

FUND MANAGEMENT

Portugal



Fund Management

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Quick reference guide enabling side-by-side comparison of local insights into fund management issues, including regulatory framework and authorities; regulation of fund administration; fund authorisation and licensing; territorial scope of regulations; acquiring a stake in a fund manager; restrictions on compensation and profit sharing; fund marketing, including rules on commission payments; legal vehicles available for retail funds and non-retail pooled funds; investment, borrowing ownership, management and operating restrictions; tax, asset protection, governance, reporting, issue, transfer and redemption issues; separately managed accounts; re-domiciliation of funds; listing funds; foreign investor participation rules; funds investing in derivatives; hot topics, such as treatment of strategic industries, high-frequency trading, commodity position limits, capital adequacy for investment firms and 'shadow banking'; and other recent trends.

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FUND MANAGEMENT REGULATION

Regulatory framework and authorities

How (in very general terms) 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 Asset Management Regime (AMR) enacted by Decree-Law No. 27/2023 of 28 April 2023 that implements and consolidates into one framework 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 Market 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 AMR;
- CMVM Regulation No. 3/2015 on Venture Capital, Social Entrepreneurship and Specialised Alternative Investment; 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.

CMVM is the regulatory body for investment funds and fund managers.

Law stated - 31 May 2023

Fund administration

Is fund administration (support services provided to funds such as book-keeping, preparing reports, trade settlement, etc) 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, except for alternative investment funds targeting professional investors only, subject to specific authorisation by CMVM.

Furthermore, some support services, depending on their specific scope, may be deemed investment services or activities, or ancillary services, thus subject to authorisation by CMVM.

Law stated - 31 May 2023

Authorisation

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?

CMVM authorises the setting up of funds or proceeds to their registration in the case of closed-end, externally managed and privately subscribed funds, as applicable. When requesting authorisation or registration, the relevant fund

manager must provide CMVM with the fund's documentation (notably, the key investor information document and the full prospectus of the fund or the fund's management regulations).

In addition, CMVM must also be given information on:

- the agreements to be executed between the management company and the depositary (except for funds targeting professional investors only, which are managed by below-AIFMD thresholds fund managers who are not required to appoint a depositary);
- the distributors or entities that will market the fund; and
- any other entities that will render services to the fund or fund manager.

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

Authorisation, whenever applicable, is issued within:

- three months, extendable for one additional month by decision of CMVM, in the case of the incorporation of a self-managed collective investment company above AIFMD thresholds;
- 30 days, in the case of the incorporation of a self-managed collective investment company below AIFMD thresholds; and
- 15 days for the remaining funds, as from the date the file is deemed complete by CMVM.

If, at the end of the relevant period, the applicants have not yet been notified of the success of their application, they may resort to administrative procedure means and, in the case of item (3) above, the authorisation is considered to have been tacitly granted.

CMVM may refuse to grant authorisation if the applicant does not submit the required documentation or 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 funds; or from the date the by-laws are registered with the Commercial Companies Registry Office in the case of collective investment companies.

Law stated - 31 May 2023

Territorial scope of regulation

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.

Law stated - 31 May 2023

Acquisitions

Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator? (Restrict your answers to the regulator with responsibility for oversight of fund management. Do not answer with respect to other agencies, such as the merger control authorities.)

In the case of fund managers authorised to manage UCITS, the Undertakings for Collective Investment Law establishes that any entity or legal person wishing to acquire or raise a qualifying shareholding in a fund manager, to the extent that it surpasses the 10, 20, 33 or 50 per cent share capital thresholds, or if the fund manager becomes a subsidiary of the acquirer, will have to file a prior application with CMVM. If the fund manager is not authorised to manage UCITS, it must immediately notify CMVM of any change to the qualifying shareholding structure.

Law stated - 31 May 2023

Restrictions on compensation and profit sharing

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

Article 68 of the AMR establishes that the fund manager is remunerated through a management fee, which may comprise a variable component calculated in accordance with the performance of the fund. The fixed or variable components of the management fee and its calculation methods must be clearly stipulated in the fund's constitutional documents.

Law stated - 31 May 2023

FUND MARKETING

Authorisation

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

Yes. The marketing or distribution of funds is defined as the offer or placement of units or shares of a fund made directly or indirectly at the initiative of the management company or on its behalf.

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

- fund managers, which may be represented by tied agents subject to the regime established in the Portuguese Securities Code;
- depositaries;
- financial intermediaries registered or authorised by the Portuguese Securities Market Commission (CMVM) to perform the relevant activities, namely those of placement (with or without guarantee) or the reception and transmission of orders on behalf of third parties; and
- other entities, as foreseen in CMVM regulations and subject to 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.

Law stated - 31 May 2023

What marketing activities require authorisation?

The Asset Management Regime (AMR) encompasses a narrower concept of marketing than the previous legal regime. Nevertheless, actively seeking investors and promoting the subscription of funds or directly assisting investors throughout the subscription process are usually deemed as regulated activities.

Conversely, the mere referral of investors and the general presentation of the fund to potential investors or of the latter to a management company, without further steps being taken, is not considered a regulated activity.

Law stated - 31 May 2023

Territorial scope and restrictions

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 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.

Law stated - 31 May 2023

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).

Law stated - 31 May 2023

Commission payments

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.

Additionally, the marketing agent may be paid by the fund manager by splitting the management fee charged by the latter to the fund.

Law stated - 31 May 2023

RETAIL FUNDS

Available vehicles

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, we use the term 'retail fund' here refer to the Portuguese legal concept of undertakings for collective investment in transferable securities (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.

Alternative investment funds (AIFs), if publicly distributed, can to a certain degree be assimilated to the retail fund concept. Nonetheless, being subject to a specific framework and their regulation not yet fully harmonised throughout the European Union hampers 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 Market 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.

Law stated - 31 May 2023

Laws and regulations

What are the key laws and other sets of rules (regulatory and self-regulatory) that govern retail funds?

These include:

- the Asset Management Regime (AMR) enacted by Decree-Law No. 27/2023 of 28 April 2023 that implements and consolidates into one framework Directive 2009/65/EC on undertakings for collective investment in transferable securities (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 AMR;
- CMVM Regulation No. 3/2015 on Venture Capital, Social Entrepreneurship and Specialised Alternative Investment; 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.

CMVM authorises or registers the setting up of funds.

Law stated - 31 May 2023

Authorisation

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

Yes.

Law stated - 31 May 2023

Marketing

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

The following can market retail funds:

- fund managers, which may be represented by tied agents subject to the regime established in the Portuguese Securities Code;
- depositaries;
- financial intermediaries registered or authorised by CMVM to perform the relevant activities, namely those of placement (with or without guarantee) 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.

Law stated - 31 May 2023

Managers and operators

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 AMR.

Law stated - 31 May 2023

Investment and borrowing restrictions

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 over the counter 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 if 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.

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, consecutive or interpolated, and up to 10 per cent of the fund's global net value;
- 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.

Law stated - 31 May 2023

Tax treatment

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 are entitled to be carried forward under the general terms. The income of retail funds is not subject to withholding tax.

Retail funds exclusively investing in money market instruments and bank deposits are 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 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, will 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).

Moreover, income tax exemptions may be applicable to non-resident investors regarding 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 retail funds that mainly invest in real estate assets.

In this respect, income derived from 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 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, will 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).

Law stated - 31 May 2023

Asset protection

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 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 the EU legislation 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. It has three main responsibilities:

- 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 depositary 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.

Law stated - 31 May 2023

Governance

What are the main governance requirements for a retail fund formed in your jurisdiction (registration, record-keeping, filings, officers)?

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

Moreover, the fund manager must also have an audit board comprising at least three members and a sole auditor, or it may have only a sole auditor depending on the supervision structure adopted by the fund manager.

The members of the fund manager's board of directors and audit board must be assessed by CMVM during the authorisation procedure of the fund manager, whenever the composition of the corporate bodies is changed or whenever CMVM becomes aware of supervening facts that may have an impact on the assessment previously made.

Furthermore, 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 CMVM and, to a certain extent, of the depositary.

Law stated - 31 May 2023

Reporting

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 on CMVM's website. Moreover, the fund manager must publish and send the following to 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.

Law stated - 31 May 2023

Issue, transfer and redemption of interests

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 Undertakings for Collective Investment 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 CMVM regulations.

Law stated - 31 May 2023

NON-RETAIL POOLED FUNDS

Available vehicles

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

A non-retail pooled 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 Market Commission's (CMVM) authorisation or registration, as applicable. 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.

Law stated - 31 May 2023

Laws and regulations

What are the key laws and other sets of rules (regulatory and self-regulatory) that govern non-retail funds?

The Asset Management Regime (AMR) enacted by Decree-Law No. 27/2023 of 28 April 2023 that implements and consolidates into one framework 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, as amended from time to time, which sets forth more specific rules regarding certain aspects of the AMR CMVM – Regulamento da CMVM No. 2/2015.

CMVM Regulation No. 3/2015 on Venture Capital, Social Entrepreneurship and Specialised Alternative Investment.

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 CMVM – Código dos Valores Mobiliários.

Law stated - 31 May 2023

Authorisation

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

No. The setting up or incorporation of non-retail pooled funds is subject to prior communication to CMVM.

Law stated - 31 May 2023

Marketing

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

Those who can market non-retail funds are:

- fund managers, which may be also represented by tied agents subject to the regime established in the Portuguese Securities Code;
- depositaries;
- financial intermediaries registered or authorised by CMVM to perform the relevant activities, namely those of placement (with or without guarantee) 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 express limitations as to whom non-retail funds may be marketed. Both natural and legal persons, professional and non-professionals, can invest in the units or shares of a non-retail fund, subject to the selling restrictions established in the fund's constitutional documents.

Nevertheless, typically, non-retail funds target professional and affluent investors, but there are cases where this type of fund is sold to retail investors as well, provided that the latter are willing and capable of sustaining the lack of liquidity of the invest.

Law stated - 31 May 2023

Ownership restrictions

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.

Law stated - 31 May 2023

Managers and operators

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

The AMR 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, venture capital funds or real estate funds).

Law stated - 31 May 2023

Tax treatment

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

Non-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 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 non-retail funds, are also disregarded for profit assessment purposes.

The tax losses of these funds are entitled to be carried forward under the general terms. The income of non-retail funds is not subject to withholding tax.

Non-retail funds exclusively investing in money market instruments and bank deposits are 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 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, will 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, are 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).

Law stated - 31 May 2023

Asset protection

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, except for funds targeting professional investors only that are managed by below-AIFMD thresholds fund managers, which are not required to appoint a depositary.

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 the EU legislation 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.

Law stated - 31 May 2023

Governance

What are the main governance requirements for a non-retail fund formed in your jurisdiction (registration, record-keeping, filings, officers)?

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

Moreover, the fund manager must have an audit board comprising at least three members and a sole auditor, or it may have only a sole auditor depending on the supervision structure adopted by the fund manager.

The members of the fund manager's board of directors and audit board must be assessed by CMVM during the authorisation procedure of the fund manager, whenever the composition of the corporate bodies is changed or whenever CMVM becomes aware of supervening facts that may have an impact on the assessment previously made. Below-AIFMD thresholds fund managers are subject to a light-touch regime in this regard.

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

- the risk of its activity;
- remuneration issues (save for below-AIFMD thresholds fund managers);
- 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 CMVM and, to a certain extent, of the depository.

Law stated - 31 May 2023

Reporting

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 on CMVM's website. Moreover, the fund manager must publish and send the following to CMVM:

- the annual accounts within five months of the end of the financial year;
- the biannual accounts, if applicable, within two months of 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; and
- in the case of venture capital funds, the manager must disclose to unitholders, at least on an annual basis, the value of the units held by them and the portfolio of the fund.

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.

Law stated - 31 May 2023

SEPARATELY MANAGED ACCOUNTS

Structure

How are separately managed accounts (ie, accounts through which investor funds are segregated – not pooled – and the investor owns the underlying assets, which are managed at the investment manager's discretion) 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 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 (a financial intermediary duly licensed to develop such activity or 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.

Law stated - 31 May 2023

Key legal issues

What are the key legal issues (eg, standard of care, indemnification) to be determined when structuring a separately managed account?

The portfolio managers are subject to the obligations arising from the Portuguese Security Code, which are also generally applicable to fund managers providing separately managed account services. Both must record and segregate the client's assets in different accounts or sub-accounts and abide by the regulatory standards established under MiFID II.

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.

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.

Law stated - 31 May 2023

Regulation

Is the management or marketing of separately managed accounts regulated in your jurisdiction?
(If so, how does this operate? Is this the same regime for fund management?)

Yes. The legal framework applicable to separately managed accounts is different from the Asset Management Regime framework, because separately managed accounts are subject to the provisions of the Portuguese Securities Code and MiFID II delegated acts, being a tailored made contractual arrangement, rather than corresponding to the management of a collective investment portfolio.

Law stated - 31 May 2023

GENERAL

Proposed reforms

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

The Asset Management Regime (AMR) entered into effect on 28 May 2023 and completely reshaped the legal and regulatory framework applicable to investment funds in Portugal by streamlining and reorganising the legal landscape.

Nevertheless, it is still pending the publication of the new Portuguese Securities Market Commission (CMVM) regulation that will adapt and detail the second level rules applicable to investment funds. This piece of regulation is important to the complete application of the new regime and is expected to be published and to entered into effect in the coming months, after a public consultation procedure that is yet to start.

Law stated - 31 May 2023

Public listing

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 must 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, investors have the right to redeem their units and shares acquired in the regulated market. The redemption procedure is set out in the fund's prospectus.

Moreover, the fund manager must disclose to the market manager any changes to:

- 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, but if they have an indefinite term, the respective constitutional documents must provide for the admission to trading of its units within a period of three years after the constitution.

Law stated - 31 May 2023

Overseas vehicles

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

There is no specific provision on this matter in the AMR and, to date, the redomiciliation of an overseas vehicle in Portugal has not been considered by CMVM. It is possible that CMVM may come to consider this possibility in the future, but we anticipate that redomiciliation, in practical terms, could entail a proceeding with CMVM similar to that required in setting up a new vehicle in Portugal.

Law stated - 31 May 2023

Foreign investment

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.

Law stated - 31 May 2023

Funds investing in derivatives

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.

In the case of real estate funds, it is expressly provided that the investment in derivatives, other than the ones aiming at risk coverage, is subject to authorisation by CMVM.

Law stated - 31 May 2023

UPDATE AND TRENDS

Recent developments

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'.

The Portuguese golden visa regime is under revision by the government and will likely be revoked. Considering that the investment of €500,000 on certain Portuguese venture capital funds is an eligible investment for obtaining a golden visa, this news is impacting the local market and driving away potential foreign investors that were responsible, to a large extent, for propelling the growth of the venture capital ecosystem in Portugal in recent years.

Moreover, the constant changes to the Tax Incentive Scheme for Business Research and Development, which is obtained many times through the investment by companies in venture capital funds is also raising issues and making it more difficult to implement certain projects.

Lastly, the recent housing programme implemented by the Portuguese government contains several measures that try to address the lack of residential housing at accessible rent; however, some of these measures restrict the rights of landlords and may subsequently impact real estate funds.

Due to the novelty of these legal developments, their full impact on the local investment funds market cannot be fully assessed at this moment.

Law stated - 31 May 2023

Jurisdictions

	Germany	POELLATH
	Greece	Souriadakis Tsibris
	Italy	Legance
	Japan	TMI Associates
	Luxembourg	Loyens & Loeff
	Malta	Gordon S. Blair Law Offices
	Monaco	Gordon S. Blair Law Offices
	Portugal	VdA
	Spain	Alter Legal
	Sweden	Vinge
	Switzerland	Walder Wyss Ltd
	United Kingdom	Morgan, Lewis & Bockius LLP
	USA	Morgan, Lewis & Bockius LLP