



**COUNTRY  
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# **The Legal 500 Country Comparative Guides**

## **Poland**

# **ALTERNATIVE INVESTMENT FUNDS**

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

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# POLAND

## ALTERNATIVE INVESTMENT FUNDS



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

In Poland the following entities qualify as an alternative investment fund (“**AIF**”) within the meaning of the Act of 27 May 2004 on investment funds and the management of alternative investment funds (“**IFA**”):

- selected types of investment funds, i.e. closed-end investment fund (“**CEIF**”) and specialized open-end investment fund (“**SOEIF**”),
- alternative investment company (“**AIC**”).

According to the legal definition, AIF means a mutual investment institution, the objective of which, including cases where it is achieved within a separate sub-fund, is to collect assets from a number of investors in order to invest them for the benefit of these investors in accordance with a predetermined investment policy, and which at the same time is not a fund operating in accordance with EU law governing collective investment in securities.

An investment fund (CEIF, SOEIF) is a separate category of legal entity recognized by Polish law, while an AIC is a commercial company or a partnership (limited liability company, joint stock company, European company, limited partnership, limited joint-stock partnership). An investment fund may be established and managed only by a specialized entity – an investment fund company (“**IFC**”). However, an IFC is not itself a participant in the fund. AICs are set up directly by their investors (an internally managed AIC) or by the investors and an AIC manager (an externally managed AIC). All of the above types of entities must be established as AIFs, i.e. there is no possibility for an existing entity to obtain AIF status.

The IFA also describes the rules for the operation of EU AIFs and EU managers in Poland, but in this guide we focus on purely Polish structures.

### 2. Does a structure provide limited liability to the investors? If so, how is this achieved?

The liability of AIF’s investors for the AIF’s obligations is generally limited to the amount of their contribution (investment).

The IFA expressly provides that the investors of an investment fund (including the investors of SOEIF and CEIF) are not liable for the fund’s liabilities.

In the case of AICs, the liability rules are regulated in the Commercial Companies Code (“**CCC**”) and depend on the chosen form of company, but – in general – the liability of investors is also limited (or may be structured as such).

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

The choice of structure generally depends on the class of asset and investment strategy preferred by the investor(s), the intended value of the investment or available funds, as well as on the tax treatment of a given structure.

A registered AIC (see question 4 and 13) provides for the most flexibility in terms of day-to-day management, investment strategy and policy, asset classes and portfolio structure. As for AICs, this is by far the preferred structure for the vast majority of investors willing to invest in equities. The cost of the AIC structure is also much lower than that of a CEIF or SOEIF. However, this vehicle is only suitable for investments that will not exceed certain value limits (see question 12). For high value of assets, not only is a license required, but there are, for example, restrictions on the use of AIF leverage. For large scale investments (especially as a dedicated vehicle), CEIF format is the primary choice. CEIF is also used as a vehicle for

investing in real estate, being a Polish equivalent of REIT structures.

#### **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?**

The IFA distinguishes between open-end and closed-end investment funds; however, the main division between investment funds adopted in IFA is the division into open-end and alternative investment funds (i.e. SOEIF and CEIF).

In a typical open-end investment fund ("OEIF") there are no restrictions on the timing of making and withdrawing investments (the fund shall sell and repurchase the participation units at the request of the participant), the circle of investors is generally open, and the participation units are not transferable to third parties and are not recognized as securities under Polish law.

SOEIF is a specific type of OEIF. It may restrict the pool of investors, i.e. its statute shall provide that the fund's participants may be entities specified in the statute or those that meet the conditions specified therein. The SOEIF's statute may also specify the conditions under which a participant may request the repurchase of participation units by the fund (otherwise, the SOEIF will be obliged to repurchase the units upon the request of the participant). SOEIF dedicated to certain categories of investors, may choose to underlie the CEIF regime with respect to the investment rules and restrictions.

CEIF issues investment certificates, which are securities under Polish law. The issuance of investment certificates may be conducted by way of a public or private offering. Investment certificates may be admitted to trading on a regulated market or to an alternative trading system. Investment certificates are transferable, but in a non-public CEIF the transferability may be restricted. CEIF may repurchase and redeem the investment certificates only if its statute so provides.

Specific types of investment funds include:

- funds with different categories of participation units – SOEIF may distribute units that differ in the related handling fees or fees charged on the fund's assets,
- umbrella funds – funds composed of sub-funds that differ, for example, in their investment policy,

- master fund and affiliated funds – the IFC may establish an investment fund (master fund) that will sell units or issue investment certificates exclusively to other investment funds established by the same IFC (affiliated funds).

The IFA also mentions specific types of investment funds, of which the most relevant are:

- CEIF of non-public assets / SOEIF of non-public assets, provided that it adopted CEIF investment restrictions – equivalent of private equity funds; funds which invest at least 80% of the value of their assets in selected non-public assets (e.g. shares of non-public companies);
- portfolio fund, which is a CEIF that continuously issues certificates that will be offered by public offering or admitted to trading on a regulated market, or introduced into an alternative trading system, provided that the composition of the fund's portfolio is essentially unchangeable;
- securitization fund, which is a CEIF that issues investment certificates to raise funds for the acquisition of receivables or rights to benefits from certain receivables.

Due to the different nature of AIC's legal form, it does not fall under the above fund divisions. However, in general, its construction is most similar to a non-public CEIF. In the case of AIC, the IFA distinguishes between internally and externally managed AIC – see question 12. Additionally, the AIC manager may be either registered or licensed (see question 13), and depending on this, different IFA regulations apply.

#### **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?**

In CEIF, investment certificates may only be redeemed if the fund's statute so provides. The fund may redeem only fully paid-up certificates. The statute should specify the prerequisites, procedure and conditions for the redemption of investment certificates, as well as the timing and method of making announcements about the redemption of certificates. In practice, the funds' statutes usually also provide that redemption is excluded if the fund does not have liquid assets to cover the redemption payment.

As regards SOEIF, in principle, the investor may request redemption of participation units any time and the fund is obliged to repurchase the units and pay the redemption price. However, the fund's statute may flexibly specify the conditions under which a participant may demand the repurchase of participation units (similar as in the case of CEIF).

Apart from redemptions, the CEIF's and SOEIF's statutes may also provide for the distribution of the fund's incomes, and – in the case of funds of non-public assets – the distribution of proceeds from the disposal of the fund's investments.

In the case of AICs, there are several ways of distributing funds to investors that are typical for the particular regime of a company or partnership under which the given AIC operates, including redemption of shares in companies, reduction of equity shares in partnerships, or dividend / profit distribution. They can be regulated quite freely in the articles of association, subject to certain statutory limitations applicable to a particular legal form of AIC.

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

A key mechanism for managing illiquidity risk is the possibility of introducing provisions in the fund's statute that allow the investment fund to suspend the repurchase of participation units or investment certificates if financing of redemptions would compromise the fund's liquidity. The same applies to the distribution of the fund's income.

An additional tool is a properly structured diversification policy. For instance, the statute may also provide that the fund should maintain a minimum amount of cash or other liquid assets to ensure at least a certain level of liquidity.

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

In SOEIF, the participation units are not transferable to third parties. They may only be acquired by the fund for redemption purposes.

CEIF's investment certificates are transferable, but in a non-public CEIF the transferability may be restricted in the fund's statute. A typical restriction is to make the possibility of disposal subject to the approval of the investors' meeting.

Similar as in the case of CEIF, transfer of shares in AIC may be restricted in the articles of association, e.g. by requiring the seller to obtain a prior consent of other shareholders or introducing priority rights.

Additionally, natural persons that wish to participate in SOEIF that adopted CEIF investment restrictions or non-public CEIF should contribute at least the PLN equivalent of EUR 40,000.

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

Diversification requirements are the main limitation on the scope of AIF's investments and the composition of its portfolio. The requirements vary depending on the type of fund.

For instance, in the case of CEIF, the basic requirement is that the aggregated value of securities or money market instruments issued by one entity, receivables towards that entity, as well as shares in that entity, should not exceed 20% of the total value of the fund's assets. In the case of CEIF of non-public assets, there are certain exceptions releasing funds from complying with diversification requirements in some periods.

SOEIF may choose to underlie the diversification limit applicable for CEIF, provided that its participants may only be legal persons, entities without legal personality and natural persons, and – in the case of natural persons – their contribution amounts to at least EUR 40,000. Otherwise, the OEIF rules will apply, where the basic requirement is that the fund may not invest more than 5% of the value of its assets in securities or money market instruments issued by a single entity.

If the diversification limits are exceeded, the IFC is required to take steps to adjust the composition of the portfolio.

As regards AICs, there are no statutory diversification requirements. However, the diversification rules should be determined by the AIC manager and described in AIC's investment policy, which is filed with the Polish Financial Supervision Authority ("FSA") and is usually verified in detail by the authority during the process of registration.

## **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?**

Local investment and pension funds (i.e. established in Poland based on IFA) are considered tax residents in Poland. Resident pension funds are exempt from tax irrespective of the source/type of income (i.e. subjective exemption). Resident investment funds may benefit from a similar exemption (if they are of open-ended nature) or an objective exemption (where some types of income are not covered, e.g. interest income from securities issued by tax transparent entities) in case of CEIFs or SOEIFs. With respect to resident AICs exemption covers only capital gains (i) on disposal of shares (5% shareholding held over 2 years is required) and (ii) achieved in connection with the implementation of specific financial instruments.

As regards non-resident entities similar exemptions are applicable to pension, investment funds, CEIFs and SOEIFs, although some additional requirements are applicable (e.g. being considered as body corporate for tax purposes in the country of incorporation or having an external licensed asset management company). In this respect the structure of the given Alternative Investment Funds and its features must be verified on a case-by-case basis in order to determine the possibility of exemption in Poland

Polish tax resident investors of an AIF are, in principle, taxable on the distributions of an AIF and capital gains from a disposal/redemption of shares in an AIF. The applicable tax rate is 19% on gains. Non-resident investors may be taxed in Poland in certain cases (in particular, if the given investment certificates or SOEIF's participation units are listed on the Warsaw Stock Exchange). In such cases taxation may be mitigated subject to the availability of Double Tax Treaty protection and its provisions.

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

In principle, AIF's investors do not have direct influence on day-to-day management of the fund. However, there are legal mechanisms to ensure such participation, especially in dedicated funds, where the group of investors is limited. The IFA or fund's statute / articles of association may for example require the manager to obtain the approval of the investors' meeting (in CEIF) or

the shareholders' meeting (in AIC), even under pain of nullity, for the acquisitions and disposals of individual assets, distributions from the fund, changes to investment policy, etc.

The IFA also provides for the establishment of supervisory bodies, i.e. investor councils (in SOEIF and CEIF) and supervisory boards (AIC).

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

Due to the relatively flexible possibility of shaping the investment policy, portfolio structure and corporate governance rules, AIC and non-public CEIF are most often chosen as dedicated vehicles. Their funding documents and policies may be tailored to the needs of the particular investor who wishes to set up a fund.

Some of customized forms of investment funds are regulated expressly in the IFA (securitization funds, portfolio funds, funds of non-public assets). In turn, a typical example from the market practice would be a real estate fund in which specific regulations related i.a. to the procedure of acquisitions and divestments of the real property as well as valuation methods and investment policy would be introduced.

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

AIF being an investment fund is managed by the IFC. IFC must hold a license issued by the FSA.

AIC in the form of a company is internally managed (in such a case the AIC itself is also referred to as the AIC manager). AIC being a partnership is managed externally, i.e. by AIC manager, which is a separate company that acts as a general partner of AIC. Depending on the value of AIC's assets, the AIC manager needs to be registered or licensed by the FSA. Registration is sufficient if the total value of investment portfolios of AIC that the AIC manager intends to manage or manages does not exceed the PLN equivalent of the amount of EUR 100,000,000. Where the AIC manager manages only companies that do not use AIF leverage and in which participation rights may be repurchased after at least 5 years from their acquisition, the limit is higher and amounts to the PLN equivalent of EUR 500,000,000. If the limits are exceeded, the AIC



manager is required to obtain a license.

In general, members of the governing bodies of IFC and AIC manager must meet standard requirements, such as having full legal capacity, good reputation and no criminal record. Additionally, in the case of IFC and licensed AIC, some members must also (i) have a university degree or be a licensed investment advisor, and (ii) have relevant experience.

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

Establishment of an investment fund, except for a non-public CEIF, must be approved by the FSA. Subsequent changes of the fund's statute may also require FSA's approval. All investment funds are registered in a public register of investment funds kept by the District Court in Warsaw.

AICs themselves are not required to be licensed or authorized by the FSA – only AIC managers are subject to licensing or registration (see question 12). However, external AIC managers shall notify the FSA about every new AIC which they intend to manage. AICs are entered in the commercial register like every commercial company or partnership.

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

The IFA expressly states that both IFC and AIC manager must be commercial companies incorporated in Poland.

However, based on the agreement with IFC or AIC manager and upon fulfillment of other statutory requirements, an EU manager that operates in Poland may take over the management of SOEIF, CEIF or externally managed AIC, respectively. The EU manager is defined as a legal person based in the territory of an EU member state that has been authorized by the competent authority to carry out the activity of AIF management. The EU manager can operate in Poland directly or through a branch, after complying with the notification procedure to the FSA.

Additionally, IFC or licensed AIC manager may outsource particular functions, including portfolio management, to local or foreign entities. However, such possibility, depending on the scope of functions intended to

outsource, might be limited and/or subjected to conditions specified in IFA, such as obligation to obtain a relevant permit from the FSA.

### **15. Are there local residence or other local qualification or substance requirements for the Alternative Investment Fund and/or the manager and/or the advisor to the fund?**

Generally, Polish AIFs must be incorporated and registered in Poland. The IFA requires that the investment fund and the IFC, which manages this fund, have the same seat and address. The IFC must be based in Poland, which refers to both incorporation and management seats. In the case of AIC managers, the IFA only requires the AIC manager to be a company incorporated in Poland, but there are no restrictions as to the actual management seat.

EU AIFs and EU managers may also operate in the territory of Poland on a cross-border basis. Detailed rules are described in the IFA. See also question 14 and 18.

### **16. What service providers are required by applicable law and regulation?**

Investment funds and licensed AICs must have a depositary, which, in particular, stores the fund's / AIC's assets, keeps the asset record and monitors the cash flows. This role may only be performed by selected regulated entities, e.g. banks, financial institutions, National Deposit of Securities.

Investment funds also engage agents maintaining registers of participants (in case of CEIF cooperation with so-called issuance agents is obligatory).

AICs operating in the form of joint-stock companies or joint-stock partnerships are obliged to hold a shareholder register, which may only be maintained by specialized entities (e.g. brokerage houses or public notaries).

In principle, the IFC must employ at least two investment advisors and one securities broker. A licensed AIC manager is required to employ at least one investment advisor – provided that the AIC can be marketed to retail investors.

In practice, the managers also enter into contracts for valuation, legal, tax, accounting and other support services.

### **17. Are local resident directors / trustees**

**required?**

Members of the AIF's governing bodies are not required to be Polish residents. However, it follows from the corporate governance principles issued by the FSA, that the regulator expects that the composition of the management body of a supervised entity includes an appropriate ratio of persons who speak Polish and have adequate experience and knowledge of the Polish financial market required to manage the supervised entity.

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

An EU manager may operate in Poland via a branch or in other forms. In both cases the FSA shall first receive an appropriate notification, including, in particular, a certificate that the EU manager has an authorization to manage AIFs issued by a competent authority in an EU member state.

The EU manager is generally subject to the regulations of country of its establishment, however, it is also required to comply with Polish law, in particular with regulations that describe the AIF's operations and require the manager to act in the best interests AIF's investors, act in a reliable and professional manner, manage conflicts of interest, and govern the portfolio management, investment advisory services and services of receiving and transmitting orders to buy or sell financial instruments. In this regard, EU managers are subject to the FSA's supervision.

EU managers shall also provide the FSA with periodical reports on its operations.

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

The FSA has broad supervisory powers. It can conduct inspections, demand explanations and additional information or documents, impose fines and, in extreme cases, revoke licenses. Depending on the type of fund, the manager also has certain information and reporting obligations.

In general, the FSA ensures that AIF's are managed and that their investment activities are conducted in the interests of the investors. The most common reasons for

penalties in the recent years have been the lack of the proper diversification of portfolios, inadequate supervision of the third party's performance of outsourced investment portfolio management activities, and arbitrary investment decisions (investment decisions made by the fund managers without the required approval from the investors). The topic of outsourcing of IFC's functions is also investigated by the regulator, which may potentially result in statutory restrictions on management outsourcing (e.g. limiting the group of possible service providers).

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

The level of management fees generally depends on the AIF type, specific of its investments and value of its assets. It is commonly a fixed percentage of the value of assets under management (usually 1-4%). In the case of SOEIF, the maximum amount of fixed remuneration is limited by law and currently amounts to 2% of the fund's net asset value. In dedicated funds, the management fee is usually fixed in a lump sum (approximately PLN 200,000-400,000).

A fixed management fee is usually combined with a variable remuneration structure (success fee) depending on the management performance (see question 21).

Additional handling fees are also common (e.g. fees for the sale or redemption of certificates / units).

Apart from typical management fees, the funds also incur other operating expenses, such as supervisory fees, depositary's remuneration, external services costs, etc.

**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.**

Variable remuneration structures are typical. The ways of calculating the success fee vary and depend on the specifics of a particular fund. In general, both performance fees and carried interest models can be observed in the market. Performance fees are rather typical for IFC, while carried interest structures are often seen in externally managed AICs.

**22. Are fee discounts / fee rebates or other**

### **economic benefits for initial investors typical in raising assets for new fund launches?**

Such practices generally depend on the AIF type and its specifics but, in general, it is legally possible to introduce such mechanisms. For instance, particular series of CEIF's registered investment certificates or SOEIF's participation units may differ in the amount of handling fees or fees charged to the fund's assets. See also question 23.

A typical practice would be to introduce privileged shares in AIC or similar personal benefits, but this rather applies to areas other than fees (e.g. increased share of profits or liquidation proceeds). Similar mechanism is also allowed in securitisation funds, CEIFs with registered certificates or within sub-funds in umbrella funds.

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

First, it should be noted that the management fee is charged to the fund and not to investors directly. However, there are cases where, based on the appropriate authorisation in the fund's statute, the IFC and the investors may agree that part of the management fee attributable to their certificates / units will be later returned to the investor if the value of their investment exceeds a predetermined amount.

Differentiation of fees, introduction of discounts, etc. is more common for handling fees. It is also possible to differentiate the fees per series of certificates.

### **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)?**

In investment funds (CEIF, SOEIF) such programs are not typical. The IFC generally focuses on management and does not contribute to investments.

In contrast, such a setup is sometimes seen in AICs where the managers (either in AIC managed internally or in AIC external manager) may also contribute to the company.

### **25. What is the typical terms of a seeding /**

### **acceleration program?**

AIC is a type of vehicle used in structuring seed and acceleration investments in Poland. From the AIF perspective, in case of such structures typical management fee is set at relatively low level while the manager is granted a high profit share if the investment is successful (often subject to certain hurdles and waterfall principles).

### **26. What industry trends have recently developed regarding management fees and incentive/performance fees or carried interest? In particular, are there industry norms between primary funds and secondary funds?**

In recent years, management fees have attracted increased interest from the FSA. Apparently, the regulator seeks to develop standards for transparent setting and collecting the fees, in particular success fees. In fact, such standards have been already developed in cooperation with industry organizations and based on ESMA's guidelines, but these are of limited application to AIFs.

The FSA also reviewed transparency and unjustified overcharging of distribution fees.

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

Due to the extensive rules regarding foreign / EU AIFs marketing in Poland, in our further responses we focused on the marketing of this type of entities.

#### **Applicable regulations**

The Polish rules and regulations regarding marketing carried out by AIF in Poland implement the provisions of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 and are primarily set out in:

- IFA;
- Regulation of the Minister of Finance of December of 14 December 2022 on Fees to Cover the Costs of Capital Market Supervision ("FEES REG").
- Act of 29 July 2005 on Public Offer and the Conditions for Introducing Financial Instruments to the Organized Trading System and Public Companies ("Public Offer Act").

In addition to the above-mentioned acts, there may be



other Polish legal provisions, which are not specifically dedicated to marketing of AIF in Poland, that may apply, depending on the individual case.

The applicability of any other legal requirements, should be assessed before marketing or investing in AIF. Where uncertainty exists, those marketing or investing in AIFs should obtain independent advice as to the applicable requirements to their individual situation.

### Entities allowed to market their units/shares in Poland

We can distinguish two types of AIF in Poland, namely:

- Domestic vehicles:
  - AIC,
  - SOEIF,
  - CEIF
- EU-based vehicles ("**EU AIF**").

Polish regulations do not allow non-EU Alternative Investment Fund Manager ("**AIFM**") or non-EU AIF to operate in the territory of Poland. National private placement regime (under Article 36 and Article 42 of the Directive 2011/61/UE) wasn't established in Poland, therefore, it is not possible for authorized EU AIFMs to market in Poland the units of AIFs from the third country they manage without a passport or for AIFMs from third countries to market in Poland units of funds they manage without a passport.

### Restrictions on marketing

In the event of marketing units/shares of EU AIF in the territory of Poland, EU AIF is required to establish adequate technical and organizational solutions ensuring:

- the proper transfer, take-up and repurchase of the units/ shares of the EU AIF in the territory of Poland pursuant to the rules contained in the internal regulations of the EU AIF,
- for the investors – access to the information on the manner of acquisition, take-up or repurchase of units/ shares of the EU AIF in the territory of Poland and on the manner of making payments of the amounts related to repurchasing the units/ shares of the EU AIF,
- possibility of exercising rights related to the investment in units/ shares of the EU AIF, including lodging complaints, as well as easy access to procedures and information concerning the exercise by investors of the rights related to the investment in the units/ shares of the EU AIF, including the rights related to the measures applied in respect of

examination of the complaints,

- for the investors – access to the documents and information referred to in Articles 222a, 222b and 222d of IFA in a manner enabling to learn them and to make copies thereof,
- to participants – making accessible the information concerning the obligations of the EU AIF fulfilled through the established technical and organizational solutions, on a durable information carrier,
- information exchange between the Polish Financial Supervision Authority and the EU manager.

### 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)?

An EU manager may, prior to marketing an EU AIF on the territory of Poland, perform activities related to presenting on this territory the information not constituting an offer to acquire or a proposal of acquisition of units/ shares of this EU AIF, concerning the investment policy and strategy of an EU AIF which has not yet been established or in respect of which no notification referred to in Article 263b (1) of IFA has been filed, in order to test, among professional investors, the interest in acquisition of the units/ shares of this EU AIF ("**pre-marketing information**").

The information regarding pre-marketing may not:

- constitute sufficient grounds for enabling potential participants to undertake to acquire units/shares of an EU AIF,
- be formulated in a form of subscriptions for units/ shares of the EU AIF or similar documents, including their drafts,
- present the final form of articles of association or other founding document or prospectus or other offering document of the EU AIF which has not yet been established.

What is important, if the pre-marketing information present the draft prospectus or the draft of other offering document, such information shall additionally include an explicit statement that:

- it does not constitute either an offer to acquire or a proposal of acquisition of units/ shares of the EU AIF and
- the information presented in these documents, as incomplete and as possibly subject to change, may not provide the grounds for making investment decisions.

The EU manager may perform pre-marketing of the EU AIF in the territory of Poland directly or through an investment firm, an investment firm's agent, a foreign investment firm, a foreign investment firm's agent, a bank, a credit institution, a management company and other EU manager, society or AIC's managing party.

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

Alternative Investment Funds may be marketed to retail investors exclusively where the units/ shares of such EU AIF are securities offered under a public offer, except for the public offer which does not require preparation of the prospectus under Article 1(4)(b) of Regulation 2017/1129, therefore distribution of open-ended AIFs to retail investors in the Republic of Poland is not permitted.

See also: question 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)?

Apart from vehicles governed by the European regulations, namely:

1. the European venture capital funds (EuVECA) pursuant to Regulation (EU) No. 345/2013,
2. the European Long Term Investment Fund (ELTIF) pursuant to Regulation (EU) No. 2015/760, and
3. the European social entrepreneurship fund (EuSEF) pursuant to Regulation (EU) No. 346/2013

Polish SOEIF and CEIF may be invested by non-professional investors, provided they declare themselves as well-informed investors and invest or commit to invest not less than the PLN equivalent of EUR 40,000.

## 31. What are the minimum investor qualification requirements for an Alternative Investment Fund? Does this vary by asset class (e.g. hedge vs. private equity)?

The IFA distinguishes two types of investor categories: the professional clients and the retail clients within the meaning of the MiFID with certain details due to the

specificities of the Polish legal system, which are set out in the IFA. There are no variances in respect to asset class.

## 32. Are there additional restrictions on marketing to government entities or similar investors (e.g. sovereign wealth funds) or pension funds or insurance company investors?

In general, Polish regulations do not provide specific restrictions on marketing to government entities, pension funds or insurance companies.

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

Assisting in the fundraising process may qualify either as intermediary within the meaning of Article 32 of IFA or as investment services within the meaning of the MiFID. In any event, such a qualification will lead to an obligation to obtain a respective license.

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

The use of side letters between the investors and the fund and/or IFC is not expressly prohibited by law. However, according to the general principle of investment fund law, all participants shall have equal rights. There are also statutory requirements for the content of incorporation documents, terms of issuance, etc., which are additionally subject to the FSA's verification.

Side letters executed between the investors are also not prohibited. In fact, side agreements (e.g. investors' agreements) governing the rules for making further contributions, exit rules, etc. are common, especially in AICs.

There are no specific restrictions with respect to transactional side letters to be concluded by the funds in the course of their investment activity.

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

The conclusion of the side letter and its contents would be covered by professional secrecy, so their disclosure requires a statutory basis. There is no obligation to actively report or disclose side letters to the FSA or to the public. However, the FSA and other authorized public

bodies in the course of inspection activities may request access to such documentation.

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

A typical example of a side agreement is a cooperation agreement between the participants of the CEIF and the IFC, which is typical for funds dedicated to a specific

narrow group of investors. Its role is to provide the rules for good order of cooperation between the manager of the fund and introducing certain corporate governance principles supplementing the provisions of the statute.

Further examples of side agreements are agreements establishing a division between active and passive investors and rules for bearing investment risk, agreements on reduction of management fees (see question 23.) or shareholders' agreements in AIC (see point 34).

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