

UNIT LINKED LIFE POLICIES IN PORTUGAL

AN INTERVIEW WITH MARTA COSTA,
PARTNER IN ABREU AVOGADOS

In this article, Mafalda Cesário who is responsible for the Portuguese market in the Utmost PanEurope legal and tax department, interviewed Marta Costa, Partner in Abreu Avogado and asked her some key questions about the use of unit-linked solutions in Portugal. This interview will provide some guidance to high net worth clients considering a unit linked policy as part of their wealth planning strategy.



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PROFILE

Mafalda Cesário is a senior member of the legal and tax department for the Portuguese market in Utmost PanEurope.

Mafalda draws upon her 15+ years of technical knowledge of multi-jurisdictional uses of life assurance policies to provide insights and solutions to partners in Private Banks, Family Offices, Asset Managers, legal and accountancy firms and their HNW and UHNW clients.

Mafalda is also a fully qualified Portuguese lawyer.

Is a Unit Linked life policy an efficient instrument for succession planning?

Unit Linked, as a structured savings instrument falling under the category of life insurance and normally covering the death risk of the insured(s), offers a policyholder significant flexibility in terms of "succession" planning. Indeed, this product allows the policyholder, in countless situations, to define and organise the future transfer of his/her assets in a way that is more in line with the respective real wishes and objectives, and not only in accordance with the legal provisions created in general and abstract terms by the legislator to regulate the succession.

We can highlight, for instance, the possibility of providing for a transfer of part of the estate to the beneficiaries, in tranches and at successive times, after the death of



MARTA COSTA
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PROFILE

Marta Costa is a Professional Partner and has been at Abreu Advogados since 2019, co-heading the industry sector dedicated to Private Clients and Family Businesses.

She has vast experience in consulting family offices and individual clients on successions law and family law (in the areas of planning, negotiation, organisation and transfer of assets between generations and litigation), wealth planning, private international law and nationality matters.

Marta teaches Family and Succession law at Nova University and Lusófona University.

the policyholder, and according to the needs previously individualised (and often changeable) by the policyholder.

At Utmost, we have seen some situations, where the clients would like to transmit their wealth to their children with some conditions, for example, when the children reach a certain age, or to plan the wealth transmission to children with disabilities. In your opinion, would a Unit Linked life policy be an option to achieve these goals?

The Portuguese succession regime is defined by strong rigidity. In this regard, the legislator has established a reserved share, varying between 1/2 and 1/3 of the total value of the estate, which the testator cannot freely dispose of and which is destined to the forced heirs (the spouse, descendants and ascendants). Moreover, with respect to this share, the testator does not have the flexibility to

determine the timing at which it should be received (or parts thereof). This can lead, for instance, to forced heirs of legal age but still quite young, receiving very large sums of money and putting at risk the efficient and lasting management of the investment.

Unit Linked life policies, as an alternative solution, offer real possibilities for the policyholder to determine not only the beneficiaries, but also the terms, including the most suitable time or other, at which the benefit will be received, after the death of the insured(s).

Can we assure our clients after the Supreme Court decision on the process n. 530/10.6TJPR.T. P1.S1 that a Unit Linked life policy does not form part of the Policyholder's estate?

The decision by the Supreme Court of Justice determined that, in the case of a Unit Linked life policy, the acquisition of the right to the insurance benefit, by the beneficiary, only arises after the death of the insured(s), thus the insurance value is not transferred from the policyholder's estate to the beneficiary's estate, but directly from the insurer. This means that, according to this decision, which is a good barometer, the right to the insurance benefit does not form part of the estate. Therefore, according to the current case-law, it is possible to safeguard that the insured capital does not form part of the policyholder's estate. Hence, the general rules of succession may only be applied to the value of the premiums paid by the policyholder, when disputed in court by the legal heirs. In principle, even where an heir seeks to dispute the beneficiary nomination, the insurer should pay the full benefit (including the premium) upon receive of the claim from the contractual appointed beneficiary. An eventual judicial action will normally be decided after the benefit payment.

As the Unit Linked life policy does not form part of the Policyholder's estate, does a Policyholder need to consider the normal succession rules on determining the beneficiaries at the inception of the policy?

According to the insurance contract regime, and without prejudice to what was referred to in the previous query, the policyholder can designate whomever he/she wishes as beneficiary of the contracted insurance, independently of the existence of any familiar relation between them. In the absence of a contractual beneficiary designation, the beneficiary(ies) will be the legal heirs. As such, in principle, the insurer should pay the contractual appointed beneficiaries, if they exist, independently of the eventual existence of legal heirs.

Could the nomination of an irrevocable beneficiary be treated as a donation for tax purposes?

Contrary to what has already occurred in other jurisdictions, Portuguese courts have not yet ruled specifically on this issue in relation to Unit Linked life policies.

Nevertheless, we believe that, in certain cases, and in accordance with the general principles of law, the appointment of an irrevocable beneficiary may be understood as an "indirect donation", since the policyholder is deprived of any possibility of freely exercising the rights arising from the contract, which includes not only the inability to change the beneficiary but also, frequently, the prohibition of making total or partial capital redemptions. We do not believe it is appropriate, at this stage, to give a unique answer to this problem, as it will depend on the specific circumstances under analysis.

At Utmost we've seen a lot of individuals moving their residence to Portugal but they often don't have a full understanding around the succession rules and how they could apply to them and their families.

As you know, with the Regulation (EU) No. 650/2012, of July 4, the application of the succession rules applies to the country of the habitual residence at the time of the death, except if the law of the citizenship was chosen in a will. Do you consider that the Unit linked life policy is a way to ensure that foreign citizens residing in Portugal fall outside Portuguese succession rules?

Indeed, Regulation (EU) No. 650/2012 of the European Parliament and of the Council of July 4, 2012 (on jurisdiction, applicable law, recognition and enforcement of decisions, and acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession) established the connecting factor of the habitual residence of the deceased at the time of death as a rule, unless the deceased chose his/ her nationality law or if he/ she was manifestly more closely connected with another State.

Thus, this rule has led to the application of the Portuguese succession regime to an increasing number of non-national citizens residing in Portugal, many of which are not even aware of it or its applicability. In this sense, the Unit Linked life policy may serve as a possible solution to exclude part of the assets of foreign citizens residing in Portugal from the application of Portuguese succession rules. Notwithstanding, it is also recommended to grant a will.

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