



# PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2012

## INVESTMENT FUNDS

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# Portugal

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## RETAIL FUNDS

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

The term retail funds in this chapter refers to the Portuguese legal concept of *organismos de investimento colectivo em valores mobiliários*, or undertakings for collective investment in securities that have as a purpose the investment of capital obtained from the public and are subject to a principle of risk sharing and the pursuit of the participants' interest. The principle of risk sharing requires that the risk of the investment be shared by the investors.

#### Open-ended retail funds

A significant number of open-ended retail funds are operating in Portugal. The overwhelming majority of these have been created within the financial services groups operating in Portugal as an instrument to attract clients' savings. Virtually all of Portugal's largest financial services groups include at least one investment fund management company.

In addition, the number of foreign investment funds being marketed to Portuguese investors by Portuguese marketing entities (including some smaller banks) is growing. However, this is still a relatively small market compared to the amounts invested in the funds set up and promoted by Portuguese financial services groups. This is probably due to the fact that the client base for these groups is larger than that of the entities marketing foreign investment funds. In fact, statistics made available by the Portuguese Fund Managers Association on assets managed by each management company show that the five management companies with most assets managed belong to the five largest financial groups currently active in Portugal.

There have been no significant changes in market practice during 2011.

#### Closed-ended retail funds

The market for closed-ended retail funds is smaller than the one for open-ended retail funds. Naturally, retail investors seem to be more interested in an investment which can be easily redeemed.

There have been no significant changes in market practice during 2011.

## Regulatory framework and bodies

### 2. What are the key statutes, regulations and rules that govern retail funds? Which regulatory bodies regulate retail funds?

#### Open-ended retail funds

**Regulatory framework.** The key statutes and regulations that govern both open- and closed-ended retail funds are the:

- Undertakings for Collective Investment (UCI) Law (*Regime Jurídico dos Organismos de Investimento Colectivo*), established by Decree-Law No. 252/2003, which implemented Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) in Portugal and sets out most of the rules relating to investment funds.
- Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*) (CMVM) Regulation no. 15/2003 on Undertakings for Collective Investment (Regulation No. 15/2003), which provides more specific rules regarding certain aspects of the Decree-Law above.
- Portuguese Securities Code (*Código dos Valores Mobiliários*).

**Regulatory bodies.** The CMVM is the main regulatory body in relation to retail funds. It is responsible for the:

- Authorisation of retail funds.
- Supervision of their compliance with the rules and requirements set out in the applicable laws and regulations (*see above*).

In addition, investment funds' management entities, as financial institutions, are subject to the supervision of the Bank of Portugal.

#### Closed-ended retail funds

This is the same as for open-ended retail funds (*see above, Open-ended retail funds*).



### 3. Do retail funds themselves have to be authorised or licensed?

#### Open-ended retail funds

An authorisation from the CMVM is required before setting up a retail fund. In making a request for an authorisation, the management company of the retail fund must provide the CMVM with the fund's documentation, notably the draft simplified prospectus and the full prospectus of the fund, which must also include the fund regulation.

Besides that, 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 the entities involved in the fund's activities must also be delivered to the CMVM.

An authorisation is given within 15 days of the reception of either the request or of any supplementary information or alterations to the documents that the CMVM has required in the meantime. If at the end of this period the applicants have not been informed of the success of their application, the authorisation is considered to have been tacitly refused. The CMVM may refuse the authorisation if the applicant does not submit the requisite documentation or if the management company in question engages in the irregular management of other funds.

The authorisation having been granted, a retail fund will be fully set up as soon as the amount of the first subscription by investors is settled.

#### Closed-ended retail funds

A similar procedure applies to closed-ended retail funds, although in this case a prospectus is not required.

#### Foreign retail funds

Portuguese law is only applicable with respect to the marketing of foreign retail funds in Portugal (see *Question 4*). The setting-up of foreign funds is not governed by Portuguese law.

#### Marketing

### 4. Who can market retail funds?

#### Open-ended retail funds

The placement of a retail fund will be considered marketing or distribution (*comercialização*) whenever it is:

- Directed at undetermined addressees.
- Preceded or accompanied by the gathering of investment intentions of undetermined addressees or marketing campaigns.
- Directed at a minimum of 100 investors.
- Not directed exclusively at qualified investors.

The placement of an investment fund aimed exclusively at qualified investors, while not classed as marketing of a fund, is still possible within the context of financial intermediation activities such as reception and transmission of orders or investment management. In these circumstances, financial intermediation rules apply.

The entities which are permitted to market retail funds by law are the:

- Fund management companies.
- Depositaries.
- Financial intermediaries registered or authorised by the CMVM to perform the relevant activities, namely those of placement and reception and transmission of orders on behalf of third parties.

In addition, the marketing of retail funds may also be carried out by other entities that satisfy the following conditions:

- Possession of adequate material and technical means to do so.
- Ensuring that their personnel is trained accordingly.
- Authorisation by the CMVM.

In relation to the marketing of funds, these entities must observe the same rules and are subject to the same supervision as financial intermediaries.

#### Closed-ended retail funds

Similar rules apply to closed-ended funds. However, the marketing of these funds to the public is deemed to occur only when it is addressed to at least 100 non-qualified investors.

#### Foreign retail funds

Foreign retail funds may also be marketed in Portugal. In relation to marketing authorisation, different rules apply depending on whether the foreign fund is:

- Non-UCITS compliant.
- UCITS compliant.
- UCITS compliant and from a member state which has implemented Directive 2009/65/EC on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS IV).

The marketing of non-UCITS funds is subject to the authorisation of the CMVM.

The marketing of UCITS III compliant funds is not subject to the authorisation of the CMVM, although the CMVM may block the marketing if it considers applicable laws and regulations have not been complied with. It must be preceded by the delivery of a number of constitutive and informational documents of the fund, as well as a certificate of compliance with UCITS III issued by its home state supervisory authority.

It is important to note that, although UCITS IV has not yet been implemented in Portugal, there is a special procedure in place for the marketing of foreign retail funds that are compliant with that Directive, close to the procedure which will probably be in place after the implementation of UCITS IV.

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## 5. To whom can retail funds be marketed?

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### Open-ended retail funds

There are no limitations as to whom retail funds can be marketed. Both natural and legal persons can invest in the units or shares of a retail fund.

In relation to an open-ended fund, the fund's prospectus should describe the type and characteristics of investors to whom the fund is addressed.

### Closed-ended retail funds

This is the same as for open-ended retail funds (*see above, Open-ended retail funds*).

### Managers and operators

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## 6. What are the key requirements that apply to managers or operators of retail funds?

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According to Portuguese law, a fund is deemed to be domiciled in the place where the registered office and effective administration of its management company is situated. Therefore, a local retail fund cannot be managed by a foreign manager.

### Open-ended retail funds

Retail funds can be managed by an investment fund management company (*sociedades gestoras de fundos de investimento mobiliário*), which has as its main business purpose the management of one or more funds.

An investment fund management company must act independently and exclusively in the interest of the investors, at all times in observance of the principle of risk sharing and according to high standards of diligence and professional competence.

Management companies must have a minimum share capital of EUR249,399. In addition, there are also requirements concerning the own funds of the management companies. As a percentage of the global net value of the assets managed by the management company, the own funds must correspond to:

- At least 0.5% of an asset value of up to EUR75 million.
- If the global net value exceeds EUR75 million, 0.6% of the amount in excess, up to a maximum of EUR10 million.

Irrespective of the above criteria, the own funds of management companies must not be less than a quarter of their general fixed costs, as set out in Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions (recast).

### Closed-ended retail funds

Closed-ended funds can be managed by certain credit and financial institutions (such as banks) which hold at least EUR7.5 million in own funds.

Any entity that intends to manage a fund must obtain the necessary authorisation from the CMVM before doing so.

### Assets portfolio

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

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### Open-ended retail funds

The assets of a retail fund must be entrusted to a single depositary, which must be a certain type of financial institution (same as those that can manage closed-ended funds; see *Question 6, Closed-ended retail funds*).

A depositary must have at least EUR7.5 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 have a branch in Portugal. A fund cannot have the same entity as both its management company and depositary.

The depositary, like the management company, must act in an independent manner and exclusively in the interest of the fund's investors. It has three main responsibilities:

- The safekeeping of the fund's assets.
- Acts related to the transfer or exercise of the rights in relation to the assets, as instructed by the management company, as well as the payment of the proceeds of the redemption or liquidation of the assets to the investors.
- Monitoring and guaranteeing to investors that the investment policy, the use of proceeds, and the calculation of the value of the units of the fund comply with the law, regulations, and constitutive documents of the fund.

The depositary and the management company are jointly responsible, towards participants, for the compliance with the legal duties, regulations and the constitutive documents of the fund.

### Closed-ended retail funds

The position is the same as for open-ended funds (*see above, Open-ended retail funds*).

### Legal fund vehicles

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

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### Open-ended retail funds

**Legal vehicles.** A retail fund can take one of two forms or structures:

- A mere contractual figure with no legal personality. This is the classic structure and requires that the fund be managed by a separate management company (*see Question 6*). The participants' interests in these funds are called units (*unidades de participação*).
- Collective investment companies endowed with legal personality (*sociedades de investimento mobiliário; SIMs*). These investment companies must have a minimum initial capital of EUR300,000 and their constitution is subject to the authorisation of the CMVM. SIMs can be self-managed



or managed by an appointed third party, which must be a duly authorised investment fund management company. The participants' interests in these funds are called shares (*acções*).

**Advantages.** The main difference between the two structures is that in a collective investment company, the holders of the shares can also be in charge of managing the fund. If they choose to do so, the investors have greater control over the management and investment decisions. Investment companies can also be managed by professional investment managing companies (the same that manage contractual investment funds).

**Disadvantages.** Where a mere contractual entity is used, the investors have lesser control over the management and investment decisions.

#### Closed-ended retail funds

This is the same as for open-ended retail funds (*see above, Closed-ended retail funds*).

#### *Investment and borrowing restrictions*

#### 9. What are the investment and borrowing restrictions on retail funds?

##### Open-ended retail funds

The following investment limits apply to retail funds in relation to issuing entities:

- No more than 10% of a fund's global net value can be invested in securities and money market instruments of the same issuer.
- The sum of the investments in securities and money market instruments from the same issuer exceeding 5% cannot exceed 40% of a fund's global net value.

There are a number of exceptions to these limits, such as:

- The first limit rises to 35% where:
  - the issuer is an EU member state or one of its local or regional authorities;
  - the issuer is a non-EU state or an international organisation which has at least one EU member state as a member; or
  - one of these entities guarantees the securities or money market instruments.
- The first limit rises to 100% if one of the above entities acts as issuer or guarantor and the investment is made across six separate issues, with the value invested in each issue not exceeding 40% of the global net value of the fund.
- The limits are increased to 25% and 80% respectively if the investment is in covered bonds issued by a credit institution from an EU member state, provided this increase is stipulated in the fund's constitutive documents.

In addition, the following limits apply:

- No more than 20% of a fund's global net value can be invested in the units of a single investment fund.

- No more than 30% of a fund's global net value can be cumulatively invested in the units of funds that have not been authorised under the UCITS Directive.
- A fund's exposure to a single counterparty in transactions involving derivatives outside a regulated market cannot exceed 5% of its global net value, with the limit rising to 10% if the counterparty is a bank.
- No more than 20% of a fund's global net value can be invested in securities and money market instruments of issuers belonging to the same corporate group.

Management companies can obtain loans on behalf of funds. Within a one-year period, the sum of all the loan periods cannot exceed 120 days, consecutive or not. Additionally, there is a borrowing limit of 10% of the global net value of the fund.

##### Closed-ended retail funds

The position relating to the closed-ended funds is the same, subject to the following:

- The cumulative limit of 40% in relation to investments in the same issuer exceeding 5% does not apply.
- The borrowing limit is 20% of the fund's global net value.

#### 10. Can the manager or operator place any restrictions on the issue and redemption of interests in retail funds?

##### Open-ended retail funds

The issue and subscription of the units of an open-ended retail fund are subject to the conditions set out in the constitutive documents. There are generally no restrictions as to who can invest in a retail fund and when this can be done.

The units of an open-ended retail fund can generally be redeemed at any time. Where there is an increase in the deposit fees to be paid by the fund, or a substantial change in the investment policy, participants can redeem their units without paying the applicable redemption fee, up to one month after the entry into the force of the relevant changes.

However, the redemption of units may be suspended where:

- The liquidity of the fund having been exhausted, redemption requests exceeding 10% of the global net value of the fund are made within a period of up to five days.
- Exceptional circumstances that put the legitimate interests of the investors at risk justify the suspension.

The decision to suspend the redemption of units in these circumstances is made by the management company. The CMVM may also choose to suspend redemption in exceptional circumstances if the interests of unit holders or the market justify the suspension.

The protection of the interests of the investors may also justify the suspension of the issue or subscription of units.

##### Closed-ended retail funds

The issue of the units of a closed-ended fund is, by definition, limited to the fixed number offered in the initial subscription period. The issue of new units may be determined through a vote by the unit holders.



A closed-ended fund's units can generally only be redeemed once the lifetime period of the fund, which is fixed at the outset and cannot exceed ten years, has terminated. However, if there is a vote to extend the lifetime period of the fund (which may be extended to a maximum of ten years), any investor who votes against it may then redeem his units.

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### 11. Are there any restrictions on the rights of participants in retail funds to transfer or assign their interests to third parties?

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#### Open-ended retail funds

There are generally no restrictions on the transfer or assignment of interests to third parties. The constitutive documents of a fund may set the applicable conditions.

#### Closed-ended retail funds

The transfer of interests in closed-ended retail funds is subject to a right of first refusal by the other participants in the fund.

#### Reporting requirements

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### 12. What are the general periodic reporting requirements for retail funds?

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#### Open-ended retail funds

**Investors.** A fund's management company must prepare and publish annual and bi-annual accounts. These must be made available free of charge upon request by unit holders.

The marketing entity must send or make available to unit holders a statement informing them of:

- The number of units they hold.
- Their value and the aggregate value of the investment.

In addition to this information, the marketing entity may provide any other information regarding the investor's financial situation. For example, if the marketing entity is a bank of which the unit holder is a client, it could provide the above information together with the unit holder's bank statement.

Any information published pursuant to the requirements set out below is available to investors, usually through the CMVM's information diffusion system.

**Regulators.** A fund's management company must publish and send to the CMVM:

- The annual accounts within three months after the end of financial year.
- The bi-annual accounts within two months after the end of the relevant semester.
- An inventory of the fund's asset portfolio, its global net value, any responsibilities not found in the balance sheet and the number of units currently in circulation, on a monthly basis.

#### Closed-ended retail funds

The same requirements apply to closed-ended funds as to open-ended funds (*see above, Open-ended retail funds*).

#### Tax treatment

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### 13. What is the tax treatment for retail funds?

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#### Open-ended retail funds

**Funds.** Income other than capital gains made in the Portuguese territory is taxed, on the net value made each year, at either:

- The applicable withholding tax, as if such income were obtained by an individual resident in Portugal.
- For income not subject to withholding tax, a flat rate of 25%.

The tax is payable by the management company by the end of April of the following year.

If such income is obtained outside of Portugal it is taxed, on the net value made each year, at either:

- A flat rate of 25%.
- If it results from bond, equity or investment fund holdings, a flat rate of 20%.

If the income derives from capital gains, whether or not obtained in Portugal, it is taxed under the same conditions that would apply to individuals resident in Portugal, at a rate of 10% on the positive difference between each year's capital gains and losses. (The Portuguese Budget Law Proposal for 2012 (2012 BLP), which will come into force on 1 January 2012, foresees that this rate will increase to 21.5%.)

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

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

- **Personal income tax (PIT).** A PIT exemption applies whenever income payments (including income from redemption of units) fall outside the scope of a commercial, industrial or agricultural activity.

Income from a 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 are taxed at:

- a special tax rate of 20% on the positive difference between capital gains and losses (25% under the 2012 BLP); or
- progressive income tax rates of up to 46.5%, if the investor chooses to aggregate the income received (the 2012 BLP foresees an additional tax of 2.5% on the part of income exceeding EUR153,000).



As an exceptional measure, income earned in 2011 is subject to an extraordinary 3.5% tax on the part of income exceeding the annual minimum salary (EUR6,790).

- **Corporate income tax (CIT).** Income payments to a resident entity are not subject to withholding tax and are qualified as profit or gains for CIT purposes. A resident entity is subject to a progressive corporate tax rate of:
  - 12.5% on the first EUR12,500 of income;
  - 25% on income exceeding EUR12,500.

A resident entity may also be subject to a municipal surcharge (*derrama municipal*) of up to 1.5% on taxable profits, or a state surcharge (*derrama estadual*) of up to 2.5%, which is payable on the taxable profits exceeding EUR2 million.

Capital gains earned upon the transfer of fund units are included in the taxable income of the resident entity and are subject to the same rates and surcharges as above.

Under the 2012 BLP, the standard CIT rate will be 25% (the 12.5% rate will be abolished) and the state surcharge rate will be increased to:

- 3% payable on the taxable profits from EUR1.5 million to EUR10 million;
- 5% payable on the taxable profits exceeding EUR10 million.

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

- **PIT.** Income payments to a non-resident beneficiary without a permanent establishment in Portugal are exempt from PIT.

Capital gains earned from the transfer of units by a non-resident beneficiary without a permanent establishment in Portugal are generally exempt from PIT. This exemption shall not apply if the non-resident beneficiary is either:

- domiciled in a blacklisted jurisdiction as defined in Ministerial Order (Portaria) No. 150 of 13 February 2004 amended by Ministerial Order (Portaria) 292/2011, of 8 November (*Lista dos países, territórios e regiões com regimes de tributação privilegiada, claramente mais favoráveis*);
- resident in a country which is not party to an effective double tax convention or tax information exchange agreement with Portugal (this is eliminated by the 2012 BLP).

- **CIT.** A CIT 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 made by a non-resident fund without a permanent establishment in Portugal are, as a general rule, exempt from CIT.

The exemption does not apply in the following circumstances:

- more than 25% of the capital of the non-resident company is held, directly or indirectly, by resident legal entities;
- the non-resident entity is domiciled in a blacklisted jurisdiction (*see above*);

- the non-resident entity is resident in a country, which is not party to an effective double tax convention or tax information exchange agreement with Portugal (this criterion is eliminated by the 2012 BLP).

If the CIT exemption does not apply, the gains are subject to CIT at the rate of 25%. Under the tax treaties entered into by Portugal, such gains are usually not subject to Portuguese CIT, but the applicable rules should be studied on a case-by-case basis.

#### Closed-ended retail funds

The position is the same as for open-ended retail funds (*see above, Open-ended retail funds*).

#### Foreign retail funds

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

- **PIT.** Investment income payments made to resident individuals are subject to PIT which shall be withheld at the current final withholding rate of 21.5% (25% under the 2012 BLP) 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 46.5%. In this case, the tax withheld is deemed to be a payment on account of the final tax due.

If the investment income payments are made through a foreign paying agent, a special tax rate of 21.5% (25% under the 2012 BLP) is applied.

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 30%, unless the relevant beneficial owner(s) of the income is(are) identified, in which case the tax rates applicable to such beneficial owner(s) apply.

The positive difference between the capital gains and losses made during the year is taxed at the special tax rate of 20% (the 2012 BLP increases this to 25%), but the taxpayer may choose to aggregate this income, in which case it will be subject to personal income progressive tax rates (plus an extraordinary 3.5% tax in 2011) (*see above, Open-ended retail funds: Resident investors*).

- **CIT.** Income payments and capital gains made by a resident entity are subject to a progressive corporate tax rate of:
  - 12.5% on the first EUR12,500 of income;
  - 25% on income exceeding EUR12,500.

A resident entity may also be subject to a municipal surcharge of up to 1.5% on taxable profits, or a state surcharge of up to 2.5%, which is payable on the taxable profits exceeding EUR2 million.

Under the 2012 BLP, the standard CIT rate will be 25% and the state surcharge rate will be increased (*see above, Open-ended retail 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 (for exceptions, *see above, Open-ended retail funds: Non-resident investors*).

## Reform

### 14. What proposals (if any) are there for the reform of retail fund regulation?

The deadline for implementing UCITS IV has already passed, so it is expected that this Directive will be implemented in the near future. In the meantime, the CMVM has responded to the implementing Regulations by adopting a special procedure for allowing marketing of foreign UCITS-compliant funds where the home member state of such funds has already implemented UCITS IV.

## HEDGE FUNDS

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

This part of the chapter will focus on the special investment undertaking (SIU), which is the closest entity to a hedge fund type structure in Portuguese law. Compared to retail funds, SIUs allow for investment in a broader range of assets and the use of riskier management techniques.

There are currently a little over one hundred SIUs active in Portugal. They invest in a variety of assets, ranging from financial instruments to football players.

Similarly to retail funds, most SIUs are managed by management companies which are part of the largest Portuguese financial services groups (see *Question 1*). However, their predominance is less significant than in the retail fund market. 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.

There have been no significant changes in the market practice during 2011.

## Regulatory framework and bodies

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

#### Regulatory framework

SIUs are regulated by:

- A particular section of Regulation No. 15/2003.
- To the extent that it is not incompatible with their nature, by the remainder of the Regulation and the other laws applicable to retail funds.

#### Regulatory bodies

This is the same as for retail funds (see *Question 2, Open-ended retail funds: Regulatory bodies*).

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

#### Risk

The rules applicable to retail funds generally also apply to SIUs to the extent there are no special provisions for the latter. Although retail funds and SIUs are subject to different rules in relation to the assets that can comprise their portfolio, both are subject to the principle of risk sharing.

#### Valuation and pricing

The global net value of the asset portfolio must be calculated and disclosed (see *Question 12, Open-ended retail funds*).

#### Systems and controls

There are no special provisions in place concerning systems and controls of SIUs.

#### Insider dealing and market abuse

Insider dealing and market abuse in this context constitute crimes and are punishable by imprisonment.

#### Transparency

SIUs must comply with the same information requirements as retail funds (see *Question 12, Open-ended retail funds*).

#### Money laundering

The management company of an SIU is subject to a number of rules aimed at preventing money laundering, and must comply with due diligence duties concerning, among others, the identification of investors and the communication of suspect activity.

#### Short selling

The management company of an SIU (like the fund manager of a retail fund) is prohibited from carrying out short selling activities on its own behalf.

The constitutive documents of an SIU should specify the limits and conditions applicable to the short selling activities of the fund.

## Marketing

### 18. Who can market hedge funds?

This is the same as for retail funds (see *Question 4*).

### 19. To whom can hedge funds be marketed?

SIUs are marketed to the specific segment of investors defined in the constitutive documents of the fund.

The CMVM may refuse to grant an authorisation for the marketing of an SIU to certain types of investors if their protection is not properly ensured, namely with regards to the complexity and expected risk of the SIU.





### Investment restrictions

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

The CMVM may refuse to grant an authorisation for the marketing of an SIU to certain types of investors if their protection is not properly ensured.

### Assets portfolio

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

This is the same as for retail funds (see *Question 7*).

### Requirements

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

In addition to the elements applicable to retail funds (see *Question 3*), an authorisation request for the setting up of an SIU must be accompanied by:

- Evidence of the aptitude of the management company, taking into account the fund's investment policy, objectives, management techniques, type of assets and markets in which it will invest and, if applicable, any entity that provides consultancy to the management company.
- The reasoning behind minimum subscription amount, taking into account the complexity, risk and type of investors to which the fund is addressed.

Where it is intended to market the fund to non-qualified investors, the management company should deliver to the CMVM the training plan of the entities that will be in charge of the marketing.

The constitutive documents of an SIU 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 Undertakings for Collective Investment Law (*Decree-Law No. 252/2003*) will not be attained.

In cases where the SIU 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.

In addition, the periodic accounts should emphasise the overall performance of the SIU, and the management company must inform investors of the development of the risk and profitability involved.

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

This is the same as for retail funds (see *Question 6*).

### Legal fund vehicles and structures

#### 24. 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?

#### SIU

**Advantages.** An SIU may take the form of a contractual entity with no separate legal personality. Subject to the CMVM approval, an SIU may also be set up as an investment company. In that case, the holders of the shares can also be in charge of managing the fund. Therefore, the investors have greater control over the management and investment decisions.

**Disadvantages.** Where a mere contractual entity is used, the investors have a lesser degree of control over the management and investment decisions.

#### 25. What are the advantages and disadvantages of using onshore and offshore structures?

This varies according to the circumstances of the individual case. In general, the main consideration is the tax treatment of a structure used.

In spite of the foreseeable increasing regulatory pressure on hedge funds, the fact that onshore structures are usually viewed by regulators and tax authorities more favourably may mean they remain a more attractive option.

### Tax treatment

#### 26. What is the tax treatment for hedge funds?

This is the same as for retail funds (see Question 13).

### Restrictions

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

The restrictions on the right to redeem or transfer interests to third parties are usually set out in the fund's constitutive documents.

### Reform

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

Once adopted by the European Union and implemented in Portugal, the Alternative Investment Fund Managers Directive (2011/61/EU) (AIFM Directive) is expected to have a significant impact on the investment fund managers.

There are no further proposals for the reform of hedge fund regulation in Portugal.

### CONTRIBUTOR DETAILS



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- Ongoing assistance to Portuguese and foreign entities in negotiating distribution agreements and complying with the necessary regulatory steps for marketing funds in Portugal.



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