

Fund Management 2021

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Oliver Rochman

Morgan, Lewis & Bockius LLP

Lexology Getting The Deal Through is delighted to publish the seventh 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.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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 the contributing editor, Oliver Rochman of Morgan, Lewis & Bockius LLP, and to Michelle Moran of K&L Gates LLP for her assistance with previous editions.



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FUND MANAGEMENT REGULATION

Regulatory framework and authorities

- 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 relevant European regulations and by the following:

- the Undertakings for Collective Investment Law, enacted by Law No. 16/2015 of 24 February 2015 (the UCI Law), which implemented in Portugal Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS) (the UCITS Directive), and Directive 2011/61/EU on alternative investment fund managers (AIFMD), as amended from time to time;
- the Portuguese Securities Exchange Commission (CMVM) Regulation No. 2/2015 on Undertakings for Collective Investment, as amended from time to time, 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 from time to time, which entered into force on 1 March 2000.

The CMVM is the regulatory body in relation to investment funds and fund managers.

Fund administration

- 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. Particularly, the outsourcing of decision powers regarding the investment of the fund may only be carried out in relation to other fund managers or entities authorised to take up discretionary portfolio management, save for the case of alternative investment funds targeting professional investors only, subject to specific authorisation to be granted by CMVM.

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 Bank of Portugal or the CMVM, as applicable.

Authorisation

- 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 three or six months in the case of self-managed collective investment companies, which are respectively AIF or UCITS) 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.

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 in the case of opened-ended funds; from the moment the initial subscriptions are settled in the case of closed-ended funds; or from the date the by-laws are registered with the Commercial Companies Registry Office in the case of collective investment companies.

Territorial scope of regulation

- 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. For fund managers 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 or the AIFMD.

Acquisitions

- 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?

In the case of fund managers authorised to manage UCITS, the UCI 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, 30 or 50 per cent share capital threshold, or if the fund manager becomes a subsidiary of the acquirer, will have to file a prior authorisation application with the CMVM. If the fund manager is not authorised to manage UCITS, it will need to immediately notify CMVM of any change to the qualifying shareholding structure.

Restrictions on compensation and profit sharing

- 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. CMVM Regulation No. 2/2015 further determines that the variable component of the management fee depends on the valorisation of the relevant fund's unit or share, which needs to be higher than the last relevant term (minimum 12 months) and to the relevant benchmark.

FUND MARKETING

Authorisation

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

Yes. The marketing or distribution of funds is defined as an activity aiming to investors with a view to promoting or proposing the subscription of units or shares, regardless of the way such activity is carried out.

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

- fund managers;
- depositaries;
- financial intermediaries registered or authorised by the Portuguese Securities Exchange Commission (CMVM) to perform the relevant activities, namely those of placement or the reception and transmission of orders on behalf of third parties; and
- other entities, as foreseen in CMVM regulations and subject to their 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?

The Undertakings for Collective Investment Law, enacted by Law No. 16/2015 of 24 February 2015 (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.

Territorial scope and restrictions

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

No. 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 Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS), Directive 2011/61/EU on alternative investment fund managers or Directive 2014/65/EU on markets in financial instruments.

- 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). Nevertheless, the CMVM usually demands that the marketing in Portugal of foreign investment funds requires the appointment of a local paying agent to handle the payments by and to the investors and the disclosure of information, even if the marketing activity itself is carried out from abroad.

Commission payments

- 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. Moreover, the marketing agent may directly receive from the the fund part of the fund manager's fee, provided that this is established under the fund's documents.

Under the UCI Law, and contrary to the previous regime, the fund manager cannot receive the entirety or part of the marketing fee, unless it conducted the marketing of the fund itself.

RETAIL FUNDS

Available vehicles

- 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 undertakings for collective investment in transferable securities, 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.

Alternative investment funds (AIFs), if publicly distributed could to a certain degree be assimilated to the retail fund concept. Nonetheless, considering that such AIFs are subject to a specific framework and that their regulation is not fully 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:

- 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. The incorporation of such entities is subject to the Portuguese Securities Exchange Commission's (CMVM) authorisation. They can be self-managed, in which case a minimum initial capital of €300,000 will be required, or managed by an appointed third party (ie, a duly authorised investment fund manager), in which case a minimum initial capital of €50,000 will be required. Participants in the collective investment company will hold shares.

Laws and regulations

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

These include:

- the Undertakings for Collective Investment Law, enacted by Law No. 16/2015 of 24 February 2015 (the UCI Law), which implemented in Portugal Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS) (the UCITS Directive), and Directive 2011/61/EU on alternative investment fund managers (AIFMD), as amended from time to time;
- 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 from time to time, which entered into force on 1 March 2000.

The CMVM authorises the setting up of funds.

Authorisation

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

Yes.

Marketing

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

Those who can market retail funds are;

- fund managers;
- depositaries;
- financial intermediaries registered or authorised by the CMVM to perform the relevant activities, namely those of placement or the reception and transmission of orders on behalf of third parties; and
- other entities, as foreseen in CMVM regulations 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.

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.

Managers and operators

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

Yes. The UCITS fund managers will need to abide by the UCITS Directive framework as implemented in Portugal by the UCI Law.

Investment and borrowing restrictions

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

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

- 1 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;
- 2 no more than 20 per cent of a fund's global net value may be invested in deposits with the same entity;
- 3 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
- 4 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 (1) 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 (1) and (4) 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 repurchase agreements;
- collective investment companies may enter into loan facilities to acquire immovable assets indispensable to the direct exercise of their activities, in up to 10 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.

Tax treatment

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 five 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 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;
- income is not paid or made available to accounts opened in the name of one or more accountholders acting on behalf of one or more unidentified third parties, unless the relevant beneficial owners of the income are identified; 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).

Asset protection

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 €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 and to possessing an adequate internal structure for such activity.

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, to 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.

Governance

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 will have a board of directors comprising at least two members.

Moreover, in accordance with 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 CMVM 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.

Reporting

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 four 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.

Lastly, the fund manager needs to provide CMVM with continuous regulatory reports on its activities and the funds under management, in accordance with CMVM's regulations.

Issue, transfer and redemption of interests

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 issuance, transfer and redemption of the aforementioned interests.

Moreover, pursuant to special circumstances, including liquidity shortage and if the interest of the investors so justifies, the subscription or redemption of interests in the fund may be suspended following a decision of the fund manager in accordance with the regulations of the CMVM.

NON-RETAIL POOLED FUNDS

Available vehicles

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

A retail fund may take one of the following two forms or structures:

- 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. The incorporation of such entities is subject to the Portuguese Securities Exchange Commission's (CMVM) authorisation. They can be self-managed, in which case a minimum initial capital of €300,000 will be required, or managed by an appointed third party (ie, a duly authorised investment fund manager), in which case a minimum initial capital of €50,000 will be required. Participants in the collective investment company will hold shares.

In addition, it should be noted that, in Portugal, Directive 2011/61/EU on alternative investment fund managers (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 the collective investment (UCI) framework, is perceived under Portuguese law as being an autonomous subject in relation to UCIs. Despite this, the Venture Capital Law falls outside the relevant scope of this chapter.

Laws and regulations

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

- The Undertakings for Collective Investment Law, enacted by Law No. 16/2015 of 24 February 2015 (the UCI Law), which implemented in Portugal Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS), and the AIFMD, as amended from time to time;
- CMVM Regulation No. 2/2015 on Undertakings for Collective Investment, as amended from time to time, 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 from time to time, which entered into force on 1 March 2000.

The CMVM authorises the setting up of funds.

Authorisation

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

Yes.

Marketing

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

Fund managers 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.

Ownership restrictions

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 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.

Managers and operators

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

The UCI Law establishes 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).

Tax treatment

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

The taxable income of non-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 five years. The income of non-retail funds is not subject to withholding tax.

Non-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 non-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 non-retail funds, including capital gains resulting from the redemption of units 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 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;
- income is not 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, unless the relevant beneficial owners of the income are identified; 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).

Moreover, 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.

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).

Asset protection

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?

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

A depositary must have at least €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 depositary. A depositary can also be an investment company authorised to provide registration and deposit of financial instruments services, subject to compliance with the own funds requirements set out in article 92 of Regulation 575/2013/EU and to possessing an adequate internal structure for such activity.

The depositary, like the management company, must act independently and exclusively in the interest of the fund's investors.

Governance

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

The retail fund must be managed by a licensed fund manager and will have a board of directors comprising at least two members.

Moreover, in accordance with 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 CMVM 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.

Reporting

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

The fund manager must prepare and publish annual and biannual accounts, as applicable. 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 four months of the end of the financial year;
- the biannual accounts, if applicable, 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.

Lastly, the fund manager needs to provide CMVM with continuous regulatory reports on its activities and the funds under management, in accordance with CMVM's regulations.

SEPARATELY MANAGED ACCOUNTS

Structure

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

Separately managed accounts are not specifically provided for under Portuguese law within the scope of the Undertakings for Collective Investment Law's (UCI) framework, but correspond to portfolio management activity under the second Markets in Financial Instruments Directive (MiFID II) framework.

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, and sometimes a fund manager duly authorised to provide this service), pursuant to which the portfolio manager is obliged, in respect of the client, to carry out all actions necessary to increase the value of the portfolio and to exercise all rights inherent to the financial instruments comprised in the portfolio.

Key legal issues

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

Besides the general obligations arising from the Portuguese Securities 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 general obligations arising from the Portuguese Security Code are also applicable to fund managers providing separately managed account services.

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 or accepting deposits; 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.

Regulation

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

Yes.

The legal framework applicable to separately managed accounts 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 or the Portuguese Securities Code, or both, and are tailored and managed in accordance with an agreement entered into between the client and the portfolio manager. A UCI will be subject to the specific legal framework established in the UCI Law.

GENERAL

Proposed reforms

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

Several regulations recently issued by the Portuguese Securities Exchange Commission (CMVM) relating to, inter alia, reporting obligations of funds and fund managers started to produce effects as from April 2021, subject to certain extensions granted by CMVM due to the covid-19 pandemic outbreak.

Ongoing is an extensive and in-depth review of the Undertakings for Collective Investment Law, enacted by Law No. 16/2015 of 24 February 2015 (UCI Law), by CMVM envisaging to streamline and reorganise the legal framework; however, due to the covid-19 pandemic outbreak this project got delayed and currently there is no target date for the new UCI Law to be put forward for public discussion.

Public listing

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

The listing of retail funds and opened-ended non-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 diverges significantly 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 closed-ended non-retail funds, no specific requirements are established in the Portuguese legal framework.

Overseas vehicles

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 redomiciliation of an overseas vehicle in Portugal has not been considered by the CMVM. It is possible that the CMVM may come to consider this possibility in the future, but we anticipate that redomiciliation, in practical terms, could entail a proceeding with the CMVM similar to that required to set up a new vehicle in Portugal.

Foreign investment

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.

Funds investing in derivatives

40 | Are there any special requirements in your jurisdiction relating to funds investing in derivatives?

The fund's documentation must clearly set out the terms and limitations under which the fund manager may resort to derivatives.

UPDATE AND TRENDS

Recent developments

41 | Are there any other current developments or emerging trends in your jurisdiction that should be noted? Please include reference to world-wide regulatory concerns, such as restrictions on foreign ownership in strategic industries, high-frequency trading, commodity position limits, capital adequacy for investment firms and 'shadow banking'.

It is expected that the Undertakings for Collective Investment Law, enacted by Law No. 16/2015 of 24 February 2015 (UCI Law) will be subject to further amendments and that more regulations may be published by the Portuguese Securities Exchange Commission (CMVM).

Regarding Brexit, Portugal published at the end of 2020 a Decree-Law establishing contingency measures for investment funds and fund managers, basically providing for a phasing-out period until 31 December 2021 or, alternatively, a grace period during which UK fund managers may continue doing business in Portugal, provided that they file an application with the CMVM by 30 June 2021 to be authorised under the UCI Law as a third-country fund manager.

Moreover, UK investment funds distributed in Portugal prior to Brexit may continue to be distributed herein, but the fund manager needs to have filed by 31 March 2021 a simple notice with CMVM, the template for which is provided under Annex III of Decree-Law No. 106/2020 of 23 December.

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Coronavirus

42 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic outbreak has led the Portuguese government to adopt a comprehensive set of relief programmes, mainly directed at consumers and working population affected by the disease and the successive lockdowns.

We highlight the moratoriums on loans and rents, which are supporting the economy and keeping people and businesses afloat, and that had, until now, a mild effect on investment funds. Likewise, fund managers were able to adapt to the new environment and keep their business going, including in regard to the regulatory obligations towards the CMVM.

However, the end of the moratoriums in the near future may unchain the full effects of the pandemic on the economy and lead to an increase in unemployment, bankruptcy and payments default. We anticipate that real estate funds may be more susceptible to the direct impacts stemming from the end of the moratoriums, but other types of investment funds will likely be indirectly impacted as well, if businesses in which they invest are affected by the worsening of the economic fundamental.

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