



ICLG

The International Comparative Legal Guide to:

Alternative Investment Funds 2016

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A practical cross-border insight into Alternative Investment Funds work

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1 Regulatory Framework

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

The 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, that entered into force on 1 March 2000.

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

Furthermore, AIFs' managers, as financial institutions, are also subject to the Bank of Portugal (*Banco de Portugal* or BoP) prudential supervision, notably in what concerns the applicable provisions of the Portuguese Banking Law, enacted by Decree-Law no. 298/92 of 31 December, as amended from time to time, and all complementary legal documents in connection therewith.

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 Bank of Portugal's supervision, notably in respect of prudential matters. Moreover, fund managers, as financial intermediaries, are also subject to the CMVM's supervision in what concerns most of the rules governing their management of AIFs activity.

Therefore, the fund managers' authorisation procedure will be conducted before the BoP and the CMVM at the same time, but the final authorisation will only be granted if both regulators agree that the candidate fulfils all legal requirements to manage AIFs.

The UCI Law did not implement into 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 in what concerns 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 with 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) 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) AIFs which invest in long-term non-financial assets with a determinable value.

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.

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, 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?

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 to 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 30 days in the case of self-managed collective investment companies) of the reception 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 refused.

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.

1.6 Are there local residence or other local qualification requirements?

Considering that the vast majority of the 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 financial institution 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.

However, it is important to bear in mind that the UCI Law only allows for an EU fund manager, passported under AIFMD, to manage a Portuguese AIF if such an AIF exclusively targets professional investors, in accordance with the MiFID definition.

As regards Portuguese incorporated fund managers, they shall have a board of directors comprising at least three members, one of them necessarily being an independent director (or non-executive director).

Moreover, pursuant to the recently enacted 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 BoP, 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, the BoP and to a certain extent 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 co-operation or information sharing agreements have been entered into with other governments or regulators?

In accordance with the information currently available at CMVM's website, CMVM has signed memorandums of understanding with the competent regulators of other non-EU Member States, namely with Albania, Australia, Bahamas, Bermuda, Brazil, the British Virgin Islands, Canada, Canada OSFI, the Cayman Islands, Dubai, the Former Yugoslav Republic of Macedonia, Guernsey, Hong Kong MA, Hong Kong SFC, India, the Isle of Man, Israel, Japan FSA, Japan MAFF, Japan METI, Jersey, South Korea (FSC & FSS), Labuan, Malaysia, the Maldives, Morocco, Mauritius, Mexico, Montenegro, Pakistan, Singapore, Republika Srpska, Switzerland, South Africa, Tanzania, Thailand, the United Arab Emirates, US CFTC, US SEC and Vietnam.

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*). Collective investment companies which mainly invest in securities are classified as SIMs (*sociedades de investimento mobiliários*), while those which mainly invest in real estate are classified as SIIs (*sociedades de investimento imobiliário*). Both SIMs and SIIs may be self-managed or have appointed a third party as its manager, which must be a duly authorised investment fund manager. Participants in these collective investment companies will hold shares (*ações*).

Lastly, please note that the AIFMD has been partially implemented in Portugal by Law no. 18/2015 of 4 March, relating to Venture Capital, Social Entrepreneurship and Specialised Investment (Venture Capital Law).

The Venture Capital Law contains a specific regime applicable to AIFs investing in equity instruments for a limited period of time as well as other structures, which in spite of sharing similar features with the UCI's framework, is perceived under Portuguese law as being an autonomous subject in relation to the UCIs. That being said, the present questionnaire does not take into account the Venture Capital Law as it falls outside the relevant scope.

In Portugal, besides one collective investment company endowed with legal personality that has been set up until the present 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 is clearly a more complex model that allows, however, a greater control of 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.

2.2 Please describe the limited liability of investors.

Legally, the asset of an AIF is only liable for its debts, thus it will not be liable for investors, 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 (financial institution) authorised to manage UCITS, AIFs investing in securities or financial assets and in non-financial assets, or real estate investment funds (*sociedade gestora de fundos de investimento mobiliário*);
- real estate fund manager (financial institution), which may only manage real estate funds (*sociedade gestora de fundos de investimento imobiliário*); or
- credit institution, provided that it has own funds in an amount no less than €7,500,000, the AIF is closed-ended, and that the overall asset of the AIFs under its management falls below (i) €100,000,000, if the portfolio includes assets acquired with resort to the leveraging effect, or (ii) €500,000,000, if the AIFs do not resort to leveraging.

Considering that it is unusual for an AIF to be self-managed in Portugal and due to the limitations falling upon credit institutions, almost every AIF is managed by fund managers (financial institutions) as described in the first two paragraphs 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 targets retail investors, 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 minute 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 in what concerns 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.

3 Marketing

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

Please refer to question 1.1 above.

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 include already 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 the investment on 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 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 and 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 CMVM's scrutiny.

Virtually, every type of marketing is caught on the concept 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, *i.e.* 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 we will not be facing a marketing activity subject to the UCI Law requirements.

3.5 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 with 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.

3.6 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.

Nonetheless, the fund manager shall ensure that the "know your customer and investment adequacy analysis" is properly carried out in relation to the 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.

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

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 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.

3.9 Are there any restrictions on the participation by financial institutions in Alternative Investments Funds (whether as sponsors or investors) arising from the 2008 financial crisis?

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.

4 Investments

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

Yes. The 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 the ones resulting from the implementation carried out in Portugal of the MiFID by the PSC.

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 its 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 may invest the majority of their asset 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 its NAV in long-term non-financial assets with a determinable value and may invest up to 25% of its NAV in real estate, units/shares in real estate investment funds and shares in real estate investment companies.

Lastly, we stress that loans originating from AIFs are not allowed in general terms under Portuguese law.

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

Yes. In respect of the 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 exclusively qualified as professional investors) subscribed AIFs. The closed-ended privately subscribed by five or less investors or whose investors are exclusively qualified as professional investors AIFs 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, but the UCI Law is silent in respect of borrowing limits.

5 Disclosure of Information

5.1 What public disclosure must the Alternative Investment Fund make?

Besides the reporting obligations referred to in question 5.2 below, which elements are made available to the public at CMVM's website, 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 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 What are the reporting requirements in relation to Alternative Investment Funds?

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 three 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.

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 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.

In closed-ended AIFs, notably in the privately subscribed or 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, the provisions of the UCI Law are imperative, therefore any side letter providing for actions in breach of such legal provisions will be deemed as 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?

Decree-Law no. 7/2015 of 13 January 2015 (DL 7/2015) has introduced a new UCI specific tax legal framework, which has been in since 1 July 2015.

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, investment income, rental income and capital gains (except when sourced in a tax haven) are disregarded for profit assessment purposes. Expenses related to such income (including funding costs) are also disregarded for profit assessment purposes. The following are also disregarded for 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.

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 assets at a rate of 0.0025% (per quarter). Other funds will be subject to stamp duty at a rate of 0.0125% (per quarter).

6.2 What is the tax treatment of the principal forms of investment manager/adviser?

In the case of AIFs endowed with legal personality which 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, the income obtained by such an AIF manager (including capital gains earned on the transfer of fund units) is subject to a 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 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% payable on the taxable profits from €1.5 million up to €7.5 million; (ii) 5% payable on the taxable profits from €7.5 million up to €35 million; and (iii) 7% payable on the part of the taxable profits which exceed €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 in the case of acquisition of AIF's units of a closed-ended real estate AIF privately subscribed, which result in the investor 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 tax treatment of (a) resident, and (b) non-resident investors 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. In addition, if the option of income aggregation is made, an additional surcharge rate will be due for the tax year of 2016 according to the taxpayer's taxable income, as follows: (i) for taxable income up to €7,070, the rate is 0%; (ii) for taxable income of €7,070 to €20,000, the rate is 1%; (iii) for taxable income of €20,000 to €40,000, the rate is 1.75%; (iv) for taxable income of €40,000 to €80,000, the rate is 3%; and (v) for taxable income above €80,000, the rate is 3.5%. However, from 1 January 2017 it is foreseen that the additional surcharge will no longer be applicable.

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 applies. 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, additional income tax rates and additional surcharge if the investor opts to aggregate the income received.

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 bill) and are qualified as profit 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 tax rates applicable to the beneficial owner applies.

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 €15,000 and 21% on profits in excess of this amount). 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% payable on the taxable profits from €1.5 million up to €7.5 million; (ii) 5% payable on the taxable profits from €7.5 million up to €35 million; and (iii) 7% payable on the part of the taxable profits that exceeds €35 million.

Capital gains earned on the transfer of fund units are 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 AIF are exempt from PIT provided that the evidence of non-residence status required by the tax law is delivered in due time. A refund procedure is available within a two-year period in cases where a 28% withholding tax was applied for failure to submit timely 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 will not benefit from income tax exemptions. In those cases, a 35% withholding tax will apply. Income payments to accounts opened in the name of one or more account holders acting on behalf of one or more unidentified third parties is 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 applies. This increased withholding tax rate also applies to payments to corporate entities subject to CIT.

Non-resident individuals who obtain income distributed by a real estate AIF or through the redemption of such AIF units/participations 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.

CIT. A CIT exemption applies where income arising from the units is distributed or made available to a non-resident entity without a permanent establishment in Portugal.

Capital gains arising from the transfer of units are also exempt from CIT. In order to benefit from such exemptions, an adequate evidence of non-residence status must be provided in due time. The above refund procedure is also available to non-resident corporate entities.

Non-resident corporate investors who obtain income distributed by a real estate AIF or through the redemption of such an AIF shall become subject to withholding tax at the final rate of 10%. Income payments and capital gains derived from units in AIF are exempt from CIT.

However, non-resident investors cannot benefit from the income 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; (ii) more than 25% of the capital of the non-resident company 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 European Economic Area Member State 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 whom Portugal has a double tax treaty in force or a tax information exchange agreement in force; or (iii) non-resident investors have not provided non-residence evidence in Portugal on due time.

If the exemptions or reduced withholding tax rates do not apply, the general rules and tax rates (25%, 28% or 35%, as the case may be) will apply.

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 between €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 90 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?

Portugal has recently 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 has signed the Intergovernmental Agreement with the US on 6 August 2015. However, the Intergovernmental Agreement (IGA) with the US is not yet in force FATCA IGA measures will be transposed into the Portuguese law and therefore further legislation is expected to be enacted to require reporting by Portuguese financial institutions. In any case, Portuguese financial institutions (Funds and Fund managers) are already implementing procedures to be able to duly comply with such future reporting and compliance rules.

6.7 Are there any other material tax issues?

The acquisition of real estate by any real estate AIF is subject to Property Transfer Tax (up to 6.5%) and stamp tax (0.8%) and each applicable tax rate will be due over the price or the tax patrimonial value of the property, if higher.

6.8 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?

There have been amendments into the Portuguese legislation in connection with the recommendations foreseen on the Base Erosion and Profit Shifting (BEPS) issued by OECD such as on the definition of interest deduction limits and on substance assessment requirements in order to be able to benefit from Parent Subsidiary Directive. However, 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 Portuguese Authorities regarding Action 6 and 7 of BEPS.

7 Reforms

7.1 What reforms (if any) are proposed?

Considering that the new UCI Law was enacted less than a year ago, no major amendment to the law is expected in the near future. However, the possibility of further one-off amendments to the UCI Law directly attributable to changes in the EU legislation in this respect cannot be set aside, particularly in what concerns the implementation of additional amendments to the AIFMD and UCITS Directive.

Moreover, the new UCI tax regime, which has entered into force and effect on 1 July 2015, and which aligned the taxation of investment funds in Portugal with the European standards, may be subject to future amendments, depending on the political options to be taken by the Portuguese government.



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- Regulation Funds – *The European Lawyer Reference Series*, 2011.
- Hedge Funds in Portugal – *The European Lawyer Reference Series*, 2011 (first edition) and 2014 (second edition).
- Investment funds in Portugal: Regulatory overview – *Practical Law Company Investment Funds Global Guide* 2012, 2013, 2014, 2015 and 2016 (a Thomson Reuters Legal Solution).
- *Fusão Transfronteiriça de Organismos de Investimento Coletivo em Valores Mobiliários* – *Funds People*, 2015.



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