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The International Comparative Legal Guide to:

Alternative Investment Funds 2018

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A practical cross-border insight into Alternative Investment Funds work

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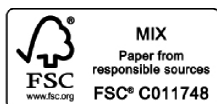
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Mozambique

Pedro Simões Coelho



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1 Regulatory Framework

1.1 What legislation governs the establishment and operation of Alternative Investment Funds?

Activity involving the management, investment and marketing of Alternative Investment Funds (AIFs) is mainly regulated by: the Undertakings for Collective Investment Law, enacted by Decree no. 54/99 of 8 September 1999 and amended by Decree no. 36/2005 of 29 August (the UCI Law), which sets out most of the rules relating to AIFs; Law no. 15/2009 of 1 November 1999, amended from time to time, which implemented the Credit and Financial Institutions Regime (Banking Law); Decree no. 56/2004 of 10 December 2004, as amended by Decree no. 31/2006 of 30 August, which implemented the Regulation on Credit and Financial Institutions (Banking Law); Decree-Law no. 4/2009 of 24 July 2009 (Mozambique Securities Market Code); and Ministerial Ordinance no. 10/99 of 24 February 1999 (Financial Intermediation Activities Regulation).

The Bank of Mozambique (BoM) is the relevant supervisory authority.

1.2 Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

Yes. Fund managers, as financial institutions, are subject to the BoM's supervision; accordingly, the relevant authorisation procedure shall be filed with the BoM.

The UCI Law does not foresee any *de minimis* exception or fast-track authorisation procedure, therefore all fund managers, regardless of the type of assets under management, will need to comply, in general terms, with the same requirements.

1.3 Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

Yes. The setting up of AIFs is subject to authorisation with the BoM, which is the competent regulator to conduct the supervision of AIF management activity and ancillary service providers as well as distribution and compliance with the general rules applying to AIFs, notably in connection with the protection of investors' interests.

1.4 Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity v hedge)) and, if so, how?

Yes. In general terms, the UCI Law distinguishes between AIFs investing in (i) securities or financial assets, and (ii) real estate (real estate investment funds). Both AIF types may be open or closed-ended.

In general terms, open-ended AIFs target the retail market and closed-ended AIFs target high-net-worth or professional investors; thus in open-ended AIFs, scrutiny by the BoM tends to be tighter.

1.5 What does the authorisation process involve and how long does the process typically take?

In a nutshell, the authorisation request for setting up AIFs is filed with the BoM and the relevant AIF's manager must provide the BoM with the relevant AIF's documentation, notably the regulation and a copy of the agreement to be executed between the fund manager and the depositary.

Furthermore, the BoM may request further information from the fund manager.

If applicable, authorisation should be given within 45 days of receipt of either the relevant documentation or any supplementary information or amendments to the documents required by the BoM. If at the end of such period the applicants have not been notified of the authorisation, this means it has been tacitly refused.

However, considering that BoM has discretion to request further information, which will halt the term for granting the authorisation and that a few AIFs are being constituted in Mozambique, the term for completing the process may vary significantly from case to case.

The marketing of the AIF's units shall start within 90 days of the granting of the relevant authorisation.

1.6 Are there local residence or other local qualification requirements?

No, there are not.

1.7 What service providers are required?

In Mozambique, an AIF is legally required to have a fund manager, a depositary, an auditor and, in the case of real estate AIFs, real estate appraisers.

It should be noted that the UCI Law does not expressly foresee the existence of an auditor and, in the case of real estate AIFs, real estate appraisers; however, the existence of such two entities in the case of real estate assets is fundamental in light of the fact that the AIF itself will need to be assessed and is subject to accounting control.

Furthermore, the AIF may also have, but is not legally compelled to have, distributors or entities that will market its units, although such entities are more common in open-ended AIFs.

1.8 What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?

In accordance with the Banking Law, the same rules established for national managers will apply to foreign managers.

However, the foreign managers will need to be properly authorised to conduct their activities in Mozambique and will need to have a local establishment.

1.9 What co-operation or information sharing agreements have been entered into with other governments or regulators?

We are not aware of any specific protocol or sharing agreement having been signed by the BoM with other governments or regulators in respect of the Alternative Investment Fund Managers Directive (AIFMD) or AIFs.

2 Fund Structures

2.1 What are the principal legal structures used for Alternative Investment Funds?

Under the UCI Law and subject to the licensing procedures described in question 1.5 above, an AIF may only adopt the contractual structure with no legal personality. This is the classic structure and requires that the AIF be managed by a separate fund manager. The investors' or unitholders' interests in such funds are called units (*unidades de participação*).

2.2 Please describe the limited liability of investors.

The assets of an AIF are only liable for its debts. Accordingly, the AIF will not bear liability for the debts of investors, fund managers, depositaries, distributors or other AIFs. Likewise, the investors are not personally liable for the debts of the AIF.

The statement of the preceding paragraph does not stem expressly from the UCI Law, but rather from general legal principles applicable to investment in AIFs.

2.3 What are the principal legal structures used for managers and advisers of Alternative Investment Funds?

An AIF needs to be managed, depending on its scope, by a:

- fund manager (financial institution), which may only manage AIFs investing in securities and other financial assets;
- real estate fund manager (financial institution), which may only manage AIFs investing in real estate funds; or
- commercial or investment bank, but only in the case of closed-ended AIFs.

2.4 Are there any limits on the manager's ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds?

The UCI Law is silent in respect of the fund manager's ability to limit redemptions in open-ended funds, but considering that such type of AIFs is, in general, targeted towards retail investors, the BoM will most certainly scrutinise this matter. In fact, such possibility would need to be clearly set out in the AIF's regulation, which is analysed throughout the authorisation procedure.

Moreover, the draft AIF regulation, approved by the UCI Law, includes a field where conditions set out for redemptions must be described, but only refers to applicable fees, settlement dates and the criteria for the determination of which units will be redeemed.

The fund manager may suspend the units' redemption, in the case of an abnormal situation that may impact the usual running of the market or jeopardise the interests of the unitholders, provided the BoM is immediately informed of said suspension.

As far as restriction of transfers in open-ended funds is concerned, the same rationale as described above in respect of redemptions is applicable.

Conversely, in the case of closed-ended AIFs – mainly those targeting professional investors – it should be considered that it is possible to establish, in the AIF's regulation, restrictions on the transfer of the units from investors to third parties.

2.5 Are there any legislative restrictions on transfers of investors' interests in Alternative Investment Funds?

No. However, it is important to bear in mind the limitations established on foreign investment, which place constraints on transfers abroad of profits or dividends obtained in Mozambique. Therefore, prior to an investment in a Mozambique AIF being performed, the thresholds and requirements to be met by such an investment shall be assessed, on a case-by-case basis, as well as the provisions applicable to the transfer abroad of the profits or dividends obtained pursuant to the redemption of the units/shares or liquidation of the AIF.

2.6 Are there any other limitations on a manager's ability to manage its funds (e.g. diversification requirements, asset stripping rules)?

The ability of the manager to manage its funds will be mainly limited by the investment policy established in the AIF's prospectus or regulation, as applicable, by the general investment limits by type of AIF, if any, established in the UCI Law and by the obligation to conduct its activity in the best interest of the investors.

The UCI Law has a list of acts that a manager cannot carry out, such as granting loans, execute certain transactions on its own account, execute transactions relating to the assets held by the AIF with related parties, e.g., entities of its group, the depositary, etc.

3 Marketing

3.1 What legislation governs the production and offering of marketing materials?

Please refer to question 1.1 above, as well as to the Consumer Law, approved by Law no. 22/2009 of 28 September 2009, and the Advertising Code, approved by Decree no. 65/2004 of 31 December 2004.

3.2 What are the key content requirements for marketing materials, whether due to legal requirements or customary practice?

There are no drafts available; neither does the UCI Law set out express provisions addressing marketing materials. However, providing information on the investment policy, markets targeted, main features (identification of the relevant entities, terms and conditions of the investment, links to the legal documents) and historic returns of the AIF is perceived as common practice for fund managers and other distribution entities.

Lastly, on a general note, the information contained in the marketing materials must comply with the following principles: legality; truthfulness; objectivity; adequacy; opportunity; and clarity.

3.3 Do the marketing or legal documents need to be registered with or approved by the local regulator?

Yes. AIFs' prospectuses, as well as their amendments, are subject to prior BoM authorisation.

Furthermore, all marketing actions in respect of an AIF shall inform the addressee of the existence of the prospectus and the place where it may be consulted.

3.4 What restrictions are there on marketing Alternative Investment Funds?

The concept of marketing or distribution of AIFs is not defined in the UCI Law. Nevertheless, it should be construed as comprising all activity directed towards investors with a view to promoting or proposing the subscription of the relevant AIF's units, regardless of the means of communication used.

Nonetheless, the general principles laid down in question 3.2 above in respect of marketing will be equally applicable to all marketing activities and materials.

Furthermore, attention is drawn to the fact that the reverse solicitation is not officially recognised or defined under Mozambican law and it is thus not an official exemption expressly foreseen in the applicable legal framework, but rather a tolerated practice. Such practice consists of an investor, on its own initiative and without having been engaged for such purpose by the distributor, requesting information on a specific AIF. However, a case-by-case assessment needs to be conducted, considering that the use of the reverse solicitation exemption may come under the BoM's scrutiny.

Lastly, the requirements and principles laid down in the Consumer Law and Advertising Code in respect of investors, which are deemed as consumers, shall also be observed.

3.5 Can Alternative Investment Funds be marketed to retail investors?

Yes, they can.

3.6 What qualification requirements must be carried out in relation to prospective investors?

There is no particular requirement to be fulfilled in relation to investors in AIFs. However, every marketing material must make reference to the existence of the AIF's prospectus and the place where it may be consulted by the investor.

Nonetheless, the fund manager shall ensure that the "know your customer" and investment adequacy analyses are properly carried out in relation to the investor, and that the procedures against money laundering and the financing of terrorism are closely respected.

3.7 Are there additional restrictions on marketing to public bodies such as government pension funds?

No, there are no additional restrictions.

3.8 Are there any restrictions on the use of intermediaries to assist in the fundraising process?

No. However, the relationship established between the intermediaries and the AIF shall be laid down in a written agreement and disclosed in the AIF's legal documents.

Furthermore, the intermediary, when carrying out the fundraising process, needs to act within the scope of activities that it is authorised to conduct; *i.e.* if the fundraising process corresponds to AIF marketing, the intermediary will need to be an authorised institution under the applicable legal terms in order to carry out the distribution of securities.

3.9 Are there any restrictions on the participation in Alternative Investment Funds by particular types of investors, such as financial institutions (whether as sponsors or investors)?

No. However, the holding of AIFs' units may have an impact on credit institutions' and financial institutions' own funds, which needs to be assessed on a case-by-case basis.

4 Investments

4.1 Are there any restrictions on the types of activities that can be performed by Alternative Investment Funds?

Yes. AIFs may only focus on investment activities and their investments must comply with the general rules applicable to financial instruments markets.

4.2 Are there any limitations on the types of investments that can be included in an Alternative Investment Fund's portfolio whether for diversification reasons or otherwise?

Yes. The assets eligible for the portfolio of an AIF will depend on its specific type.

In general terms, an AIF cannot hold in its portfolio: (i) units from a UCI managed by the same fund manager; (ii) assets encumbered with *in rem* security, liens or precautionary proceedings; (iii) securities issued or held by its fund manager; (iv) securities issued or held by entities that hold more than 10% of the fund manager share capital; (v) securities issued or held by entities 20% or more of whose share capital is held by the fund manager; (vi) securities issued or held by entities that are members of the management body of the fund manager; (vii) securities issued or held by entities 20% or more of whose share capital is held by members of the management body of the fund manager; (viii) securities issued or held by entities whose management bodies are comprised of one or more directors of the

fund manager; (ix) securities issued or held by entities, pursuant to a placement agreement, by the fund manager, depository or entities which hold 10% or more of the share capital of the fund manager, save for public subscription offers targeting securities envisaged to be admitted to trading in a stock exchange; and (x) real estate assets in co-ownership.

The prohibitions laid down in points (iv) to (viii) do not apply if the securities at stake are admitted to trading in the Mozambique stock exchange.

Moreover, in general terms, an AIF investing in securities or financial assets may have on its portfolio securities as defined in the Mozambique Securities Code, which comprise shares, bonds, participation titles in public funds, units and any other similar instruments, as well as instruments stemming from rights detached from the previous securities, provided that they are exchangeable in a secondary market.

An AIF investing in real estate may hold in its portfolio real estate assets registered in the Land Registry Office as pertaining to an investment fund, and holdings of 50% or more in companies listed in a stock exchange and whose scope consists in acquiring, selling, renting and exploring real estate assets.

4.3 Are there any restrictions on borrowing by the Alternative Investment Fund?

Fund managers may obtain loans on behalf of AIFs under their management, but the loan period cannot exceed 120 days, consecutive or not, within a period of one year and up to a maximum of 10% of the AIF's global value.

Moreover, the assets of the AIF can only be encumbered, in any way whatsoever, in order to obtain loans within the conditions referred to in the preceding paragraph.

5 Disclosure of Information

5.1 What public disclosure must the Alternative Investment Fund or its manager make?

AIFs' legal documents and their updates shall be made available to investors, in the premises of the fund manager, the depository and, if applicable, the distributor.

Considering that legal documents must describe the identity of the fund manager, depository, auditor, distributors and other AIF services providers, the majority of data in connection with the AIF will be made available to the public.

However, the identity of the investors in the AIF is not mandatorily subject to public disclosure.

5.2 What are the reporting requirements in relation to Alternative Investment Funds or their managers?

Fund managers must prepare annual accounts of the AIFs under management by 31 December of each year. In the following four months, the fund manager shall publish the balance sheets and profit and loss accounts.

The fund manager shall also prepare biannual accounts after the end of the relevant semester.

The annual and biannual accounts shall be made available to investors, as they become ready, in the premises of the fund manager, the depository and, if applicable, the distributor.

Additionally, with regard to such data, the fund manager shall publish a report containing the activities carried out during the last term, which shall comprise information on the units, transactions, portfolio evaluation and evolution, etc.

In the case that the marketing entity of the AIF is also a bank of which the investor is a client, it can provide the above information together with the investor's bank statement.

The fund manager shall publish in the Mozambique Stock Exchange's official journal, on a monthly basis with reference to the last day of the immediately preceding month, an inventory of the AIF's asset portfolio, its global net value and the number of units currently in circulation. The fund manager shall remit this information to the BoM within three days after its publication.

Lastly, the fund manager shall submit to the BoM its monthly trail balances, by the 15th day of the following month.

5.3 Is the use of side letters restricted?

The use of side letters that set out particular terms and conditions in respect of governance, investment, etc. of an AIF is not specifically addressed by the UCI Law.

However, in the case of open-ended AIFs, considering that they usually target retail investors and/or a broader unrestricted scope of investors, the use of side letters which alter any relevant provision of the legal documents shall be deemed illegal, considering that as a general principle fund managers need to abide by the AIF's legal documents during the provision of its activity.

In closed-ended AIFs, notably in AIFs targeting only professional investors, we trust that there is a wider margin to set out, namely through a side letter, specific provisions in respect of certain matters. However, in general terms, as the provisions of the UCI Law are imperative, any side letter providing for actions in breach of such legal provisions will be deemed illegal and may subject the fund manager to administrative offence proceedings.

6 Taxation

6.1 What is the tax treatment of the principal forms of Alternative Investment Funds identified in question 2.1?

Considering there is no special tax regime applicable to Collective Investment Vehicles, the general tax regime applies, under which Mozambican-resident entities are subject to corporate income tax at the rate of 32% (*Imposto sobre o Rendimento das Pessoas Coletivas – IRPC*) to be levied on taxable profits obtained on a worldwide basis (including income obtained abroad).

6.2 What is the tax treatment of the principal forms of investment manager / adviser identified in question 2.3?

There is no special tax treatment or rules applicable in Mozambique for investment managers or advisers. Therefore, as Mozambican-resident entities, they will also be subject to the general taxation regime referred to above (32% IRPC rate to be levied on taxable profits obtained on a worldwide basis).

6.3 Are there any establishment or transfer taxes levied in connection with an investor's participation in an Alternative Investment Fund or the transfer of the investor's interest?

No establishment or transfer taxes are applicable.

6.4 What is the tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors in Alternative Investment Funds?

For tax purposes, income deriving from a fund's units is qualified as investment income, while income deriving from the sale of said units is qualified as capital gains.

Resident investors

Personal Income Tax (*Imposto sobre o Rendimento das Pessoas Singulares – IRPS*): investment income earned by resident beneficiaries is subject to final withholding tax at a 20% rate.

The positive difference between capital gains and capital losses assessed by resident beneficiaries on the sale of fund units is included in the taxable income of the beneficiary and subject to taxation at progressive income rates (currently between 10% and 32%). Such balance may be partially exempt according to the fund units' holding period.

IRPC: investment income payments to a resident entity are subject to withholding tax at a rate of 20% (to be paid on account of the final CIT bill). Such income will subsequently be included in the entity's final IRPC tax result.

Capital gains earned on the sale of fund units are also included in the final IRPC tax result of the resident entity and are subject to IRPC at a 32% rate.

Non-resident investors

IRPS: investment income earned by non-resident beneficiaries is subject to a final withholding tax at the rate of 20%.

As a rule, capital gains taxation on the sale of fund units is similar to that which is set out above for resident individuals. Nevertheless, capital gains obtained by non-resident investors do not benefit from partial exemption according to the fund units' holding period and are fully taxed.

IRPC: investment income paid to a non-resident entity is subject to a 20% final withholding tax rate.

As a rule, capital gains taxation on the sale of fund units is similar to that which is set out above for resident corporate beneficiaries, with the exception that capital gains obtained by non-resident investors do not benefit from partial exemption according to the fund units' holding period and are fully taxed.

Pension funds

Pension funds established and operating according to the Mozambique laws are subject to a similar tax treatment to that mentioned above for resident investors under the IRPC.

Pension funds established and operating according to the laws of a foreign jurisdiction are subject to a similar tax treatment to that mentioned above for non-resident investors under the IRPC.

6.5 Is it necessary or advisable to obtain a tax ruling from the tax or regulatory authorities prior to establishing an Alternative Investment Fund?

Mozambique legislation provides for a tax ruling system in which tax authorities may provide a binding ruling by request. In this

respect, since there is no specific tax regime for investment funds, we would recommend that they request a tax ruling in order to obtain more regulatory and tax certainty. This results from the fact that, after the ruling is issued, the decision obtained by the taxpayer (which it may request previously to a potential transaction or the setting up of a fund) is binding on the tax authorities and could only be amended or changed by a court decision.

6.6 What steps have been or are being taken to implement the US Foreign Account and Tax Compliance Act 2010 (FATCA) and other similar information reporting regimes such as the Common Reporting Standard?

Mozambique has not entered into any treaty or adhered in any way to any mechanism in order to implement either FATCA or the Common Reporting Standard and, to the best of our knowledge, no initiative has been undertaken by the Mozambique authorities regarding this matter.

6.7 What steps are being taken to implement the OECD's Action Plan on Base Erosion and Profit-Shifting (BEPS), in particular Actions 6 and 7, insofar as they affect Alternative Investment Funds' operations?

Mozambique is not an OECD Member State and we are not aware of any initiative by the Mozambican tax authorities regarding this subject.

However, the OECD's Commissioners General and Heads of Delegations of the Revenue Authorities of Botswana, Lesotho, Mozambique, Namibia, South Africa, Swaziland and Zambia gathered in Pretoria, South Africa on 16 July 2015 in order to discuss BEPS, among other matters.

6.8 Are there any tax-advantaged asset classes or structures available? How widely are they deployed?

No, there are not.

6.9 Are there any other material tax issues for investors, managers, advisers or AIFs?

No, there are not.

6.10 Are there any meaningful tax changes anticipated in the coming 12 months?

No, there are not.

7 Reforms

7.1 What reforms (if any) are proposed?

The Mozambique capital markets framework has been subject to several updates in recent years. However, at the present date, the UCI Law remains in urgent need of a complete revamp in order to address its shortfalls and the increasing market needs, particularly as far as real estate AIFs are concerned.

Nonetheless, we are not aware of any legislative initiatives aimed at amending or updating the UCI Law currently in effect.

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Carlos Filipe Couto joined Vieira de Almeida & Associados in 2011. He is a senior associate in the Banking & Finance practice area, where he has worked on several key transactions, notably on securities issues, banking and insurance sectors. He advises several assets managers in regulatory and legal matters, such as the setting up of collective investment schemes, providing ongoing counsel to the respective fund managers, as well as in respect of sale and purchase transactions in connection with assets under management or their shareholdings. Moreover, he also provides advice to common representatives and trustees and has been actively involved in regulatory and contractual matters in connection with banking entities, aviation finance and cross-border factoring transactions. Lastly, he regularly assists insurance companies and intermediaries with regulatory matters, as well as with matters related to pension fund schemes and pension fund managers.



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