

CHATHAM PARTNERS

**German Future Financing Act -
Facilitation of Investments in
Renewable Energy Plants**

Client Briefing

29 August 2023

The German Future Financing Act

On 12 April 2023, the German Federal Ministry of Finance (*Bundesministerium der Finanzen*; **BMF**) and the German Federal Ministry of Justice (*Bundesjustizministerium*; **BMJ**) published a draft law on securing the financing of future investments - the so-called *Future Financing Act* (*Zukunftsfinanzierungsgesetz*; **ZuFinG**) (*Ministerial Draft*). The goal of this act is to mobilise private capital for the politically envisaged investments in digitalisation and climate protection, thus strengthening the performance of the German capital market and increasing the attractiveness of Germany as a financial hub. Various legal changes are intended to simplify, and in some cases facilitate, private investments in digitalisation and renewable energies. *Inter alia*, the following amendments are envisaged:

- ▶ multiple voting shares will be implemented,
- ▶ electronic shares can be issued,
- ▶ the tax framework for employee share ownership will be improved.

Finally, the German Federal Government aims to establish the regulatory framework for mutual and special funds to allow them to enhance investments in installations for the generation, conversion, transport or storage of electricity, gas or heat from renewable resources (**RE Installations**). This aspect of the *ZuFinG* shall be discussed in this briefing in more detail.

After carrying out a consultation procedure, the German Federal Government made amendments to the Ministerial Draft, taking into account the numerous comments of involved interest groups, then adopted it on 16 August 2023 as a *Draft Bill* and introduced it into the parliamentary procedure on 18 August 2023.

Domestic real estate funds and special funds - clear legal framework / green light for investments in RE Plants?

The German Federal Government plans to simplify investments from

- ▶ real estate special funds (**Real Estate Funds**) and
- ▶ open-end special AIF with fixed investment conditions (**Special Funds**)

in RE Installations. Similarly,

- ▶ infrastructure special funds (**Infrastructure Fund**),

shall be granted additional latitude with regard to investments in RE Installations.

To this end, the German Investment Code (*Kapitalanlagegesetzbuch*; **KAGB**) shall be amended.

Real Estate Funds, Infrastructure Funds and Special Funds are regulated products. The capital management companies (*Kapitalverwaltungsgesellschaften*; **KVG**) as managers

of these funds are bound by the specifications and restrictions of the *KAGB*. In particular, they may only invest the resources of the funds under their management in assets that are permissible for the respective type of fund according to the relevant provisions of the *KAGB*. The scope of permissible investments for Special Funds is wider since they are solely designated for professional and semi-professional investors. However, also for these funds, sec. 284 para. 2 no. 2 *KAGB* defines an exhaustive catalogue of eligible assets.

Under current law, *KVG* for Real Estate Funds are only allowed to invest in RE Installations to a limited extent. As to Special Funds, the *KVG* must first interpret the legal framework, and this proves to be an obstacle, especially in the conception of new funds that shall invest in RE Installations. Infrastructure Funds are only permitted to invest indirectly in RE Installations via special purpose companies.

The *ZuFinG* aims to clarify and expand the regulatory framework for investments in RE Installations. The Draft Bill proposes significant improvements compared to the Ministerial Draft.

In the future, *KVG* will be allowed to acquire the following assets:

▶ for **Real Estate Funds**

- ▷ directly or indirectly (via a real estate company) properties that are undeveloped and
 - are intended and suitable for the immediate construction of RE Installations,
 - on which RE Installations are being constructed at the time of acquisition; or
 - on which RE Installations have already been constructed at the time of acquisition;
- ▷ RE Installations (according to the wording of the Draft Bill: also without ownership of the land on which the RE Installations have been constructed, i.e. stand-alone; the German Federal Government seems undecided whether it actually intends this – the grounds of the *ZuFinG* speak partly in favour of and partly against this);
- ▷ Electric charging stations (also stand-alone?);

▶ for **Infrastructure Funds**

- ▷ RE Installations (also directly and no longer only indirectly, via infrastructure project companies);

▶ for **Special Funds**

- ▷ RE Installations (also directly and no longer only indirectly, via infrastructure project companies).

At the same time, it should be clarified that RE Installations may also be operated, which is significant for the direct acquisition of such installations and for the corporate purpose of real estate companies and applies equally to Real Estate Funds and Infrastructure Funds.

The German Federal Government intends to limit investments for the account of *Real Estate Funds* in properties that are equipped or shall be equipped with RE Installations to 15% of the fund volume. The requirements for risk diversification, in particular the maximum of 15% of the fund volume in a single property, continue to apply.

For *Infrastructure Funds*, direct and indirect investments in RE Installations shall be limited to 80% of the fund volume (in consistent continuation of the already applicable limitation). The value of an individual RE Installation may not exceed 10% of the total value of the fund – as is already the case.

Changes to insurance supervisory and tax law in the wake?

If the legislative measures are to achieve their goal of facilitating investment by institutional investors in RE Installations, further changes will be required. On the one hand, the regulatory framework for pension funds and other investors not applying Solvency II should be adapted to the new investment law framework provided by the amendments to the *KAGB*. And the same applies to tax law, at least in the form of the administrative instructions on sec. 15 and 26 of the German Investment Tax Act.

Otherwise, the envisaged investment law overhaul may not align with the specifics of insurance supervision and/or tax law, potentially causing complications.

Opportunities

When the *ZuFinG* comes into effect (which is likely to happen soon), the *KVG* of Real Estate Funds and Special Funds will have access to promising novel investment prospects.

At the same time, the Ministerial Draft and the Draft Bill provide useful guidance for fund conception and management under current legislation. The grounds of law of both drafts offer clarifications on the interpretation of the existing law (while certain statements during the consultation process proved unhelpful, complicating matters for *KVG*).

Due to the regulatory framework, many RE Installations offer special features as an asset class that significantly reduce investment risks, e.g.:

- ▶ Operators of renewable electricity generation plants often receive support under the German Renewable Energies Act (*Erneuerbare-Energien-Gesetz*, *EEG Support*), which provides a reliable cash flow over a longer period of time.
- ▶ Even without *EEG Support*, plants for the generation of electricity from renewable energies offer a high degree of investment security because potential market risks are usually outsourced (e.g. by marketing via a direct marketer) or do not arise in the first place (e.g. by concluding so-called Corporate Power Purchase Agreements,

i.e. long-term bilateral contracts with large electricity consumers for the supply of electricity from renewable energies at fixed conditions).

- ▶ Operators of facilities for transporting electricity or gas are natural monopolies, can usually pass on their CAPEX and OPEX to the respective grid users and receive, *inter alia*, a fixed return on equity on their CAPEX.
- ▶ In addition to energy sales, some RE Installations provide supplementary business models. For instance, electricity storage can be used to maintain grid stability. Furthermore, guarantees of origin for electricity produced through renewable resources have become a commodity.

Next steps

It is to be expected that the legislative process will be carried out quickly. There is reason to hope that further questions will be clarified in the course of this process and that the *ZuFinG* will be passed by the end of the year.

We will be happy to keep you up to date on this!

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