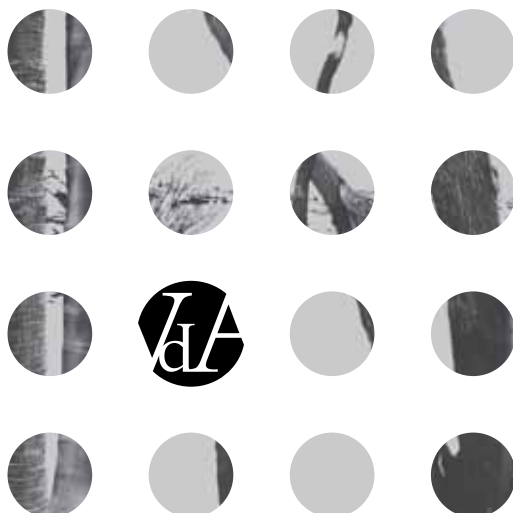


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# Collective capital investment schemes in Portugal

**Pedro Simões Coelho, Ricardo Seabra Moura and Orlando Vogler Guiné of Vieira de Almeida & Associados explain the Portuguese laws that govern collective investments**

**C**ollective investments schemes, notably mutual funds and real-estate investment funds, have been an important tool in the Portuguese financial system for the last 20 years.

Decree-Law 252/2003 of October 17 2003 (as amended UCI Law) sets out the general legal framework on undertakings for collective investment (UCI). A UCI may be defined as an undertaking with the purpose of collectively investing capital obtained from investors, which is managed under a principle of risk sharing and exclusively aiming at the investors' best interests.

The UCI Law determines that UCI may adopt the legal structure of either an investment fund (contractual structure) or an investment company (corporate structure). An investment fund corresponds to an autonomous pool of assets, owned by the unitholders but managed by the respective fund manager. An investment company is owned by its shareholders and manages itself, even though it may have an investment advisor or outsource its management.

Although foreseeing the corporate structure for UCI, the UCI Law refers to the possibility of special regulation, which so far has not been adopted. Presently Portuguese UCIs may only adopt the contractual structure and be set up as investment funds. However, a set of amendments to the current UCI legal framework was disclosed for public consultation last year. It is expected that during the course of 2009 the regime will be amended to allow UCI to be incorporated as investment companies, following the successful path trailed by other EU Member States, such as Luxembourg.

Besides the UCI Law, UCI are also governed by the *Comissão do Mercado de*

*Valores Mobiliários* (CMVM), the Portuguese Securities Market Commission Regulation 15/2003 (UCI Regulation) and CMVM Regulation 16/2003 (on UCI accounting). The UCI Law implemented in Portugal Directive 85/611/EEC governs the undertakings for collective investment in transferable securities (the so-called UCits or harmonised UCI).

The last two major amendments to Directive 85/611/EEC were aimed at (i) extending the limits on assets in which UCits may invest, while preserving a uniform minimum level of investor protection and (ii) boosting levels of consumer protection and confidence in financial products by introducing rules for service providers, management companies and simplified prospectuses. Such changes have also been reflected in the UCI (Law and the UCI) Regulation.

But the UCI (Law and UCI) Regulation also govern non-harmonised UCI or non-UCits including rules applicable to the so-called special investment undertakings. Generally UCI may adopt either an open or closed-ended type, depending on whether they have a fixed or variable capital structure. The applicable Portuguese legal framework also foresees a mixed-structure UCI, in which part of the capital is fixed and the other part is variable. This type has not yet been used and no mixed structure UCI have been set up.

Further to the aforementioned UCI, the Portuguese legal framework also includes special rules regarding other types of collective investment schemes, including real-estate investment funds, venture capital funds and securitisation funds, governed, respectively and in particular, by Decree-Law 60/2002 of 20 March and CMVM Regulations 8/2002 and 2/2005, Decree-Law 375/2007 of 8 November and CMVM Regulations 1/2008 and 12/2005, and Decree-Law 453/99 of 5 November

and CMVM Regulations 1/2002 and 2/2002 (all aforementioned laws and regulations as amended).

## Fund managers

Fund managers must be authorised and registered with CMVM, as they qualify as financial intermediaries, and are typically required to have certain amounts of own funds. They can either be companies specifically incorporated to manage the relevant type of funds, or credit institutions (mainly banks), in this case only in respect of closed-ended investment funds.

The fund manager must carry out all actions and transactions required for the proper implementation of the relevant fund's investment policy. This includes selecting, acquiring and disposing of all relevant assets. They must manage the assets, including dividend and interest collection, and providing necessary legal and accounting services, such as evaluating the relevant fund's portfolio and determining its net asset value (NAV). The fund manager and their corporate bodies shall act independently and solely in the interests of the unit holders, and act with high diligence and professional competence.

The fund manager is remunerated by means of a management fee, the terms of which shall be set out in the relevant fund's documentation. It is standard practice to have a flat fee, calculated as a percentage applicable to the fund's annual NAV, payable monthly, quarterly or otherwise. However, performance fees are allowed, eventually combined with a high water mark.

Performance fees are more widely spread with respect to the management of venture capital funds, the terms of their calculation being carefully detailed in the relevant fund's documents. Subscription, redemption and transfer fees are also accepted, provided that such fees are clearly indicated in the relevant fund's documents. Normally such fees revert to the fund manager, but they can also revert to the fund, thereby offering an incentive for long-term investment. In any case, further fees may eventually be set out in the fund's documentation.

## Depositary

Each fund is required to have a depositary. This role may be fulfilled by credit institutions that meet certain requirements. The depositary is entitled to receive a depositary fee, to be specified in the relevant fund's management regulations.

The depositary shall act independently,

in the sole interests of the investors and shall comply with all applicable laws, regulations and documents. It shall hold and register the fund's securities and execute transactions and exercise rights inherent to the fund's assets, as instructed by the fund manager, except if such instruction would breach any applicable provisions. It shall monitor compliance of the fund manager's activity with the applicable rules and is liable, jointly with the fund manager, before the investors for such compliance. The depositary shall pay to the investors the income (if any) and the redemption or winding up proceeds arising from their interests in the relevant fund.

### Subcontracting

The fund manager may subcontract investment management and administrative functions, provided certain principles are duly complied with. Subcontracting is of relevance particularly where the fund manager lacks specific knowledge or expertise of local markets and thus intends to hire a partner to assist them in investing the fund's assets in a given jurisdiction.

The essential framework on subcontracting regarding investment funds is provided for in the UCI Law and foresees that the fund manager remains responsible for defining the investment criteria, keeping the core of its management activity and controlling subcontracted party's activity. The subcontracted party must have proper qualifications and meet certain requirements. The CMVM will be informed beforehand of the execution of any subcontract.

### Establishment requirements

Generally, any fund has to be previously authorised by the CMVM. The fund manager will file the authorisation request, together with some further documentation.

The main document is the fund regulation, which provides the fund's internal management rules. The fund regulation includes information on the fund and fund-related entities and defines the fund's essential rules. It sets out, amongst other things, the fund's investment strategy and limits, governance issues (investment committee, investors' meetings), subscription, redemption and winding up procedures, valuation methods, and accounting.

Depending on the range of investors targeted by the fund, a prospectus and simplified prospectus may be necessary. Additionally, certain agreements will have to be filed, in particular a depositary agreement and (if applicable) distribution

## Author biographies



**Pedro Simões Coelho**  
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Pedro Simões Coelho has a law degree from the Universidade Livre de Lisboa, Faculty of Law. Before joining the firm, Pedro was a partner at J D'Korth-Brandão Luis de Morais e Associados-Sociedade de Advogados, a Lisbon-based law firm. He later joined the Comissão do Mercado de Valores Mobiliários, which is the Portuguese Securities Market Commission, and was responsible for the Collective Investment

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He joined Vieira de Almeida & Associados in 1998 and is currently partner in the Banking & Finance Practice Group. He has been involved in several transactions, in Portugal and abroad, mainly focused on the advising of private equity structures, collective investment schemes and of non-performing loans transactions, asset finance transactions, particularly in the aviation finance field, retail banking, securities law and capital markets. He has also been actively working in advising investment firms on a wide range of regulatory and related matters. He has participated as speaker in several conferences and seminars related to his area of practice and since 2003 has been responsible for lecturing the real estate investment funds programme at Lisbon Management and Economics University in postgraduate Real Estate Management and Evaluation. Admitted to the Portuguese Bar Association and recognised thereby as a financial law expert since 2004.

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Ricardo Seabra Moura has a law degree from the University of Coimbra, Faculty of Law and a master degree in Taxation from the Instituto Superior de Gestão in Lisbon.

Before joining the firm Ricardo worked as a tax adviser in the Tax Department of Banco Finantia. He joined Vieira de Almeida & Associados in 2004 and is presently an associate in the Tax Law Practice Group, working closely with the Banking and Finance Practice Group.

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Orlando Vogler Guiné has a law degree from the University of Coimbra, Faculty of Law, where he received a number of awards for academic achievements. Orlando has been conducting research in business law, having published several articles and obtained a masters degree in this field from the University of Coimbra, Faculty of Law in March 2009. His postgraduate degree is in securities law, from the University of Lisbon, Faculty of Law, Securities Institute.

Before joining the firm, he completed an internship with the Portuguese Securities Market, having been a part of the working-group for the reform of the Portuguese Commercial Companies Code and for the implementation of the Takeover Directive. He also worked as a consultant at Fundação Bissaya Barreto. He joined Vieira de Almeida & Associados in 2006 and is currently an associate with the Banking and Finance and Capital Markets Practice Groups.

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agreements and subcontracts.

In certain cases, such as if the relevant fund qualifies as a special investment fund

or a special real-estate investment fund, further documents may have to be filed, such as evidence of the fund manager's

experience and of the minimum subscription amount, a unit distribution plan and a model subscription form for investors.

There is no deadline after which a tacit authorisation may be considered to have been given in the absence of a response from the CMVM. Timing will mostly depend on the complexity of the file and CMVM's manpower during the application period. Year-end is generally considered to be problematic given the number of deals and transactions that market operators wish to conclude during that period.

## Investments

Funds may invest in a wide range of assets, depending on their particular type and applicable legal and regulatory framework and the guidelines provided for in the relevant fund documents.

Ucits may invest, amongst other things, in securities, money-market instruments and financial instruments (including derivatives) listed or soon-to-be listed in EU-regulated markets (or third country's stock exchanges, if so provided for in the law, the fund's documents or approved on a case by case basis by the CMVM). They may also invest in units of other Ucits, bank deposits, over-the-counter financial instruments and interests in UCI, provided in each case that certain requirements are met.

Real estate investment funds invest mainly in urban property, but may also acquire, inter alia, interests in other real-estate investment funds and real-estate companies.

Venture capital funds can invest, for a limited period of time, in companies with a high development potential, while securitisation funds will invest in pools of receivables.

As mentioned above, the Portuguese regulatory framework also allows for the establishment of special investment funds and special real-estate investment funds. Provided they are previously authorised by the CMVM, such special funds may invest in different types of assets or in the same types of assets as compared to regular real estate investment funds but without having to comply with the same limits applicable to common funds. For instance, a special investment fund may invest in illiquid securities or in art, while a special real-estate investment fund may invest in rural property or in derivatives for purposes other than risk coverage.

In any case, both the legal and regulatory rules and the funds' documents set out certain investment limits, mostly to

diversify risk. For instance, a Ucits may not invest more than a given percentage of its NAV in securities or instruments issued by the same issuer or group or in certain types of assets. As to real-estate investment funds, these have the same type of limitations, but concerning real-estate assets. Funds may usually also use leverage up to a certain limit, calculated with reference to the NAV.

Investment limitations and management flexibility usually depend on the nature of the fund and the targeted investors. Open-ended funds are legally and regulatory less flexible than closed-ended funds. The same applies to publicly placed funds versus privately placed funds.

## Placement

A major aspect of the fund's framework refers to the placement of funds in the Portuguese jurisdiction.

Regarding the placement in Portugal of Portuguese funds, other than open-ended UCI, it should be assessed whether the placement may be qualified as a public offering of securities, in light of the Portuguese Securities Code (PSC).

An offering of securities is deemed to be of a public nature whenever it is (i) addressed to undetermined addressees in the Portuguese jurisdiction, or (ii) made together with the gathering of investment intentions or marketing campaigns, or (iii) addressed to at least 100 non-qualified investors domiciled or established in Portugal.

Diversely, should the offering be addressed exclusively to qualified investors the offering will not be qualified as public. Qualified investors include credit institutions, investment companies, insurance companies, UCI and respective management companies and other financial institutions. Additionally, the regime does not apply where the nominal value or the minimum subscription amount per investor equals at least €50,000 (\$68,133).

Generally, a public offering in Portugal will require CMVM's prior approval of the prospectus or its passporting into Portugal from another EU-Member State, in accordance with the provisions of the PSC and the EU Prospectus rules. The placement services shall be provided by a financial intermediary (for instance, a bank) registered for such purpose with the CMVM.

Any marketing materials shall be previously approved by the CMVM. Such materials should include complete, not misleading, updated, simple, objective and lawful information and state where the relevant offering documentation (such as

the prospectus) may be obtained. Additionally, they are subject to the general requirements on advertising.

The offering in Portugal of open-ended Portuguese-domiciled or foreign UCI, imply the assessment of whether such offering may be qualified as a distribution (*comercialização*) under the UCI Law. The general qualification principles are similar to the aforementioned ones regarding public offerings. Notwithstanding there is one significant difference, relating to the fact that the 100 investors reference is irrespective of the qualified or non-qualified nature of the investors. Thus, offering directed to 99 or more qualified investors and only to one non-qualified investor shall be considered a distribution for such purposes. Additionally, the €50,000 exception is also not applicable.

The open-ended UCI may be distributed by their respective fund management companies and custodians, financial intermediaries (such as banks) registered with the CMVM for public offerings placement or reception and transmission of orders or special entities allowed by regulation.

If the open-ended UCI is not domiciled in Portugal, the relevant distributor shall file a set of documents with the CMVM. The procedure is quite straightforward as regards to Ucits. In such cases CMVM shall receive the passporting request, together with (i) the harmonisation certificate provided by the competent authority, (ii) fund regulation or by-laws, (iii) prospectus and simplified prospectus, (iv) fund documents conformity certificate issued by the manager, (v) annual and semi-annual accounts, (vi) distribution agreement and (vii) marketing information. Any marketing materials must be previously approved by the CMVM.

If the distribution refers to a non-Ucits, although the documentation to be filed is essentially the same, CMVM has a discretionary power to authorise or refuse the relevant fund's distribution in Portugal. As above, any marketing materials must be previously approved by the CMVM.

## Taxation

UCI's are not subject to a common or unified Portuguese tax framework. Therefore, the tax framework hereby summarized refers solely to the taxation applicable to the mutual funds and real estate investment funds.

In spite of the abovementioned we draw your attention to the fact that other types of UCI, such as the securitization funds and the venture capital funds, have a

specific applicable tax regime.

### **Taxation of mutual funds and real estate investment funds**

Income earned by Portuguese mutual funds is subject to a similar taxation as that of a individual resident in Portugal.

In general terms, income obtained in Portuguese territory is taxed at the withholding tax applicable to a individual resident in the Portuguese territory. Additionally, a flat rate of 25% applies to income that is not subject to withholding tax. With regard to foreign-source income a flat rate of 25% is applicable, except for on earnings from bond, equity or investment fund holdings, which will be taxed at a flat rate of 20%.

Income deriving from capital gains (from a domestic- or foreign-source) is autonomously taxed at a rate of 10% on the positive difference between the capital gains and capital losses of each year.

Portuguese real estate investment funds benefit from a tax framework similar to the above, with three minor distinctions: (i) Rental income obtained by the real estate investment funds shall be, in principle, subject to an autonomous taxation at a rate of 20%; (ii) capital gains arising from the sale of immovable property are subject to an autonomous taxation at an effective rate of 12.5% (25% on 50% of the positive difference between the capital gains and capital losses of each year); and (iii) an exemption of 50% up to 100% on Property Transfer Tax and Municipal Property Tax.

Corporate Income Tax due by mutual funds and real estate investment funds is assessed on the net value made each year and is payable by the management company by the end of April of the following year.

### **Resident investors**

Income deriving from the units held by a resident individual investor benefit from a personal income tax (PIT) exemption as long as such income is not attributable to the scope of a commercial, industrial or agricultural activity. Conversely, provided that such income is comprised within the scope of a commercial, industrial or agricultural activity it is not subject to withholding taxes and is qualified as profits or gains.

Capital gains arising from the transfer of units are, in principle, taxed on the special tax rate of 10%. Income payments to a resident company are not subject to withholding tax and qualify as profits or gains for corporate income tax (CIT) purposes. Such income shall be included in

the companies' taxable income and subject to the progressive corporate tax rate of 12.5% on the first €12,500 of taxable income and 25% on taxable income exceeding €12,500, to which may accrue municipal surcharge (derrama) of up to 1.5% on the taxable profits.

The tax withheld to the mutual funds will be qualified as a payment on account of the resident company, which may deduct 50% of the equity profits distributed if the applicable legal requirements are met. Capital gains arising from the transfer of units are included in the taxable income of the resident entity which will be subject to progressive corporate tax rates as described above.

### **Non-resident investors**

Income payments deriving from the units held by a non-resident beneficiary (individual or company) without a permanent establishment in the Portuguese territory are exempt from PIT and CIT, respectively.

Capital gains arising from the transfer of units will be, as general rule, exempt from PIT and CIT. However, this exemption shall not apply if the non-resident beneficiary is domiciled in a blacklisted jurisdiction or if the non-resident company is held, directly or indirectly, in more than 25% by resident entities.