

Hedge funds in Portugal: regulatory overview

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HEDGE FUNDS Market overview

1. What is the structure of the hedge funds market? What have been the main trends over the last year?

In comparison with other jurisdictions, the history of hedge funds in Portugal is more recent and the structure is generally understood as a matter of business approach, not of law. Due to their high-risk profile, the regulator has been cautious in relation to this type of investment structure. However, hedge funds are permitted under Portuguese law and fall within the framework applicable to alternative investment funds (AIFs). In fact, AIFs are currently the closest thing to a hedge fund type structure in the recently approved UCI Law, which, among other changes, has partially implemented Directive 2011/61/EU on alternative investment fund managers (AIFM Directive). After Portugal implemented the AIFM Directive venture capital, social entrepreneurship and specialised investment regimes are regulated by Law No 18/2015 of 4 March 2015 (Venture Capital Law). The Venture Capital Law applies to funds that invest in:

- Equity instruments for a limited period of time.
- Other structures, that are treated under Portuguese law as being different to Undertakings for Collective Investment (UCIs) despite being similar to actual UCIs applicable under the general regulatory framework (see *Question 2, Regulatory framework*).

However, the Venture Capital Law falls outside the scope of this article.

For these historical reasons, hedge funds placed in Portugal are usually UCIs registered in foreign jurisdictions. Therefore, all references to "hedge funds" in this article should be understood as referring to the AIF structure admissible in Portugal.

In comparison to retail funds, hedge funds allow for investment in a broader range of assets and the use of riskier management techniques.

Virtually all of Portugal's largest financial services groups hold an investment fund management company managing AIFs. Important players include management companies belonging to smaller financial services groups and even some independent management companies. This trend may be explained by the fact that this type of investment structure is usually sought by more affluent (and also more diligent) investors.

Regulatory framework and bodies

2. What are the key statutes and regulations that govern hedge funds in your jurisdiction? Which regulatory bodies regulate hedge funds?

Regulatory framework

Hedge funds are regulated by the general laws and regulations applicable to UCIs. The key statutes and regulations that govern UCIs in Portugal are as follows:

- Undertakings of Collective Investment Law (*Regime Geral dos Organismos de Investimento Coletivo*), (established by Law No 16/2015 of 24 February 2015, as amended from time to time) (UCI Law). The UCI Law sets out most of the relevant rules to investment funds. Most of the UCI Law regime entered into force on 26 March 2015.
- CMVM Regulation No 2/2015 on Undertakings for Collective Investment (Regulation No 2/2015). This sets out specific rules regarding certain aspects of the UCI Law.
- Portuguese Securities Code (*Código dos Valores Mobiliários*), enacted by Decree-Law No 486/99 of 13 November 1999, as amended from time to time, which entered into force on 1 March 2000 (CVM).
- The relevant EU directives and regulations.

Regulatory bodies

The Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*) (CMVM) is the main regulatory body for hedge funds. It is responsible for:

- Authorising hedge funds.
- Supervising market conduct.

Hedge fund managers (as financial institutions) are also subject to:

- Prudential supervision by the Bank of Portugal, under the Portuguese Banking Law (enacted by Decree-Law No 298/92 of 31 December, as amended from time to time).
- All applicable Bank of Portugal regulations.

3. How are hedge funds regulated (if at all) to ensure compliance with general international standards of good practice?

Risk

The portfolio of hedge funds can comprise a wide range of assets and a flexible asset allocation policy. Therefore, hedge funds are subject to the scrutiny of the Securities Market Commission (CMVM). The risk management requirements are as follows:

- A hedge fund manager must have an internal risk management policy. The policy must be suited to the scope of the funds under

its management and which should contemplate measures to address any potential risks it may be subject to (such as the risk of credit, counterparts, legal, compliance, interest rates and so on).

- The hedge fund manager has a duty to monitor the exposure to derivatives, leverage, repos and securities lending transactions (*UCI Law and Regulation No 2/2015*).
- The hedge fund documents must clearly disclose to investors the risk profile of a hedge fund through a synthetic indicator of risk. The hedge fund documents include the fund's prospectus, the fund regulations (which contains information on the entities involved in the fund activity, the investment policy, the rules of calculation of the units/shares value, the investors' rights, etc.) and Key Investor Information Document (KIID) (as applicable). The synthetic indicator of risk must be updated by the hedge fund manager at least once a year (not more than ten business days after 30 April each year).

Articles 73 and 74 of Regulation No 2/2015 set out the formulas for calculation of the risk of a hedge fund, based on its volatility. They also provide the reference metrics to classify this risk (from Level 1 to Level 7).

The CMVM can prohibit the distribution of a hedge fund to a certain group of investors if it takes the view that the hedge fund's level of risk does not ensure adequate protection to these investors.

Valuation and pricing

Hedge fund managers must also have valuation and pricing policies. These policies must set out:

- The valuation methods and internal procedures to be adopted in respect of all portfolio assets.
- How price is determined.
- How relevant information is disclosed to the general public. This information may include the:
 - asset allocation of the portfolio;
 - net asset value of the hedge fund; and
 - the price of its units or shares.

The UCI Law and Regulation No 2/2015 set out rules on these types of assets:

- Financial instruments traded on a regulated market.
- Financial instruments not traded on a regulated market.
- Other assets. These include immovable assets which are subject to strict rules with little scope for discretion by the hedge fund manager (because of the historical significance of real estate investment funds in the Portuguese market).
- After applying the required valuation methods, the hedge fund assets must be priced when the price of units or shares is disclosed to the public. Depending on the type of legal structure adopted by the hedge fund, the price may vary:
- Daily (for open-ended funds).
- Every six months (for closed-ended funds).

Systems and controls

- The hedge fund manager or the hedge fund itself (if it is set up as an investment company) must have internal policies in place addressing the following matters (among others):
- Internal organisation.
- Investment decision.
- IT systems.
- Remuneration.

- Outsourcing.
- Internal control (including compliance, risk management and auditing).
- Valuation and pricing of the assets of the hedge fund.
- Anti-money laundering.
- Record-keeping.
- Selection of members for the board of directors and audit board.
- These internal policies are reviewed and approved by the CMVM, and compliance with them is controlled by the CMVM, Bank of Portugal and the depository.

Insider dealing and market abuse

Insider dealing and market abuse are both criminal offences and are punishable as follows:

- Insider dealing, by imprisonment of up to five years or a fine.
- Market abuse, by imprisonment for up to four years or a fine of up to 240 days.

As Regulation (EU) 596/2014 on market abuse (Market Abuse Regulation) is directly applicable, it has also amended the national regime set out in the Portuguese Securities Code. However, Directive 2014/57/EU on market abuse (MAD II) is still not transposed in Portugal.

Transparency

A hedge fund management company must:

- Disclose to the public and send to the CMVM:
 - its annual accounts within four months of the end of the financial year;
 - its bi-annual accounts within two months of the end of the first half of the financial year;
 - an inventory of the fund's portfolio, its global net asset value, any liabilities that are not listed in the balance sheet and the number of units or shares currently in circulation; and
 - The ratio between the performance and the risk of the hedge fund and any relevant factors that can affect the value of the portfolio, at least once a year.
- Publish a Key Investor Information Document and keep it updated.
- Provide professional investors with key information on the fund structure, strategy and objectives before they invest in the hedge fund, if the hedge fund only targets professional investors (*Article 23, AIFM Directive, as implemented by Article 221, UCI Law*).
- Publish other periodic information, as determined by the CMVM and the Bank of Portugal. CMVM Instruction No 8/2016 sets out the procedures for hedge fund managers to follow to meet their report obligations under Articles 3(3)(d) and 24(1), (2) and (4) of the AIFM Directive (*Annex IV, Regulation (EU) 231/2013 on exemptions, general operating conditions, depositaries, leverage, transparency and supervision (AIFM Deregulated Regulation)*).

Money laundering

The hedge fund manager is subject to a number of rules aimed at preventing money laundering and terrorism financing, and must adopt and implement an internal anti-money laundering policy.

Law No 25/2008 of 5 June transposed in Portugal the relevant EU directives. The transposition of Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of

money laundering or terrorist financing (Fourth EU Anti-Money Laundering Directive) is currently in progress.

Bank of Portugal Notice No 5/2013 further specifies the formalities a hedge fund manager must comply with in fulfilling its obligations. Of particular importance are the hedge fund manager's obligations to:

- Produce and file with the Bank of Portugal an annual report on this matter
- Comply with the letters and instructions issued by the Bank of Portugal and, to a lesser extent, the CMVM.

The hedge fund manager is subject to the supervision of both the Bank of Portugal and the CMVM in terms of anti-money laundering.

Short selling

The hedge fund manager is prohibited from carrying out short selling activities on its own behalf.

The constitutional documents of a hedge fund should specify the limits and conditions applicable to the hedge fund's short selling activities.

Marketing

4. Who can market hedge funds?

Onshore hedge funds

The placement of a hedge fund, which encompasses its marketing or distribution (*comercialização*), falls within the definition of an "activity directed towards investors with a view to promoting or proposing the subscription of UCIs" (regardless of the means of communication used to such end).

The entities that are legally permitted to market hedge funds are:

- Hedge fund managers.
- Depositaries.
- Financial intermediaries registered or authorised by the Securities Market Commission (CMVM) to perform the relevant activities, namely those of placement, reception and transmission of orders on behalf of third parties.
- Other entities, as foreseen in the CMVM's Regulation and subject to its authorisation. In terms of marketing hedge funds, these entities must observe the same rules and are subject to the same supervision as financial intermediaries.

Offshore hedge funds

The rules for onshore hedge funds apply to offshore hedge funds (see above, *Onshore hedge funds*.)

A hedge fund manager that has not passported into Portugal must appoint a local distributor. For a list of the entities that can act as a local distributor, see above, *Onshore hedge funds*.

5. To whom can hedge funds be marketed?

Onshore hedge funds

Hedge funds are generally marketed to the specific group of investors under its constitutional documents.

The Securities Market Commission (CMVM) can refuse to authorise the marketing of a hedge fund to certain types of investors if their protection is not adequately ensured (for example, in terms of the complexity and expected risk of the hedge fund).

However, hedge funds can be aimed at qualified and non-qualified investors, subject to the aforementioned analysis by the CMVM.

Under Portuguese law, qualified investors include:

- Credit institutions.
- Investment companies.
- Insurance companies.
- Undertakings for collective investment and their respective management entities.
- Pension funds and their respective management entities.
- Other authorised or regulated financial institutions, such as securitisation companies or funds.
- Financial institutions of states outside the EU performing activities similar to the ones set out above.
- Entities negotiating financial instruments on commodities.
- National and regional governments, central banks and public agencies managing state debt, such as the European Central Bank, European Investment Bank, International Monetary Fund and the World Bank.

Other entities that can be deemed qualified investors include:

- Entities whose main activity is investment in securities.
- Entities with:
 - own capital of at least EUR2 million;
 - assets valued at more than EUR20 million; or
 - a turnover of more than EUR40 million.
- Small or medium-sized companies that:
 - are registered with the CMVM;
 - have a head office in Portugal; and
 - comply with one of the criteria listed above (that is, capital of at least EUR2 million, assets valued at more than EUR20 million or turnover of more than EUR40 million).
- Individuals who are resident or located in Portugal, registered with the CMVM and have either:
 - made significant transactions of securities, the frequency of which is no less than ten operations per quarter during the previous year;
 - a portfolio of securities amounting to more than EUR500,000; or
 - performed an activity in the financial sector for at least one year, in a position that requires sound knowledge of securities investment.

Offshore hedge funds

- The position is the same as for onshore hedge funds in respect of UCITS-compliant hedge funds.

The AIFM Directive passport, if available, only allows marketing to qualified investors. However, the CMVM can also allow the marketing of offshore hedge funds to retail investors under the national private placement rules if these investors are given the same level of protection under the applicable foreign law as under Portuguese law.

Investment restrictions

6. Are there any restrictions on local investors investing in a hedge fund?

The Securities Market Commission can refuse to authorise the marketing of a hedge fund to certain types of investors if their protection is not adequately ensured.

Assets portfolio

7. Who holds the portfolio of assets? What regulations are in place for its protection?

The assets of a hedge fund must be entrusted to a single depositary, which must be a certain type of financial institution (this is usually a bank). A depositary must have at least EUREUR7.5 million in own funds and its registered office must be located in Portugal or in another EU member state, although in the latter case it must also have a branch in Portugal.

A hedge fund must have different entities acting as fund manager and as depositary.

A depositary can also be an investment company authorised to provide registration and deposit of financial instruments services, subject to compliance with the own funds requirements set out in Articles 92 to 98 of Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms (Capital Requirements Regulation).

The depositary, like the hedge fund manager, must act independently and exclusively in the interest of the hedge fund's investors. It has three main responsibilities:

- The safekeeping of the hedge fund's assets.
- Carrying out all acts related to the transfer or exercise of the rights over the assets, as instructed by the hedge fund manager, as well as the payment to investors of the proceeds from the redemption or liquidation of said assets.
- Monitoring and guaranteeing investors that the investment policy, the use of proceeds and the calculation of the value of the hedge fund's units or shares comply with the law and with the CMVM regulations and constitutional documents of the hedge fund.

Under the general rules of civil liability, the depositary is responsible to the hedge fund manager and the investors for compliance with the hedge fund's legal duties, regulations and constitutional documents, and for the loss of any financial instrument under its safekeeping (under the AIFM Directive and the UCITS IV Directive).

Requirements

8. What are the key disclosure or filing requirements (if any) that must be completed by the hedge fund?

Authorisation from the Securities Market Commission (CMVM) is required to set up a hedge fund. To request such authorisation, the hedge fund manager must provide the CMVM with the hedge fund's documentation, notably, the Key Investor Information Document and the full prospectus of the fund, which must also include the hedge fund regulations.

In addition, the CMVM must also be given copies of the agreements to be executed between the management company and:

- The depositary.

- Distributors or entities that will market the fund.
- Any other entities that will render services to the fund or management company.

Documents evidencing the acceptance of functions by all entities involved in the fund's activities must also be presented to the CMVM.

The authorisation request for the setting up of the hedge fund must be accompanied by:

- Evidence of the hedge fund manager's ability, taking into account the:
 - hedge fund's investment policy, objectives, management techniques and type of assets,
 - markets in which the hedge fund will invest; and
 - information on any entity that provides consultancy to the management company (if applicable).
- The reasoning behind the minimum subscription amount, taking into account the complexity, risk and type of investors that the hedge fund targets.

The constitutional documents of a hedge fund must contain information on:

- The type of assets that can form part of its portfolio.
- Its internal rules, such as the conditions of subscription and redemption.
- Minimum and maximum investment limits in relation to assets, issuers and certain operations.
- The number of participants and the minimum global net value of the fund, whenever it is expected that the minimum amounts set by the UCI Law will not be attained.

In cases where the hedge fund is directed at non-qualified investors, the fund's documentation must contain additional information, such as on:

- Its investment policy and management techniques.
- The risks arising from the use of derivatives, leverage, or other similar management techniques.
- The valuation of the assets and units of the fund.

Furthermore, the periodic accounts should emphasise the overall performance of the hedge fund, and the hedge fund manager must keep investors informed about the development of the risk and performance involved.

9. What are the key requirements that apply to managers or operators of hedge funds?

Onshore hedge fund managers

The hedge fund must be managed by a licensed fund manager. Following the recent changes by the UCI Law, a hedge fund must also have at least three directors on its board and one of them must be a non-executive director.

Under the recent Law No 148/2015 of 9 September 2015 (Auditing Supervision Framework), the fund manager must also have an audit board with at least three members (most of them must be considered independent) and a sole auditor.

The members of the board of directors and the audit board must be previously authorised by the Bank of Portugal to take office. Before taking their respective position, a member must be thoroughly assessed in terms of their:

- Suitability, professional and academic qualifications.

- Independence/conflicts of interest.
- Availability (that is, free time).

See *Question 3* for the regulatory requirements.

Hedge fund managers must act independently and exclusively in the interest of investors and in accordance with the highest standards of diligence and professional expertise. They must also comply at all times with the risk sharing principle.

Hedge fund managers must have a minimum share capital of EUR125,000. Irrespective of any other criteria, management companies' own funds must not be less than a quarter of their fixed overheads in the previous year (Article 97, Capital Requirements Regulation).

Other than these minimum thresholds, hedge fund managers are also subject to the following limits set out in Article 71 of the UCI Law. These include:

- Additional capital requirements if the aggregate portfolio value exceeds EUR250 million (equivalent to 0.02% of that excess amount).
- EUR10 million cap.
- The Bank of Portugal's power as regulator to demand a remedy or termination of activities if the fund manager's own funds drop below a certain level (that is, the minimum amount specifically determined by the Bank of Portugal or EUR125,000, depending on the circumstances).
- If a hedge fund manager falls within the scope of Article 9(7) of the AIFM Directive and Articles 12 to 14 of the AIFM Deregulated Regulation, it can take out professional civil liability insurance contract or to apply additional own funds.

If a hedge fund manager is authorised to provide other services (such as the management of real estate investment funds or venture capital funds), it is subject to the applicable prudential requirements too.

Offshore hedge fund managers

Offshore hedge fund managers (either registered in another EU member state, or registered in a third country but authorised in another EU member state) can apply for a passport under the UCITS IV Directive or AIFM Directive to manage hedge funds located in Portugal. Offshore hedge fund managers can passport into Portugal through a regulator-to-regulator procedure under either:

- The freedom to provide services regime.
- The freedom of establishment regime.

Article 114 of the UCI Law prohibits offshore fund managers that passport into Portugal at managing hedge funds (considered as AIFs) exclusively targeted at qualified investors. This Article seems to contradict Article 33 of the AIFM Directive, which does not restrict the type of investor targeted by hedge funds that are managed by a passported hedge fund manager. Moreover, paragraph 5 of Article 33 of the AIFM Directive explicitly prohibits member states from imposing additional requirements.

Open-ended hedge funds

See above, *Onshore hedge fund managers* and *Offshore hedge fund managers*.

Closed-ended hedge funds

See *Questions 7* and *8*.

Moreover, closed-ended hedge funds may also be managed by certain credit and financial institutions (such as banks) that hold at least EUR7.5 million in own funds, provided that the aggregate portfolios of the closed-ended hedge funds at stake do not exceed either:

- EUR100 million, when the portfolio includes assets acquired through leverage;
- EUR500 million, when the closed-ended hedge funds do not resort to leverage techniques.

Legal fund vehicles and structures

10. What are the main legal vehicles used to set up a hedge fund and what are the key advantages and disadvantages of using these structures?

A hedge fund may take one of the following two structures, both of which are subject to licensing procedures with the Securities Market Commission (CMVM):

- **Contractual structure without a legal personality.** This is the traditional structure and requires the fund to be managed by a separate hedge fund manager. The interests of the investors or the participants in these funds are called units.
- **Collective investment company with a legal personality.** To incorporate a hedge fund under this structure, prior authorisation from the CMVM is required. Participants in this structure hold shares. A collective investment company can either be:
 - self-managed. This requires a minimum initial capital of EUREUR300,000; or
 - managed by an appointed third party, that is, a duly authorised hedge fund manager.
- The UCI Law regulates both regimes unless the nature of the collective investment company with a legal personality prevents the application of the general rules established for the contractual structure with no legal personality, thus being applicable the specific provisions to the structure embodied with legal personality. However, the most relevant practical differences between the structures are between the:
- The contractual structure without legal personality and the externally-managed collective investment company with legal personality.
- Self-managed collective investment company with a legal personality.

Advantages. Investors have greater control over the management and investment decisions of a hedge fund under a collective investment company structure (particularly if it is self-managed). The investors (that is, the shareholders) have a direct influence on the way the hedge fund is managed because they are appointing the board of directors which manages the hedge fund.

The contractual form is widely used in Portugal. The market acknowledges it as a simple and effective structure that allows fund managers to quickly set up hedge funds in accordance with the demands of their investors.

Disadvantages. If a contractual entity is used, investors have less control over the management of the hedge fund and its investment decisions.

The self-managed collective investment company structure is legally more complex and has not been used often in Portugal.

Tax treatment

11. What is the tax treatment for hedge funds?

Hedge funds

Funds. Decree-Law No 7/2015 of 13 January 2015 (DL 7/2015) introduced a new tax regime applicable to UCIs. This new regime entered into force on 1 July 2015.

Hedge funds are subject to corporate income tax at the general rate (currently set at 21%), but are exempt from municipal and state surcharges. Taxable income corresponds to the net profit assessed in accordance with a hedge fund's accounting standards.

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

- Non-deductible expenses under the Corporate Income Tax Code.
- Income and expenses relevant to management fees and other commissions earned by hedge funds.

Tax losses generated by hedge funds may be carried forward but such ability is subject to two limitations: (i) a timing limitation whereby such tax losses may only be offset against taxable profits assessed during the five following fiscal years and (ii) a quantitative limitation, whereby such tax losses may only be offset against a maximum of 70% of the amount of the taxable profit.

A hedge fund's income is not subject to withholding tax. However, autonomous tax rates established in the Corporate Income Tax Code will apply.

Hedge funds that exclusively invest in money market instruments and bank deposits are also subject to stamp duty calculated on their global net asset value at a rate of 0.0025% (per quarter). Other funds will be subject to stamp duty calculated on their global net asset value at a rate of 0.0125% (per quarter).

Resident investors. The taxation of resident investors is as follows:

- **Personal income tax.** Income distributed or derived from redemptions to Portuguese individuals (outside a commercial activity) is subject to 28% final withholding tax. If the investor opts to aggregate the income received, it becomes subject to progressive income tax rates of up to 48%. In this case, an additional income tax is due on the part of the taxable income exceeding EUR80,000, as follows:
 - 2.5% on the part of the taxable income exceeding EUR80,000 up to EUR250,000;
 - 5% on any taxable income exceeding EUR250,000.
- In addition, if the option of income aggregation is made, an additional surcharge rate will also be due for the tax year of 2017 on the taxpayer's taxable income, as follows:
 - for taxable income up to EUR20,261, the rate is 0%;
 - for taxable income exceeding EUR20,261 up to EUR40,522, the rate is 0.88%;
 - for taxable income exceeding EUR40,522 up to EUR80,640, the rate is 2.75%;
 - for taxable income exceeding EUR80,640, the rate is 3.21%;
- However, from 1 January 2018 it is foreseen that the additional surcharge will no longer be applicable.

- Income payments to omnibus accounts are subject to a final withholding tax rate of 35%, unless the relevant beneficial owner of the income is identified, in which case the tax rates applicable to the beneficial owner apply.
- Capital gains arising from the transfer of units are taxed at:
 - a special tax rate of 28% on the positive difference between capital gains and losses; or
 - the above progressive income tax rates, additional income tax rates and additional surcharge if the investor opts to aggregate the income received.
- **Corporate income tax.** Income payments to a resident entity are subject to withholding tax at a rate of 25% (to be paid on account of the final corporate income tax due) and are qualified as income or gains for corporate income tax purposes. Income payments to omnibus accounts are subject to a final withholding tax rate of 35%, unless the relevant beneficial owner of the income is identified, in which case the tax rates applicable to the beneficial owner apply.
- A resident entity is subject to corporate tax at a rate of 21% (if the taxpayer is a small or medium-sized enterprise (as established in Decree-Law No. 372/2007 of 6 November 2007) the rate is 17% for taxable profits up to EUR15,000 and 21% on profits in excess of this amount).
- A resident entity may also be subject to a municipal surcharge (*derrama municipal*) of up to 1.5% on taxable profits, depending on the municipality where it is established (municipalities have the right to decide if the municipal surcharge is to be levied and at what rate). Taxable profits are also subject to a progressive state surcharge (*derrama estadual*), which has the following applicable rates:
 - 3% payable on the taxable profits from EUR1.5 million up to EUR7.5 million;
 - 5% payable on the taxable profits from EUR7.5 million up to EUR35 million; and
 - 7% payable on the part of the taxable profits that exceeds EUR35 million.
- Capital gains earned on the transfer of hedge fund units are included in the taxable income of the resident entity and are subject to the same rates and surcharges as above.

Non-resident investors. Non-resident investors are taxed as follows:

- **Personal income tax.** Income payments and capital gains derived from units held in hedge funds are exempt from personal income tax provided that the evidence of non-residence status required by the tax law is delivered in due time. A refund procedure is available within a two-year period for cases where a 28% withholding tax was applied for failure to submit timely documentation. The refund procedure requires the certification of a special form by the competent authorities of the state of residence. Non-resident investors domiciled in a blacklisted territory do not benefit from income tax exemptions. In those cases, a 35% withholding tax will apply. Income payments to accounts opened in the name of one or more account holders acting on behalf of one or more unidentified third parties is subject to a final withholding tax rate of 35%, unless the relevant beneficial owner of the income is identified, in which case the tax rates applicable to the beneficial owner apply. This increased withholding tax rate also applies to payments made to corporate entities subject to corporate income tax.
- **Corporate income tax.** A corporate income tax exemption applies where income arising from the units is distributed or made available to a non-resident entity without a permanent establishment in Portugal.

- Capital gains arising from the transfer of units are also exempt from corporate income tax. In order to benefit from such exemptions, adequate evidence of non-residence status must be provided in due time. The above refund procedure is also available to non-resident corporate entities.
- However, non-resident investors cannot benefit from income exemptions if:
 - the non-resident entity is domiciled in one of the blacklisted jurisdictions listed in Ministerial Order 150/2004 of 13 of February; or
 - more than 25% of the capital of the non-resident entity is held, directly or indirectly, by resident legal entities. However, there is an exception to this rule if the non-resident entity is established in an EU or EEA jurisdiction that is bound by administrative cooperation obligations in the field of taxation with an equivalent effect to the cooperation established within the EU, or in a jurisdiction with which Portugal has a double tax treaty in force and which provides a mechanism for information exchange.
- If the exemption does not apply, the general rules on corporate income tax will apply.

Foreign hedge funds

Resident investors. Resident investors of foreign hedge funds (both open- and closed-ended) are taxed as follows:

- **Personal income tax.** Investment income payments made to resident individuals are subject to personal income tax, which must be withheld at the current final withholding tax rate of 28% if there is a Portuguese resident paying agent, unless the individual elects to include this income in their overall taxable income, subject to tax at progressive rates of up to 48%. In this latter case, additional income tax will be due on the part of the taxable income exceeding EUR80,000 as follows:
 - 2.5% on the part of the taxable income exceeding EUR80,000 up to EUR250,000; and
 - 5% on any taxable income exceeding EUR250,000.
- In addition, if the option of income aggregation is made, an additional surcharge rate will be due for the tax year of 2017 according to the taxpayer's taxable income. In such cases, the personal income tax rates are the same as for resident investors of local funds (see above, *Open-ended hedge funds: resident investors*). However, from 1 January 2018 it is foreseen that this additional surcharge will no longer be applicable.
- Income payments made through a foreign paying agent will be subject to autonomous taxation at a rate of 28%.
- Investment income paid or made available to accounts opened in the name of one or more account holders, acting on behalf of one or more unidentified third parties, is subject to a final withholding tax rate of 35%, unless the relevant beneficial owner of the income is identified, in which case the tax rates applicable to the beneficial owner apply.
- A 35% withholding tax rate applies to investment income payments from companies domiciled in one of the blacklisted jurisdictions listed in Ministerial Order No 150/2004 of 13 of February 2004, as amended.
- The positive difference between the capital gains and losses made during the year is taxed at the special tax rate of 28%. However, the taxpayer may choose to aggregate this income, in which case it will be subject to progressive personal income tax rates and to the additional income tax surcharges, as the case may be (see above).
- Gains resulting from the redemption of units held in funds incorporated in the blacklisted jurisdictions listed in the

above-mentioned Ministerial Order are subject to a special tax rate of 35%.

- **Corporate income tax.** Income payments and capital gains made by a resident entity are subject to a corporate tax rate of 21% (if the taxpayer is a small or medium-sized enterprise, as established in Decree-Law No 372/2007 of 6 November 2007, the applicable rate is 17% for taxable profits up to EUR15,000 and 21% on profits in excess of this amount).
- A resident entity may also be subject to a municipal surcharge of up to 1.5% on taxable profits. Taxable profits will also become subject to a progressive state surcharge (see above, *Open-ended hedge funds: resident investors*).

Non-resident investors. Income payments to, and capital gains made by a non-resident beneficiary without a permanent establishment in Portugal are not subject to taxation in Portugal.

Restrictions

12. Can participants redeem their interest? Are there any restrictions on the right of participants to transfer their interests to third parties?

Redemption of interest

Restrictions on the right to redeem or to transfer interests to third parties are usually set out in the hedge fund's constitutional documents.

Transfer to third parties

See above, *Redemption of interest*.

Private placement

13. Are private placements of hedge funds permitted under national private placement rules in your jurisdiction?

The private placement regime is recognised under the UCI Law for several purposes. However, the licencing rules still apply and the hedge fund must still be passported with the Securities Market Commission before commencing the relevant marketing activities in Portugal.

14. What are the requirements for making a private placement of hedge funds?

Essential requirements to qualify for the regime

A private placement corresponds to all offerings that are not qualified as public offerings.

An offering is qualified as public if it is either:

- Addressed to undetermined addressees in Portugal.
- Issued together with the gathering of investment intentions or marketing campaigns.
- Addressed to at least 150 non-qualified investors per by member state.

Registrations/permits/licences

To be admitted for marketing in Portugal, a hedge fund must either:

- Comply with the UCITS or AIFM Directive notification procedures (as applicable).

- Have a Securities Market Commission (CMVM) authorisation, (if the hedge funds are located in Portugal and are subject to the national private placement rule).

Documents to be filed

If a hedge fund is located in Portugal, the CMVM must authorise a hedge fund located in Portugal to be set up. When applying for authorisation, the hedge fund manager must provide the CMVM with:

- The hedge fund's documentation, in particular the key investor information document
- The full prospectus of the fund. This must also include the fund regulations.
- Copies of the agreements that will be executed between the fund manager and:
 - the depositary;
 - the distributors or other entities that will market the fund; and
 - any other entities that will provide services to the hedge fund or to the hedge fund manager.
- Documents confirming the acceptance of the services rendered by all entities involved in the hedge fund's activities (such as contracts) must also be delivered to the CMVM.
- Authorisation is issued within 20 days (or 30 days for a self-managed collective investment company) from the date of receipt of either the respective request or of any supplementary information or amendments to the documents required by the CMVM. Authorisation is deemed granted if the CMVM does not inform the applicants whether their application is successful within period. This deemed authorisation rule does not apply to hedge funds that are alternative investment funds. For them, the authorisation application is deemed refused.
- The CMVM may refuse to grant authorisation if the applicant does not submit the required documentation or if the hedge fund manager of the fund mismanages other investment funds. Once authorisation is granted and the first subscription takes place, the hedge fund becomes fully set up.

In terms of marketing offshore hedge funds from another EU Member State, there is a distinction between UCITS-compliant hedge funds and hedge funds that do not comply with the UCITS IV Directive.

As for the marketing of UCITS-compliant hedge funds, the passport procedure is set out in:

- The UCITS IV Directive.
- Regulation (EU) 584/2010 on the form and content of the standard notification letter and UCITS attestation, the use of electronic communication between competent authorities for the purpose of notification, and procedures for on-the-spot verifications and investigations and the exchange of information between competent authorities.

Although no authorisation by the CMVM is required, the CMVM can (but is unlikely to) block the marketing if it considers that the applicable laws and regulations have not been complied with. The following documents must therefore be submitted to the CMVM before the fund is marketed:

Certain constitutional and informational documents of the fund.

A certificate of compliance with the UCITS IV Directive, issued by its home state supervisory authority.

There is a difference between:

- Marketing to retail investors. This is subject to CMVM authorisation under the national private placement regime, (*Article 43, AIFM Directive*).
- Marketing to qualified investors. Compliance with the AIFM Directive is necessary to qualify for using a passport under the AIFM Directive.

If a hedge fund that does not comply with the UCITS IV Directive is to be marketed to retail investors or is from a third country, the applicant must provide the following documentation to the CMVM:

- Certification or equivalent document issued by the competent authority of the country where the hedge fund is established, stating that:
 - the hedge fund has been created and operates normally, in accordance with the applicable laws of its home member state; and
 - the hedge fund is supervised by the competent supervisory authority of the home state.
- Management regulation of the hedge fund (or, if applicable, its articles of association).
- Marketing arrangements of the hedge fund and its draft agreement governing the relationship between the marketing/distribution entity and the hedge fund's management company.
- Last annual report (and, if applicable, bi-annual report).
- Identification of the laws of the country where the hedge fund is registered and of the competent supervisory authority in the hedge fund's home state.
- The CMVM has 30 days to issue a decision as to whether it is authorising:
- The marketing of an offshore fund to retail investors.
- The marketing of a fund that is not established in an EU member state.

Regulatory timescales

See above, *Documents to be filed*.

Registration/permit/licence fees

Initial fees. A one-time fee of EUR3,000 or EUR5,000 (depending on whether the fund is a UCITS or an AIF) is due to the CMVM for distributing hedge funds in Portugal. The fee is the same regardless of the number of sub-funds to be marketed if they are all submitted together to CMVM.

An extra fee of EUR300 is payable to add another sub-fund to the list of authorised hedge fund of sub-funds that can be marketed in Portugal.

Ongoing fees. An on-going monthly fee of EUR125 is payable to the CMVM by each hedge fund.

The local distributor of the hedge fund in Portugal is deemed liable to the CMVM for the paying the initial and ongoing fees.

Content requirements for offering memorandum

The UCI Law and Regulation No 2/2015 do not require an offering memorandum. However, they require each hedge fund authorised in Portugal to have a prospectus or a regulation.

The content of the hedge fund's legal documents may vary slightly depending on the specific type of UCI adopted by the hedge fund. However, they must generally identify and give information on the following (among others):

- The hedge fund.
- The fund manager.

- The depositary.
- The auditor.
- Any other entity that provides services to the hedge fund, their respective obligations and the rights of investors.
- Any subcontracted functions.
- The hedge fund's strategy and investment purposes.
- The assets in which the hedge fund can invest, including any associated risks and applicable limitations.
- The asset evaluation process.
- The liquidity management of the hedge fund, including reimbursement rights (under normal and exceptional circumstances) and reimbursement conditions under the fund's rules.
- The remuneration and any other expenses directly or indirectly held by investors, and the maximum applicable cap.
- Any recent report and accounts.
- The terms of the issue and the sale of participation units.
- The applicable tax regime.
- All information contained in the hedge fund documents must be complete, true, updated, clear, objective and lawful. The information must not breach any legal provision.

Restrictions on investments/leverage

The investment/leverage levels of a given hedge fund depend on the specific type of UCI that the fund has adopted. The applicable requirements may vary between the strict limitations set out by the UCITS Directive and the UCI Law limitations that apply to the types of AIFs that are recognised under Portuguese law.

It is therefore generally impossible to ascertain the investment/leverage restrictions applied to hedge funds. However, it is possible to set up hedge funds with a flexible investment policy and leverage ratio, subject to the CMVM's assessment of this matter.

Investment/leverage rules and requirements must be clearly set out in the hedge fund's rules or bye-laws (as applicable).

Requirements for local service providers

Local service providers can be the management entities, depositaries, local distributors, auditors, appraisers and so on. Depending on their nature, they must either be registered with:

- The Bank of Portugal.
- The CMVM.
- Both the Bank of Portugal and the CMVM.

Requirements for non-local service providers

There is no registration requirement for non-local service providers to the hedge fund. They must therefore meet the requirements set out by the regulator in the hedge fund's home member state

regulator, unless they are a the local distributor. To provide services in Portugal, local distributor must either be authorised by the CMVM or passported into Portugal.

Requirements for directors

The requirements established for directors are as follows:

- Directors must comply with the fitness test under Directive 2013/36/EU on capital requirements (Capital Requirements Directive IV) and the Banking Law.
- At least two directors and one independent board member must be appointed. Therefore, at least three members must be appointed in practice.
- The director remuneration policy must be adequate for a robust and efficient risk management. This must be clearly defined under the applicable legal requirements and include all emoluments.
- The directors must be fully available to take up this position (for example, they must have the time availability).
- The directors must not accumulate positions that can lead to a conflict of interest under the applicable legal provisions.

On-going filing/consent requirements

Once a hedge fund is authorised by the CMVM, information requirements are established and reports must be disclosed to the regulator on a periodic basis. These must include the invested assets, the new net liquidity management mechanisms, the risk profile of the hedge fund at all moments, and the prime activities the hedge fund has invested in, as well as the results of the stress test. The managers must also provide the financial statements for each year, a monthly report regarding the activity of the funds and a bi-annual list of all hedge funds under their management. Portuguese law also requires compliance with periodic and detailed disclosure obligations regarding the assumed leverage effect.

The same requirements are applicable to hedge funds authorised in Portugal and managed by foreign managers.

Other

Not applicable.

Reform

15. What (if any) proposals are there for the reform of hedge fund regulation?

There are no proposals for the adoption of a legal regime applying specifically to hedge funds in Portugal. However, a draft decree-law is currently under consultation. It will implement the Directive 2014/91/EU on UCITS depositary functions, remuneration policies and sanctions (UCITS V) in Portugal by amending the UCI Law. This is expected to introduce changes to certain aspects of the UCITS regime in accordance with the applicable requirements with the AIFM Directive. Therefore, hedge funds will continue to be subject to the general provisions that apply to other types of UCIs.

ONLINE RESOURCES

Portuguese Securities Market Commission (Comissão do Mercado de Valores Mobiliários)

W www.cmvm.pt **Description.** The Portuguese securities regulator's website contains the Portuguese versions of the relevant legislation (such as Portuguese Securities Code, Collective Investment Law and CMVM Regulation No 2/2015 on Undertakings for Collective Investment), along with non-binding (but generally accurate) English versions. The legislation is usually updated shortly after each amendment, but the Portuguese versions may be updated before the English versions.

Practical Law Contributor profiles



Pedro Simões Coelho, Head of Investment Funds

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Areas of practice. Banking and finance; collective investment schemes; capital markets; private equity.

Recent transactions. Actively involved in several transactions, mainly focused on the advising, structuring and setting up of collective investment schemes such as mutual funds and real estate investment funds, infrastructure vehicles, venture capital funds and private equity structures.

Languages. Portuguese, English, French, Spanish

Professional associations/memberships. Admitted to the Portuguese Bar Association as a specialist in financial law.

Publications. Among other articles, Pedro Simões Coelho has published the following:

- Alternative Investment Funds – Portugal, International Comparative Legal Guide, 2016.
- The AIFMD Passport and non-EU Alternative Investment Funds, Funds People, 2016.
- Alternative Investment Funds – Mozambique, International Comparative Legal Guide, 2016.
- Alternative Investment Funds – Angola, International Comparative Legal Guide, 2016.
- Fund Management – Portugal, Getting the Deal Through, 2016.
- Hedge Funds em Portugal - The European Lawyer Reference Series, 2011 (first edition) and 2014 (second edition).
- Investment funds in Portugal: Regulatory overview - Practical Law Company Investment Funds Handbook 2012, 2013 and 2014.



Ricardo Seabra Moura, Managing Associate, Tax

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Professional qualifications. Law degree, University of Coimbra, Faculty of Law, Postgraduate degree in Taxation, ISG, Lisbon.

Areas of practice. Tax.

Recent transactions

- Assistance to BBVA Asset Management in the structuring and implementation of a cross-border (Portugal and Luxembourg) merger of collective investment schemes.
- Regular assistance (including on the setting up) of UCIs for respective investors.

Languages. English, French, Spanish

Professional associations/memberships. Admitted to the Portuguese Bar Association.

Publications. Among other articles, Ricardo Seabra Moura has published the following:

- Alternative Investment Funds – Portugal, International Comparative Legal Guide, 2016.
- Fund Management – Portugal, Getting the Deal Through, 2016.
- Issuance of Commercial Paper in Portugal, Expert Guides Banking, Finance and Transactional Law, 2014.
- Imposto do Selo: Reporte, Empréstimo de Valores Mobiliários e Swaps, Fiscalidade - Revista de Direito e Gestão de Fiscal, 2014.



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Areas of practice. Banking and finance; collective investment schemes; capital markets; private equity and insurance.

Recent transactions

- Regularly advises common representatives and trustees, and has assisted setting up collective investment schemes, providing ongoing counsel to the respective fund managers.
- Provides general regulatory advice to banking entities and is actively involved in aviation finance and cross-border factoring transactions.
- Provides ongoing general advice to insurance companies and intermediaries on regulatory matters, as well as on pension fund schemes and pension fund managers.

Languages. Portuguese, English, French

Professional associations/memberships. Admitted to the Portuguese Bar Association.

Publications.

- Alternative Investment Funds – Mozambique, International Comparative Legal Guide, 2016.
- Fund Management – Portugal, Getting the Deal Through, 2016.
- The AIFMD Passport and non-EU Alternative Investment Funds, Funds People, 2016.
- Cross Border Merger of UCITS, Funds People, October 2015.



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Areas of practice. Banking and finance; collective investment schemes; capital markets; private equity.

Recent transactions. Market-related transactions, including active participation in advising fund managers, venture capitalists, credit institutions and investment firms regarding debt issuing and restructuring transactions; experience in corporate restructuring transactions and facility agreements drafting, review and provision of legal advice in regulatory matters to investors, financial intermediaries both domestically and internationally.

Languages. Portuguese, English, Ukrainian, Russian

Professional associations/memberships. Admitted to the Portuguese Bar Association.