

# Investment funds in Portugal: regulatory overview

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## RETAIL FUNDS

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

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

#### Open-ended retail funds

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

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

There have been no significant changes in market practice during 2014. However, GNB-SGFIM S.A. (formerly known as ESAF), one of the major players in the Portuguese securities market, lost a significant part of its market share relating to the former Banco Espírito Santo S.A. (currently Novo Banco S.A.) due to the collapse of the BES Group, which was followed by the enforcement of resolution measures by the Bank of Portugal (Banco de Portugal).

#### Closed-ended retail funds

The market for closed-ended retail funds is smaller than the one for open-ended retail funds. Retail investors seem to be more interested in an investment that can be easily redeemed. However, in accordance with data from the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*) (CMVM), there was a slight decrease of the amounts under management in more traditional types of funds (that is, open-ended funds investing in plain vanilla assets, such as shares or simple bonds) and in alternative investment undertakings (AIUs) (that is, open-ended or closed-ended funds featuring other types of assets and enjoying a more flexible regulatory framework (see Questions 16 to 28)).

There have been no other significant changes in market practice during 2014.

### Regulatory framework and bodies

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

#### Open-ended retail funds

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

- Undertakings for Collective Investment (UCI) Law (*Regime Geral dos Organismos de Investimento Coletivo*), established by Law No. 16/2015 of 24 February 2015, which partially implemented in Portugal Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS) (UCITS IV Directive), as amended, as well as Directive 2011/61/EU on alternative investment fund managers (AIFM Directive), and sets out most of the rules relating to investment funds. Most of the new legal regime entered in force on 26 March 2015.
- CMVM Regulation No. 5/2013 on Undertakings for Collective Investment (Regulation No. 5/2013), which provides more specific rules regarding certain aspects of the Decree-Law No. 63-A/2013 of 10 May 2013 (former UCI Law). It is expected that a new CMVM regulation that will revoke the current regulation will be adopted in 2015 to further implement Law No. 16/2015 of 24 February 2015 (see above).
- Portuguese Securities Code (*Código dos Valores Mobiliários*).

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

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

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

#### Closed-ended retail funds

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

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

#### Open-ended retail funds

An authorisation from the CMVM is required before setting up a retail fund. In making a request for an authorisation, the



management company of the retail fund must provide the CMVM with the fund's documentation, notably the Key investor information document (KIID) and the full prospectus of the fund, which must also include the fund regulation.

In addition, the CMVM must also be given copies of the agreements to be executed between the management company and:

- The depositary.
- Distributors or entities that will market the fund.
- Any other entities that will render services to the fund or management company.

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

An authorisation is given within 20 days (or 30 days in the case of self-managed collective investment companies endowed with legal personality) of the reception of either the request or of any supplementary information or alterations to the documents that the CMVM has required in the meantime. If at the end of this period the applicants have not been informed of the success of their application, the authorisation is considered to have been tacitly granted. The CMVM may refuse the authorisation if the applicant does not submit the requisite documentation or if the management company in question engages in the irregular management of other funds.

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

#### Closed-ended retail funds

A similar procedure applies to closed-ended retail funds (*see above, Open-ended retail funds*), although in this case a prospectus and the essential information to investors are not required.

#### Foreign retail funds

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

#### Marketing

#### 4. Who can market retail funds?

##### Open-ended retail funds

The placement of a retail fund, encompassing its marketing or distribution (*comercialização*), is defined as activity directed towards investors, in order to promote or propose the subscription of UCITS participation units, through the use of any advertising or other means of communication to achieve such effect.

Although the placement of an investment fund aimed exclusively at qualified investors is now classified as marketing of a fund, it is only subject to the regulation and supervision by the CMVM with regards to its constitution and functioning.

The entities that are legally permitted to market retail funds are:

- Fund management companies.
- Depositaries.
- Financial intermediaries registered or authorised by the CMVM to perform the relevant activities, namely those of placement and reception and transmission of orders on behalf of third parties.
- Other entities as foreseen in CMVM's Regulation and subject to its authorisation. Regarding fund marketing, these entities must

observe the same rules and are subject to the same supervision as financial intermediaries.

#### Closed-ended retail funds

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

#### Foreign funds

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

- Non-UCITS compliant.
- UCITS compliant.
- From an EU member state that has implemented and is compliant with Directive 2011/61/EU on alternative investment fund managers (AIFM Directive).

Foreign non-UCITS funds can be marketed by managing companies established and duly licensed in another EU member state or in a third country. Such companies can carry out the fund's activities defined in the respective licences either through the establishment of a branch or under the EU regime on freedom to provide services, provided that such activities are only targeted at qualified investors. To this effect, the managing company must provide the CMVM with a notice from the relevant home member state or reference member state (as applicable) containing the following information:

- Activity plan.
- Member states where it intends to manage the non-UCITS compliant funds.
- Relevant funds.

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

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

##### Open-ended retail funds

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

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

##### Closed-ended retail funds

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

##### Foreign funds

Provided that a fund is authorised for distribution in Portugal (*see Question 4, Foreign funds*), there is no difference between the persons to whom it is possible to market a Portuguese fund and a foreign fund, except for foreign non-UCITS compliant funds which can only be distributed in Portugal to qualified investors.

## Managers and operators

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

Investment fund management companies are primarily required to manage one or more funds. In addition, such companies can also market Portuguese or foreign investment funds and may be authorised to provide discretionary and individual financial instruments portfolio management services, venture capital management services, real estate investment funds management services and investment advisory services in relation to the aforementioned assets.

Under Portuguese law, fund managers must be registered with both the:

- CMVM, which carries out the bulk of the regulatory and supervisory role and is also in charge of regulating and supervising the UCIs themselves.
- Bank of Portugal, which retains some power that is often jointly exercised with the CMVM.

A UCITS-compliant fund manager may be authorised to manage retail funds if it is authorised to proceed with such activities in its home member state, and proceeds with its registration with the Bank of Portugal under the rules of freedom to provide financial services as established in Directive 2013/36/EU on the taking up and pursuit of the business of credit institutions.

#### Open-ended retail funds

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

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

Management companies must have a minimum share capital of EUR125,000.

Irrespective of other criteria, the own funds of management companies must not be less than a quarter of their fixed overheads in the previous year (*Article 97, Regulation 575/2013/EU*).

Other than these minimum thresholds, fund managers are also subject to the limits set out in Article 7 of UCITS IV, as implemented by the UCI Law. This includes the:

- Additional requirement when the aggregate portfolio value exceeds EUR250 million (equivalent to 0.02% of that excess amount).
- EUR10 million cap.
- Bank of Portugal's power as regulator to demand a remedy or termination of activities if the fund manager's own funds drop below a certain amount (that is, the minimum amount specifically determined by the Bank of Portugal or EUR125,000, depending on the circumstances).

If a fund manager is authorised to provide other services (such as managing real estate investment funds or venture capital funds), the prudential requirements relevant to such activities apply in addition to the above.

#### Closed-ended retail funds

Closed-ended funds can be managed by certain credit and financial institutions (such as banks) that hold at least EUR7.5 million in own funds, provided that the aggregate portfolios of the closed-ended funds under management do not exceed either:

- EUR100 million, when the portfolio includes assets acquired through leverage
- EUR500 million, when the closed-ended funds do not resort to leverage techniques.

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

#### Assets portfolio

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

#### Open-ended retail funds

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

A depositary must have at least EUR7.5 million in own funds and its registered office must be located in Portugal or in another EU member state, although in the latter case it must have a branch in Portugal. A fund cannot have the same entity as both its management company and depositary. 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.

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

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

The depositary is responsible under the general rules of civil liability towards the management company and the participants for the compliance with the legal duties, regulations and the constitutive documents of the fund, and for the loss of the financial instruments under its safekeeping.

#### Closed-ended retail funds

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

#### Legal fund vehicles

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

#### Open-ended retail funds

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

- A mere contractual figure with no legal personality. This is the classic structure and requires that the fund be managed by a separate management company (see *Question 6*). The participants' interests in these funds are called units (*unidades de participação*).

- Collective investment companies endowed with legal personality (*sociedades de investimento mobiliário*) (SIMs). These investment companies must have a minimum initial capital of EUR300,000 and their constitution is subject to the authorisation of the CMVM. SIMs can be self-managed or managed by an appointed third party, which must be a duly authorised investment fund management company. The participants' interests in these funds are called shares (*ações*).

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

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

#### Closed-ended retail funds

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

#### Investment and borrowing restrictions

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

#### Open-ended retail funds

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

- No more than 10% of a fund's global net value can be invested in securities and money market instruments of the same issuer.
- No more than 20% of a fund's global net value can be invested in deposits with the same entity.
- Exposure to a single counterparty in transactions involving derivatives outside a regulated market cannot exceed 5% of the fund's global net value, or 10% if the counterparty is a bank.
- The sum of the investments in securities and money market instruments from the same issuer exceeding 5% cannot exceed 40% of a fund's global net value. 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, such as:

- The first limit rises to 35% where:
  - the issuer is an EU member state or one of its local or regional authorities;
  - the issuer is a non-EU state or an international organisation which has at least one EU member state as a member; or
  - one of these entities guarantees the securities or money market instruments.
- The first and fourth limits rise to 25% and 80% respectively if the investment is in covered bonds issued by a credit institution from a EU member state. However, such covered bond issuances must be backed by underlying assets that fully secure the amount due and interest payment in the event the issuer defaults.
- No more than 20% of a fund's global net value can be invested with a single entity.

- A fund can invest up to 100% of its global net value in securities or money market instruments issued or guaranteed by a member state or its local or regional authorities, by public international entities related to a member state or a third state, provided that the investment is made across six separate issues, with the value invested in each issue not exceeding 30% of the global net value of the fund.
- No more than 20% of a fund's global net value can be invested in securities and money market instruments of issuers belonging to the same corporate group.

In addition, a retail fund cannot acquire more than:

- 10% of shares without voting rights from the same issuer.
- 10 % of an issuer's debt titles.
- 25% of the units of a UCITS or AIU.
- 10% of an issuer's monetary market instruments.

The following borrowing restrictions apply:

- Management companies can obtain loans on behalf of funds. Within a one-year period, the sum of all the loan periods cannot exceed 120 days, consecutive or not. Additionally, there is a borrowing limit of 10% of the global net value of the fund, without prejudice of the right to resort to securities loans and repo agreements.
- Collective investment companies can enter into loan facilities to acquire immovable assets indispensable to the direct exercise of their activities for up to 20% of the global net value of the fund.
- If the incorporation documents of a collective investment company provides for the possibility of entering into loan facilities, the amounts specified cannot exceed 15% of the fund's global net value.

#### Closed-ended retail funds

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

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

#### Open-ended retail funds

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

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

However, the redemption of units may be suspended where:

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

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



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

### Closed-ended retail funds

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

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

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

### Open-ended retail funds

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

### Closed-ended retail funds

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

### Reporting requirements

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

### Open-ended retail funds

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

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

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

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

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

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

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

### Closed-ended retail funds

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

### Tax treatment

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

### Open-ended retail funds

**Funds.** Decree-Law no 7/2015, of 13 January 2015 (DL 7/2015) introduced a new tax regime applicable to collective investment undertakings. This new regime will enter into force on 1 July 2015.

Funds will be subject to corporate income tax (CIT) at the general rate (currently set at 21%), but will be exempt from municipal and state surcharges. Taxable income corresponds to the net profit assessed in accordance with a fund's accounting standards. Certain types of income (such as investment income and capital gains) and expenses (such as those related to investment income and capital gains, management fees and those set out in Article 23-A of the CIT Code, and to management fees) can be disregarded for profit assessment purposes. However, income derived from blacklisted jurisdictions will always qualify as profit and subject to the applicable CIT rates. A fund's losses can be carried forward for a period of 12 years.

A fund's income is not subject to withholding tax. However, autonomous tax rates established in the CIT Code will apply.

Funds that are exclusively investing in money market instruments and bank deposits will also be subject to stamp duty calculated on their global net assets at a rate of 0,0025% (per quarter). Other funds will be subject to stamp duty at a rate of 0,0125% (per quarter).

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

- **Personal income tax (PIT).** Income distributed to Portuguese individuals (outside a commercial activity) is subject to a 28% final withholding tax. If the investor opts to aggregate the income received, it will be subject to progressive income tax rates of up to 48%. In the latter circumstance an additional income tax will be due on the part of the taxable income exceeding EUR80,000 as follows:

- 2.5% on the part of the taxable income exceeding EUR80,000 up to EUR250,000;
- 5% on any taxable income exceeding EUR250,000.

In addition, if the option of income aggregation is made, an additional surcharge at the rate of 3.5% will also be due on the amount exceeding the annual amount of the monthly minimum guaranteed wage (EUR7,070).

Income payments to omnibus accounts is subject to a final withholding tax rate of 35%, unless the relevant beneficial owner(s) of the income is (are) identified, in which case the tax rates applicable to such beneficial owner(s) apply.

- **Capital gains** arising from the transfer of units are taxed at:
  - a special tax rate of 28% on the positive difference between capital gains and losses; or
  - the above progressive income tax rates, additional income tax rates and additional surcharge if the investor opts to aggregate the income received.
- **Corporate income tax (CIT).** Income payments to a resident entity are subject to withholding tax at a rate of 25% (to be paid on account of the final CIT bill) and are qualified as profit or gains for CIT purposes. Income payments to omnibus accounts is subject to a final withholding tax rate of 35%, unless the relevant beneficial owner(s) of the income is (are) identified, in which case the tax rates applicable to such beneficial owner(s) apply.

A resident entity is subject to a corporate tax at a rate of 21% (if the taxpayer is a small or medium enterprise as established in Decree-Law No. 372/2007 of 6 November 2007, the rate is 17% for taxable profits up to EUR15,000 and 21% on profits in excess of this amount).

A resident entity may also be subject to a municipal surcharge (*derrama municipal*) of up to 1.5% on taxable profits, depending on the municipality where it is established (the municipalities have the right to decide if the municipal surcharge is levied and at what rate). Taxable profits are also subject to a progressive state surcharge (*derrama estadual*) which has the following applicable rates:

- 3% payable on the taxable profits from EUR1.5 million up to EUR7.5 million;
- 5% payable on the taxable profits from EUR7.5 million up to EUR35 million; and
- 7% payable on the part of the taxable profits that exceeds EUR35 million.

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

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

- **PIT.** Income payments and capital gains derived from units in funds are exempt from PIT provided that the evidence of non-residence status required by the tax law is delivered in due time. A refund procedure is available within a two-year period in cases where a 28% withholding tax was applied for failure to submit timely documentation. The refund procedure requires the certification of a special form by the competent authorities of the state of residence. Non-resident investors domiciled in a blacklisted territory don't benefit from income tax exemptions. In those cases, a 35% withholding tax will apply.
- **CIT.** A CIT exemption applies where income arising from the units is distributed or made available to a non-resident entity without a permanent establishment in Portugal.

Capital gains arising from the transfer of units are also exempt from CIT. In order to benefit from such exemptions, an adequate evidence of non-residence status must be provided in due time. The above refund procedure is also available to non-resident corporate entities.

However, non-resident investors cannot benefit from the exemptions if:

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

If the exemption does not apply, the general rules on CIT apply.

#### Closed-ended retail funds

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

#### Foreign retail funds

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

- **PIT.** Investment income payments made to resident individuals are subject to PIT which must be withheld at the current final withholding tax rate of 28% if there is a Portuguese resident paying agent, unless the individual elects to include this income in their overall taxable income, subject to tax at progressive rates of up to 48%. In the latter circumstance, an additional

income tax will be due on the part of the taxable income exceeding EUR80,000 as follows:

- 2.5% on the part of the taxable income exceeding EUR80,000 up to EUR250,000;
- 5% on any taxable income exceeding EUR250,000.

In addition, if the option of income aggregation is made an additional surcharge at the rate of 3.5% will also be due on the amount exceeding the annual amount of the monthly minimum guaranteed wage (EUR7,070).

Income payments made through a foreign paying agent will be subject to an autonomous taxation at a rate of 28%.

Investment income paid or made available to accounts opened in the name of one or more account holders acting on behalf of one or more unidentified third parties is subject to a final withholding tax rate of 35%, unless the relevant beneficial owner(s) of the income is (are) identified, in which case the tax rates applicable to such beneficial owner(s) apply.

A 35% withholding tax rate applies in case of investment income payments from companies domiciled in one of the blacklisted jurisdictions listed in the Ministerial Order No. 150/2004 of 13 of February 2004, as amended.

The positive difference between the capital gains and losses made during the year is taxed at the special tax rate of 28%, but the taxpayer may choose to aggregate this income, in which case it will be subject to personal income progressive taxes rates and to the additional income tax surcharges as the case may be (*see above*).

The gains arising from the redemption of units in funds incorporated in blacklisted jurisdictions are subject to a special tax rate of 35%.

- **CIT.** Income payments and capital gains made by a resident entity are subject to a corporate tax rate of 21% (if the taxpayer is a small or medium enterprise as established in Decree-Law No. 372/2007 of 6 November 2007, the rate is 17% for taxable profits up to EUR15,000 and 21% on profits in excess of this amount).

A resident entity may also be subject to a municipal surcharge of up to 1.5% on taxable profits. Taxable profits will also become subject to a progressive state surcharge (*see above, Open-ended retail funds: Resident investors*).

**Non-resident investors.** Income payments to, and capital gains made by, a non-resident beneficiary without a permanent establishment in Portugal are not subject to taxation in Portugal.

#### Quasi-retail funds

#### 14. Is there a market for quasi-retail funds in your jurisdiction?

With the objective of reverting the financial crisis and revive the Portuguese economy, a number of funds aimed at specific investors in both the public and private sectors have been created, namely through the investment in Portuguese SMEs. The most relevant fund of this nature is *Fundo de Apoio ao Financiamento à Inovação* (FINOVA).

#### Reform

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

The Undertakings for Collective Investment (UCI) Law (*Regime Geral dos Organismos de Investimento Colectivo*) was recently enacted through Law No. 16/2015 of 24 February 2015. This law implemented in Portugal Directive 2009/65/EC on undertakings

for collective investment in transferable securities (UCITS) (UCITS IV Directive), as amended, and partially implemented Directive 2011/61/UE on alternative investment fund managers (AIFM Directive), and sets out most of the rules relating to investment funds. Most of the new legal regime entered in force on 26 March 2015.

A new CMVM regulation, which will revoke CMVM Regulation No. 5/2013, is expected to be enacted in 2015 to further implement Law No. 16/2015 of 24 February 2015 (see *Question 2, Open-ended retail funds*).

## HEDGE FUNDS

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

This part of the article focuses on AIUs, which are currently the closest entity to a hedge fund type structure in Portuguese law. Compared to retail funds, AIUs allow for investment in a broader range of assets and the use of riskier management techniques.

There are currently a little over 100 AIUs active in Portugal. They invest in a variety of assets, ranging from financial instruments to football players. As mentioned above (see *Question 1, Closed-ended retail funds*), demand for AIU products among investors has risen in 2014 as compared to demand for more traditional retail funds.

Similarly to retail funds, most AIUs are managed by management companies which are part of the largest Portuguese financial services groups (see *Question 1, Open-ended retail funds*). However, their predominance is less significant than in the retail fund market. Important players include management companies belonging to smaller financial services groups and even some independent management companies. This trend may be explained by the fact that this type of investment structure is usually sought by more affluent (and also more diligent) investors.

There have been no other significant changes in the market practice during 2014 other than those referred to in *Question 1*.

#### Regulatory framework and bodies

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

#### Regulatory framework

AIUs are regulated by the regulation and other laws applicable to retail funds to the extent that it is not incompatible with their nature.

#### Regulatory bodies

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

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

#### Risk

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

#### Valuation and pricing

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

#### Systems and controls

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

#### Insider dealing and market abuse

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

#### Transparency

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

#### Money laundering

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

#### Short selling

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

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

#### Marketing

### 19. Who can market hedge funds?

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

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

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

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

#### Investment restrictions

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

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

#### Assets portfolio

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

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

## Requirements

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

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

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

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

The constitutive documents of an AIU must contain information on:

- The type of assets that can form part of its portfolio.
- Its internal rules, such as the conditions of subscription and redemption.
- Minimum and maximum investment limits in relation to assets, issuers and certain operations.
- The number of participants and the minimum global net value of the fund, whenever it is expected that the minimum amounts set by the UCI Law will not be attained.

In cases where the AIU is directed at non-qualified investors, the fund's documentation must contain additional information, such as on:

- Its investment policy and management techniques.
- The risks arising from the use of derivatives, leverage, or other similar management techniques.
- The valuation of the assets and units of the fund.

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

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

The position is the same as for retail funds (see Question 6).

## Legal fund vehicles and structures

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

#### AIU

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

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

#### Tax treatment

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

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

## Restrictions

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

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

## Reform

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

There are no proposals for the adoption of a specific legal regime applying to hedge funds in Portugal. Hedge funds are therefore subject to the general provisions currently in force that apply to other types of fund.

## ONLINE RESOURCES

### Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*)

W [www.cmvm.pt](http://www.cmvm.pt)

**Description.** The Portuguese securities regulator's website contains the Portuguese versions of the relevant legislation (such as Portuguese Securities Code, UCI Law and CMVM Regulation 5/2013), along with non-binding (but generally accurate) English versions. The legislation is usually updated shortly after each amendment, but the Portuguese versions may be updated before the English versions.



## Practical Law Contributor profile



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- Setting up Benfica Stars Fund and Sporting Portugal Fund, innovative special investment undertakings for investing in football players in Portugal.
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- Volta II: Electricity Receivables Securitisation Notes.
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