

Fund Management 2019

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Fund Management 2019

Contributing editor**Michelle Moran****K&L Gates LLP**

Lexology Getting The Deal Through is delighted to publish the fifth edition of *Fund Management*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new Global Overview and new chapters on France and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Michelle Moran of K&L Gates LLP, the contributing editor, for her assistance in devising and editing this volume.



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Contents

Global overview	3	Norway	63
Michelle Moran K&L Gates LLP		Børge A Grøttjord and Johan Christian Kongsli Advokatfirmaet Grette AS	
France	9	Portugal	71
Arnaud Pince De Pardieu Brocas Maffei		Pedro Simões Coelho, Ricardo Seabra Moura and Carlos Filipe Couto Vieira de Almeida	
Germany	17	South Africa	78
Tarek Mardini and Sebastian Käßlinger P+P Pöllath + Partners		Johan Loubser and Jessica Blumenthal ENSAfrica	
Greece	25	Sweden	87
Michael Tsibris and Giannis Koumettis Souriadakis Tsibris		Fredrik Wilkens, Emma Stuart-Beck and Lave Nilsson Advokatfirman Vinge	
Hong Kong	32	Switzerland	94
Vivien Teu and Christina Suen Vivien Teu & Co LLP		Urs Hofer and Alexander Eichhorn Walder Wyss Ltd	
Ireland	40	Thailand	103
Sarah Cassidy and Shane Geraghty Dillon Eustace		Apisith John Sutham Apisith & Alliance Ltd	
Japan	48	United Kingdom	108
Kiyomi Kikuchi and Kazuyuki Wakasa TMI Associates		Michelle Moran K&L Gates LLP	
Luxembourg	55	United States	118
Marc Meyers and Veronica Aroutiunian Loyens & Loeff Luxembourg SARL		Michael W McGrath, Clair E Pagnano, Pablo J Man and Abigail P Hemnes K&L Gates LLP	

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Activity involving the management, investment and marketing of funds is mainly regulated by the following:

- the Undertakings for Collective Investment Law, enacted by Law No. 16/2015 of 24 February 2015 (the UCI Law), which partially implemented in Portugal Directive 2009/65/EC on Undertakings for Collective Investment in Transferable Securities (UCITS) (the UCITS Directive), as amended on a regular basis;
- Directive 2011/61/EU on alternative investment fund managers (AIFMD), which sets out most of the rules relating to investment funds;
- Portuguese Securities Exchange Commission (CMVM) Regulation No. 2/2015 on Undertakings for Collective Investment, which sets forth more specific rules regarding certain aspects of the UCI Law; and
- the Portuguese Securities Code, enacted by Decree-Law No. 486/99 of 13 November 1999, as amended when necessary, which entered into force on 1 March 2000.

The CMVM is the main regulatory body in relation to investment funds.

Further, fund managers, as financial institutions, are also subject to prudential supervision under the Bank of Portugal (BoP), along with the applicable provisions of the Portuguese Banking Law, enacted by Decree-Law No. 298/92 of 31 December 1992, as amended when necessary, and all complementary legal documents in connection therewith.

2 Is fund administration regulated in your jurisdiction?

Fund administration activities, when not directly carried out by the fund managers, are generally undertaken by a depositary and are subject to specific legal provisions, including the duty of care, outsourcing and liability of the parties involved, etc.

Further, some support services, depending on their specific scope, may be deemed investment services or activities, or ancillary services, thus being subject to specific authorisation by the BoP or the CMVM, as applicable.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

The CMVM authorises the setting up of funds. When requesting such authorisation, the relevant fund manager must provide the CMVM with the fund's documentation, notably, the key investor information document and the full prospectus of the fund, which must also include the fund regulations.

In addition, the CMVM must also be given copies of the agreements to be executed between the management company and the depositary; the distributors or entities that will market the fund; and any other entities that will render services to the fund or to the fund manager.

Documents corroborating the acceptance of the services rendered by all entities involved in the fund's activities must also be delivered to the CMVM.

Authorisation is issued within 20 days (or 30 days in the case of self-managed collective investment companies) of the receipt of either the request or of any supplementary information or amendments to the documents required by the CMVM. If, at the end of this period, the applicants have not yet been notified of the success of their application, authorisation is considered to have been tacitly granted, with the exception of alternative investment funds (AIFs) where, conversely, authorisation is deemed as tacitly refused.

The CMVM may refuse to grant authorisation if the applicant does not submit the required documentation or if the fund manager in question engages in irregular management of other investment funds.

Once authorisation is granted, a fund will be fully set up from the moment the first subscription is settled.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

No. Considering that fund managers are financial institutions carrying out intermediation activities, in order to provide their services in Portugal, they will need to be incorporated in Portugal or resort to the passport regime, notably, the freedom of services or the freedom of establishment under the UCITS Directive, the AIFMD or Directive 2013/36/EU (the Capital Requirements Directive IV).

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

Yes. The Portuguese Banking Law establishes that any entity or legal person wishing to acquire or to raise a qualifying shareholding in a fund manager, to the extent that it surpasses the 10, 20, 33.33 or 50 per cent share capital threshold, or if the fund manager becomes a subsidiary of the acquirer, will have to file an authorisation application with the BoP.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

Yes. Article 139 et seq of the UCI Law establishes that the fund manager is remunerated through a management fee, which may comprise a variable component. The fixed or variable components of the management fee and its calculation methods must be clearly foreseen in the fund's constitutional documents.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Yes. The marketing or distribution of funds is defined as an activity directed towards investors with a view to promoting or proposing the subscription of units or shares, regardless of the means of communication used.

The entities that are legally permitted to market funds are as follows:

- fund managers;
- depositaries;

- financial intermediaries registered or authorised by the CMVM to perform the relevant activities, namely those of placement and the reception and transmission of orders on behalf of third parties; and
- other entities, as foreseen in CMVM Regulation No. 2/2015 and subject to its authorisation.

As regards fund marketing, such entities must observe the same rules and are subject to the same supervision as that exercised over financial intermediaries.

8 What marketing activities require authorisation?

As described in question 7, the UCI Law encompasses a very broad concept of marketing and, as such, any activity falling within this scope will require that the relevant marketing entities secure authorisation for such purpose.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

No. As best described in question 7, entities permitted to perform fund marketing activities in Portugal must be incorporated in Portugal or resort to the passport regime, notably, the freedom of services or the freedom of establishment under the UCITS Directive, the AIFMD, the Markets in Financial Instruments Directive 2004/39/EC or the Capital Requirements Directive IV.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

There is no need to have a local entity involved provided that the foreign marketing entity has a proper licence (eg, under the passport regime).

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

The conditions according to which fund marketing is rewarded should be defined in the marketing contract. It is admissible for the marketing agent to be paid through the total or partial amount of the subscription, redemption or transfer commission, provided that this option is foreseen in the constitutional documents of the funds. Under the UCI Law, and contrary to the previous regime, the fund manager cannot receive the entirety or part of the marketing fee.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

Despite the fact that the concept of a retail fund is not entirely applicable under Portuguese law, for the purposes of this chapter, the term 'retail fund' shall refer to the Portuguese legal concept of UCITS, which are aimed at investing capital obtained from the public and are subject to a risk-sharing principle and the pursuit of the relevant participants' interest.

AIFs, if publicly distributed real estate investment funds, could to a certain degree be assimilated to the retail fund concept. Nonetheless, considering that such AIFs are subject to a stricter framework and that their regulation is not harmonised throughout the EU, such grounds hamper their qualification as retail funds.

A retail fund may take one of the following two forms or structures, both subject to the licensing procedures described in question 3:

- a contractual structure with no legal personality. This is the classic structure and requires that the fund be managed by a separate fund manager. The investors' or participants' interests in these funds are called units; or
- a collective investment company endowed with legal personality (SIM). The incorporation of such entities is subject to the CMVM's authorisation. SIMs can be self-managed, in which case a minimum initial capital of €300,000 will be required, or managed by an appointed third party, which must be a duly authorised investment fund manager. Participants in these SIMs will hold shares.

13 What are the key laws and other sets of rules that govern retail funds?

See the laws set out in question 1 and the fund's documentation specified in question 3, which govern retail funds.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes.

15 Who can market retail funds? To whom can they be marketed?

See question 7. There are no limitations as to whom retail funds may be marketed. Both natural and legal persons can invest in the units or shares of a retail fund.

16 Are there any special requirements that apply to managers or operators of retail funds?

No.

17 What are the investment and borrowing restrictions on retail funds?

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

- no more than 10 per cent of a fund's global net value may be invested in securities and money market instruments of the same issuer;
- no more than 20 per cent of a fund's global net value may be invested in deposits with the same entity;
- exposure to a single counterparty in transactions involving derivatives outside a regulated market cannot exceed 5 per cent of the fund's global net value, or 10 per cent if the counterparty is a bank; and
- the sum of the investments made in securities and money market instruments from the same issuer exceeding 5 per cent cannot exceed 40 per cent of a fund's global net value. This limit does not apply to deposits or transactions on derivatives performed outside a regulated market and multilateral trading facility where the fund's counterparty is an entity subject to prudential supervision.

There are a number of exceptions to these limits. For example, limit (i) rises to 35 per cent where:

- the issuer is an EU member state or one of its local or regional authorities;
- the issuer is a non-EU member state or an international organisation with at least one EU member state as a member; or
- one of these entities guarantees the securities or money market instruments.

Limits (i) and (iv) rise to 25 and 80 per cent, respectively, if the investment is in covered bonds issued by a credit institution from an EU member state. However, such covered bond issuances must be backed by underlying assets that fully secure the amount due and any interest payment in the event that the issuer defaults.

No more than 20 per cent of a fund's global net value can be invested with a single entity.

A fund can invest up to 100 per cent of its global net value in securities or money market instruments issued or guaranteed by an EU member state or its local or regional authorities, or by public international entities related to a member state or a third state, provided that the investment is made across six separate issues and the value invested in each issue never exceeds 30 per cent of the global net value of the fund.

No more than 20 per cent of a fund's global net value can be invested in securities and money market instruments of issuers belonging to the same corporate group.

In addition, a retail fund cannot acquire more than:

- 10 per cent of shares without voting rights from the same issuer;
- 10 per cent of an issuer's debt titles;
- 25 per cent of the units of a UCITS or AIF; and
- 10 per cent of an issuer's monetary market instruments.

The following borrowing restrictions apply:

- management companies may obtain loans on behalf of the funds they manage. Within a one-year period, the sum of all loan periods cannot exceed 120 days, irrespective of whether they are back-to-back. Additionally, there is a borrowing limit of 10 per cent of the fund's global net value, without prejudice of the right to resort to securities loans and repo agreements;
- collective investment companies may enter into loan facilities to acquire immovable assets indispensable to the direct exercise of their activities, in up to 20 per cent of the global net value of the fund; and
- if the incorporation documents of a collective investment company provide for the possibility of entering into loan facilities, the amounts specified cannot exceed 15 per cent of the fund's global net value.

18 What is the tax treatment of retail funds? Are exemptions available?

Retail funds are subject to corporate income tax (CIT) at the general corporate tax rate (currently set at 21 per cent). No municipal tax or state surtax will apply.

The taxable income of retail funds corresponds to the net profit assessed in accordance with their respective accounting standards. However, investment income, rents and capital gains (except when sourced in a tax haven) are disregarded for profit assessment purposes; on the other hand, expenses related to this type of income (including funding costs), as well as non-deductible expenses under the CIT code, and income and expenses relative to management fees and other commission earned by retail funds, are also disregarded for profit assessment purposes.

The tax losses of these funds shall become entitled to be carried forward for a period of 12 years. The income of retail funds is not subject to withholding tax.

Retail funds exclusively investing in money market instruments and bank deposits shall become subject to stamp duty calculated over their global net assets at the rate of 0.0025 per cent (per quarter), with the remaining retail funds being subject to a 0.0125 per cent rate (per quarter).

However, at the investor level, income tax exemptions may be applicable to non-resident investors.

In this respect, income derived from retail funds, including capital gains resulting from the redemption of unit participations or their liquidation, shall be exempt from income tax provided that:

- a maximum of 25 per cent of the share capital is not held, directly or indirectly, by Portuguese residents or by individuals resident in Portugal, except when the latter is resident in an EU member state or in a European Economic Area (EEA) member state that is bound to cooperate with Portugal under an administrative cooperation arrangement in tax matters similar to the exchange of information schemes in relation to tax matters existing within the EU member states or in any country with which Portugal has a double tax treaty in force;
- proof of non-residence in Portugal is provided in due time; and
- investors are not domiciled in tax haven jurisdictions listed in Ministerial Order No. 150/2004 of 13 February 2004, as amended.

Non-residents that have failed to prove their non-residence on time may request a total or partial refund of the tax withheld during a two-year period (counted from the end of the year in which the event that generated the tax liability took place).

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The assets of a retail fund must be entrusted to a single depository, which must be a certain type of financial institution.

A depository must have at least €7.5 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 fund must have different entities as fund manager and as depository. A depository 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 article 92 of Regulation 575/2013/EU.

The depository, like the management company, must act independently and exclusively in the interest of the fund's investors. It has three main responsibilities, as follows:

- the safekeeping of the fund's assets;
- carrying out acts related to the transfer or exercise of the rights over the assets, as instructed by the fund manager, as well as the payment to the investors of the proceeds of the redemption or liquidation of the assets; and
- 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 depository is responsible, under the general rules of civil liability, towards the fund manager and the investors for compliance with the legal duties, regulations and constitutive documents of the fund, and for the loss of the financial instruments under its safekeeping. In this respect, the UCI Law closely follows the measures and provisions established in the AIFMD.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

The retail fund must be managed by a licensed fund manager and, considering the recent changes enacted by the UCI Law, will have a board of directors comprising at least three members, of which, one must be an independent director (or non-executive director).

Moreover, pursuant to the recently enacted Law No. 148/2015 of 9 September 2015 (the Auditing Supervision Framework), the fund manager shall also have an audit board comprising at least three members (the majority of whom must be considered independent) and a sole auditor.

The members of the fund manager's board of directors and audit board must be previously authorised by the BoP to take office, being subject to a thorough suitability assessment during this procedure.

Further, the fund manager must have several internal policies in place aimed at addressing the following:

- the risk of its activity;
- remuneration issues;
- outsourcing;
- internal control;
- evaluation of the assets pertaining to the funds under management;
- anti-money laundering;
- record-keeping; and
- selection of the members of the board of directors and audit board.

All of these are subject to the control of the CMVM and, to a certain extent, of the depository.

21 What are the periodic reporting requirements for retail funds?

The fund manager must prepare and publish annual and biannual accounts. These must be made available free of charge on request by investors.

The marketing entity must send or make available to investors a statement informing them of the number of units held by the investor in question and their value and the aggregate value of the investment. In addition to this information, the marketing entity may provide further information regarding the investor's financial situation. For example, if the marketing entity is a bank and the investor is a client of that bank, it might provide the above information together with the investor'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 (website). Moreover, the fund manager must publish and send the following to the CMVM:

- the annual accounts within three months of the end of the financial year;
- the biannual accounts within two months of the end of the relevant semester; and
- 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.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

There are generally no restrictions placed on the issue, transfer or redemption of interests in retail funds. However, considering that the UCI Law does not expressly forbid the establishment of such restrictions in the fund's prospectus, it is possible to set certain specific conditions in respect of the issue, transfer and redemption of the aforementioned interests.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

The vehicles available are those described in question 12.

However, in cases where collective investment companies invest in real estate, they are qualified as real estate investment companies.

In addition, it should be noted that, in Portugal, the AIFMD has been partially implemented by Law No. 18/2015 of 4 March 2015, relating to venture capital, social entrepreneurship and specialised investment (the Venture Capital Law).

The Venture Capital Law contains a specific regime applicable to funds investing in equity instruments for a limited period of time, as well as in other structures, which, despite having similar features to the undertakings for collective investment's (UCI) framework, is perceived under Portuguese law as being an autonomous subject in relation to UCIs. That being said, the Venture Capital Law falls outside the relevant scope of this chapter.

24 What are the key laws and other sets of rules that govern non-retail funds?

See questions 1 and 3.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes.

26 Who can market non-retail funds? To whom can they be marketed?

The entities listed in question 7 can market non-retail funds. There are no limitations as to whom retail funds may be marketed. Both natural and legal persons may invest in the units or shares of a retail fund.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

No. However, the constitutional documents of the non-retail fund may establish that the fund will only be placed with qualified, professional investors, or those of a certain class. In such cases, the distribution of the fund's units or shares must comply with this restriction.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

The UCI Law, which partially implemented the AIFMD in Portugal, opted out of establishing a framework similar to fund managers of retail and non-retail funds.

Therefore, the requirements applicable to the licensing and development of fund management are identical for the most part, save for a few provisions only applicable to fund managers managing certain types of funds, owing to their specific nature (eg, retail funds, non-financial assets funds or real estate funds).

29 What is the tax treatment of non-retail funds? Are any exemptions available?

The tax treatment of non-retail funds is the same as that applied to retail funds (see question 18), except as regards the following aspects.

At the investor level, income tax exemptions may be applicable to non-resident investors regarding non-retail funds that mainly invest in movable assets, or a reduced withholding tax rate of 10 per cent may be applicable to non-resident investors regarding non-retail funds that mainly invest in real estate assets.

In this respect, income derived from non-retail funds, including capital gains resulting from redemption of units or their liquidation, will benefit from income tax exemption or a reduced withholding tax rate, as the case may be, under the same provisions for retail funds as discussed in question 18.

For the purposes of this regime, income derived from non-retail funds that mainly acquire real estate assets, including capital gains from the sale or redemption of such units or from the liquidation of such funds, shall be classified as income derived from immovable property (as a rule, under a double tax treaty, the right to tax immovable property income is attributed to the source state).

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

See question 19.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

See question 20.

32 What are the periodic reporting requirements for non-retail funds?

See question 21.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Separately managed accounts are not provided for under Portuguese law within the scope of the UCI's framework, but correspond to portfolio management activity.

The structure of separately managed accounts is set up in Portugal through a discretionary mandate agreement between the client and the portfolio manager (usually a portfolio management company, asset management company or another financial intermediary duly licensed to develop such activity), pursuant to which the portfolio manager is obliged, in respect of the client, to carry out all actions necessary to value the portfolio and to exercise all rights inherent to the financial instruments comprised in the portfolio.

34 What are the key legal issues to be determined when structuring a separately managed account?

Besides the general obligations arising from the Portuguese Security Code, which portfolio managers must adhere to in their capacity as financial intermediaries, Decree-Law No. 163/94 of 4 June 1994, as amended, establishes specific provisions in this respect.

The portfolio manager is subject to a strict duty of diligence when acting on behalf of the client; the former is required to act in the sole interest of the latter.

More specifically, the portfolio manager:

- must record and segregate the client's assets in different accounts or sub-accounts;
- shall refrain from practising certain transactions on its own, such as granting credit under any circumstance, providing collateral, accepting deposits, etc; and
- may not acquire, on behalf of its client, securities issued by entities pertaining to its governance bodies or any company holding more than 10 per cent of the share capital of the portfolio manager, as well as other related entities.

The portfolio management agreement must be entered into between the relevant parties and must determine the level of discretion exercised by the portfolio manager. Nonetheless, the client always has the right to issue binding orders to the portfolio manager regarding the transaction to be carried out, unless the portfolio management agreement contains a guaranteed minimum return undertaking by the portfolio manager.

Finally, this type of agreement always leaves room for the parties to regulate their contractual relationship as they see fit, provided that the principles and obligations of the financial intermediaries are not breached.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

Yes. See question 34 for more details on the operation structure.

The legal framework applicable to separately managed accounts, as described in question 33, is different from the UCI's framework because separately managed accounts are subject to the provisions of article 1 of Decree-Law No. 163/94 (ie, the fund is a mere pool of assets without legal personality per se) and are tailored and managed in accordance with an agreement (which abides by the UCI Law) entered into between the client and the portfolio manager. A UCI will be subject to the legal framework outlined in question 1 et seq.

General**36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?**

The UCI Law and the Portuguese Securities Code are expected to undergo changes in the near future as a result of the implementation of the Markets in Financial Instruments Directive 2014/65/EU legal package. Further one-off amendments to the UCI Law, directly attributable to changes in EU legislation in this respect, cannot be set aside, particularly concerning the implementation of additional amendments to the AIFMD and the UCITS Directive.

Moreover, the new UCI tax regime, which entered into force on 1 July 2015, aligning the taxation of investment funds in Portugal with European standards, may be subject to future amendments, depending on the political decisions taken by the Portuguese government.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

The listing of retail funds on a regulated market depends on the daily tradability of these funds being guaranteed in said market, and on the execution of a market-maker contract between the fund manager and the market maker.

The market-maker contract shall guarantee that the market price of the units and shares does not significantly diverge from the value of the units and shares or, when applicable, from their indicative value.

The fund's constitutional documents may establish that the units and shares acquired in the regulated market cannot be redeemed, but in such cases a warning must be inserted in the fund's prospectus and in all advertising material. Notwithstanding this, if the market value of the units and shares significantly diverges from the calculated and disclosed value of the units and shares, the investors have the right to redeem their units and shares acquired in the regulated market. The procedure for this redemption is set out in the fund's prospectus.

Moreover, the fund manager shall disclose to the market manager any change to the following:

- the value of the units and shares calculated in accordance with the fund's updated portfolio;
- the number of units and shares issued; and
- the assets contained in the fund's portfolio.

Regarding non-retail funds, no specific requirements are established in the Portuguese legal framework.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

There is no specific provision on this matter in the UCI Law and, to date, the redomiciling of an overseas vehicle in Portugal has not been considered by the CMVM. However, it is possible that the CMVM may come to consider this possibility in the future.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

No.



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