

Retail 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, as they are subject to a stricter framework and their regulation is not harmonised throughout the EU. In addition, for the purposes of this article, closed-ended investment funds that are publically distributed and which 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 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 2016. However, the last years have been marked by a sequence of delicate events, particularly the collapse of the BES Group and the enforcement of resolution measures by the Bank of Portugal in 2014, the effects of which still linger. Furthermore, the Bank of Portugal enforced resolution measures against Banif (a Portuguese credit institution) and the Portuguese Government is currently in the process of recapitalising the national bank, Caixa Geral de Depósitos.

These measures demonstrate the level of uncertainty that still lingers in the Portuguese financial markets. Furthermore, the sense of uncertainty has been boosted by the recently enacted 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 2016.

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 of Collective Investment Law, established by Law No 16/2015 of 24 February 2015 (as amended from time to time) (UCI Law). The UCI Law sets out most of the rules relating to investment funds. Most of the UCI Law regime entered into force on 26 March 2015.
- CMVM Regulation No 2/2015 on Undertakings for Collective Investment. It sets out specific rules regarding certain aspects of the UCI Law.
- Portuguese Securities Code (*Código dos Valores Mobiliários*), enacted by DecreeLaw No 486/99 of 13 November 1999, as amended from time to time, that entered into force on 1 March 2000.
- The relevant EU directives and regulations.

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.
- Market conduct 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 UCI" (regardless of the means of communication used to such end).

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

- Fund management companies.
- Depositaries.
- Financial intermediaries registered or authorised by the Securities Market Commission (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

The rules described in *Question 4, Open retail funds* also apply to foreign funds.

If the fund manager has not passported its services to Portugal, it must appoint a local distributor. The local distributor must be one of the entities that are legally permitted to market funds (*see above, Open-ended retail funds*).

For marketing offshore retail funds from another EU member state, there is also a distinction between UCITS-compliant funds and retail funds that do not comply with Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS) (UCITS IV Directive).

UCITS-compliant funds. To market these, the passport procedure must be followed. The procedure is set out in the:

UCITS IV Directive.

Regulation (EU) 584/2010 on the form and content of the standard notification letter and UCITS attestation, the use of electronic communication between competent authorities for the purpose of notification, and procedures for on-the-spot verifications and investigations and the exchange of information between competent authorities.

Although no authorisation from the CMVM is required, the CMVM can (but is unlikely to) block the marketing if it considers that the applicable laws and regulations have not been complied with. The following documents must therefore be submitted to the CMVM before the fund is marketed:

Certain constitutional and informational documents of the fund.

A certificate of compliance with the UCITS IV Directive, issued by its home state supervisory authority.

Off-shore funds that do not comply with the UCITS IV Directive. There is a difference between:

- **Marketing to retail investors.** This is subject to CMVM authorisation under the national private placement regime (*Article 43, AIFM Directive*).
- **Marketing to qualified investors.** Compliance with the AIFM Directive is necessary to qualify for using a passport under the AIFM Directive.

If a fund does not comply with the UCITS IV Directive and is to be marketed to qualified investors, the applicant must provide the CMVM (through its home state regulator) with the documents and information listed in Article 32 and Annex IV of AIFM Directive. Once the CMVM has received these documents/information, the retail fund can be marketed to qualified investors.

If a retail fund that does not comply with the UCITS IV Directive is to be marketed to retail investors or is from a third country (that is, a non-EU member state), the applicant must provide the following documentation to the CMVM:

- Certification or equivalent document issued by the competent authority of the country where the retail fund 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 fund is supervised by the competent supervision authority of the home member state.
- Management regulation of the fund (or, if applicable, the articles of association).
- Marketing arrangements of the fund and its draft agreement governing the relationship between the marketing/distribution entity and the management company of the fund.
- Last annual report (and, if applicable, bi-annual report).
- Identification of the laws of the country in which the fund is registered and the competent supervision authority in the fund's home state.
- The CMVM has 30 days to issue a decision as to whether it is authorising:
 - The marketing of an offshore fund to retail investors.
 - The marketing of a fund that is not established in an EU member state.

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 funds that do not comply with the UCITS IV Directive which can only be distributed under the AIFM Directive passport regime in Portugal to qualified investors.

In some circumstances funds that do not comply with the UCITS IV Directive 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 fondos 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 the UCITS IV Directive, 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 (generally a bank). 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 also have a branch in Portugal.

A retail fund must have different entities as fund manager and as depositary.

A depositary can also be an investment company authorised to provide registration and deposit of financial instruments services, subject to compliance with the own funds requirements set out in Article 92 et. seq. of Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms (Capital Requirements Regulation).

The depositary, like the fund manager, must act independently and exclusively in the interest of the retail fund's investors. It has three main responsibilities, as follows:

- The safekeeping of the fund's assets.
- Carrying out acts related to the transfer or exercise of the rights over the assets, as instructed by the hedge fund manager, as well as the payment to the investors of the proceeds of the redemption or liquidation of the assets.
- Monitoring and guaranteeing to investors that the investment policy, the use of proceeds and the calculation of the value of the units or shares 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 fund manager and the investors for compliance with the legal duties, regulations and constitutive documents of the hedge fund, and for the loss of the financial instruments under its safekeeping, as established in the UCITS framework.

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

There are two structures a retail fund can take and both of them are subject to licensing procedures with the Securities Market Commission (CMVM). A retail fund can have one of the following:

- **A contractual structure with no legal personality.** This is the classic structure and requires the fund to be managed by a separate fund manager. The interests of the investors or participants in these funds are called units.
- **A collective investment company with a legal personality.** The incorporation of these entities is subject to the CMVM's authorisation. A collective investment company can be:
 - self-managed. If so, a minimum initial capital of EUR300,000 is required; or

- managed by an appointed third party. This must be a duly authorised fund manager.

- Participants in this structure are holding shares.
- The UCI Law is generally in line with both regimes. However, specific UCI Law provisions and general rules established for the contractual structure with no legal personality may not apply to a collective investment company with a legal personality. The more relevant differences in practice are between:
 - Contractual structures without a legal personality and externally managed collective investment companies with a legal personality, but externally managed.
 - Self-managed collective investment company endowed with legal personality.

Advantages. When a collective investment company structure is adopted (particularly a self-managed one), the shareholders have a direct influence in the way the UCI is managed as they appoint the board of directors. Therefore, the investors have greater control over the management and investment decisions.

The contractual form has a good track-record in Portugal and it is acknowledged by the market as a simple and effective structure. This allows the fund manager to maximise and streamline its activities by quickly setting up funds in accordance with the demands of investors.

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

The self-managed collective investment company structure is legally more complex and has still not been extensively tested in Portugal.

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, or 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 also 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, whether 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 provide 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 Securities Market Commission (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 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 taxable income 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 Corporate Income Tax Code.
- Income and expenses relative to management fees and other commissions earned by funds.

Tax losses of UCIs can be carried forward subject to two limitations:

- **A timing limitation.** Tax losses can only be offset against taxable profits assessed during the five following fiscal years.
- **A quantitative limitation.** Tax losses can only be offset against a maximum of 70% of the amount of the taxable profit.

Fund's income is not subject to withholding tax. However, autonomous tax rates established in the Capital Income Tax 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 asset value at a rate of 0.0025% (per quarter). Other funds will be subject to stamp duty calculated on their global net asset value at a rate of 0.0125% (per quarter).

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

- **Personal income tax.** 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 also be due for the tax year of 2017 according to the taxpayer's taxable income, as follows:
 - For taxable income up to EUR20,261, the rate is 0%.
 - For taxable income exceeding EUR20,261 up to EUR40,522, the rate is 0.88%.
 - For taxable income exceeding EUR40,522 up to EUR80,640, the rate is 2.75%.
 - For taxable income exceeding EUR80,640, the rate is 3.21%.
 - However, from 1 January 2018 it is foreseen that the additional surcharge will no longer be applicable.
- Income payments to omnibus accounts are 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 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.** Income payments to a resident entity are subject to withholding tax at a rate of 25% (to be paid on account of the final corporate income tax due) and are qualified as income or gains for the purposes of capital income tax. 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 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.
 - 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:

- **Personal income tax.** Income payments and capital gains derived from units in funds are exempt from personal income tax 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 capital income tax.

- **Capital income tax.** A capital income tax 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 capital income tax. 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 entity is held, directly or indirectly, by resident legal entities. However, there is an exception to that rule if the non-resident entity is established in an EU or EEA jurisdiction that is bound to administrative cooperation in the field of taxation with equivalent effect to the cooperation established within the EU or in a jurisdiction with which Portugal has a double tax treaty that is in force and provides a mechanism to exchange information.
- If the exemption does not apply, the general rules on capital income tax 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:

- **Personal income tax.** Investment income payments made to resident individuals are subject to personal income tax, 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; and
 - 5% on any taxable income exceeding EUR250,000.
- In addition, if income aggregation is opted for, an additional surcharge rate will be due for the tax year of 2017 according to the taxpayer's taxable income. In such cases, the personal income tax rates are the same as those for resident investors of local funds (*see above, Open-ended retail funds: resident investors*). However, from 1 January 2018 it is foreseen that the additional surcharge will no longer be applicable.

- Income payments made through a foreign paying agent will be subject to 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 apply.
- A 35% withholding tax rate applies to investment income payments from companies domiciled in one of the blacklisted jurisdictions listed in 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 tax rates and to the additional income tax surcharges as the case may be (*see above*).
- Any gains arising from the redemption of units in funds incorporated in the blacklisted jurisdictions listed in the above Ministerial Order is subject to a special tax rate of 35%.
- **Capital income tax.** Income payments to 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 applicable rates are 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).

Other projects that are currently reviewed include ways to increase company access to financing, provide support to distressed companies and to clean balance sheets. However, no significant decision has been made and there has been little impact on the retail funds market.

Reform

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

A decree-law draft is currently under consultation to implement the UCITS V Directive in Portugal by amending the UCI Law. This is expected to introduce changes to certain aspects of the UCITS regime in accordance with AIFM Directive.

ONLINE RESOURCES

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

W www.cvm.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 No 2/2015 on Undertakings for Collective Investment), 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 profiles



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Recent transactions. Actively involved in several transactions, mainly focused on the advising, structuring and setting up of collective investment schemes such as mutual funds and real estate investment funds, infrastructure vehicles, venture capital funds and private equity structures.

Languages. Portuguese, English, French, Spanish

Professional associations/memberships. Admitted to the Portuguese Bar Association as a specialist in financial law.

Publications. Among other articles, Pedro Simões Coelho has published the following:

- Alternative Investment Funds – Portugal, *International Comparative Legal Guide*, 2016.
- The AIFMD Passport and non-EU Alternative Investment Funds, *Funds People*, 2016.
- Alternative Investment Funds – Mozambique, *International Comparative Legal Guide*, 2016.
- Alternative Investment Funds – Angola, *International Comparative Legal Guide*, 2016.
- Fund Management – Portugal, *Getting the Deal Through*, 2016.
- Hedge Funds em Portugal - *The European Lawyer Reference Series*, 2011 (first edition) and 2014 (second edition).
- Investment funds in Portugal: Regulatory overview - *Practical Law Company Investment Funds Handbook* 2012, 2013 and 2014.

Professional qualifications. Law degree, University of Lisboa, Faculty of Law, Postgraduate degree in Taxation, Universidade Católica de Lisboa

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- Regularly advises on banking and finance and collective investment vehicles tax issues;
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Areas of practice. Banking and finance; collective investment schemes; capital markets; private equity and insurance.

Recent transactions

- Securities issues.
- Regularly advises common representatives and trustees, and has assisted setting up collective investment schemes, providing ongoing counsel to the respective fund managers.
- Provides general regulatory advice to banking entities and is actively involved in aviation finance and cross-border factoring transactions.
- Provides ongoing general advice to insurance companies and intermediaries on regulatory matters, as well as on pension fund schemes and pension fund managers.

Languages. Portuguese, English, French

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

Publications

- Alternative Investment Funds – Mozambique, *International Comparative Legal Guide*, 2016.
- Fund Management – Portugal, *Getting the Deal Through*, 2016.
- The AIFMD Passport and non-EU Alternative Investment Funds, *Funds People*, 2016.
- Cross Border Merger of UCITS, *Funds People*, October 2015.