



ICLG

The International Comparative Legal Guide to:

Alternative Investment Funds 2019

7th Edition

A practical cross-border insight into Alternative Investment Funds work

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Andorra

Miguel Cases



Marc Ambrós



Cases & Lacambra

1 Regulatory Framework

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

The establishment and operation of Alternative Investment Funds (AIFs) are governed by Law 10/2008 regulating Andorran Collective Investment Schemes, dated 12 June 2008 (Law 10/2008). The Law 10/2008 includes the constitution of collective investment schemes in the Principality of Andorra (“Andorra”) and regulates their functioning and distribution. Depending on the type of investor, the purpose of the vehicle and the advertising involved, various schemes may be found from fully regulated collective investment vehicles to closed Alternative Investment Funds.

As Andorra is not a member of the European Union, Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers is not applicable. Consequently, the Andorran legal framework, dating from 2008, does not define AIFs as European regulations do. With the exception of undertakings for collective investment in transferable securities, “*organismes d’inversió col·lectiva en valors mobiliaris*” (OICVMs), which are aligned with the UCITS Directive, the definition of AIFs comprises other open-ended and closed-ended collective investment schemes (“*organismes d’inversió col·lectiva*” – OICs), such as alternative funds *per se* (also known as hedge funds), real estate funds and other OICs as a catch-all term for private equity entities or those which, because of the composition of their assets and diversification risk policies, cannot be included in any other regulated categories.

Obtaining a specific performance objective and fundraising are the distinguishing elements of AIFs.

In addition, the Andorran Financial Authority (AFA) – the regulatory and supervisory authority of the Andorran financial system for banking and insurance sector, whose prior name was the Andorran National Finance Institute “*Institut Nacional Andorrà de Finances*” – is competent to issue technical communications and recommendations in order to develop regulations and standards regarding activity related to OICs. Furthermore, its constitutive law grants the AFA the ability to set the applicable fall-back of international standards for interpretational and prudential supervision purposes. The most relevant technical communications regarding AIFs and AIFs management companies are the following:

- Technical Communication 189/09 of 27 July 2009, on registration of foreign collective investment undertakings.
- Technical Communication 7/SGOIC of 27 May 2011, on rules for ethics and behaviour.

- Technical Communication 20/SGOIC of 27 May 2011, on clarification regarding Law 10/2008.
- Technical Communication 23/SGOIC of 27 May 2011, on classification of OICs.
- Technical Communication 28/SGOIC of 29 November 2011, on transactions with related entities and individuals.
- Technical Communication 35/SGOIC of 31 July 2014, on publicly available tariffs.
- Technical Communication 44/SGOIC of 3 August 2018, on distribution to clients of OIC shares under the same investment policy.

As Andorra is not a member of the European Union (EU), the freedom to provide financial services in the European Economic Area does not apply (the so-called “community passport” is not recognised). Consequently, all financial activities directly carried out within the Andorran jurisdiction are subject to prior authorisation by the AFA.

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

Only Andorran financial entities which are authorised to manage OICs can be management companies of Andorran AIFs. OIC management companies are entitled to provide OIC management and OIC advisory services.

The AFA is the regulatory and supervisory authority of such entities. Accordingly, they must comply with licensing requirements.

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

The AFA is responsible for authorising the establishment of Andorran AIFs through a two-tiered procedure comprising: (a) authorisation by; and (b) registration before, the AFA. They acquire the condition of OICs upon registration before the AFA.

The distribution of foreign AIFs, if this is considered active commercialisation, will also trigger registration obligations.

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

There is no specific distinction between open-ended and closed-

ended AIFs under Andorran legislation. The only categorisation regulated by Law 10/2008 and the AFA's technical communications is as follows: (i) money market funds; (ii) fixed-income funds; (iii) mixed fixed-income funds; (iv) equity funds; (v) mixed equity funds; (vi) guaranteed funds; (vii) real estate funds; (viii) alternative funds; (ix) private equity funds; (x) securitisation funds; and (xi) other funds.

Notwithstanding the aforementioned, the different types of OIC are subsumed within two general categories: (i) "OICVMs"; and (ii) other undertakings for collective investment schemes "Altres OICs", which includes real estate OICs, alternative OICs and other OICs.

The Andorran regulatory regime does not distinguish between different strategies of the funds.

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

Prior to the distribution of Andorran AIFs and their subscription, they must be registered before the AFA. Indeed, the regulation of funds is subject to the AFA's approval in the authorisation and registration process of the OIC which would take around three months.

The documentation which is required in order to obtain authorisation, prior to the establishment of an Andorran AIF, is the following:

- The prospectus.
- The agreement between the management company and the depositary entity.
- A technical document detailing the particular features of the AIF and the specific investment programme.
- The depositary entity of the OICs being invested in (only for subordinated funds).
- An explanatory memorandum of the control levels conducted by the management company (only for alternative funds).
- A service delegation agreement.

The authorisation also requires the AFA's approval regarding the management company and the choice of the depositary entity.

1.6 Are there local residence or other local qualification requirements?

As mentioned above, only Andorran financial entities which are authorised to manage OICs can be management companies of Andorran AIFs.

1.7 What service providers are required?

According to applicable law, there must be a depositary entity with which the securities, cash or any other asset, subject to the activity of any AIF, are deposited.

In the case of investment funds, they must be managed by a management company (in the case of investment companies, the appointment of a management company is optional). Functions of management, administration and control can be provided by the management company itself or by a third party.

Investment companies must also have a suitable administrative and accounting system and internal control procedures, including risk management procedures, together with IT control and safety procedures, money laundering bodies and procedures.

An AIF must be audited and can be marketed by the management company or by a local licensed distributor.

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

All financial activities carried out in Andorra are reserved to local licensed entities that compose the Andorran financial system. Therefore, foreign managers or advisers wishing to manage, advise or otherwise operate funds in Andorra have to obtain prior authorisation from the AFA as stated in question 1.2.

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

In June 2011, Andorra signed a Monetary Agreement with the EU. The Monetary Agreement not only recognises the euro as the official currency of the Principality of Andorra, the right to issue euro coins and the obligation to grant euro banknotes and coins with legal tender status issued by the Eurosystem and the Member States which have adopted the euro but represents the cornerstone of the legal changes envisaged for the next 10 years. This is because the Monetary Agreement requires that Andorra adopts, within certain timeframes, a substantial part of all the EU banking/financial legislation.

Furthermore, in September 2013, the International Organization of Securities Commissions (IOSCO) protocol for multilateral agreement on consultations was signed.

A Memorandum of Understanding (MoU) was signed between Andorra and Spain on 4 April 2011. The MoU: (i) constitutes an agreement for consolidated cooperation in the supervisory framework between the AFA and the Bank of Spain; (ii) establishes the terms of the protocol for the relationship and collaboration between both authorities; and (iii) enables the supervisory authority of the country of origin to request information on consolidated risks of banking groups from the relevant authority of the country where the entity has subsidiaries.

Andorra signed, on 12 February 2016, the Multilateral Competent Authority Agreement with the European Union to automatically exchange information under the Common Reporting Standard.

Further, an Andorra-EU Association Agreement is being negotiated as of today's date, the outcome on key-negotiation areas (e.g. free movement of persons and services) of which still remains to be seen.

2 Fund Structures

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

It can be either an investment fund or an investment company. Investment funds can only be managed by a management company, whereas an investment company can be managed directly or by delegating management to an authorised institution, provided that the shareholders' meeting or the board of directors, by delegation, decides it.

2.2 Please describe the limited liability of investors.

Investors are liable for the debts of the AIF to the extent of their contributions. Consequently, under normal circumstances, an AIF's creditors cannot claim against the investors' assets.

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

Investment funds

As mentioned above, only Andorran financial entities which are authorised to manage OICs can be management companies of Andorran AIFs. Such entities must be established as an Andorran limited company. Management companies must have a minimum equity share capital of EUR 300,000, fully subscribed and paid-in. In addition, they must have a board of directors of at least three members. Management companies are obliged to comply with specific solvency/own funds requirements (for “*Altres OIC*”, these provisions have been aligned with Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms – CRR/CRDIV – as, mainly, 0.01% of own funds and a civil liability insurance of 0.7% of the OIC’s assets), core capital ratio provisions, and its board of directors’ members, must comply with good governance/suitability requirements.

Investment companies

An investment company must be established as an Andorran limited company and can be self-managed or delegate to a management company the management of all or part of the assets of the institution.

Both the management company and the investment company may contract intermediaries or financial agents, who must have the relevant authorisation for rendering such services.

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?

In general, both subscriptions and redemptions are made on the basis of the net asset value, which is subject to the subscription/redemption fees and other possible costs borne by the investor. Moreover, subscriptions and redemptions (which set the value date of the request) are made through contributions or charges to the OIC. These circumstances must be set out in the prospectus.

Both the management company and the investment company can justifiably limit redemptions, according to the prospectus, which may establish certain limitations, including the provisional suspension of redemptions, in exceptional cases, in the investors’ interests. In addition, the AFA may temporarily suspend subscription and redemption when value determination is not possible.

Regarding real estate funds, investors may subscribe or request the redemption of their units at least twice a year.

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

There are no Andorran legislative restrictions on transfers of investors’ interests in AIFs.

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

Andorran AIFs are composed by Common AIFs and AIFs for well-informed investors.

Common AIFs have to comply with some diversification requirements:

- they cannot invest more than 20% of its assets in financial instruments of the same issuer;
- they may be leveraged to up to 200% of its net asset value; and
- they are able to engage in short selling of securities with some restrictions.

On the other hand, AIFs for well-informed investors are only subject to limits established in their own prospectus.

In the Andorran funds law, there are no specific asset stripping limitations.

3 Marketing

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

The production and offering of marketing materials are governed by Law 10/2008 and the Technical Communication 7/SGOIC, 27 May 2011, on rules for ethics and behaviour.

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

Andorran OIC legislation does not provide for an express definition of “pre-marketing” nor recognises an equivalent concept. However, due to the power recognised by the AFA to apply international standards in the exercise of its supervisory activity, further legal developments in EU legislation could be taken into consideration in a factual way so as to build a “pre-marketing” or equivalent concept.

Specifically, following the EU Action Plan on the Capital Markets Union (CMU), the European Commission issued a proposal for Regulation of the European Parliament and of the Council on facilitating cross-border distribution of collective investment funds and amending Regulations (EU) No 345/2013 and (EU) No 346/2013 (the “CIF Proposal”). Among others reform aimed at enhancing the regulatory framework applicable to investment funds and to better protect investors, the CIF Proposal introduces a harmonised concept of pre-marketing, amending AIFMD.

Specifically, “pre-marketing” is defined as “a direct or indirect provision of information on investment strategies or investment ideas by an AIFM or on its behalf to professional investors domiciled or registered in the Union in order to test their interest in an AIF which is not yet established”.

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

Advertising must be clear, sufficient, objective and not misleading and must state explicitly that it is an advertisement.

Prior to the investment, the latest published reports and the simplified prospectus – and, if requested, the full prospectus – must be delivered free of charge to the investors.

Marketing materials should contain: (i) a reference to the full prospectus and where it can be consulted; (ii) information regarding the managing company, the custodian and their authorisations to operate; and (iii) relevant information about the product's main characteristics, which must not lead to confusion regarding its content.

Marketing materials may also contain past performance information, in which case they should: (i) include a disclaimer stating that past performance does not condition future performance, or similar; and (ii) designate where and how to access quarterly and annual reports. They should avoid any expression or argument that may lead the investor to believe that there is a guaranteed positive return, unless there is a minimum return guaranteed, in which case all its elements should be clearly exposed (object, duration, conditions, commissions, etc.).

Also, the typography, format and content of marketing materials should be transparent, clear and accurate; and should not be comparative or estimative.

When marketing activities are conducted through the internet, information shall be displayed in such a manner that the investors have access to the full prospectus prior to subscription.

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

All marketing materials shall be registered before the AFA prior to its publication. Any marketing materials shall include the fund's registration number before the AFA.

3.5 What restrictions are there on marketing Alternative Investment Funds?

Alternative Investment Funds for well-informed investors cannot be made available by any disclosure means not specifically addressed to this investor profile.

3.6 Can Alternative Investment Funds be marketed to retail investors?

According to Law 10/2008, the AFA can restrict the marketing of AIFs to well-informed investors, in case of a low liquidity level or a high risk of loss for the AIFs. The marketing of AIFs which are limited to well-informed investors is prohibited to retail investors, whose definition is aligned with the Markets in Financial Instruments Directive (MiFID).

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

Investment in an AIF reserved for well-informed investors requires a limited level of protection. Pursuant to Law 10/2008, "well-informed" investors are those which meet the criteria of being either: (i) institutional investors; (ii) professional investors; or (iii) other investors who confirm in writing that they adhere to the status of "well-informed" investors and who either: (a) invest a minimum of EUR 50,000; or (b) have been assessed by a credit institution, an investment firm or a management company which certifies the investors' ability to understand the risks associated with investing in the AIF.

With the exception of those limited to well-informed investors, AIFs can be marketed to retail investors upon complying with any other regulatory requirements.

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

There are no specific restrictions on marketing to public bodies in the Andorran jurisdiction. National and regional governments, the AFA, public institutions, central banks and other international institutions are expressly recognised as professional investors.

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

There are no specific restrictions thereof in the Andorran jurisdiction. However, any such fundraising activities carried out through intermediaries, if qualifying as financial activities falling under the activity reservation regime stated in question 1.2, should be carried out by local financial entities authorised to operate by the AFA.

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

There are no specific restrictions on the participation of particular types of investors other than those that may be imposed by the investors' applicable regulation.

4 Investments

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

AIFs in Andorra are divided into three categories: (i) Real Estate Investment Funds; (ii) common Alternative Investment Funds; and (iii) Alternative Investment Funds only for qualified investors.

A Real Estate Investment Fund shall invest at least 90% of its annual average of monthly balances of its real estate assets. Additionally: (i) any asset, including rights on such asset, can represent more than 35% of the total assets in the acquisition moment; (ii) real estate assets being part of the asset state of the fund, rented to legal entities that are part of the same group, cannot represent more than 35% of the assets of the AIF; and (iii) entities belonging to the same group can only acquire a real estate asset when it is a new construction, it is permitted by its bylaws, the managing company informs about it on the prospectus and periodical information, and it does not represent more than 25% of real estate investment fund assets.

Overall, the rest of the AIFs under Andorran legislation cannot invest more than 20% of their assets in securities or financial instruments from the same issuer, along with other investment restrictions particulars.

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?

Please see question 4.1 above.

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

Under Andorran legislation, there are no restrictions on borrowing by AIFs (OICMV's may not generally enter into loans, although they may acquire currencies through back-to-back lending).

5 Disclosure of Information

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

Overall, the management company of an AIF must publish a prospectus of each of the AIFs it manages, as well as quarterly reports (for *Altres* OICs it is not necessary to report on a quarterly basis, according to the AFA criteria). The simplified prospectus and annual reports must also be disclosed.

Such information must be published in accordance with the prospectus.

Andorran AIFs and foreign AIFs which are going to be distributed in Andorra must be registered in the special AFA registry.

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?

There are no specific AIFMD-Andorran legislation requirements to provide details of participants in AIF. However, AIF managers must keep details of participants' data (with no reporting obligations to AFA nor to any other authority).

On a side note, there is a register obligation which applies as per Act 14/2017 of 22 June 2017 on prevention of money laundering and terrorism financing "*Llei 14/2017, del 22 d'abril, de prevenció del blanqueig de capitals i finançament del terrorisme*" and related legislation regarding the register of beneficial owners, which follows that of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

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

Overall, management companies (for each of their managed AIFs) and investment companies are obliged to prepare annual reports which shall be published and submitted to the AFA and to the investors. In addition, it is also compulsory to prepare quarterly reports which must be submitted to the AFA.

Management companies and investment companies must report to the AFA any decrease in net assets (if it is less than 10%).

Finally, as mentioned above, prior to the marketing of AIFs, management companies and investment companies must send to the AFA a copy of the marketing materials.

5.4 Is the use of side letters restricted?

There are no Andorran provisions regarding the use of side letters. However, using specific language to determine obligations and duties, mentioning their binding character, as well as their signing by the parties, is advisable.

6 Taxation

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

All the different forms of Alternative Investment Funds have the same tax treatment. All of them are subject and not exempt to corporate income tax, but the tax rate is 0%. Consequently, no tax burden is supported by the fund for any kind of income.

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

The management company/investment manager does not have any special tax treatment and it is subjected to corporate income tax at the standard rate of 10%.

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?

This is not applicable in Andorra.

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

- If the investor is an individual tax resident: (i) no tax on distribution of dividends; (ii) 10% of tax burden for capital gains, unless the investor only holds a stake of less than 25% or have maintained the investments for at least 10 years; and (iii) 10% if the shareholder is a resident legal person.
- If the investor is an individual or legal person non-tax resident, Andorra does not apply any withholding tax either for income coming from dividends or capital gains distributed to non-residents.
- Not applicable, since pension funds are not regulated in Andorra as a special class of fund.

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?

No. This is not necessary in Andorra.

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

The country itself did not sign any IGA, but all the banks assumed the commitments through the corresponding registration before the Internal Revenue Service (IRS).

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

Andorra assumed the commitments on CRS/OECD on 18/06/2014 and made its first report in September 2018 for major value accounts and will do in September 2019 regarding the rest of the accounts.

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

No tax-advantaged asset classes/structures are available under the current state of the OIC's legislation in Andorra.

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

No. There are not.

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

No. There are not.

7 Reforms

7.1 What reforms (if any) are proposed?

As stated in question 1.9, the Monetary Agreement sets forth EU banking/finance pieces of legislation to be implemented progressively along with their respective deadlines.

Considering this, there are specific Directives which will impact on AIFs and its management companies, mainly crystallised through the implementation as the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (AIFMD).

Despite AIFMD's implementation being foreseen for 31 March 2016, it has not taken place as of today's date.

Moreover, the full implementation of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments ("MiFID II") and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments ("MiFIR") legislation twofold body is foreseen by 31 December 2020 as per the latest Annex to the Monetary Agreement.

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Marc Ambrós is Partner of the Commercial & Corporate law and Financial Services practices at Cases & Lacambra in the Principality of Andorra. He has extensive experience in corporate and commercial matters. He has advised in mergers, acquisitions, joint ventures, private equity, corporate restructuring and refinancing, representing both Andorran and foreign clients in international transactions. He regularly advises during the entire process of a transaction, from both the buying side as well as the selling side perspective using different legal structures. He is also specialised in project and corporate finance issues.

His practice includes advising on regulatory cross-border matters to foreign credit institutions and investment services firms. He has also advised on the incorporation of Andorran supervised entities.

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