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Portugal

ALTERNATIVE INVESTMENT FUNDS

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This country-specific Q&A provides an overview of alternative investment funds laws and regulations applicable in Portugal.

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ALTERNATIVE INVESTMENT FUNDS



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

Law no. 16/2015 of 24 February 2015 (“**Asset Management Law**”) transposed Directive 2009/65/EC on undertakings for collective investment in transferable securities (“**UCITS Directive**”) and Directive 2011/61/EU on Alternative Investment Fund Managers (“**AIFMD**”) into the Portuguese jurisdiction.

According to the Asset Management Law, alternative investment funds (“**AIFs**”) may take one of two legal structures: (i) contractual structure (i.e., investment funds with no legal personality) and (ii) corporate structure (investment companies with legal personality). The investors’ interests in investment funds are represented by “units” and in investment companies by “shares” (both “units” and “shares” are freely transferable securities).

Additionally, Law no. 18/2015 of 4 March 2015, which regulates venture capital, social entrepreneurship and specialised investment (“**Venture Capital Law**”) which establishes a regime applicable to funds investing in private companies for a certain period, also partially implemented the AIFMD. However, these AIFs, namely venture capital funds, social entrepreneurship funds and loan funds, and are only considered in this questionnaire where specifically relevant and expressly mentioned. The structures available for investment are also funds or companies.

2. Does a structure provide limited liability to the sponsor and/or manager vis-a-vis investors?

Yes. AIFs in the form of investment funds are set-up as segregated pools of assets and the investors are not

liable beyond their capital contributions to the fund. AIFs in the form of investment companies are incorporated as public limited liability companies in which shareholders’ liability is limited to the amount contributed to the company’s share capital. Sponsors (unitholders/shareholders) are also not personally liable for the AIF’s debts.

Additionally, and as a rule, the assets of an AIF are only liable for its own debts. Therefore, an AIF will not be liable for the investors’, the fund manager’s, the depository’s or the distributors of other AIFs’ debts.

Nevertheless, the internal regulations of closed-ended real estate AIFs may establish that the sponsors/investors may take over the debts of the AIF, provided that (i) this is subject to prior approval by the investors’ meeting, (ii) the creditors agree to such undertaking, and (iii) it is ensured that the debts arising after the extinction of the AIF will be taken over by the fund’s manager.

3. Is there a market preference and/or most preferred structure? Does it depend on asset class?

Historically, AIFs have been structured as funds. However, more recently, especially since 2015, there has been an increased market trend towards the registration of investment companies (SICAFIs) as real estate AIFs. This is often carried out by converting existing companies that hold real estate and that are externally managed by a licensed AIF manager (“AIFM”). It is highly unusual for an AIF to be self-managed in Portugal, although there are some self-managed AIFs already registered in Portugal.

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. The current regulatory regime established several subtypes of AIFs in accordance with their underlying investment policy, notably:

- i. Financial instruments AIF – Undertakings (open or closed-ended) the purpose of which is collective investment in transferable securities or other financial assets and which do not comply with the UCITS Directive limits;
- ii. Real estate AIF – Undertakings (open or closed-ended) the purpose of which is investment in real estate assets;
- iii. Non-financial assets AIF – Other closed-ended undertakings, the purpose of which is to invest in non-financial assets that are durable goods and have a measurable value;
- iv. Specialized AIF – Specialized alternative investment undertakings;
- v. Loan AIF – which are allowed to invest in performing loans to companies or granting credit and other specific assets;
- vi. Venture capital AIF – Venture capital investment undertakings; and
- vii. Social entrepreneurship AIF – Social entrepreneurship funds.

Certain AIFs may be open-ended, when there is a variable number of investment units/shares, or closed-ended, if there is a fixed number of investment units/shares. According to the Portuguese market practice, open-ended AIFs are typically targeted towards retail investors and closed-ended AIFs are preferably directed to professional investors (but the law allows that closed-ended AIFs may also accept retail investors, subject to certain restrictions).

The AIFs mentioned in points (i) to (iii) above may be structured as an open-ended or a closed-ended, whereas the AIFs referred to in points (iv) to (vii), which are regulated by the Venture Capital Law, must be closed-ended. Open or closed-ended AIFs are subject to different investing limits, in particular in respect of leverage and asset allocation.

Finally, the real estate investment companies (“**SIGIs**”), although do not qualify as an AIF and thus not regulated as a collective investment scheme, may accomplish similar objectives to Real Estate AIFs and subject to similar tax treatment, being regulated by a specific legal

regime (Decree Law 19/2019 of 28 January, as amended). SIGIs are subject to certain requirements, such as admission to trade of its shares on a trading platform and free-float, as well as specific investment restrictions (mainly focused on real estate for lease).

5. Are there any limits on the manager’s ability to restrict redemptions? What factors determine the degree of liquidity that a manager offers investor of an Alternative Investment Fund?

Redemptions per se are only possible in open-ended AIFs. Regulations of such AIFs may restrict redemptions by investors under certain circumstances. Moreover, the Asset Management Law provides that, in certain extraordinary circumstances (notably in cases of increased lack of liquidity) and taking into consideration the participants’ interests, redemptions may be suspended by the AIFM or by the competent authority (CMVM). For open-ended real estate AIFs certain legal restrictions are also mandatorily applicable to redemptions.

The AIFM may solely decide to suspend redemption if:

- the liquid resources have been exhausted, and the redemption requests for investment units exceed 10% of the AIF’s NAV within a period not exceeding five days; or
- the depositary agrees with such suspension and there are other extraordinary circumstances affecting the AIF’s performance.

The AIFM must immediately notify CMVM upon deciding to suspend redemptions, detailing the extraordinary circumstances behind the decision, how the participants’ interest is hindered and the expected duration for the envisaged suspension.

6. What are potential tools that a manager may use to manage illiquidity risks regarding the portfolio of its Alternative Investment Fund?

The Alternative Investment Fund Managers (“**AIFMs**”) must establish liquidity management mechanisms and adopt procedures which enable them to monitor the liquidity risk of the AIF, notably by conducting stress tests and taking measures to ensure alignment of investment strategy, liquidity profile and redemption policy.

Additionally, AIF's regulations may include specific rules for redemptions, notably certain conditions for suspension, without prejudice of the general powers set out under the law that may allow the suspension of redemption in certain extraordinary circumstances.

7. Are there any restrictions on transfers of investors' interests?

There are no legal restrictions, however the AIF's regulation may provide for specific requirements or restrictions on transfer, such as pre-emption rights or authorisations.

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

The AIF manager is subject to the rules and limitations set out under the investment policy established in the AIF's prospectus or regulation (as applicable), as well to the legal investment limits applicable to each type of AIF, in particular in terms type of assets they can invest in, rights and liens on those assets, etc.

Moreover, certain types of AIFs are subject to additional mandatory minimum diversification rules (e.g.: for open-ended or real estate AIFs that accept retail investors, more demanding diversification rules apply, and credit AIFs are subject to diversification rules regarding the amount invested in a specific group of companies).

In addition, under the Asset Management Law, AIFM shall not carry out activities in connection with the management of its funds, notably granting loans and executing transactions relating to the assets held by the related parties of the AIFs (e.g., the depository).

9. 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? Does the tax treatment of the target investment dictate the structure of the Alternative Investment Fund?

(a) Resident investors

Resident individuals are subject to 28% final withholding Personal Income Tax ('PIT') rate on income deriving from securities or real estate AIFs (with option of aggregation with other income, which is subject to progressive rates up to 48% plus solidarity surtaxes).

Capital gains arising from the sale of units are subject to a flat 28% PIT rate over the positive balance between capital gains and capital losses accrued in a certain tax period (no withholding tax applies on capital gains and self-assessment by the taxpayer is required). The above-mentioned rates are reduced to a flat 10% PIT rate whenever the investment is made in private equity funds (a 50% exemption applies on income from distributions if the investor opts for aggregation with other income).

Resident legal entities are subject to a 25% withholding Corporate Income Tax ('CIT') rate on income payments made by securities or real estate AIFs or 10% withholding CIT rate on income payments made by private equity funds (in both cases, on account of the final CIT due). CIT is due in Portugal at the standard 21% rate applicable over the yearly taxable profit of the taxpayer (plus municipal and state surtaxes, if applicable). Capital gains or capital losses will be included in the entities' yearly taxable profits and will therefore be subject to CIT at the above-mentioned rates.

In either case, payments by AIFs and private equity funds to resident investors will be subject to a 35% withholding tax rate if made to omnibus accounts, unless the relevant beneficial owner of the income is disclosed.

(b) Non-resident investors

The tax framework applicable to non-resident investors varies according to the target investments of the AIFs, as follows.

Investment in securities AIFs

Non-resident investors are generally exempt from PIT and CIT on income and capital gains deriving from securities AIFs.

However, non-resident individuals will not be entitled to the above-mentioned PIT exemption if they are resident or domiciled in a blacklisted jurisdiction, as approved by Ministerial Order 150/2004, of 13 February. In such case, a 35% withholding tax rate will apply on income distributions and capital gains will be subject to a flat 28% PIT rate in Portugal.

Non-resident legal entities will also not benefit from any exemptions if: (i) they are resident or domiciled in a blacklisted jurisdiction, as approved by Ministerial Order 150/2004, of 13 February; or (ii) more than 25% of the share capital of the non-resident investor is held, directly or indirectly, by taxpayers (individuals or legal entities) resident in Portugal, except if the non-resident investor is resident in: (a) a Member State of the European Union ('EU') or in a Member State of the European Economic

Area which is bound by a tax administrative cooperation agreement with Portugal, or (b) in a State with which Portugal has a Convention for the Avoidance of Double Taxation or a tax exchange of information agreement. In such cases, a 35% withholding tax rate will apply on income distributions and capital gains will be subject to a flat 25% CIT rate in Portugal.

Furthermore, payments by securities AIFs to non-resident investors will be subject to a 35% withholding tax rate if made to omnibus accounts, unless the relevant beneficial owner of the income is disclosed.

Investment in real estate AIFs

Income distributions by real estate AIFs to non-resident investors (individuals and legal entities) are subject to a final 10% withholding tax rate. Capital gains arising from the transfer of units of real estate AIFs are also subject to a flat 10% rate.

The application of such reduced rates is, however, withdrawn if: (i) the non-resident investors are resident or domiciled in a blacklisted jurisdiction, as approved by Ministerial Order 150/2004, of 13 February; or (ii) in the case of non-resident legal entities, more than 25% of its share capital is held, directly or indirectly, by taxpayers (individuals or legal entities) resident in Portugal, except if the non-resident investor is resident in: (a) a Member State of the EU or in a Member State of the European Economic Area which is bound by a tax administrative cooperation agreement with Portugal, or (b) in a State with which Portugal has a Convention for the Avoidance of Double Taxation or a tax exchange of information agreement.

Investments in private equity funds

Non-resident individual investors are subject to 10% PIT withholding tax rate on income distributions, as well as a flat 10% PIT rate on any capital gains derived from the transfer of participation units in the private equity fund.

Income distributions to non-resident legal entities are exempt from withholding tax, unless: (i) investors are resident or domiciled in a blacklisted jurisdiction, as approved by Ministerial Order 150/2004, of 13 February; or (ii) more than 25% of the share capital of the non-resident investor is held, directly or indirectly, by legal entities resident in Portugal. In such cases, a 10% withholding tax would apply.

Capital gains derived by non-resident legal entities without a permanent establishment in Portugal from the transfer of units in private equity funds are CIT exempt. However, a 10% CIT rate will apply if: (i) investors are resident or domiciled in a blacklisted jurisdiction, as

approved by Ministerial Order 150/2004, of 13 February; or (ii) investors are owned, directly or indirectly, in more than 25% by a Portuguese resident legal entity (carve-outs may apply); or (iii) the gains derived relate to units of a private equity fund whose underlying assets consist in more than 50% of Portuguese-situs immovable property.

(c) Pension fund investors

Pension funds established in Portugal are generally exempt from CIT, including regarding income deriving from AIFs.

Pension funds established in an EU Member State or in a Member State of the European Economic Area (which is bound by a tax administrative cooperation agreement with Portugal) are exempt from CIT on income and capital gains deriving from securities AIFs. However, if the investment is made in real estate AIFs, income distributed is subject to a final 10% withholding tax rate and capital gains on the transfer of units is subject to a flat 10% CIT rate.

Notwithstanding the above, Pension funds established in an EU Member State or in a Member State of the European Economic Area benefit from a CIT exemption in Portugal (regardless of investing in securities or real estate AIFs) if such funds: (i) exclusively grant the payment of retirement benefits for old age or disability, survival, anticipated retirement, post-employment health benefits and complementary death benefits; (ii) is managed by institutions for occupational retirement to which Directive 2003/41/EC is applicable; (iii) is the beneficial owner of such payments; and (iv) the units in the AIFs are held for at least one year. Due to the lack of administrative guidance on this matter, it is unclear whether the taxpayer should apply for the exemption or should claim the withholding tax refund at a later stage.

The CIT exemptions and reduced rates outlined above are not applicable if: (i) the non-resident pension fund is resident or domiciled in a blacklisted jurisdiction, as approved by Ministerial Order 150/2004, of 13 February; or (ii) more than 25% of the pension fund's capital is held, directly or indirectly, by taxpayers (individuals or legal entities) resident in Portugal, except if the non-resident investor is resident in: (a) a Member State of the EU or in a Member State of the European Economic Area which is bound by a tax administrative cooperation agreement with Portugal, or (b) in a State with which Portugal has a Convention for the Avoidance of Double Taxation or a tax exchange of information agreement. 1.10 What rights do investors typically have with respect to the management or operations of the Alternative Investment Fund?

The management entity is an independent entity that shall carry out its functions and duties in pursuit exclusively of the investors' interest and therefore the management entity is not subject to the orders or instructions of investors regarding investment decisions.

In the case of closed-ended AIFs, there is a General Meeting of Investors that has powers to decide on several essential matters, such as capital increase or decrease, replacement of the management company (with the approval of the CMVM), material amendments to the investment policy, review of the management company's fees, etc.

It is also common practice for the investors of closed-ended AIFs to establish advisory/investment committees, which are included in the AIF legal documentation, which may grant (non-binding) opinions on investment matters and other aspects concerning the AIF's management and usually the members are core investors of the AIF.

10. What rights do investors typically have with respect to the management or operations of the Alternative Investment Fund?

N/A

11. Where customization of Alternative Investment Funds is required by investors, what types of legal structures are most commonly used?

N/A

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

Yes. AIFMs with registered office located in Portugal must be authorised by the CMVM. All AIFMs are subject to similar authorization requirements (regardless of the portfolio of assets under management), but managers under the Venture Capital Law that only manage AIFs below certain thresholds are subject to a simplified regime. In this regard, we note a new Asset Management Law, that is expected to be approved and in force by year end or early 2023, will introduce small AIFs in Portugal.

Regarding the AIF advisers located in Portugal, they may also be authorised as financial intermediaries by CMVM

(in the case of investment firms) or the Bank of Portugal (in the case of credit institutions) notably to provide investment advice as contemplated in MiFID II, relating to investment in financial instruments.

For the requirements applicable to EU and third country AIFMs and AIF advisers, please refer to 18 below.

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

Yes. AIFs are highly regulated structures, being mainly supervised by CMVM and mostly regulated by (i) the Asset Management Law; (ii) the Venture Capital Law; and (iii) CMVM Regulations 2/2015 and 3/2015. We note that the preliminary draft of the new Asset Management Law aggregates the regulation of all AIFs and AIFMs, including venture capital.

The incorporation of a Portuguese AIF is subject to the prior authorisation or registration by the CMVM, following the filing of an application by its AIFM, together with (i) drafts of the AIF's regulation and any other incorporation documents, (ii) draft agreements to be entered into with the depository, placement agents and any other service providers, (iii) any other applicable documentation as set out in Asset Management Law.

14. Does the Alternative Investment Fund require a manager or advisor to be domiciled in the same jurisdiction as the Alternative Investment Fund itself?

N/A

15. Are there local residence or other local qualification or substance requirements?

Other than self-managed AIFs, other AIFs will require an AIFM to carry out the management of the relevant AIF's assets pursuant to its underlying investment policy and AIF's regulations.

Therefore, the following mandatory elements must be provided in order to CMVM to authorise the setting-up of a AIF in Portugal:

- i. Authorisation form duly completed;
- ii. Draft of AIF's regulation;
- iii. Draft of Prospectus (if applicable, only in open-ended AIFs);

- iv. Draft of KIID or Informative Memorandum directed to professional investors (as being relevant in the context);
- v. Evidence of acceptance of functions by the mandatory service providers (depository, auditor and, if applicable, real estate appraisers)
- vi. Draft of the agreements entered into with any service providers.

As regards Portuguese AIFMs, they must have a board of directors composed of at least two directors. Also, the AIFM may have a statutory board and a statutory auditor or just a sole auditor. In respect of credit AIFs (loan funds), pursuant to CMVM Regulation no. 3/2015, at least one of the board members must have experience on lending and credit risk assessment.

The terms and conditions that regulate the management of the fund are essentially laid out in the AIF's internal regulations that are supplemented by the Asset Management Law and Venture Capital Law, as applicable. The AIF's regulation must contain the elements identifying the investment fund, the management company, the depository and any subcontractors if applicable. In addition, these rules shall also set out the specific activities to be carried out by each party as well as the rights and duties of the investors, of the management entity, of the depository and the conditions for replacement of these entities, the investment policy in place and the conditions for its liquidation.

On the marketing of AIFs, CMVM may require the production of a KIID.

Finally, the AIFM must implement certain internal policies which are subject to the control of the CMVM and are aimed at addressing the risks of its activity, notably:

- remuneration;
- outsourcing;
- internal control;
- valuation of assets belonging to the AIFs under management;
- anti-money laundering; and
- election of the corporate member and key function members.

16. What service providers are required?

Under the Asset Management Law, an AIF must be managed by an AIFM (unless in the case of AIFs in corporate form which can be self-managed). In addition, it must also have a depository, an auditor and, in the

case of real estate AIFs, real estate appraisal experts.

Beyond the AIFM responsible for the management of the AIF, the following entities may also market AIFs:

- Other AIFMs;
- Depositories; and
- Financial intermediaries registered with the CMVM for the purpose of placement of public offerings or the reception and transmission of orders on behalf of third parties (including, notably, EU entities which have passported the provision of these services into Portugal).

The marketing entities are liable to the participants for any damage caused in the course of their business.

Regardless of the type of service provider identified above, its relationship with the management company is governed by a written contract which shall include the services to be provided, the procedures to be adopted and information and confidentiality requirements.

17. Are local resident directors / trustees required?

From a legal standpoint, there is no rule establishing that AIFMs and self-managed AIFs must have local resident directors.

However, under Asset Management Law, the directors must be suitable and have the required experience for performing their duties, being such suitability assessed by CMVM. Thus, the directors must be fully available to take up their position (e.g. they must have time availability). Hence, although there is no express guidance in this regard, Portuguese AIFMs have usually a majority of their board members as residents in order to ensure an effective management of the AIFs.

From a tax perspective, having non-resident directors/trustees may give rise to a risk that the AIFM and self-managed AIFs is deemed effectively managed in the country of residence of those directors/trustees, thus potentially creating a case of dual tax residence.

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

AIFMs

AIFMs with registered office in Portugal and third-country AIFMs must be authorised by CMVM. While AIFMs with

registered office in another EU Member State or third-country AIFMs authorised to carry out management activities in another EU Member State may manage AIFs in Portugal without a licence from CMVM through the EU frameworks of freedom of establishment or freedom of services (under the AIFMD), subject to the extension of the relevant home state authorisation.

AIF Advisers

Similarly, AIF advisers with registered office in Portugal and third-country AIFMs must also be authorised by CMVM (in the case of investment firms) or the Bank of Portugal (in the case of credit institutions) to provide investment advice. AIF advisers with registered office in another EU Member State or third-country AIF advisers authorised to provide investment advice or generic advice in another EU Member State may advise AIFs in Portugal without a licence from CMVM or Bank of Portugal, provided that they have (i) passported such services into Portugal or (ii) established a branch in Portugal.

In addition to authorisation or passporting rules, when providing their services to clients or investors resident in Portugal these foreign managers and advisers will be subject to applicable Portuguese laws and regulations.

19. What are common enforcement risks that managers face with respect to the management of their Alternative Investment Funds?

Any breach of regulatory requirements may be sanctioned by the CMVM, which has the power to sanction AIFMs for any breach of their professional obligations as set out in EU regulations, Portuguese law and/or professional rules approved by AIFs.

20. What is the typical level of management fee paid? Does it vary by asset type?

The level as well as the structure of management fee to be paid by an AIF is considerably variable in Portugal, and it depends on the type of AIF, its underlying investment policy, the targeted investors, and the assets comprising the AIF's portfolio.

21. Is a performance fee typical? If so, does it commonly include a "high water mark", "hurdle", "water-fall" or other

condition? If so, please explain.

Yes, this is a common practice in Portugal to have the remuneration at least partially indexed to performance. An AIFM may charge a performance fee, which is calculated, for example, taking into consideration the current NAV of the AIF's assets, the sales of assets during a divestment period or, otherwise, the compound return for investors. On hedge funds/ private equity /venture capital funds, "hurdle rates" are also commonly used as a prerequisite to carried interest remuneration of the AIFM. The calculation of performance fees is certified by the AIF's auditor.

22. Are fee discounts / fee rebates or other economic benefits for initial investors typical in raising assets for new fund launches?

AIFs can be incorporated with different share / unit classes, each with its own fee structure. The use of different fee structures is not only related to the investment phase, but also often to the type of investor and the minimum investment amount. AIFMs may hold a different share / unit class with performance-based remuneration, while founders of the invested companies usually hold ordinary shares and occasionally may receive an additional participation on a long-term management incentive plan.

23. Are management fee "break-points" offered based on investment size?

As noted, AIFs can be incorporated with different share / unit classes, being the minimum investment amount a material factor to establish the fee structure applicable to each category/class of participants/shareholders. There are cases where the management fees rate based on NAV or assets under management is reduced when the AIF reaches a certain threshold amount.

24. Are first loss programs used as a source of capital (i.e., a managed account into which the manager contributes approximately 10-20% of the account balance and the remainder is furnished by the investor)?

As per the market practice, first loss programs are not widely used by Portuguese AIFMs.

25. What is the typical terms of a seeding / acceleration program?

Seeding and acceleration programs normally include mentorship through a continuous support to start-ups on business planning, roadmap, sales and marketing, networking, and fundraising. Some programs involve paid workshops and specialized training, and others entail an investment made in exchange for equity or revenue sharing. Usually, seed investors will not have special controlling rights, but require the execution of a standard term-sheet setting up the general terms and conditions of the investment made. Recently many acceleration programs supported exclusively or preferentially ESG focused projects, including on renewable energies, social impact, blue economy, etc.

26. What industry trends have recently developed regarding management fees and incentive fees?

In recent years, there has been an increase in the use of performance-based remuneration as well as through creating new classes of participation units/shares accruing carried interest (instead of the use of typical performance fees). Also, ESG and other non-financial indicators have been added as relevant performance criteria.

27. What restrictions are there on marketing Alternative Investment Funds?

The current Portuguese definition of marketing/distribution 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. As consequence of the broad marketing definition, almost every type of marketing or communication (e.g., advertisement) falls into the definition of marketing/distribution and, therefore, this activity can only be carried out by licensed/passported entities or under the reverse solicitation rule. Nevertheless, is expected that the Portuguese legislator introduces amendments in such definition, as the new draft Asset Management Law adopts the AIFMD “marketing” definition.

Under the current Asset Management Law, the following entities are entitled to market AIFs: (i) AIFM, (ii) depositories, (iii) investment firms licensed or passported to perform the relevant activities, and (iv) other entities as set out in CMVM Regulation no. 2/2015 and subject to its authorisation.

In addition, the reverse solicitation rule is not expressly foreseen in the Asset Management Law – but rather a tolerated and restrictive practice. In any case it will not be applicable in case of active marketing / advertisement.

Cross-border marketing of EAA AIFs benefits from the European passport rights when marketed to professional investors. Conversely, the marketing to retail investors of EAA AIFs is subject to authorisation requirements.

Lastly, the cross-border marketing of non-EEA AIFs to professional and retail investors is also subject to authorisation requirements.

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

Yes. The Asset Management Law adopts the European definition set forth in AIFMD.

29. Can Alternative Investment Funds be marketed to retail investors?

Yes. Please refer to Section 27.

30. Does your jurisdiction have a particular form of Alternative Investment Fund be that can be marketed to retail investors (e.g. a Long-Term Investment Fund or Non-UCITS Retail Scheme)?

N/A

31. What are the minimum investor qualification requirements?

The Asset Management Law does not set forth any specific qualification requirements to be complied with in connection to the investors in AIFs. However, AIFs are usually restricted to professional investors (in which case MiFID definitions apply, with some specificities for AIFs regulated under the Venture Capital Law) and AIFs which are not limited to professional investors may be subject to additional investment restrictions and requirements.

The marketing of AIFs is subject to suitability and “KYC” procedures, under which the AIF manager shall ensure that the AIF is suitable for that type of investor.

32. Are there additional restrictions on marketing to government entities or pensions?

N/A

The use of side letters must therefore be assessed on a case-by-case basis and its effects must not lead to discriminatory treatment of the investors or negatively impact the independency of the AIFM. In addition, side letters cannot be used to amend any relevant provision of the legal documents (e.g., the AIF's regulation).

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

No. Nevertheless, intermediaries that conduct marketing or distribution activities are generally subject to licensing requirements. The fundraising assistance shall be set out in a written agreement to be executed between the intermediaries and the AIF/AIF manager.

35. Are there any disclosure requirements with respect to side letters?

Yes. The AIF's legal documents shall disclose any preferential treatment received by an investor under the side letters executed.

34. Is the use of "side letters" restricted?

The use of side letters is not restricted *per se* by Asset Management Law but these are subject to certain transparency requirements and the overall principle of equal treatment of investors and the principle of independency of the management entities.

36. What are the most common side letter terms? What industry trends have recently developed regarding side letter terms?

Side letters may be used by investors to establish the terms and conditions in connection with certain matters, such as governance, remuneration, etc. of AIFs. Nevertheless, as stated side letters are subject to the principle of equal treatment of investors and the principle of independency of the management entities.

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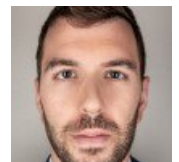
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