



Portugal: Investment Funds Update

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Collective investment schemes (CIS), notably for investment in transferable securities or in real estate assets, have been an important tool in the Portuguese financial system for the last 20 years. CIS may be defined as an undertaking having the purpose of collectively investing capital obtained from investors, which is managed under a principle of risk sharing and exclusively aimed at the investors' best interests. Decree-Law 252/2003 of 17 October 2003 (as amended) sets out the general legal framework on undertakings for collective investment (UCI), while Decree-Law 60/2002 of 20 March 2002 (as amended) established the general regime on real estate investment funds (REIF).

Corporate structure

From the beginning, Portuguese UCI law determined that UCIs may adopt the legal structure of either an investment fund (contractual structure) or an investment company (corporate structure). An investment fund corresponds to an autonomous pool of assets, owned by the unitholders but managed by the respective fund manager, while an investment company is owned by its shareholders and manages itself, even though it may have an investment adviser or outsource its management.

Only very recently this year has the Portuguese Council of Ministers approved legislation enabling both UCIs and REIFs to be incorporated as investment companies (corporate structure) under Portuguese law. This legislation has not yet entered into force, but draft legislation has been made available.

Having regard to the latest draft statute, both closed and open-ended CIS may adopt the corporate form bearing the denomination of 'investment company' and will be qualified as 'financial intermediaries' for the purposes of the Portuguese Securities Code, although many of the rules usually applicable to such entities (notably, many of the MiFID requirements) will not be applicable to them.

The purpose of investment companies may be the investment in securities and financial instruments (*sociedades de investimento mobiliário*, 'SIM') or in real estate (*sociedades de investimento imobiliário*, 'SII'), and they shall be subsidiarily governed by the corresponding provisions of contractual type CISs. The minimum capital of SIMs shall be of €300,000, while in respect of SIIs it shall be of €375,000. Notwithstanding the above, their net global value shall not be lower than €4m (or €1.25m per compartment) or €5m for SIMs and SIIs respectively.

The constitution of SIMs and SIIs is subject to the authorisation and revocation of the Portuguese Securities Market Commission (CMVM), which has also an extensive regulatory power in their activity. SIMs and SIIs may either be managed solely by their respective board of directors or have the management subcontracted to a third party CIS management company, which outsourcing shall be notified to the Bank of Portugal.

Similarly to contractual structure CISs, SIMs and SIIs shall have a custodian, responsible to inter alia issue, register and redeem the shares representing their respective capital.

In any event, considering that the investors will enjoy the quality of shareholders and that SIMs and SIIs will be subject to Portuguese company law, these structures may allow a closer participation of investors in the management of these structures, notably by electing the relevant board members, which may be a particularly important feature in the case of privately subscribed SIMs and SIIs.

We anticipate that the new legislation will be an important step towards the sophistication of the Portuguese market, and that SIMs and SIIs may forge a successful path in the Portuguese jurisdiction, similarly as in other EU jurisdictions, notably Luxembourg, where CISs in corporate form are well known and have been used for decades.

Taxation

Regarding the tax implications on the taxation of UCIs and REIFs it is important to distinguish between the new amendments that are now in force regarding Property Transfer Tax (PTT) and Municipal Property Tax (MPT) taxation and amendments that are likely to enter into force in the Portuguese tax law during the course of this month regarding capital gains taxation and that will have direct impact on the UCSS, REIUs and investors.

Taxation of REIUs

The Portuguese State Budget Law for 2010, entered into force on 29 April 2010, has introduced one relevant change on

the REIFs' tax regime. In fact, until 28 April 2010, Portuguese real estate assets integrated in closed-ended or mixed REIU held by non qualified (i.e., non institutional) investors were granted a partial PTT and MPT exemption. Whenever closed-ended or mixed REIFs were held by qualified investors a full PTT and MPT exemption was applicable.

Currently, Portuguese State Budget Law for 2010 has: (i) revoked the above partial PTT and MPT exemption; and (ii) narrowed the scope of the full PTT and MPT exemption only to open-ended REIFs without foreseeing any transitory rules and therefore affecting future real estate transactions and real estate held by REIFs constituted both after and before the entry into force of the Budget Law.

UCIs, REIFs and investors capital gains taxation

The most probable amendment will be an increase of the special tax rate from 10 to 20 percent, which will impact the taxation of UCIs and REIFs and their individual investors resident in Portugal for tax purposes. In brief terms, the capital gains arising from the transfer of units obtained by individual resident investors are currently taxed at a rate of 10 percent on the positive difference between the capital gains and capital losses of each year. An equivalent taxation regime arises on UCIs and REIFs since they are under the same conditions that would apply to individuals resident in Portuguese territory.

It is also expected that the positive difference between the capital gains and capital losses of each year regarding the disposal of (i) shares held by investment funds for more than 12 months or (ii) debts securities, is not subject to taxation. However, according to the proposed disclosed wording, some doubts may arise on the tax rate applicable on the positive difference between the capital gains and capital losses whenever obtained by closed-ended or mixed funds since, on the one hand, the new amendment remits to the rules of the Portuguese Personal Income Tax Code (and, consequently, to a 20 percent taxation on such positive difference) and, on the other hand, article 22 (1)(c) of the Portuguese Tax Benefits Statute (which foresees a tax rate of 10 percent) was not revoked.

Finally, no changes are anticipated on the capital gains exemption granted to non-resident entities (either individuals or legal persons) arising from the transfer of units.

Therefore, non residents may continue to benefit from a capital gains exemption unless the non-resident beneficiary: (i) is domiciled in a blacklisted country; or (ii) in case of a non resident legal person, is held, directly or indirectly, by more than 25 percent of resident entities.

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