

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?

Although the term "retail fund" is not an entirely applicable concept under Portuguese law, for the purposes of this article the term will refer to the Portuguese legal concept of undertakings for collective investment in transferable securities (UCITS) (*organismos de investimento colectivo em valores mobiliários*). UCITS are intended for the investment of 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) under the Directive 2011/61/EU on alternative investment fund managers (AIFM Directive), even if they are publicly distributed real estate investment funds should not be considered retail funds, considering that AIFs are subject to a stricter framework and their regulation is not harmonised throughout the EU. In addition, for purposes of this article, closed-ended investment funds which are publically distributed and invest in securities (mutual funds as opposed to real estate investment funds) are deemed to be qualified as retail funds.

Open-ended retail funds

A significant number of open-ended retail funds exist and 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 hold at least one investment fund management company.

In addition, the number of foreign investment funds currently 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 amount invested in 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 show that the trends observed in previous years have remained essentially unchanged, as the management companies with the largest portfolios are the largest financial groups active in Portugal (source: *Portuguese Fund Managers Association*).

There have been no significant changes to market practice during 2015. However, there were certain developments in 2015 in respect of Banco Espírito Santo SA (currently Novo Banco SA) following the collapse of the BES Group and the enforcement of resolution measures by the Bank of Portugal (*Banco de Portugal*) in 2014. Furthermore, the Bank of Portugal enforced resolution measures against Banif (a Portuguese credit institution).

These measures demonstrate the level of uncertainty that still lingers in the Portuguese financial markets. Furthermore, the sense of uncertainty has been boosted by a new Undertakings for Collective Investment (UCI) Law (*Regime Geral dos Organismos de Investimento Coletivo*) (Collective Investment Law) and approved amendments to the UCI tax legal framework (see *Question 2*). The effect and adaptation of this new framework is still in progress.

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 in the total amount under management of both:

- Traditional types of funds (that is, open-ended funds investing in plain vanilla assets, such as shares or simple bonds).
- AIFs (that is, open-ended or closed-ended funds featuring other types of assets which enjoy a more flexible regulatory framework (see *Questions 16 to 28*)).

There have been no other significant changes in market practice during 2015.

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:

- Collective Investment Law, 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 the AIFM Directive. The Undertakings for Collective Investment Law sets out most of the rules relating to investment funds. Most of the new legal regime entered into force on 26 March 2015.
- CMVM Regulation No. 2/2015 on Undertakings for Collective Investment (Regulation No. 2/2015), which sets out specific rules regarding certain aspects of the Collective Investment Law.
- Portuguese Securities Code (*Código dos Valores Mobiliários*), enacted by Decree-Law No. 486/99 of 13 November 1999, as amended from time to time, that entered into force on 1 March 2000.



Regulatory bodies. The Securities Market Commission (CMVM) is the main regulatory body in relation to retail funds. It is responsible for both:

- The Authorisation of retail funds.
- Compliance supervision.

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

Closed-ended retail funds

The same is applicable to 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

Authorisation from the Securities Market Commission (CMVM) is required to set up a retail fund. To request such authorisation, the retail fund's management company 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 presented to the CMVM.

An authorisation is given within 20 days (or 30 days in the case self-managed collective investment companies endowed with legal personality) of the reception of either the request or of any supplementary information or amendments to the documents required by the CMVM 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*).

However, alternative investment funds which are privately placed or exclusively targeted at qualified investors (regardless of whether they are open or closed-ended) only need to have in place the fund regulation.

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*) falls within the definition of "activity directed towards investors with a view to promoting or proposing the subscription of UCITS" (regardless of the means of communication used to such end).

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 Securities Market Commission (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*).

Foreign funds

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

- UCITS compliant.
- Non-UCITS compliant.
- From an EU member state that has implemented and is compliant with the AIFM Directive.

In relation to what concerns marketing of foreign non-UCITS funds, a distinction should be drawn between:

- Marketing to retail investors, which is subject to CMVM authorisation.
- Marketing to qualified investors, which requires compliance with the requirements set out in the AIFM Directive (for example, the marketing of a non-EEA alternative investment fund (AIF) by an EEA AIF manager or non-EEA AIF manager, or the marketing of an EEA AIF by a non-EEA AIF manager).

If a non-UCITS fund is to be marketed to retail investors the applicant should provide the following documentation to the CMVM:

- Certification or equivalent document issued by the competent authority of the country where the AIF is established stating that:
 - the fund has been created and operates normally, in accordance with the applicable laws of the home member state; and
 - the AIF is supervised by the competent supervision authority of the home member state.

- Management regulation of the AIF (or, if applicable, the articles of association).
- Marketing arrangements of the AIF and its draft agreement governing the relationship between the marketing/distribution entity and the management company of the AIF.
- Last annual report (and, if applicable, bi-annual report).
- Identification of the laws of the country in which the AIF is registered and identification of the competent supervision authority in the AIF's home state.

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 under the passport regime in Portugal to qualified investors.

In some circumstances non-UCITS funds may be distributed with non-qualified investors by fund managers or other financial intermediaries incorporated in the EU under the private placement regime, following prior authorisation from the Securities Market Commission.

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:

- Securities Market Commission (CMVM), which carries out the bulk of the regulatory and supervisory role and is also in charge of regulating and supervising UCIs.

- 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 EU member state, and proceeds with its registration with the Bank of Portugal under the rules of freedom to provide financial services as established in the UCITS IV Directive.

Open-ended retail funds

Retail funds can be managed by an investment fund management company (*sociedades gestoras de fundos de investimento*), 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 compliance with the risk sharing principle and according to high standards of diligence and professional expertise.

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 (EU) 575/2013 on prudential requirements for credit institutions and investment firms (Capital Requirements Regulation)*).

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 Collective Investment 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 must have different entities as management company and as depositary. A depositary can also be an investment company authorised to provide registration and deposit of financial instruments services subject to compliance with the own funds requirements set out in Article 92 of the Capital Requirements Regulation.

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.
- 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 Securities Market Commission. 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 open-ended retail funds (UCITS) 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 an 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 alternative investment fund.
- 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 limits for closed-ended retail funds vary greatly depending on the type of closed-ended UCI investment stake (for example, whether the fund is a real-estate fund, a UCI investing in non-financial assets and so on).

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 can such investment be performed.

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 both:

- The liquidity of the fund has been exhausted and 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 Securities Market Commission 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 same considerations provided in relation to open-ended retail funds are also applicable to closed-ended retail funds (*see above, Open-ended retail funds*).

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 additional 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 Securities Market Commission'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 UCIs. This new regime entered into force on 1 July 2015.

Funds are subject to corporate income tax (CIT) at the general rate (currently set at 21%), but are exempt from municipal and state

surcharges. Taxable income corresponds to the net profit assessed in accordance with a fund's accounting standards.

However, investment income, rental income and capital gains (except when sourced in a tax haven) are disregarded for profit assessment purposes. Expenses related to such income (including funding costs) are also disregarded for profit assessment purposes. The following are also disregarded for profit assessment purposes:

- Non-deductible expenses under the CIT Code.
- Income and expenses relative to management fees and other commissions earned by funds.

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 or derived from redemptions 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 rate will be due for the tax year of 2016 according to the taxpayer's taxable income, as follows:

- for taxable income up to EUR7,070, the rate is 0%;
- for taxable income of EUR7,070 to EUR20,000, the rate is 1%;
- for taxable income of EUR20,000 to EUR40,000, the rate is 1.75%;
- for taxable income of EUR40,000 to EUR80,000, the rate is 3%;
- for taxable income above EUR80,000, the rate is 3.5%.

However, from 1 January 2017 it is foreseen that the additional surcharge will no longer be applicable.

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

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 of the income is identified, in which case the tax rates applicable to the beneficial owner applies.

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. Income payments 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 of the income is identified, in which case the tax rates applicable to the beneficial owner applies. This increased withholding tax rate also applies to payments to corporate entities subject to CIT.
- **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 income exemptions if:

- the non-resident entity is domiciled in a blacklisted jurisdiction listed in Ministerial Order 150/2004 of 13 of February; 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.

Please note that the Portuguese State Budget Proposal for 2016 is currently under discussion in the Portuguese Parliament. If this approved, no substantial amendment is expected to be introduced to the above tax regime at this stage with the exception of the 25 % threshold referred above (since it will not be applicable to EU member states or any country with which Portugal has a double tax treaty in force).

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 rate will be due for the tax year of 2016 according to the taxpayer's taxable income. In such case, the rates of PIT are the same as for resident investors of local funds (see above, *Open-ended retail funds: resident investors*). However, from 1 January 2017 it is foreseen that the additional surcharge will no longer be applicable.

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 of the income is identified, in which case the tax rates applicable to the beneficial owner applies.

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 listed in the above Ministerial Order is 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.

Please note that the Portuguese State Budget Proposal for 2016 is currently under discussion in the Portuguese Parliament. If this approved, no substantial amendments are expected to be introduced to the above tax regime at this stage.

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?

Considering the new Collective Investment Law was recently enacted, no major amendments are expected in the near future. However, there is still a possibility of further direct amendments to the UCI Law, which would directly attributable to changes to EU legislation which cannot be set aside (in particular, in relation to updates to the AIFM Directive and UCITS IV Directive).

HEDGE FUNDS

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

The following section of the article focuses on alternative investment funds (AIFs), which are currently the closest entity to a hedge fund type structure in Portuguese law.

Compared to retail funds, AIFs allow for investment in a broader range of assets and the use of riskier management techniques.

There are currently a little over 280 AIFs 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 AIF products among investors has slightly decreased in 2015.

Similarly to retail funds, most AIFs 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 significant changes in the market practice during 2015.

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

Alternative investment funds are regulated by the regulation and 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 are generally also applicable to alternative investment funds (AIFs) to the extent that there are no special provisions regulating specifically the latter. Although retail funds and AIFs are subject to different rules in relation to the assets that may comprise their portfolio, both are subject to the risk sharing principle.

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 AIFs.

Insider dealing and market abuse

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

Transparency

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

Money laundering

The management company of an AIF 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 AIF (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 AIF 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?

Alternative investment funds (AIFs) are marketed to the specific segment of investors defined in the constitutive documents of the fund.

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

Investment restrictions

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

The Securities Market Commission may refuse to grant an authorisation for the marketing of an alternative investment fund 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 alternative investment fund (AIF) 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.

The constitutive documents of an AIF 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 Collective Investment Law will not be attained.

In cases where the AIF 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 AIF, 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?

Advantages. An alternative investment fund (AIF) may take the form of a contractual entity with no separate legal personality. Subject to the Securities Market Commission approval, an AIF 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

Description. The Portuguese securities regulator's website contains the Portuguese versions of the relevant legislation (such as Portuguese Securities Code, Collective Investment Law and CMVM Regulation 2/2015), 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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Recent transactions

- Setting up Benfica Stars Fund and Sporting Portugal Fund, innovative special investment undertakings for investing in football players in Portugal.
- Ongoing assistance to Portuguese and foreign entities in negotiating distribution agreements and complying with the necessary regulatory steps for marketing funds in Portugal.

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- Collective capital investment schemes in Portugal, *International Financial Law Review*, June 2009.
- Portugal: investment funds update, *Financier Worldwide*, 2010.
- Regulation Funds, European Lawyer Reference Series, 2011.
- Hedge Funds in Portugal, *The European Lawyer*, 2014.



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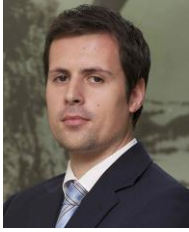
- Assistance to BBVA Asset Management in the structuring and implementation of a cross-border (Portugal and Luxembourg) merger of collective investment schemes.
- Regular assistance (including on the setting up) of UCIs for respective investors.

Languages. English, French, Spanish

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- Issuance of Commercial Paper in Portugal, *Expert Guides Banking, Finance and Transactional Law*, 2014.
- Imposto do Selo: Reporte, Empréstimo de Valores Mobiliários e Swaps, *Fiscalidade - Revista de Direito e Gestão de Fiscal*, 2014.



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Languages. Portuguese, English, French

Professional associations/memberships. Admitted to the Portuguese Bar Association.

Publications. Cross Border Merger of UCITS, *Funds People*, October 2015.