

International **Comparative** Legal Guides



Alternative Investment Funds **2020**

A practical cross-border insight into alternative investment funds work

Eighth Edition

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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 (*Regime Geral dos Organismos de Investimento Coletivo*), enacted by Law no. 16/2015 of 24 February 2015 (UCI Law), which implemented, in Portugal, Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS) (UCITS Directive), as amended from time to time, as well as Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD), which sets out most of the rules relating to AIFs, the CMVM Regulation no. 2/2015 on Undertakings for Collective Investment (Regulation no. 2/2015), which sets forth more specific rules regarding certain aspects of the UCI Law and the Portuguese Securities Code (*Código dos Valores Mobiliários* or PSC), enacted by Decree-Law no. 486/99 of 13 November 1999, as amended from time to time, which entered into force on 1 March 2000.

The Portuguese Securities and Exchange Commission (*Comissão do Mercado de Valores Mobiliários* or CMVM) is the competent regulatory body in relation to the aforementioned matters.

In addition, it should be noted that, in Portugal, the AIFMD has been partially implemented by Law No. 18/2015 of 4 March 2015, relating to venture capital, social entrepreneurship and specialised investment (the Venture Capital Law).

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

Yes. Fund managers are also subject to the CMVM's authorisation and supervision in what concerns the rules governing their management of AIFs' activity.

Therefore, the fund managers' authorisation procedure will be conducted before the CMVM.

The UCI Law did not implement, in Portugal, the *de minimis* exemption foreseen in the AIFMD. As a result, all fund managers, regardless of the asset under management, will need to comply, in general terms, with the same requirements.

Nonetheless, considering the type of AIFs the fund manager intends to manage, i.e. AIFs investing in securities or financial assets, non-financial assets or real estate, there will be some specific requirements to be met, notably as regards investment policies and contracts with service providers.

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 by the CMVM, which is the competent regulator to undertake the supervision of AIF managers, ancillary service providers, AIFs' distributors and compliance with the general rules applying to AIFs, notably those relating to 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 vs. hedge)) and, if so, how?

Yes. In general terms, the UCI Law distinguishes between AIFs investing (i) in securities or financial assets, such as undertakings for collective investment in transferable securities that do not comply with the UCITS Directive limits and are thus classified as AIFs which invest in securities, (ii) in real estate (real estate investment funds), and (iii) in long-term non-financial assets with a determinable value.

Furthermore, Regulation no. 2/2015 allows AIFs investing in securities to adopt the branding of AIF investing in bonds, shares, index tracker, money-market fund, etc., provided that its investment policy complies with certain criteria.

The AIFs described in points (i) and (ii) above may be open- or closed-ended, but the type referred to in point (iii) shall be closed-ended.

The UCI Law does not contain any specific provisions regarding private equity or hedge funds; thus in principle they will be encompassed by the regime of the AIFs investing in securities. Nevertheless, the Venture Capital Law contains a specific regime applicable to funds investing in equity instruments for a limited period of time, as well as in other structures, which, despite having similar features to the undertakings for the collective investment (UCI) framework, are perceived under Portuguese law as being an autonomous subject. That being said, the Venture Capital Law falls outside the relevant scope of this chapter.

In general terms, the open-ended AIFs are addressed to the retail market and the closed-ended AIFs target affluent or professional investors. As a result, the CMVM's scrutiny over open-ended AIFs tends to be tighter.

Furthermore, depending on the type of AIF at stake and whether it is open or closed-ended, different investing limits will apply, notably in respect of leverage and asset allocation.

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

In a nutshell, the authorisation for the setting up of an AIF must be filed with the CMVM. In requesting such authorisation, the relevant AIF's manager must provide the CMVM with the AIF's documentation, notably the Key Investor Information Document (KIID) and the full prospectus of the AIF (if applicable), which must also include the AIF's regulation.

In addition, the CMVM must also be given copies of the agreements to be executed between the management company and (i) the depository, (ii) the distributors or entities that will market the AIF, and (iii) any other entities that will render services to the AIF or the AIF manager.

Documents evidencing the acceptance of the rendering of the relevant services by all entities involved in the AIF's activities must also be provided to the CMVM.

An authorisation is given within 20 days (or three months, extendable for another three by decision of the CMVM, in the case of self-managed collective investment companies) of the receipt of either the fully documented application or of any supplementary information or amendments to the documents required by the CMVM. If at the end of such period the applicants have not yet been notified of the deferral of their application, the authorisation is considered to have been tacitly granted.

The CMVM may refuse the authorisation if the applicant does not submit the required documentation or if the AIF manager at stake engages in irregular management of other investment funds.

After the authorisation has been granted, an AIF will be fully set up from the moment the first subscription is settled or the from the moment the articles of association are registered with the Commercial Registry Office, depending on the AIF being set up, respectively, under the contractual form or as a company.

1.6 Are there local residence or other local qualification or substance requirements?

Considering that the vast majority of AIFs in Portugal have been set up under the contractual form with no legal personality, they ought to be managed by a separate fund manager.

The fund manager may be a Portuguese incorporated entity or an entity providing services on a cross-border basis under the AIFMD passport legal framework, either through the free provision of services or the freedom of establishment.

As regards Portuguese incorporated fund managers, they shall have a board of directors comprising at least two members.

Moreover, pursuant to Law no. 148/2015 of 9 September (Auditing Supervision Framework), the fund manager shall also have an audit board comprising at least three members (the majority of which need to be considered independent) plus a sole auditor.

The members of the board of directors and audit board of the fund manager need to be previously authorised by the CMVM, being subject to a thorough suitability assessment during such a procedure.

Furthermore, the fund manager shall have in place several internal policies aiming to address the risk of its activity, remuneration issues, outsourcing, internal control, evaluation of the assets pertaining to the AIFs under management, anti-money laundering, selection of the members of the boards of directors and audit board, all subject to the control of the CMVM and to a certain extent of the depository, and entailing permanent record-keeping by the fund manager.

1.7 What service providers are required?

An AIF is legally required in Portugal to have a fund manager (if it is not endowed with legal personality), a depository, an auditor and, in the case of real estate AIFs, real estate appraisal experts.

Furthermore, the AIF may also have, but is not legally compelled to have, distributors or entities that will market the AIF, which is standard practice in the case of 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?

The same rules established for national managers will apply, in addition to the harmonised rules for requesting a passport to carry out management of AIFs' activity in Portugal.

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

In accordance with the information currently available on the CMVM's website, the CMVM has signed memorandums of understanding with the competent regulators of other non-EU Member States, namely Abu Dhabi, Cabo Verde, Angola, Algeria, USA (SEC), Israel, China, Malaysia, Mozambique, etc.

2 Fund Structures

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

An AIF may take one of two forms or structures, both subject to the licensing procedures described in question 1.5 above:

- 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 participants' interests in these funds are called units (*unidades de participação*).
- Collective investment company endowed with legal personality (*sociedade de Investimento coletivo*). They may be self-managed or have appointed a third party as their manager, which must be a duly authorised investment fund manager. Participants in these collective investment companies will hold shares (*ações*).

In Portugal, besides one collective investment company endowed with legal personality that has been set up to date, all AIFs are usually set up under the contractual structure with no legal personality.

In an overall assessment of pros and cons of both structures, it should be taken into account that the contractual structure has a long track record in Portugal, being the preferred choice for setting up AIFs, as it offers an affordable, simple and well-known model for AIFs.

Conversely, the collective investment company endowed with legal personality and self-managed is clearly a more complex model that allows, however, greater control for the investors over the management of the AIF. Nonetheless, the lack of a decisive incentive to change the current *status quo* in respect of the way AIFs are usually set up in Portugal may be deemed as holding back a better use of the opportunities offered by this structure.

Recently, we have also been assisting in a market trend based on the transformation of non-AIF companies into collective investment companies endowed with legal personality, but

externally managed by a fund manager. This model does not differ significantly from a contractual structure, given that it needs to have a fund manager in place complying with the aforementioned requirements.

Lastly, real estate investment trusts (SIGIs) are not subject to the UCI Law nor do they need to be managed by a fund manager. Even though SIGIs are qualified as real estate collective investment companies endowed with legal personality, they are only subject to the SIGIs Framework, the Portuguese companies code and certain provisions of the PSC regarding publicly traded companies.

SIGIs' main activity is the acquisition of rights in real estate, leases or other forms of economic exploitation of real estate, the acquisition of holdings in companies with similar purposes and under equivalent requirements and the acquisition of units or shares in real estate AIFs, whose profit distribution policy is equal to the one provided for in the SIGIs Framework. The shares of SIGIs are traded on a regulated market or multilateral trading facility. In addition, SIGIs are subject to specific requirements regarding the dissemination of their share capital, asset allocation and profit distribution to investors.

2.2 Please describe the limited liability of investors in respect of different legal structures and fund types (e.g. PE funds and LPACs).

Legally, the asset of an AIF is only liable for its debts, thus it will not be liable for investors, the fund manager, depository, distributors or other AIFs' debts. Likewise, investors are not personally liable for the AIF's debts and will under no circumstances be burdened by any debt of the AIF.

Notwithstanding, in the case of closed-ended real estate AIFs, the UCI Law allows for the AIF's regulation to establish that, following a resolution of the investors' assembly, the investors in a privately subscribed real estate AIF will take over the debts of the AIF, provided that the creditors agree so and that it is ensured that the debts arising after the extinction of the AIF will be taken over by the fund manager.

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

The AIF, which is not self-managed, will need to be managed by a fund manager authorised to manage UCITS or AIFs, as applicable (*sociedade gestora de organismos de investimento coletivo*).

Considering that it is unusual for an AIF to be self-managed in Portugal, almost every AIF is managed by fund managers as described in the paragraph above.

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 ability of the fund manager to restrict redemptions in open-ended funds, but considering that such types of AIFs in general target retail investors, the CMVM will most certainly closely scrutinise this matter. In fact, such possibility would need to be clearly set out in the AIF's regulation, which is analysed during the authorisation procedure.

Moreover, the layout of the AIF regulation, approved by Regulation no. 2/2015, contains a field where the conditions set out for redemptions must be described, but only as regards the applicable fees, settlement dates and the criteria for the

determination of which units/shares will be redeemed. Likewise, Regulation no. 2/2015 only seems to foresee conditions under which redemptions may be suspended, but not restricted.

As regards the restriction of transfers in open-ended funds, the same rationale described above in respect of the redemption applies.

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

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

There are no legislative restrictions.

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, executing certain transactions on its own account, executing transactions relating to the assets held by the AIF with related parties, e.g., entities of its group, the depository, etc.

3 Marketing

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

Please refer to question 1.1 above. In addition, marketing materials are also subject to the general provisions regarding marketing of products to the public, such as the Marketing Code, etc.

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

Regulation no. 2/2015 provides minutes for the AIF's legal documents (KIID, prospectus and regulation).

On the contrary, there are no minutes available in respect of marketing materials. Nonetheless, it is common practice for the fund manager and other distribution entities to provide information on the investment policy, markets targeted, main features (identification of the relevant entities, ISIN Code, terms and conditions of the investment, links to the legal documents) and historic returns of the AIF.

Pursuant to Regulation no. 2/2015, if the marketing materials disclose return figures, they shall also contain, at least:

- The identification of the AIF and fund manager.
- The reference "the disclosed returns represent past data and do not guarantee future returns".
- The identification of the reference period for return figures indicated.
- Confirmation on whether or not the return figures disclosed already include the applicable taxation.

- Information on where and how the KIID and other legal documents may be obtained.
- In cases where the AIF's units/shares are admitted to trading on a regulated market, identification of the market at stake and if the values disclosed are calculated on the basis of the asset value or on the market value of the units/shares.
- The warning that investment in the AIF may lead to the loss of principal invested, in cases where the AIF does not guarantee payment of the principal invested.
- If the figures disclosed are annualised, but have a reference period greater than one year, the information disclosed shall also contain the reference according to which the reference return could only be obtained if the investment was performed during the entire period of reference.
- The risk level, with identical emphasis of the return figure, for an identical period of reference.

Lastly, as a general note, in accordance with the PSC, the information contained in the marketing materials shall be prepared in Portuguese or followed with a duly legalised translation, and must be complete, true, updated, clear, objective and licit.

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

Marketing materials in respect of AIFs do not need to be registered or authorised by the CMVM.

However, an AIF's legal documents, namely the KIID, the full prospectus of the AIF and/or the AIF's regulation, as well as any further amendment to them, need to be registered with the CMVM and publicly disclosed through the CMVM's website.

3.4 What restrictions are there on marketing Alternative Investment Funds?

The marketing or distribution (*comercialização*) of AIFs is very broad, being defined as the activity directed towards investors with a view to promoting or proposing the subscription of units/shares, regardless of the means of communication used.

The entities which are legally permitted to market AIFs are (i) AIF managers, (ii) depositaries, (iii) financial intermediaries registered or authorised by the CMVM to perform the relevant activities, namely those of placement or reception and transmission of orders on behalf of third parties, and (iv) other entities as foreseen in Regulation no. 2/2015 and subject to its authorisation.

Furthermore, the concept of reverse solicitation is not an official exemption from the UCI Law requirements, but rather a tolerated practice, which consists of an investor, on its own initiative and without any previous engagement on the part of the distributor, requesting information on the AIF at stake. However, a case-by-case assessment needs to be conducted, considering that the new AIFMD framework has induced a greater use of the reverse solicitation expedient, which may come under the CMVM's scrutiny.

Virtually every type of marketing falls into the category of distribution (*comercialização*), thus if such is not carried out by a duly licensed entity or under the reverse solicitation exemption, it will be in breach of the UCI Law.

A clear distinction must be drawn regarding pre-marketing. If such marketing is conducted in relation to a specific AIF with the intention of triggering a future solicitation by the addressee to receive more information and subscribe the AIF, it is rather likely that the CMVM will consider it to fall within the

concept of actual marketing. Conversely, if the pre-marketing has only a general nature, there are grounds to sustain that it does not constitute a marketing activity subject to the UCI Law requirements.

An AIF may only be marketed in Portugal after its constitution has been authorised by CMVM and, in any case, the marketing material may contradict or diminish the importance of the AIF's prospectus or regulation and KIID.

3.5 Is the concept of "pre-marketing" (or equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?

The concept of pre-marketing is not expressly recognised in the UCI Law and is generally viewed by CMVM as being encompassed in the concept of marketing itself (please refer to question 3.4 above).

Nevertheless, if the pre-marketing has only a general nature, i.e. it seeks to present to the investor the existence and activity carried out by the fund manager or an overall look at the market, without recommending or referring to any investment opportunity in particular, there are grounds to sustain that it does not constitute a marketing activity subject to the UCI Law requirements.

3.6 Can Alternative Investment Funds be marketed to retail investors?

Yes. However, AIFs passported under the AIFMD can only be marketed in Portugal to professional investors.

In order for the AIF to be marketed to retail investors in Portugal, the fund manager will need to obtain an authorisation of the CMVM, to be granted after the conclusion of a full registration procedure in Portugal of the AIF.

3.7 What qualification requirements must be met in relation to prospective investors?

There is no particular requirement to be fulfilled in relation to investors in AIFs.

Nonetheless, the fund manager shall ensure that the "know your customer and investment suitability analysis" is properly carried out in relation to the potential investor, as well as ensure that the anti-money laundering and terrorism financing procedures are respected.

We stress that in the case of AIFs exclusively targeting professional investors, the fund manager shall guarantee that the investors that do not meet such eligibility criteria cannot invest in the AIF.

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

There are no additional restrictions.

3.9 Are there any restrictions on the participation in Alternative Investments Funds by particular types of investors (whether as sponsors or investors)?

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

Regarding the Portuguese insurance and pension funds sectors, there are limits relating to the representation of technical provisions with interests in AIFs, as well as to the asset allocation of pension funds, which restricts the exposure to a single AIF or the investment in AIFs in excess of a certain percentage of the portfolio, which will vary in accordance with the entity at stake.

3.10 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 put 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 marketing of the AIF under the UCI Law, the analysis carried out in respect of question 3.4 above will be entirely applicable herein.

4 Investments

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

Yes. AIFs can only focus on investment activities and their management and investment shall comply with the general rules applicable to the financial instruments markets, notably those resulting from the implementation carried out in Portugal of the MiFID II by the PSC, with the due adaptations in accordance with their specific nature.

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 the AIF will depend on its specific type.

Therefore, AIFs investing in securities or financial assets, such as undertakings for collective investment in transferable securities that do not comply with the UCITS Directive limits, may also invest up to 10% of their net asset value (NAV) in units/shares of real estate AIFs. Moreover, the AIF's regulation shall set out the other relevant limits, otherwise the limits established in the UCITS Directive, as implemented by the UCI Law, shall apply.

Real estate investment funds shall invest the majority of their assets in real estate, but may also invest in shares of real estate investment companies (*sociedades imobiliárias*), derivatives, mainly for hedging purposes, units/shares of other real estate investment funds and liquidity instruments. The extent to which the investment in the referred assets is limited will depend on the fact of the AIF being closed-ended or open-ended, and privately or publicly subscribed. Either way, the real estate investment fund cannot invest in assets encumbered, with liens or charges that may render its future disposal more difficult, such as *in rem* security.

AIFs which invest in long-term non-financial assets with a determinable value need to hold at least 30% of their NAV in long-term non-financial assets with a determinable value and may invest up to 25% of their NAV in real estate, units/shares in real estate investment funds and shares in real estate investment companies.

4.3 Are there any local regulatory requirements which apply to investing in particular investments (e.g. derivatives or loans)?

As a matter of principle, the investment in derivatives by AIF is generally limited to risk management purposes, save for specific cases where they may be used of leveraging purposes and if that is specified in the AIF's constitutional documents.

Loans originating from AIFs are not allowed in general terms under Portuguese law. Nevertheless, a recent amendment to the Venture Capital Law created a new type of AIF, the loan originating fund, which may extend loans, subject to the limitations established in CMVM Regulation No. 3/2015, as amended; namely, it cannot extend credit to natural persons or credit institutions and the maturity of the loans shall not exceed the maturity of the AIF.

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

Yes. In respect of real estate AIFs, the borrowing limits are 25% of the asset for open-ended AIFs and 33% of the asset for closed-ended publicly and privately (by more than five investors, which are not exclusively qualified as professional investors) subscribed AIFs. Closed-ended AIFs which are privately subscribed by five or fewer retail investors or whose investors are exclusively qualified as professional investors are not subject to any borrowing limit.

As regards AIFs investing in securities or financial assets and AIFs investing in long-term non-financial assets with a determinable value, their regulations shall set out the limits for borrowing.

5 Disclosure of Information

5.1 What disclosure must the Alternative Investment Fund or its manager make to prospective investors, investors, regulators or other parties?

Besides the reporting obligations referred to in question 5.3 below, the elements which are made available to the public on the CMVM's website and the identity of the persons/companies holding qualifying shareholdings (10% or more) in the fund manager shall also be publicly disclosed.

Furthermore, the legal documents of the AIFs and their updates shall also be made available on the CMVM's website. Considering that the legal documents shall describe the identity of the fund manager, depository, auditor, distributors and other services providers to the AIF, the majority of the 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 Are there any requirements to provide details of participants (whether owners, controllers or investors) in Alternative Investment Funds or managers established in your jurisdiction (including details of investors) to any local regulator or record-keeping agency, for example for the purposes of a public (or non-public) register of beneficial owners?

The implementation in Portugal of the Fourth Anti-Money Laundering Directive set out a broad range of administrative measures to prevent and tackle breaches of the applicable AML/CFT framework. Within this context, the Ultimate Owner Central Registry (*Registo Central do Beneficiário Efetivo*) was created, in order to collect and centralise the data provided by entities subject to this framework.

AIFs and fund managers or any other entity established in Portugal or possessing a Portuguese tax payer number will need to provide information to the Registry, and keep it permanently updated, on their ultimate beneficial owners, which, depending on the specific case, may include details on the investors and their shareholders or controllers.

5.3 What are the reporting requirements to investors or regulators in relation to Alternative Investment Funds or their managers?

The fund manager must prepare and publish annual and biennial accounts. These must be made available free of charge at the investors' request.

The marketing entity must send or make available to the investors a statement informing them of:

- the number of units such investor holds; and
- their value and the aggregate value of the investment.

In addition to this information, the marketing entity may provide any additional information regarding the investor's financial situation. For example, if the marketing entity is a bank of which the investor is a client, it could provide the above information together with the investor's bank statement.

Any information published pursuant to the requirements set out below is available to investors, usually through the CMVM's information diffusion system (website).

Moreover, the fund manager must publish and send to the CMVM:

- The annual accounts within four months after the end of the financial year.
- The biennial accounts within two months after the end of the relevant semester.
- An inventory of the fund's asset portfolio, its global net value, any responsibilities not found in the balance sheet and the number of units currently in circulation, on a monthly basis.

The fund manager as a regulated entity shall also, in respect of its activities, prepare and submit its accounts and financial statements and internal control report to CMVM.

Lastly, the fund manager needs to provide CMVM with continuous regulatory reports on its activities and the funds under management, in accordance with CMVM's instructions.

5.4 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 the AIF is not specifically addressed by the UCI Law.

However, in the case of open-ended AIFs, considering that they tend to 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, the fund manager needs to abide by the AIF's legal documents during the provision of its activity and treat equally all investors.

In closed-ended AIFs, notably those which are privately subscribed or targeting only professional investors, we trust that there is a wider margin to set out, namely through a side letter, giving specific provisions in respect of certain matters. However, in general terms, the provisions of the UCI Law are imperative, therefore 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?

AIFs are subject to corporate income tax (CIT) at the general rate (currently set at 21%), but are exempt from municipal and state surcharges. Taxable income corresponds to the net profit assessed in accordance with an AIF's accounting standards.

However, passive income, such as investment income, rental income and capital gains (except when sourced in a tax haven) are disregarded for taxable profit assessment purposes. Costs incurred in connection with such income (including funding costs) are also disregarded for profit assessment purposes. The following are also disregarded for taxable profit assessment purposes: (i) non-deductible expenses under the CIT Code; and (ii) income and expenses relative to management fees and other commissions earned by AIFs.

An AIF's income is not subject to withholding tax. However, autonomous tax rates established in the CIT Code will apply.

AIFs that are exclusively investing in money market instruments and bank deposits will also be subject to stamp duty calculated on their global net asset value at a rate of 0.0025% (per quarter). Other AIFs will be subject to stamp duty to be levied on their global net asset value at a rate of 0.0125% (per quarter).

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

In the case of AIFs endowed with legal personality that are self-managed, the tax regime referred to in question 6.1 above applies.

On the contrary, in the case of AIFs managed by a third party, income obtained by such an AIF manager (including capital gains earned on the transfer of fund units) is subject to CIT at a rate of 21% to which a municipal surcharge of up to 1.5% may be applicable on taxable profits, depending on the municipality of where the AIF manager is established (the municipalities have the right to decide if the municipal surcharge is levied and at which rate).

Taxable profits are also subject to a progressive state surcharge which has the following applicable rates: (i) 3% on the part of the taxable profits exceeding €1.5 million up to €7.5 million; (ii) 5% on the part of the taxable profits exceeding €7.5 million up to €35 million; and (iii) 9% on the part of the taxable profits exceeding €35 million.

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?

Establishment taxes are not applicable in Portugal to the mere holding of a participation in an AIF. Please note in this regard that the acquisition of an AIF's units of a privately subscribed closed-ended real estate AIF, as well as operations of redemption, capital increase or reduction, which results in a single investor or two spouses holding more than 75% of the units representing the assets of such AIF, property transfer tax should apply proportionally at the applicable rate (up to 6.5%) to the taxable value or the total value of the assets, as the case may be, but in each case with preference to the evaluation report of the investment fund manager, if higher.

6.4 What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in Alternative Investment Funds?

(a) Resident investors

The taxation of resident investors is as follows:

Personal income tax (PIT): Income distributed or derived from redemptions to Portuguese individuals (outside their commercial activity) is subject to a 28% final withholding tax. If the investor opts to aggregate the income received, it will be subject to progressive income tax rates of up to 48%. In the latter circumstance, an additional income tax will be due on the part of the taxable income exceeding €80,000 as follows: (i) 2.5% on the part of the taxable income exceeding €80,000 up to €250,000; and (ii) 5% on any taxable income exceeding €250,000.

Income payments to omnibus accounts are subject to a final withholding tax rate of 35%, unless the relevant beneficial owner of the income is identified, in which case the tax rates applicable to the beneficial owner apply. Capital gains arising from the transfer of units are taxed at a special tax rate of 28% on the positive difference between capital gains and losses or the above progressive income tax rates and additional income tax rates, if the investor opts to aggregate the income received.

Corporate income tax (CIT): Income payments to a resident entity are subject to withholding tax at a rate of 25% (to be paid on account of the final CIT due) and are qualified as income or gains for CIT purposes. Income payments to omnibus accounts are subject to a final withholding tax rate of 35%, unless the relevant beneficial owner of the income is identified, in which case the standard tax rates applicable to the beneficial owner apply.

A resident entity is subject to CIT at a rate of 21% (if the taxpayer is a small or medium-sized enterprise as established in Decree-Law no. 372/2007 of 6 November 2007, the rate is 17% for taxable profits up to €25,000 and 21% for taxable profits in excess thereof). A resident entity may also be subject to a municipal surcharge (*derrama municipal*) of up to 1.5% on taxable profits, depending on the municipality where it is established (the municipalities have the right to decide if the municipal surcharge is levied and at what rate). Taxable profits are also subject to a progressive state surcharge (*derrama estadual*) which has the following applicable rates: (i) 3% on the part of the taxable profits exceeding €1.5 million up to €7.5 million; (ii) 5% on the part of the taxable profits exceeding €7.5 million up to €35 million; and (iii) 9% on the part of the taxable profits exceeding €35 million.

Capital gains earned on the transfer of fund units are fully included in the taxable income of the resident entity and are subject to the same rates and surcharges as above.

(b) Non-resident investors

Non-resident investors are taxed as follows:

PIT: Income payments and capital gains derived from units in a securities AIF are exempt from PIT provided that the evidence of non-resident status required by the tax law is timely delivered by the beneficiary of the income to the AIF. A refund procedure is available within a two-year period in cases where a 28% withholding tax was applied for failure to timely deliver the documentation. The refund procedure requires the certification of a special form by the competent authorities of the state of residence. Non-resident investors domiciled in a blacklisted jurisdiction listed in Ministerial Order 150/2004 of 13 February, as amended from time to time, are not able to benefit from income tax exemptions and, in addition, will be subject to an aggravated 35% withholding tax. Income payments to accounts opened in

the name of one or more account holders acting on behalf of one or more unidentified third parties are subject to a final withholding tax rate of 35%, unless the relevant beneficial owner of the income is identified, in which case the tax rates applicable to the beneficial owner apply.

Non-resident individuals who obtain income distributed by a real estate AIF or through the redemption of such AIF units shall become subject to withholding tax at the final rate of 10% provided the non-residence evidence in Portugal has been obtained in due time. Capital gains deriving from the sale of said units are taxed autonomously at a 10% rate.

If the exemptions or reduced withholding tax rates do not apply, the general rules and tax rates (28% or 35%, as the case may be) will apply.

CIT: A CIT exemption applies where income arising from the units of a securities AIF is distributed or made available to a non-resident entity without a permanent establishment in Portugal. Capital gains arising from the transfer of the said units are also exempt from CIT.

In order to benefit from such exemptions, adequate evidence of non-resident status must be timely provided.

Non-resident corporate investors who obtain income distributed by a real estate AIF or through the redemption of units on such AIF are subject to withholding tax at the final rate of 10%. Capital gains deriving from the sale of units in a real estate AIF are taxed autonomously at a rate of 10%.

However, non-resident investors cannot benefit from the exemptions or the reduced withholding tax rates, as the case may be, pursuant to the characteristics of the AIF, if: (i) the non-resident entity is domiciled in a blacklisted jurisdiction listed in Ministerial Order 150/2004 of 13 February, as amended from time to time; (ii) more than 25% of the capital of the non-resident entity is held, directly or indirectly, by resident legal entities except when such entities are resident (a) in a Member State of the EU other than Portugal or in a Member State of the European Economic Area provided, in this case, that such a State is bound to cooperate with Portugal under an administrative cooperation arrangement in tax matters similar to the exchange of tax information existing within the EU Member States, or (b) in a State with which Portugal has a double tax treaty in force or a tax information exchange agreement in force; or (iii) non-resident investors have not timely provided non-residence evidence in Portugal.

If the exemptions or reduced withholding tax rates do not apply, the general rules and tax rates (25% or 35%, as the case may be) will apply.

(c) Pension fund investors

Pension fund investors are taxed as follows:

1. Pension funds which are established and operate in accordance with Portuguese law are taxed as follows:
 - i. In the event of income deriving from AIFs distributions, pension funds are exempt from CIT and are exempt from withholding tax.
 - ii. In the event of income deriving from the redemption of the units or liquidation of the AIF, pension funds are subject to withholding CIT at a 25% rate, which will be refunded upon submission of the annual income tax return, since pension funds are exempt from CIT.
2. Pension funds which are established and operate in accordance with the law of a Member State of the EU other than Portugal or in a Member State of the European Economic Area are taxed as follows:
 - i. In the event of income distributed by real estate AIFs or through the redemption of the units or liquidation of such a real estate AIF, the pension funds are subject to withholding tax at a final rate of 10%.

- ii. In the event of income deriving from securities AIFs, including income deriving from distributions and from the redemption of the units or liquidation of the AIF, pension funds should be exempt from CIT. In order to benefit from such exemptions, adequate evidence of non-resident status must be timely provided.
 - iii. However, non-resident pension funds cannot benefit from the exemptions or the reduced withholding tax rates, as the case may be, pursuant to the characteristics of the AIF if: (i) the non-resident pension fund is domiciled in a blacklisted jurisdiction listed in Ministerial Order 150/2004 of 13 February, as amended from time to time; (ii) more than 25% of the capital of the non-resident pension fund is held, directly or indirectly, by resident legal entities except when such entities are resident in a Member State of the EU other than Portugal or in a Member State of the European Economic Area provided, in this case, that such a State is bound to cooperate with Portugal under an administrative cooperation arrangement in tax matters similar to the exchange of tax information existing within the EU Member States or in a State with which Portugal has a double tax treaty in force or a tax information exchange agreement in force; or (iii) non-resident pension funds have not timely provided non-residence evidence in Portugal.
 - iv. If the exemptions or reduced withholding tax rates do not apply, the general rules and tax rates (25% or 35%, as the case may be) will apply.
3. In addition, pension funds which are established and operate in accordance with the law of a Member State of the EU other than Portugal or in a Member State of the European Economic Area are exempt from CIT, provided, in this case, that such Member State is bound to cooperate with Portugal under an administrative cooperation arrangement in tax matters similar to the exchange of tax information existing within EU Member States which are also exempt from CIT, provided the following cumulative requirements are met:
 - i. the pension fund covers exclusively the payment of retirement benefits for old age or disability, for survival, for early retirement, post-employment healthcare benefits and, where they are supplementary to those benefits and are provided on an ancillary basis to the previously mentioned benefits, the attribution and death grants;
 - ii. the pension fund is managed by institutions for occupational retirement, as provided by Directive no. 2003/41/EC, of the European Parliament and of the Council, of 3 June;
 - iii. the pension fund is the ultimate beneficial owner of the income; and
 - iv. with respect to income distributions made by AIFs, the corresponding participation in the share capital is held, continuously, for at least one year.

In this case, however, it is not clear if the applicable exemption for CIT purposes at the level of the pension funds enables either (i) the operation of a withholding tax exemption upon payment of income from the AIF to the pension fund or, alternatively, (ii) the attribution to the pension funds the right to claim a refund of the CIT withheld. To the best of our knowledge, the tax authorities have not provided any public guidance in this respect up to this moment.

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?

Portuguese taxpayers may request advance rulings regarding specific tax situations. When advance rulings are issued, the tax authorities may not derogate from such rulings in relation to the taxpayers that requested it, except pursuant to court decisions.

Subject to the payment of a fee (it may range from €2,550 up to €25,500), an advance ruling may be provided urgently, provided that such request by the applicant is accompanied by a tax framework proposal, reasons raised for urgency and the amount to be determined by the tax authorities according to the complexity of the topic is paid.

If the tax authorities accept the urgency of the matter, the binding ruling will be issued within 75 days from the date of presentation of the request, and in the event that the tax authorities do not issue the ruling in such a time frame, it is considered that the tax treatment presented by the taxpayer is agreed to by the tax authorities. Non-urgent rulings are delivered within 150 days, although this deadline is merely indicative.

Unless the new law does not provide a clear answer on any particular topic that might be raised by an investor, it is not necessary to obtain a tax ruling from the tax or regulatory authorities prior to establishing an AIF.

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 OECD's Common Reporting Standard?

Portugal has implemented, through Law no.82-B/2014 of 31 December, the legal framework based on reciprocal exchange of information on financial accounts subject to disclosure in order to comply with FATCA. Portugal signed an Intergovernmental Agreement with the US on 6 August 2015, which has been in force since 10 August 2016 and, as such, Portuguese financial institutions (funds and fund managers) have implemented procedures to fully comply with the legal reporting and compliance rules.

In addition, the Common Reporting Standard (CRS) has also been enacted, through Decree-Law no. 64/2016, of 11 October 2016, as amended, which implemented the legal framework based on reciprocal exchange of information on financial accounts subject to disclosure in order to comply with CRS and, as such, Portuguese financial institutions (funds and fund managers) have implemented procedures to fully comply with the legal reporting and compliance rules.

6.7 What steps are being taken to implement the OECD's Action Plan on Base Erosion and Profit-Shifting (BEPS), in particular Actions 2 (hybrids) (for example ATAD I and II), 6 (prevention of treaty abuse) (for example, the MLI), and 7 (permanent establishments), insofar as they affect Alternative Investment Funds' operations?

There have been several amendments to the Portuguese legislation in connection with the recommendations of the Base Erosion and Profit-Shifting (BEPS) action plan, issued by the OECD.

Directive (EU) 2016/1164 of 12 July 2016 (ATAD I), amended by Directive (EU) 2017/952 of 29 May 2017 (ATAD II) was transposed into the domestic legislation through Law 32/2019,

of 3 May. This Law has established a broader scope of financial costs and a different concept of EBITDA (taxable income or loss not exempt, adjusted by the net financial expenses and by the depreciation and amortisation tax deductible). Law 32/2019, of 3 May, also introduced significant changes to the general anti-abuse clause and to its application procedure in order to facilitate the application of the general anti-abuse clause, ensuring a higher level of protection against abusive planning and fiscal avoidance schemes.

The rules regarding hybrid mismatches have not yet been transposed into the domestic legislation but it is expected to happen shortly.

Portugal is also a signatory of the Multilateral Convention for the implementation of measures related to tax treaties which was ratified by the Portuguese President and deposited with the Secretary General of the OECD on 28 February 2020. This Convention will enter into force in Portugal on 1 June 2020.

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

There are some types of investment funds that benefit from a tax-advantaged treatment, namely: (a) Real Estate Investment Funds on Forest Resources; (b) Residential Letting Real Estate Investment Funds; (c) Real Estate Investment Funds on Urban Rehabilitation; and (d) Venture Capital Funds.

(a) Real Estate Investment Funds in Forest Resources

Real Estate Investment Funds in Forest Resources (REIFFR) incorporated under the Portuguese law are exempt from CIT when at least 75% of its assets are allocated to exploitation of forest resources according to approved forest management plans, provided they are carried out accordingly to the applicable regulations and are subject to the legal forest certification proceedings.

Investors who obtain income distributed by a REIFFR are subject to withholding tax at the rate of 10% unless: (i) the investors are entities exempt from CIT on capital income; or (ii) the investors are non-resident entities with no permanent establishment in Portugal to which the income can be attributed and that do not reside in a blacklisted jurisdiction or that are not held in more than 25% by resident entities.

Individual investors subject to PIT who opt to aggregate the income received may deduct 50% of the distributed income which concerns to dividends, as a means of eliminating the economic double taxation.

Capital gains deriving from the transfer of units are taxed at a 10% rate if the investors do not benefit from the specific exemption applicable to capital gains obtained by non-residents (foreseen in Article 27 of the Portuguese Tax Benefits Code) or if they are individual investors who do not obtain this income under their professional activity and that do not opt to aggregate the income received.

Whenever the conditions above described regarding the composition of the fund's assets cease to be met, the investment fund and its investors shall be taxed according to the regime described in questions 6.1 and 6.4.

For contributions in kind made for the subscription of units made by resident or non-resident individuals, no income is assessed from the transfer of rural properties intended for forest exploitation, and the acquisition value of such properties is considered as the acquisition value of those contributions for tax purposes.

Also, the acquisitions by REIFFR of rural properties intended for forest exploitation or parcels of the ownership right relating to these rural properties are exempt from stamp duty.

(b) Residential Letting Real Estate Investment Funds

Residential Letting Real Estate Investment Funds (RLREIFs) incorporated between 1 January 2008 and 31 December 2015 are exempt from CIT, Property Transfer Tax and Stamp Duty levied on the transfer of the immovable property to the RLREIF when the previous owners become the tenants or when they opt to purchase the immovable property, in accordance with the lease contract.

Investors who obtain income deriving from these funds are exempt from CIT and PIT, except with regards to capital gains earned on the transfer of fund units.

These benefits shall apply if certain conditions are met, such as the RLREIF's portfolio being composed of a minimum of 75% of real estate located in Portugal and used for residential letting purposes.

Whenever the legally required conditions cease to be met, the investment fund and its investors shall be taxed according to the regime described in questions 6.1 and 6.4.

(c) Real Estate Investment Funds for Urban Rehabilitation

Real Estate Investment Funds for Urban Rehabilitation (REIFURs) incorporated between 1 January 2008 and 31 December 2013, of which 75% of their assets are immovable property subject to urban renewal and located in urban renewal areas, are exempt from CIT on income of any type. This exemption is only applicable if urban renewal interventions were initiated after 1 January 2008 and concluded up to 31 December 2020.

Income distributed by the REIFUR is subject to withholding tax at the rate of 10% unless: (i) the investors are entities exempt from CIT on capital income; or (ii) the investors are non-resident entities with no permanent establishment in Portugal to which the income can be attributed and that do not reside in a blacklisted jurisdiction or that are not held in more than 25% by resident entities. This withholding tax becomes final when the investors are non-resident and have no permanent establishment in Portugal or when they are individual investors who earn this capital gains irrespective of their professional activity and that do not opt to aggregate the income received.

Individual investors subject to PIT who opt to aggregate income received may deduct 50% of the distributed income corresponding to dividends, as a means of eliminating the economic double taxation.

Capital gains deriving from the transfer of units are taxed at a 10% tax rate if the investors do not benefit from the specific exemption applicable to capital gains realised by non-residents (foreseen in Article 27 of the Portuguese Tax Benefits Code) or if they are individual investors who do not obtain this income under their professional activity and that do not opt to aggregate the income received.

Whenever the conditions above described regarding the composition of the fund's assets cease to be met, the investment fund and its investors shall be taxed according to the regime described in questions 6.1 and 6.4.

(d) Venture Capital Funds

Venture Capital Funds constituted under the Portuguese law are exempt from CIT on any type of income.

Investors who obtain income deriving from the distribution of income by a venture capital investment fund or from the redemption of units on such funds are subject to withholding tax at the rate of 10% unless: (i) the investors are entities exempt from CIT on capital income; or (ii) the investors are non-resident entities with no permanent establishment in Portugal to which the income can be attributed. This exception does not comprise investors that reside in a blacklisted jurisdiction or that

are held in more than 25% by resident entities. This withholding tax becomes final when the investors are non-resident and have no permanent establishment in Portugal or when they are individual investors who earn this capital gains irrespective of their professional activity and that do not opt to aggregate the income received.

Capital gains deriving from the transfer of units are taxed at a 10% rate if the investors do not benefit from the specific exemption applicable to capital gains obtained by non-residents (foreseen in Article 27 of the Portuguese Tax Benefits Code) or if they are individual investors who do not obtain this income under their professional activity and that do not opt to aggregate the income received.

(e) Real Estate Investment Trust

Real Estate Investment Trusts are subject to the same tax regime as Real Estate Investment Funds and Real Estate Investment Trust investors are subject to the same tax regime as Real Estate Investment Fund investors.

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

If an exemption is not applicable, the acquisition of real estate by an AIF is subject to Property Transfer Tax (up to 6.5%) and stamp tax (0.8%) and each applicable tax rate will be levied either on the purchase price or the tax value of the property if higher.

6.10 Are there any meaningful tax changes anticipated in the coming 12 months other than as set out at question 6.6 above?

To the best of our knowledge, we are not aware at this stage of any proceedings or actions taken or proposed to be taken by the Portuguese Authorities that consist of meaningful tax changes in the coming 12 months.

7 Reforms

7.1 What reforms (if any) in the Alternative Investment Funds space are proposed?

It is expected that the UCI Law will be subject to further amendments, particularly regarding the enforcement and sanctioning powers of CMVM.

Moreover, more regulations should be issued by CMVM in order to update the current rules in force for AIFs and fund managers on matters, such as reporting obligations, continuing the trend of the beginning of 2020.

The COVID-19 pandemic has also impacted the local market with unforeseeable consequences as of this moment. Nevertheless, local operators are capable of applying contingency plans to face the crisis and CMVM is in permanent contact with them, paying attention to risk management and information reporting during this period.

In case of a no-deal Brexit, in 2019 Portugal published a Decree-Law establishing contingency measures for investment funds and fund managers. Nevertheless, since the Decree-Law will cease to produce effects on 31 December 2020 and that in the meantime it is applying the transition period provided under the Withdrawal Agreement, this matter will need legislative intervention in case no definitive agreement is reached between the EU and the UK before the referred date.



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