Portugal

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1. REGULATION OF FUNDS

1.1 Funds domiciled in the jurisdiction

Regulatory history

A hedge fund may be defined as an autonomous pool of assets (such as a unit trust), which typically pursues one or more alternative investment strategies (Global Macro, Equity Hedge, Event Driven, Market Neutral, other) and uses hedging and leveraging techniques, with a limited range of investors, practically no information reporting/disclosure obligations and usually paying a performance fee to its manager.

The history of hedge funds in the Portuguese jurisdiction is quite recent in comparison with other onshore and offshore jurisdictions, and is currently still dominated by non-Portuguese domiciled structures.

Hedge funds were originally seen by the Portuguese regulatory authorities as an unusual and dangerous type of investment, mainly due to the fact that such funds were unregulated and had a high risk profile. However, this suspicious view has increasingly softened and, even in the current post sub-prime and post Madoff environment, the regulatory approach is more flexible than it was a few years ago. Taking into account the views expressed by various major international players both in Europe (for example, the European Central Bank) as well as in the US (for instance, the Securities and Exchange Commission), it should be mentioned that it is expected that, internationally, the hedge funds industry will sail under more regulated waters (one can already notice a clear general shift in attitude notably concerning information disclosure rules), which will also have natural repercussions in Portugal.

This trend is reflected in the US Treasury Secretary's announcement, stating that hedge funds, private equity and derivative markets should be under federal supervision and that such supervision should be developed by a systemic risk regulator with powers to force companies to raise capital or reduce the credit given and even to nationalise companies in financial stress.

Hedge funds placed in Portugal are commonly collective investment schemes based in foreign jurisdictions, mainly offshore, such as the Cayman Islands, the British Virgin Islands, Bermuda or the Channel Islands. The reasons for choosing offshore jurisdictions are well known, and include, *inter alia*, the more favourable tax environment and the more flexible regulatory approach. Distribution of hedge funds in the Portuguese market will be specifically addressed below.

As to the possibility of setting up a hedge fund type of structure directly in Portugal, considering the current applicable legal framework, a special mutual fund structure would have to be used, specifically 'special investment undertakings' (SIU) which, under certain circumstances, could meet to some extent, but not entirely, the typical characteristics of a hedge fund.

Statutes and regulation

The setting up of such a special mutual fund structure should, in our view, comply with CMVM (*Comissão do Mercado de Valores Mobiliários*, the Portuguese Securities Market Commission) Regulation 15/2003 of 18 December 2003 which establishes regulatory provisions regarding undertakings for collective investment (UCI Regulation). Such legal framework was approved by Decree-Law 252/2003 of 17 October 2003 (UCI Law). The UCI Law implemented in Portugal Directive 85/611/EEC (as amended) on undertakings for collective investment in transferable securities (the so-called harmonised UCIs or UCITS) and additionally foresees the setting up and distribution of non-harmonised UCIs. The UCI Regulation in particular, Articles 50 to 55 set out a special regime for SIUs, under which CMVM is the competent regulatory authority, empowered to authorise and register such funds.

1.2 Principal requirements

Categories and classification

The setting up of UCIs in Portugal can only be achieved by using one of the categories defined by law. That is to say that a UCI has to adopt one of the legal forms regulated by the UCI Law or by the UCI Regulation which basically correspond to open and closed-ended UCIs, including SIUs and UCITS.

Additionally, both SIUs and UCITS may be set up with a fund of funds structure. While in the latter case there are certain regulatory restrictions, in particular regarding the assets the fund may invest in, SIUs may have a much greater flexibility, which shall be evidenced in the fund's documents and that are essentially limited by CMVM's discretion in approving the SIU.

Legal structures

The implementation in Portugal of a general framework for UCIs has been gradual and subject to periodic revision. As such, until very recently the UCI Law, although determining that UCIs could adopt the legal structure of either an investment fund (also known as contractual structure) or an investment company (the corporate structure), referred the latter to special regulation which was never adopted. Instead, the UCI Law was recently amended to include provisions governing UCIs incorporated as investment companies, which are essentially governed by the provisions applicable to open-ended or closed-ended investment funds, depending on whether the investment company's share capital is fixed or variable.

The set of amendments to the UCI Law which allowed for UCIs to be incorporated as investment companies was a step forward in following the successful path trailed by other EU member states, such as Luxembourg.

Notwithstanding this major legislative change, and the fact that the UCI Law determines the applicability to investment companies of provisions relating to investment funds, the UCI Regulation has not yet been amended to reflect the possibility of the new corporate structure, leaving many core aspects relating to the actual regime applicable to UCIs incorporated as investment companies relatively uncertain. For this reason, the paragraphs below still make reference only to SIUs incorporated as investment funds, although it is predictable that in the near future the UCI Regulation will be amended in order to include provisions relating to SIUs in the form of investment companies as well. We would not, however, completely exclude the possibility of applying the SIU regime contained in the UCI Regulation to vehicles incorporated as investment companies, but this would have to be discussed with CMVM.

Approval process

In addition to the documents relating to the fund described below, setting up an SIU also requires the applicants provide CMVM with evidence that the management company is fit to develop the management of the fund, notably regarding the fund's investment policy, management strategies and techniques which will be applied and the envisaged investment markets. Reference shall also be made in the application request to the minimum subscription amount indicated for the fund in light of the levels of complexity, risk and target investors.

If the relevant SIU distribution is aimed at non-qualified investors (ie, non-institutional investors), as defined in the Portuguese Securities Code (*Código dos Valores Mobiliários*, PSC), CMVM also needs to be provided with a plan referring to the entities which will carry out the distribution activities in connection with the fund.

These additional duties on the applicants are motivated by the fact that SIUs, (unlike UCIs or UCITS), having an increased freedom to invest in assets of a different nature and to use alternative management techniques, which may result in situations where there is more uncertainty as to the result of the investment and as such the regulatory requirements on the persons responsible for such investments are correspondently tougher.

This is also the rationale behind the rule that enables CMVM to refuse to grant the authorisation for the distribution of SIUs to certain categories of investors, in case CMVM considers that the required minimum conditions to ensure such protection have not been gathered.

In order not to risk having its license revoked by CMVM, an open-ended UCI has to ensure that, within the six months following its setting up, at least 25 per cent of its units are distributed by a minimum of 100 participants and that it has reached a global net asset value of at least €1.25 million. For closed-ended UCIs the first requirement is adjusted to a reduced number of 30 participants. Subsequently, should these levels fail to be complied with, for a period of over six months; the authorisation decision may be revoked by CMVM.

Documentation

The setting up of an SIU is subject to CMVM's (discretionary) authorisation and the fund's documentation must be filed with, and reviewed by, CMVM. Such documentation comprises – most importantly – the fund regulation, but may also include a simplified prospectus and a full prospectus (which essentially includes the fund regulation). When issuing its authorisation and in reviewing the relevant applicant fund's documents, CMVM will pay particular attention to the type of investors targeted by the SIU. It should also be noted that on July 2009, CMVM Regulation 1/2009 on complex financial products entered into force, requiring prior approval of an informative document by CMVM for the placement of complex financial products with non-qualified investors (ie, non-institutional investors). The qualification of the securities to be placed with the investors as complex financial products can often only be assessed on a case-by-case basis. In general, it can be said that financial products which performance derives from that of one or more underlying assets have a high risk of being deemed complex financial products.

The authorisation request addressed to the CMVM must also include a model subscription form which is to be provided to investors.

Apart from the documents referred to above, the applicants will also have to submit to the regulator the agreements to be entered into with the depositary, as well as with any distributor or any other entity rendering services to the fund, or to the management company. Such entities are required by law to declare in writing their commitment to assume their roles towards the fund. This is to avoid a situation where an approval is obtained but the essential services needed for the fund's constitution in accordance with the rules cannot be assured given the absence of the necessary responsible entities (bearing in mind that the fund is an autonomous pool of assets and not a corporate entity, therefore needing representatives to act on its behalf).

In addition to the general information which must be submitted along with any UCI authorisation request, in respect of SIUs the law further determines that particular issues must be addressed in relation to non-qualified investors. These issues will include: the SIUs investment policy; its management techniques and the management company's track-record; the risks involved in the investment in the type of assets included in the portfolio; the use of derivative instruments, leverage or similar techniques; the concentration of the fund's investments; the valuation methods adopted and the frequency of calculation and disclosure of the unit's value; and details regarding settlement of payments to investors.

Timing

Authorisation for the setting up of a UCI depends upon a specific procedure being followed, which includes filing with the CMVM all the information and documents relating to the relevant UCI. The applicant may expect a decision to be made within 15 days from the date on which the CMVM was provided with such information, or, if the regulator has requested additional

elements, from the date of provision of those elements. The absence of notification of the authorisation to the applicants within this period does not correspond to a tacit approval of the fund.

Non-UCI regulatory categories

The SIU is, in our opinion, the closest structure to a hedge fund under Portuguese law. Hypothetically it could be argued that a regular commercial company (incorporated under the Portuguese Companies' Act) or even a fund of a different nature (such as a real estate investment fund) could, under certain circumstances, pursue activities which in practice would not greatly differ from those carried out by certain hedge funds. Nevertheless, the fact that both investment vehicles would be regulated in their own category, and subject to the statutory or regulatory limitation of their object, would render them unfit as hedge funds. This is due to the fact that they are unable to adopt different investment strategies from the ones established in their documents of incorporation and allowed by the applicable legal and regulatory rules.

Additionally, regular commercial companies face specific capital requirements and are limited by their statutory object. Also, until very recently the shares of regular commercial companies had to be assigned a nominal value, which posed an obstacle to the traditional scheme of a pool of assets divided by units. For SIUs incorporated as investment companies (as referred above) it is expected that, as already foreseen in the UCI Law, no nominal value needs to be assigned to the shares and these shall, in most aspects, be governed by the provisions applicable to participation units.

As for real estate investment funds, they could hardly be construed as something similar to a hedge fund, considering their limited ability to invest in securities and the fact that the law regards them as a separate category, in the sense that even among real estate investment funds there are different types, some of which may only invest in real estate of a certain nature. In certain cases, however, whenever the relevant hedge fund intends to invest, directly or indirectly, mainly in real estate, setting up a special real estate investment fund should be taken into consideration.

The above is a summary of the difficulty faced when trying to relate the characteristics of a hedge fund to the existing legal categories of vehicles and/or companies, but, at the end of the day, the difficulty in building a hedge fund using the traditional regulatory categories lies, not so much in the categories themselves, but in the regulatory framework applicable to them. The problem is that any vehicle hypothetically built as a hedge fund will always face regulatory limitations and this, along with the ever-present information requirements, will almost certainly limit the very nature of a hedge fund, based on the non-disclosure of the techniques employed and on the wider spectrum of potential assets in which it may invest.

Regulation of SIU managers

There are no special provisions governing fund managers of SIUs. Thus, the applicable rules are those in force regarding fund managers of UCIs in general.

Fund management activity may be developed by investment fund management companies and, in the case of closed-ended UCIs, certain types of credit institutions (such as banks), which own funds at least up to €7.5 million. Fund managers have to be authorised and registered with the Bank of Portugal and with CMVM before managing any UCI.

The main object of investment fund management companies is the management of one or more UCIs. Secondarily, such companies may also market Portuguese or foreign investment funds and may be authorised to provide discretionary and individual financial instruments portfolio management services, venture capital management services, real estate investment funds management services and investment advisory services relating to the aforementioned assets.

A fund manager's own funds may not be lower than certain percentages of the net asset value (NAV) of the UCIs under management: (i) up to €75 million 0.5 per cent; and (ii) 0.1 per cent for anything over €75 million with a cap of €10 million. In any case, the own funds may not be less than the equivalent to one-quarter of the fund manager's preceding year's fixed overheads. If the fund manager is authorised to provide other services, the prudential requirements applying to such activities shall also apply.

In carrying out its fund management services, the fund manager shall carry out all actions and transactions required for the proper execution of the investment policy including: selecting, acquiring and disposing of the relevant assets; managing the assets (including exercising the inherent rights such as dividend and interest collection, providing for the necessary legal and accounting services, responding to investors' complaints, evaluating the portfolio and determining the NAV); complying with applicable laws and regulations; distributing income (if applicable); issuance and redemption services and marketing the UCIs under management; clearing, settlement, issuing certificates and keeping proper records. The fund manager and its corporate bodies shall act independently and solely in the interests of the unit holders act with high diligence and professional competence; the UCIs' assets shall be managed under a principle of risk sharing. To that end there are also some restrictions on the exercise of voting rights inherent to shares comprised in the UCI's portfolio to prevent abuse and maximise the unit holder's return; thus, voting rights may not be exercised with the main purpose of increasing the fund manager's parent company's controlling power in a given company, nor can they be cast in favour of anti-takeover amendments to the company's by-laws.

The fund manager and the depositary shall be jointly and severally liable, before the unitholders, for compliance with all applicable legal and regulatory obligations relating to the UCI and shall indemnify the investors for losses caused *inter alia* by errors and irregularities in: (i) the evaluation procedures; (ii) in the processing of subscriptions and redemptions; and (iii) for charging undue amounts.

A fund manager's employees and the members of its corporate bodies that take and/or implement investment decisions are not allowed to work for any other fund manager.

Each UCI shall be considered a client and thus the fund manager shall be organised in such a way that prevents and mitigates possible conflicts of interests. The fund manager shall give preference to the UCI's interests over its own interests, the interests of its parent company or group and the interests of the members of its corporate bodies. All UCIs under management shall be treated equally and transparently and whenever joint orders are issued on behalf of more than one UCI, the fund manager shall proportionately allocate the respective assets and costs.

If the fund manager is also authorised to perform discretionary and individual portfolio management services, it may not invest all or part of a client's portfolio in the UCIs it manages, except with the relevant client's prior consent, which may be provided in general terms.

Fund managers (except for credit institutions) shall not:

(i) take or grant loans, nor provide guarantees, on its own behalf;
(ii) invest, on its own behalf, in UCIs or securities, except money market UCIs or equivalent, managed by other fund managers and public debt or debt instruments listed on a regulated market with a rating of A or equivalent;
(iii) acquire property which is not required for performing its services and up to an amount equivalent to its own funds level; nor
(iv) carry out short-selling activities on its own behalf.

As regards short selling on behalf of UCIs under management, special attention should be given to any applicable regulatory provisions on short-selling – in the Portuguese context, currently some regulatory restrictions and limitations apply, in particular, regarding short-selling of shares of companies listed in Eurolist by Euronext Lisbon which qualify as financial institutions.

The fund manager is remunerated by means of a management fee, the terms of which shall be set out in the fund documentation. It is standard practice to have a flat fee, calculated as a percentage of the UCI's annual NAV, payable monthly, quarterly or within a different period. However, performance fees are allowed eventually combined with a high water mark. Currently, performance fees are more widely spread with respect to the management of venture capital funds, the terms of their calculation being carefully detailed in the fund's documentation. Subscription, redemption and transfer fees are also accepted, provided that such fees are clearly indicated in the relevant fund's documents. Normally such fees revert to the fund manager, but they can also revert to the fund, thereby offering an incentive for a long-term investment. In any case, further fees and commissions may be set out in the fund's documentation.

The fund manager may subcontract investment management and administrative functions, provided certain principles are complied with. Subcontracting is of relevance particularly where the fund manager lacks specific knowledge of local markets and thus intends to hire a local partner to assist it in investing the SIU's assets in a given jurisdiction. The fund manager shall periodically define the relevant investment criteria and keep the core of its management activity. The subcontracted party shall

have proper qualifications and its activity shall be controlled by the fund manager, to assess and assure that the interests of the investors are always considered. The subcontractor shall be subject to the same obligations as the fund manager, but the fund manager and the depositary will remain jointly and severally liable before the unit holders. The subcontracting party shall not compromise the regulatory supervision of the fund manager nor prevent the fund manager from acting in the best interests of the unitholders.

Investment management shall only be subcontracted to financial intermediaries authorised and registered for discretionary portfolio management services and it may not be subcontracted to the depositary or other institutions whose interests may enter into conflict with those of the fund manager or of the investors. Investment management may only be subcontracted to an institution based outside of the EU if cooperation between the CMVM and the foreign state's supervisory authority is assured.

The fund manager shall inform the CMVM of the terms of each subcontract before its execution and the fund's documents shall identify the subcontracted party and its respective functions.

Depositary

The custody of a UCI's assets is of particular importance in the Portuguese regulatory context and as such reference should be made to the depositary's role.

Each UCI is required to have a depositary, to which its securities are entrusted. The depositary's role may be performed by certain categories of credit institutions (such as banks), whose own funds are at least up to €7.5 million and who have a registered office in Portugal or in another EU member state. A written agreement shall be entered into between the management company, on behalf of the fund, and the depositary, and filed with the CMVM upon the UCI's authorisation request. The fund manager may not act as depositary but the depositary may, subject to some limitations which may apply in the secondary market, purchase units of the relevant UCI. The depositary is entitled to receive a depositary fee, to be specified in the fund's management regulations.

The depositary shall act independently, in the sole interest of the unitholders and shall comply with all applicable laws, regulations and documents. It shall hold and register the UCI's securities and execute transactions and exercise rights inherent to the assets, as instructed by the fund manager, except if such instruction would breach any applicable provisions. It shall ensure the conformity of all transactions with market practice and with all applicable rules (including the investment policy and the calculation of the NAV), keep an up-to-date chronological list of all transactions conducted on the relevant UCI's behalf and a monthly inventory of its assets. The depositary shall pay the income (if any) and the redemption or liquidation proceeds to the investors, the income arising from units and their redemption value, reimbursement or the liquidation proceeds.

The safekeeping of the UCI's assets may be entrusted, in whole or in part, to a third party, by written agreement, provided that the fund manager so

consents, but the depositary will remain fully liable for all its legal functions.

Further requirements

SIUs are governed by the provisions applicable to UCIs generally to the extent they are not incompatible with an SIU.

Thus, SIUs are subject to the regulation and supervision of the CMVM and have certain disclosure, reporting and accounting obligations, including the preparation of accounts and calculation of the NAV.

An SIU may have a diversified portfolio, comprised *inter alia* of securities, interests in other UCIs, derivatives, cash and cash equivalent assets. The fund's documentation must specify *inter alia:* the assets it shall invest in; its internal rules (including subscription and redemption, consultative and investment committees and/or external consultants); investment limits (including short selling); and the specific investors' segment it is directed to. The use of derivatives, leverage and the applicable investment restrictions of an SIU may very probably have to diverge from the legal and regulatory requirements generally applicable to UCIs and should thus be detailed in the fund's documentation. Such documentation shall in any case be subject to CMVM's judgement and may have to be further amended or adjusted.

Subject to CMVM's judgement, an SIU may comprise other types of assets, provided that such assets have a minimum duration, their value is determinable and they are neither real estate nor agricultural products. The SIU's denomination specifically identifies and limits the fund's investment policy and its portfolio is primarily comprised of such assets. In such cases the SIU must be closed-ended and its assets must be re-evaluated at least every six months and prior to each capital increase. Subject to the CMVM requiring further parameters, the valuation of the assets shall follow valuation methods used and recognised in the respective relevant markets and shall be set out in the fund's documentation.

In case the SIU may be subscribed to by non-qualified investors, special information requirements will apply, including information on the investment policy and management techniques; risks involved; valuation procedures; and the regularity of the calculation and publication of the NAV. In the periodic accounts the overall performance of the SIU and of its assets shall be addressed and the fund manager shall appropriately inform investors, at least yearly, on the risk inherent to the SIU.

Distribution

One very important aspect of the actual legal work involved with hedge funds in Portugal concerns their placement in the market.

Closed-ended funds

With the exception of open-ended UCIs and the distribution of foreign funds, any placement of a fund within the Portuguese market needs to be made with regard to the Portuguese Securities Code (PSC), particularly if it qualifies as a public offering of securities.

An offering will be deemed to be public whenever it is:

(i) addressed to undetermined addressees in Portugal;
(ii) made together with the gathering of investment intentions or marketing campaigns; or
(iii) addressed to at least 100 non-qualified investors domiciled or established in Portugal.

Should the offering be addressed exclusively to qualified investors, it will not be qualified as public. Qualified investors (institutional investors pursuant to the PSC) include *inter alia* credit institutions, investment companies, insurance companies, UCIs and respective management companies and other financial institutions. Additionally the regime does not apply where the nominal value or the minimum subscription amount per investor equals at least €50,000. This amount is expected to increase once Directive 2010/63/EU (amending the Prospectus Directive) is implemented in Portugal, as that Directive increases the wholesale exemption to €100,000.

Generally, a public offering in Portugal will require the prior approval of the CMVM of a prospectus or its passporting into Portugal from another EU member state, in accordance with the provisions of the PSC and the EU Prospectus rules. In the case of non-EU approved prospectuses, these may also be recognised in the Portuguese jurisdiction, provided that the document complies with the international guidelines set forth by international organisations of securities supervisors and that the information requirements established by the PSC and Regulation No 809/2004/EC (the Prospectus Regulation) are duly met. The placement services shall be provided by a financial intermediary (for instance, a bank) registered for such purpose with the CMVM, which may have certain information and care duties towards the investors (such as suitability and adequacy tests).

Any marketing materials shall previously be approved by the CMVM. Such materials should include complete, not misleading, updated, simple, objective and lawful information and state where the relevant offering documentation (such as the prospectus) may be obtained. Additionally, they are subject to the general requirements on advertising. It should also be noted that in July 2009, the CMVM Regulation 1/2009 on complex financial products entered into force, which requires prior approval of an informative document by CMVM for the placement of complex financial products with non-qualified investors. The qualification of the securities to be placed with the investors as complex financial products can often only be assessed on a case-by-case basis.

Open-ended funds

The placement in Portugal of open-ended Portuguese domiciled or foreign UCIs requires an assessment of whether such placement may qualify as a 'distribution' (*comercialização*) under the UCI Law. The general qualification principles are similar to the ones regarding public offerings with one significant difference: the reference to 100 investors includes both qualified and non-qualified investors. Thus, an offering directed to 99 or more qualified investors and to only to one non-qualified investor shall be considered a distribution for such purposes. Additionally, the €50,000 exception is also not applicable.

Open-ended UCIs may be distributed by their respective fund management companies and custodians, financial intermediaries (such as banks) registered with the CMVM for public offerings placement or reception and transmission of orders, or special entities allowed by regulation. Distributors should possess adequate material and technical means to pursue their activity and also employ specially trained personnel regarding the development of the activities at stake and have similar information and care duties as identified above.

If the open-ended UCI is not domiciled in Portugal, the relevant distributor shall file with the CMVM a set of documents. The procedure is quite straightforward with regard to UCITS, because the CMVM has no discretion to refuse the distribution of the relevant fund in Portugal, provided that all necessary documents have been duly filed with the regulator.

However, hardly any hedge funds qualify as UCITS. To issue its authorisation for a distribution of such a non-harmonised UCI in the Portuguese jurisdiction, the CMVM must be provided with a number of documents including: the respective constitutional documents (full and simplified prospectuses, management regulation or the articles of association); a certificate from the competent authority of the UCI's home jurisdiction stating that the UCI is validly constituted and in activity under the applicable law and supervised by such jurisdiction's competent authority with the purpose of ensuring the protection of investors; and the distribution agreement. A number of additional documents are also required by the CMVM to this effect, such as the financial reports of the management company and the law governing the activity of the UCI. Apart from these requirements, which are specifically named by law, the CMVM may determine that additional information is necessary for the evaluation of the suitability of the UCI to be distributed in Portugal. The approval of the distribution in Portugal will in these cases be subject to a discretionary decision by the CMVM, which may refuse to authorise such distribution on the grounds that it does not provide Portuguese investors with the same level of protection that national UCIs do or for the reason that in the relevant foreign jurisdiction, Portuguese UCIs may not be marketed.

As above, any marketing materials must be previously approved by the CMVM and follow the same guidelines.

2. TAXATION

2.1 Taxation of SIUs

2.1.1 Income tax

Income other than capital gains made in the Portuguese territory is taxed at the applicable withholding tax, as if such income were obtained by an individual resident in the Portuguese territory, or, for income not subject to withholding tax, at a flat rate of 25 per cent in each case on the net value made each year. The tax is payable by the management company by the end of April of the following year. If such income is obtained outside of the Portuguese territory it is taxed at a flat rate of 25 per cent, except if it results

from bond, equity or investment fund holdings in which case it will be taxed at a flat rate of 20 per cent in each case on the net value obtained each year.

If the income derives from capital gains, whether or not obtained in the Portuguese territory, it is taxed under the same conditions that would apply to individuals resident in Portuguese territory, at a rate of 10 per cent on the positive difference between the capital gains and capital losses of each year.

The annual positive difference between the capital gains and capital losses deriving from the sale of shares held for more than one year, bonds or other debt securities by SIUs is not subject to taxation in the Portuguese territory except whenever such gain is obtained by mixed or closed-ended SIUs.

2.2 Taxation of investors of SIUs

2.2.1 Personal income tax

Resident

A personal income tax (PIT) exemption applies whenever income payments (which includes income earned with the redemption of the units) to a resident beneficiary fall outside the scope of a commercial, industrial or agricultural activity.

Income payments to a resident beneficiary where such income is comprised within the scope of its commercial, industrial or agricultural activity is not subject to withholding taxes and is qualified as profits or gains.

Capital gains arising from the transfer of units obtained by Portuguese tax resident individuals will be taxed at a special tax rate of 20 per cent, levied on the positive difference between the capital gains and capital losses of each year, except if the resident beneficiary chooses to aggregate the income received, in which case it will be subject to progressive income tax rates of up to 46.5 per cent.

Non-resident

Income payments to a non-resident beneficiary without a permanent establishment in the Portuguese territory are exempt from PIT.

Capital gains obtained by a non-resident beneficiary without a permanent establishment in the Portuguese territory will be, as general rule, exempt from PIT. However, this exemption shall not apply if the non-resident beneficiary is domiciled in a blacklisted jurisdiction pursuant to Ministerial Order no. 150 of 13 February 2004 or domiciled in a country with which there is no double tax convention or Tax Information Exchange Agreement in force with Portugal.

2.2.2 Corporate income tax

Resident

Income payments to a resident entity are not subject to withholding tax and is qualified as profit or gains for corporate income tax (CIT) purposes. Such income is included in its taxable income and is subject to a progressive corporate tax rate according to which a 12.5 per cent tax rate will be applicable on the first €12,500 of taxable income and a 25 per cent tax

rate will be applicable on taxable income exceeding €12,500, which may be subject to a municipal surcharge (*derrama*) of up to 1.5 per cent on the beneficiaries' taxable profits. Corporate taxpayers with a taxable income of more than €2 million are also subject to state surcharge (*derrama estadual*) of 2.5 per cent on the part of its taxable profits that exceeds €2 million.

The tax withheld at the level of the fund, in proportion to the units, will qualify as a payment in advance of the final tax bill of the resident entity.

Capital gains will be included in the taxable income of the resident entity and is subject to a progressive corporate tax rate according to which a 12.5 per cent rate will be applicable on the first €12,500 of taxable income and a 25 per cent rate will be applicable on taxable income exceeding €12,500. A municipal surcharge of up to 1.5 per cent on the beneficiaries' taxable profits may also be applied. Corporate taxpayers with a taxable income of more than €2 million are also subject to state surcharge (*derrama estadual*) of 2.5 per cent on the part of its taxable profits that exceeds €2 million.

Non-resident

A CIT exemption applies whenever the income arising from the units is distributed or made available to a non-resident entity without a permanent establishment in Portuguese territory.

Capital gains made by a non-resident entity without a permanent establishment in the Portuguese territory with the transfer of units of participation in national hedge funds are, as a general rule, exempt from CIT.

The exemption does not apply if the non-resident entity without a permanent establishment in Portuguese territory is held, directly or indirectly, in more than 25 per cent by resident entities, or if the entity is domiciled in a blacklisted jurisdiction pursuant to Ministerial Order no 150 of 13 February 2004 or domiciled in a country with which there is no double tax Convention or Tax Information Exchange Agreement in force in Portugal.

2.3 Foreign hedge funds

2.3.1 Personal income tax

Resident

Income payments made to resident individuals are subject to personal income tax which shall be withheld at the current final withholding rate of 21.5 per cent if there is a Portuguese resident paying agent, unless the individual elects to include it in their taxable income, subject to tax at progressive rates of up to 46.5 per cent. In this case, the tax withheld is deemed to be a payment on account of the final tax due. 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 30 per cent, unless the relevant beneficial owner(s) of the income is/are identified and as a consequence the tax rates applicable to such beneficial owner(s) will apply. If the income payments are made through a foreign paying agent, a special tax rate of 21.5 per cent is applied.

The positive difference between the capital gains and capital losses made during the year by a resident beneficiary will be taxed at the special tax rate of 20 per cent, but the resident beneficiary may choose to aggregate the income received subject to the personal income progressive tax rates described above.

Non-resident

Income payments to and capital gains made by a non-resident beneficiary without a permanent establishment in the Portuguese territory is not subject to taxation in Portugal.

2.3.2 Corporate income tax

Resident

Income payments and capital gains made by resident entities are included in their taxable income and are subject to a progressive corporate tax rate according to which a 12.5 per cent tax rate will be applicable on the first €12,500 of taxable income and a 25 per cent tax rate will be applicable on taxable income exceeding €12,500. A municipal surcharge of up to 1.5 per cent of the beneficiaries' taxable profits may also be applied, as well as a state surcharge (*derrama estadual*) of up to 2.5 per cent due on the part of its taxable profits that exceeds €2 million.

Non-resident

Income payments to and capital gains made by a non-resident entity without a permanent establishment in the Portuguese territory is not subject to taxation in Portugal.