the value of every sub-pool of assets.

(9) In the case of a WK-AG with sub-pools of assets the individual sub-pools of assets are to be stated separately in the annual report pursuant to Article 18, the annual financial statement and the management report. Furthermore, in the case of a WK-AG with sub-pools of assets, the statutory auditor's audit opinion may only be granted, when a positive audit opinion is granted for every individual sub-pool of assets.

Accounting

Article 18. (1) The AIFM shall draw up an annual report pursuant to Article 20 AIFMG for the VCF for each financial year.

(2) The FMA may define the format for the annual report by way of a Regulation, taking into account the requirements pursuant to Article 20 para. 2 AIFMG, the specificities of the VCF under funds law and company law, the generally accepted accounting principles under the UGB, and the interests of the shareholders. The FMA may also include information about the granting of credit pursuant to Article 7 in this Regulation and take into account the size, internal organisation as well as the size, nature, scope and complexity of the VCF in an appropriate manner when defining the templates for the annual report and the information about the granting of credit.

The AIFM's disposal rights

Article 19. (1) Only the AIFM is authorised to dispose of the assets that belong to a VCF that it manages and to exercise the rights arising from such assets. It shall observe the interests of the shareholders, apply the due diligence and care of a prudent and conscientious director as defined in Article 84 para. 1 AktG, and shall remain in compliance with the provisions of this Federal Act, the AIFMG and the fund rules.

(2) Mergers of VCFs shall be permissible. For such purposes one of the merger procedures pursuant to Article 3 para. 2 no. 15 InvFG 2011 that apply accordingly and with the proviso that VCFs shall take the place of UCITS and sub-pools of assets shall take the place of investment compartments. Mergers require a shareholder majority that comprises at least three quarters of the share capital of participating VCFs involved or three quarters of the shares of the share capital in the participating sub-pools of assets. The right is reserved for the fund rules to stipulate a bigger majority. Furthermore, mergers shall require the approval of the depositary or depositaries. The AIFM shall notify the FMA about a merger without delay.

Contingent liabilities

Article 20. (1) To secure or recover claims against shareholders, seizure may be conducted against the units of the VCF, but not however against the assets of the VCF.

(2) To secure or recover claims arising from liabilities that the AIFM has effectively justified for a VCF as defined in the provisions contained in this Federal Act, seizure may only be conducted against the assets of the VCF.

Supervision

Article 21. The FMA shall be responsible for supervision of WK-AGs and AIFMs with regard to the observance of this Federal Act. It shall be afforded the powers pursuant to Article 56 paras. 1 and 2 AIFMG. The FMA may cooperate with foreign authorities for the purposes of fulfilling the duties conferred upon it under this Federal Act. This cooperation in particular also includes the exchange of information with foreign authorities. Section 2 of Part 9 of the AIFMG shall apply to this cooperation.

Protection of Designations

Article 22. The designation “*Wagniskapital-Aktiengesellschaft*” or combinations of words containing this designation, or the abbreviation “WK-AG” shall only be allowed to be used in the company’s name, in business operations and in advertising materials by the WK-AG and the AIFM that have notified to the establishment of a VCF pursuant to Article 4 para. 2.

Penal provisions

Article 23. (1) Any person who breaches the due diligence and care of a prudent and conscientious director as defined in Article 84 para.1 of the Stock Corporation Act of 1965 (AktG 1965; *Aktiengesetz*), by

1. repeatedly impeding the AIFM from the fulfilment of its management obligations and thereby breaches the first sentence of Article 15 para. 2, or
2. significantly breaching their monitoring obligations pursuant to the fifth sentence of Article 15 para. 2 by failing to terminate management pursuant to Article 15 para. 5 by an AIFM that has proven itself to be unsuitable for managing the VCF, and to appoint a suitable AIFM,

commits an administrative offence and shall be punished by the FMA with a fine of up to EUR 100 000.

(2) Any person who,

1. breaches the requirement to notify about the establishment of a VCF pursuant to Article 4 para. 2, or
2. breaches Article 22, by breaching the protection of designations,

commits an administrative offence and shall be punished by the FMA with a fine of up to EUR 60 000.

(3) Fines imposed by the FMA pursuant to this Federal Act shall be passed on to the Federal Government.

References and Regulations

Article 24. (1) Where references to other Federal Acts are made in this Federal Act, they shall be applicable in their most recently amended versions, unless explicitly specified otherwise.

(2) Any regulation based on this Federal Act as amended may be issued from the day following publication of the Federal Act to be implemented; however, they may not take effect before the statutory provisions to be implemented have themselves taken effect.

Gender-neutral use of language

Article 25. Where expressions in this Federal Act relating to persons are given only in the masculine form, they shall refer equally to all genders. The respective gender-specific form shall be used when applied to specific persons.

Enforcement Clause

Article 26. The following shall be responsible for the enforcement of this Federal Act

1. the Federal Minister of Finance in coordination with the Federal Minister for Justice with regard to Articles 10 and 11;
2. the Federal Minister of Finance with regard to all other provisions.

Entry into force

Article 27. This Federal Act shall enter into force on the following day after publication.