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Investment Funds

Portugal

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1. Investment Funds Market Overview

1.1 State of the Investment Funds Market

The investment fund market in Portugal has been established and operating for several decades but it may yet have room to grow and develop, given that:

- from a practical perspective, the Portuguese investment fund market has historically been “inward looking”, whereby funds are mostly incorporated by Portuguese fund managers and typically invest in Portuguese assets; and
- individual portfolio management still far outpaces asset management through collective undertakings in volume (see Securities Market Report 2019, Portuguese Securities Market Commission).

Undertakings for collective investments in transferable securities, or UCITS, are more widely marketed and have more assets under management relative to each of the types of alternative investment funds incorporated in Portugal. However, real estate funds are also a popular product and come not far behind in what concerns value under management.

Evolution of UCITS, Real Estate and Private Equity Funds

Regarding the UCITS, according to the latest data available from CMVM the respective value under management in year end 2019 increased significantly relative to year end 2018, from approximately EUR10.5 billion of value under management to approximately EUR12.6 billion of value under management.

With respect to real estate funds, according to the latest data available from CMVM the respective value under management in year end 2019 decreased marginally, relative to year end 2018, from approximately EUR10.6 billion of value under management to approximately EUR10.5 billion of value under management.

Lastly, value under management of private equity investments (through private equity funds and private equity companies) rose, in 2019, by 6.1% to approximately EUR5.1 billion (in relation to year 2018).

Due to the severe economic crisis caused by the COVID-19 pandemic, these statistics are expected to suffer significant variations for 2020 (for which no publicly available data exists at the time this article is written).

2. Alternative Investment Funds

2.1 Fund Formation

2.1.1 Fund Structures

An alternative investment fund can be construed as an investment undertaking which invests in assets which are not liquid or exchange traded (stocks, bonds, money market instruments). Private equity, venture capital, hedge funds, real estate, or commodities are all alternative investments. However, alternative investment funds can not only be closed-ended funds that focus on illiquid assets (private equity or real estate) but also open-ended funds that focus on liquid assets strategies (certain types of hedge funds).

The alternative funds which are more commonly used in practice are private equity funds and real estate funds.

Generally speaking, collective investment undertakings can assume the following forms:

- a pure fund structure, which means a fund is promoted and/or set up by a fund manager and the proceeds collected from the investors, through the subscription of participation units, are invested into certain assets (depending on the type of fund) upon a decision by the fund manager; or
- a company structure, which means the investors subscribe shares in a vehicle with a company form that can be self-managed or managed by a third-party fund manager; self-managed companies are generally subject to equivalent provisions as those applicable to fund managers – participations held by investors in collective investment undertakings in company form are called shares.

For ease of exposition, except as otherwise stated the expression “fund” shall be used indistinctively to mean collective “unincorporated” or “contractual” structures as well as “incorporated” or “company” structures.

Typical Fund Structures

The most typical structure used in practice are “unincorporated” or “fund” structures. The reasons for this are mostly historical as these structures were more thoroughly regulated and used in the past and thus most investors, managers and practitioners as well as the CMVM itself were and currently still are more used to dealing with said structures. In addition (taking into account the current legal regime):

- funds tend to have less operational and governance costs (a collective investment undertaking in company form is generally required to have also a board of directors and an audit board, which does not happen in investment funds); and

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- due to not being “tried and tested” (notably “self-managed” companies) it is usually more challenging structuring and implementing investment undertakings in company form, also in what concerns the authorisation process with the regulator.

Any of these entities, as well as their respective management companies (provided they are incorporated under Portuguese law), are subject to the regulatory oversight of the CMVM.

2.1.2 Common Process for Setting up Investment Funds

In general terms, the setting up of alternative investments funds is subject to authorisation before CMVM (in accordance with Article 19 Law No 16/2015 or “General Investment Funds Regime”). To request authorisation, the following documents must be submitted:

- the “key information document”, if the undertaking is not marketed exclusively to professional investors;
- the prospectus of the alternative investment funds, if the undertaking is not marketed exclusively to professional investors;
- the management regulation;
- copies of the agreements to be executed between the management company and the depositary, the entities that will market the alternative investment fund and other entities, such as services providers and auditors;
- documents proving the acceptance of functions of all entities involved in the activity of the collective investment undertaking under the terms of the draft contracts; and
- if the undertaking is marketed solely to professional investors, a document containing mandatory pre-contractual information to be made available to such investors.

Collective investment undertakings in company form which are:

- self-managed shall also be required to present information on their organisational structure, compliance and governance policies, among other documents and information, in terms analogous to those presented by promoters of fund management companies; and
- managed by a third-party fund manager, shall also be required to present an organisation structure chart.

If the request is not adjoined by all the required documentation, CMVM shall notify the applicants, within a 15-business day period following the delivery of the request, to send the referred documents to the CMVM within a ten day period, unless a longer period is granted by the latter.

After receiving the documentation requested, the CMVM has 20 business days (or 40 business days in case of self-managed collective investment companies) to notify the applicants of its decision. In the absence of a decision within the aforementioned periods, the authorisation shall be deemed to have been granted. The CMVM may refuse the authorisation if the applicant does not submit the required documentation.

Private Equity Collective Investment

In what concerns private equity collective investment undertakings in particular, these are a class of alternative investment collective undertakings subject to a special regime (set out under the Legal Regime for Private Equity, Social Entrepreneurship and Specialized Investment, approved by Law No 18/2015 of March 4th, (the “Private Equity Legal Regime”).

Authorisations to incorporate private equity collective investment undertakings require to be adjoined by, at least:

- a copy of the management regulation;
- draft agreement with the depositary; and
- documents proving the acceptance of functions of the depositary.

To incorporate private equity funds, a decision must be taken by the CMVM within 15 business days following the date of submission of the request (or the date CMVM receives all documentation required to assess the request).

Processes for the incorporation of alternative investment funds tend not to be lengthy (the legal deadlines are relatively short) but may depend on the CMVM’s workload. In what concerns costs, these are relatively subdued (note that in addition to an incorporation fee, an ongoing supervision fee is due to the CMVM, which may in any case be borne by the fund).

2.1.3 Limited Liability of Investors

According to the General Investment Funds Regime, only the assets of “unincorporated” collective investment undertakings or “funds” are liable for its debts. The same regime is provided for private equity funds under the Private Equity Legal Regime.

Shareholders of collective investment undertakings in company form enjoy limited liability pursuant to general provisions of Portuguese company law (ie, whereby they are not liable for the debts incurred by the company).

2.1.4 Disclosure Requirements

Under Portuguese law (implementing EU law) alternative investment funds which are marketed to retail investors are subject to extensive disclosure requirements, including the preparation of a prospectus and a “key information document”.

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On the contrary, fund managers of alternative investment funds which are marketed solely to institutional investors need only provide the latter with a “simplified” document which must also feature key pre-contractual information.

Provision of Information

Regardless of the type of investors to which the fund is marketed, the management company should make available, and communicate to CMVM, annual accounts (within four months after the financial year) and biennial accounts (within two months after the end of the relevant semester). Alternative investment funds which participations are subscribed via a private placement or solely by institutional investors are exempt from the obligation of preparing biennial accounts.

Private equity funds (regardless of the type of investors they are marketed to) are required to disclose accounts only on an annual basis.

The fund manager is obliged to divulge the prospectus, key information documents (where these are required) and accounts free of charge to investors who request it.

Finally, the management entity is also bound to make available to investors the value of the participation units/shares in the collective undertakings they manage, on a periodical basis of:

- monthly, for real estate funds and open-ended alternative investment funds investing in securities;
- monthly for closed-ended alternative investment funds investing in securities and alternative investment funds which invest in non-financial assets (except if CMVM authorises a lower frequency for reporting, up to a limit of six months); and
- every six months, for private equity funds.

2.2 Fund Investment

2.2.1 Types of Investors in Alternative Funds

The low yield environment which currently reigns in Europe, coupled with a buoyant real estate and start-up scene in Portugal (which has been affected, at least partially, by the COVID-19 pandemic), has increased the appetite for alternative investments, notably real estate, private equity and venture capital, over the last few years.

There is no publicly available information concerning the funding composition of alternative investment funds in Portugal; however, the following investor classes are the most commonly seen:

- banks, insurance companies and other financial institutions;
- pension funds (Portuguese and foreign);
- family office vehicles;

- in the case of private equity, sometimes the State, either through specific investment vehicles that are state, or EU funded or via the direct granting of funds to existing private equity investment structures; and
- retail investors (notably owing to the recent interest in the subscription of units in private equity funds for the purposes of obtaining “golden visas”) – these investors are residents outside of the EU and European Economic Area.

2.2.2 Legal Structures Used by Fund Managers

Typically, investments through collective investment undertakings are made using the vehicles mentioned in **2.2.1 Types of Investors in Alternative Funds**, notably in contractual/fund structures. Self-managed investment companies are rare and, therefore, these undertakings are for the most part managed by third-party fund managers.

In what concerns assets under management, regulatory considerations dictate which assets each type of alternative funds invest in. As a rule:

- real estate funds usually invest directly in real estate assets (but may also do so in companies which scope is the performance of real estate activities such as the purchase, sale and lease of real estate properties); and
- private equity funds are required to invest in securities or other capital or debt instruments issued by companies (which, under the law, should have “high growth prospects”).

An alternative investment fund may either be self-managed or managed by a fund management company.

Management companies, especially foreign management companies, sometimes subcontract services to fund administrators/service providers, notably day-to-day asset management and assistance with regulatory reporting requirements.

2.2.3 Restrictions on Investors

There are no particular requirements to be an investor in alternative investment funds, and no restrictions exist, apart from applicable rules and regulations governing certain sectors (banking, insurance, etc).

Certain types of funds are marketed exclusively to professional investors (as already noted, these funds are exempt from several regulatory constraints). For natural persons to be deemed professional investors, “categorisation” obligations by managers (set out in the Portuguese Securities Code and CMVM Regulation No 3/2015, the latter solely in what concerns private equity funds) shall apply.

2.3 Regulatory Environment

2.3.1 Regulatory Regime for Alternative Funds

The main law regulating investment funds is the General Investment Funds Regime, which transposed Directive 2009/65/EC as well as 2011/61/EU (AIFMD) and Directive 2009/65/EC (regarding UCITS). This law is further regulated by a CMVM Regulation (CMVM Regulation No 2/2015).

Private equity funds are governed by the Private Equity Legal Regime, which also transposes the AIFMD (ie, in what concerns private equity in particular). The statute is further regulated by a CMVM Regulation (CMVM Regulation No 3/2015).

The Portuguese Securities Code provides the overarching provisions for securities and supervision of securities markets by the CMVM.

The CMVM is the most important supervisory body in this area. Recently (Decree-Law No 144/2019 of September 23rd) the competences for the prudential supervision of fund management entities, have been shifted away from the Bank of Portugal and into CMVM (which is now the sole supervisor of such entities).

2.3.2 Requirements for Non-local Service Providers

Non-local service providers who are not regulated institutions are generally not subject to regulation or registration requirements.

This notwithstanding, in what concerns depositary/custodian services, the relevant service provider is required to be an institution established in Portugal.

It is worth noting that fund administrators/service providers, when engaged, are usually established in Portugal (as they are mostly used by non-local managers to ensure compliance with local reporting requirements and perform day-to-day asset management activities).

2.3.3 Local Regulatory Requirements for Non-local Managers

The rules established for national managers are, in principle, the same for non-local managers, provided the latter are authorised to manage or market alternative investment funds in Portugal (or both, as applicable).

Non-local managers who are established in the EU must act under the AIFMD passport legal framework to distribute alternative investment fund units (to professional investors) or render alternative investment fund management services in Portugal (if not, an authorisation from the CMVM is required).

Marketing of non-Portuguese alternative investment funds to retail investors, even by managers operating under the AIFMD passport, is subject to authorisation by the CMVM.

2.3.4 Regulatory Approval Process

As mentioned in **2.1.2 Common Process for Setting up Investment Funds**, the CMVM has 20 business days (40 business days in case of self-managed collective investment companies) to issue a decision on the incorporation of the fund, failing which the authorisation shall be deemed to have been granted.

In practice, however, the approval process takes longer since the CMVM usually has additional information requests and comments to the documentation provided (note that the deadline commences only when the CMVM receives all information required to assess the request).

2.3.5 Rules Concerning Marketing of Alternative Funds

Under the General Investment Funds Regime, marketing or distribution of funds is defined as an activity directed towards investors with a view to promoting or proposing the subscription of units or shares, regardless of the means of communication used.

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

- fund managers;
- depositaries;
- financial intermediaries registered or authorised by the CMVM to perform the relevant activities, namely those of placement and the reception and transmission of orders on behalf of third parties; and
- other entities, as established in applicable CMVM Regulations.

In the marketing of fund units, such entities must observe the same rules and are generally subject to the same supervision standards as those exercised over financial intermediaries.

Agreements between fund managers and third-party marketers must be established in writing (see CMVM Regulation No 2/2015). Marketers of fund units are bound by duties of information towards participants and are liable to the latter for damages caused in the performance of marketing activities.

Advertising Investment Funds

Advertisement of marketing materials of investment funds are subject (aside from the general rules set out in the Advertisement Code) to the following rules:

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- advertisements may only be made after the incorporation of the fund has been authorised by the CMVM;
- advertisements must be clearly identified as such, be correct, truthful and not misleading;
- statements in advertisement actions must not contradict the information set out in the fund constitutive documents; and
- advertisements must indicate (when such documents are required to be produced) the existence of a prospectus and the availability of the “key information document” (as well as the place and language where investors may obtain such documents).

2.3.6 Marketing of Alternative Funds

Alternative investment funds, subject to other obligations marketing of units is subject to (such as anti-money laundering), can be marketed to both professional and retail investors, generally without any limitations. In the case of the latter the following should be taken into account:

- funds marketed to retail investors which are located in Portugal are subject to more stringent disclosure requirements (generally involving the preparation of a prospectus and key information documents) as mentioned above, as well as to additional restrictions on activities; and
- offers of fund units to indiscriminate addressees or to 150 or more retail investors shall trigger the application of public offer rules under the Portuguese Securities Code.

2.3.7 Investor Protection Rules

Fund managers, in the exercise of their activities, have fiduciary duties before investors, being bound by the general obligations of managing the fund independently and in the interest of its participants. The management entity is liable towards investors for damages caused to the latter in the exercise of fund management activities, notably as a consequence of errors and irregularities in the valuation or attribution of transactions to the fund portfolio, errors and irregularities in subscriptions and redemptions, or undue charging of fees.

Disclosure requirements also serve to protect investors’ interests. In what concerns retail investors, the adaptation of the Portuguese legislation to the European Regulation on Fundamental Information Documents and the marketing of packages of retail investment products and insurance-based investment products have introduced even more demanding disclosure requirements of funds marketed to retail investors (which may also encompass alternative investment funds).

As an indirect measure to protect investors’ interests, there are also extensive regulatory reporting requirements which must be met by management entities. The latter must send to the CMVM, on a periodical basis, financial accounts, valuation of

participation units/shares, details on assets invested, among other information.

It should be noted that the CMVM, as the supervisory entity of funds and respective managers has powers to:

- refuse the acquisition of certain types of assets for the estate of an alternative investment undertaking, whenever the protection of investors and the regular functioning of the market so require; and
- order changes to the rules on disclosure of information when it finds that they do not suffice to safeguard investors’ interests.

2.3.8 Approach of the Regulator

The CMVM is becoming increasingly sensitive to the issues of the entities it supervises and therefore flexible and pro-active in finding solutions to practical problems.

The regulator is also (within reason) open to telephone discussions and face-to-face meetings and will issue generic opinions if requested. In what concerns regulatory authorisation processes, communication by e-mail is the norm (although “initial filings” are still done in paper form).

Enforcement actions are usually brought by the CMVM (even if not always in a timely fashion), regardless of the materiality of the regulatory obligations breached (meaning that lesser offenses are also prosecuted).

2.4 Operational Requirements for Alternative Investment Funds

Activities which may be undertaken by the main types of alternative investment funds (real estate funds and private equity funds) in Portugal and notable restrictions to the same are the following:

Real Estate Funds

Real estate funds are allowed to carry out the following activities:

- the acquisition of property for rent or other forms of for-profit operation;
- the acquisition of property for resale;
- the acquisition of other rights on property, under the terms set forth under CMVM regulations, for the purpose of the economic development of said rights;
- the implementation of improvement and extension works on the assets in the portfolio; and
- the development of property construction and renovation projects, towards for-profit operation or resale. CMVM may,

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by means of a regulation, define the conditions and limits under which this activity can be carried out.

Conversely, real estate funds are not allowed to:

- place any liens or encumbrances on their assets, unless for purposes of obtaining financing, within the limits set forth by law;
- accept the granting of security interests or credit by any unit-holder, except if these operations are included in the activity pursued by such unit-holders and the agreed conditions are in accordance with market standards; or in the event the fund is subject to private subscription or is exclusively addressed to qualified investors, all unit-holders have previously agreed on such granting of security interests or credit and the incorporation documents allow it;
- grant credit or security interests; and
- undertake to sell property that is not yet owned by the real estate fund, except if this commitment to sell comes within the scope of a property development construction project.

Private Equity Funds

Private equity funds may carry out the following activities:

- investing in equity or capital instruments, as well as securities or convertible rights which grant a right to acquire the former;
- investing in debt instruments, including loans and credits, of the companies in which they participate or intend to participate;
- investing in hybrid instruments of the companies in which they participate or intend to participate;
- give guarantees to the benefit of companies in which they participate or intend to participate;
- apply their treasury surplus in financial instruments; and
- perform financial activities, notably regarding hedging, required to develop its activities.

Subject to some exceptions, if authorised by the CMVM, private equity funds may generally not:

- carry out operations not related to the pursuit of its corporate purpose or the respective investment policy;
- invest in securities admitted to trading on a regulated market which exceed 50% of its assets;
- the acquisition of rights in immovable property other than those necessary for its premises;
- invest more than 33% of the value available for investment, whether or not applied, in a company or group of companies, limited to the end of the two-year period from the date of the first investment of the portfolio, based on the acquisition value;

- invest more than 33% of its assets in private equity funds managed by other entities;
- invest, in whatever form, in management entity related parties; and
- grant credit or the provision of guarantees, in any type or form, for the purposes of financing the subscription or acquisition of any securities issued by the management entity or related parties.

Depositary

Regarding regulations in place to protect assets held by the fund, under Portuguese law the latter is required to be held by a depositary.

A depositary, to be eligible to perform such services to an alternative investment fund, must be a credit institution or financial services firm authorised to render depositary services and subject to own funds requirements (set out in the Capital Requirements Regulation), have at least EUR5 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.

The depositary, like the management company, must act independently and exclusively in the interest of the 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 fund manager, as well as the payment to the investors of the proceeds of the redemption or liquidation of the assets; and
- monitoring and guaranteeing to investors that the investment policy, the use of proceeds and the calculation of the value of the units of the fund comply with the law, regulations and incorporation documents of the fund.

2.5 Alternative Investment Funds: Fund Finance Market

Real Estate

Real estate funds are allowed to borrow funds from third parties and often do so.

The entity responsible for management may not, on account of the fund, accept guarantees or borrow from participants of said fund, except if:

- these transactions are part of the participants' ordinary course of business and conditions agreed respect the commercial terms practiced in the market; or
- in alternative investment funds incorporated via private placement or exclusively marketed to professional investors,

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there is a prior agreement of all participants and a provision in the constitutive documents in that respect.

Other related parties to the fund or the management entity, are impeded from granting finance to the fund.

It is common for lenders to take security, notably on the properties owned by the real estate fund (ie, mortgages) and pledges over the fund units (in closed-ended funds) and bank accounts.

Private Equity

Private equity funds may only perform the following credit-related activities:

- apply their treasury surplus in financial instruments; and
- perform financial activities, notably regarding hedging, required to develop its activities.

Therefore, private equity funds borrow not directly but rather via portfolio companies or acquisition vehicles of said companies.

2.6 Alternative Funds Tax Regime

Alternative investment funds incorporated and operating according to Portuguese law are subject to the special tax regime for investment funds contained in the Tax Benefits Code. The regime currently in force has been approved in 2015. According to this special regime, in principle alternative investment funds incorporated under Portuguese law are subject to corporate income tax (CIT) at the general rate of 21%. The relevant taxable base corresponds to the net profit determined in accordance with the accounting rules that apply to these funds.

Notwithstanding the above, investment income (eg, dividends and interest), rental income and capital gains obtained by the alternative fund should be excluded from its taxable base, provided that the same do not arise from a tax haven included in the Portuguese blacklist of off-shore jurisdictions.

The costs borne in order to obtain these types of income, as well as any other costs foreseen as non-deductible in the CIT Code and any income, discounts and/or costs regarding management fees and other commissions should also be excluded from the taxable base of the alternative funds.

The income made available to these funds is not be subject to withholding tax.

Stamp Duty

Alternative funds investing in money market instruments and bank deposits are subject to Stamp Duty on a quarterly basis, which is levied on the net asset value of the fund at the rate of

0.0025%. Alternative funds investing in other types of assets should be subject to Stamp Duty at the rate of 0.0125%.

Factors Defining Applicable Tax Regimes

The tax regime applicable to the investors vary according to a number of different factors, such as the type of alternative fund, the type of income received (ie, investment income or capital gains) the type of investors (ie, an individual or a legal person) and their tax residence in Portugal or abroad.

With reference to the type of alternative fund, different rules apply to investors depending on whether the fund is a real estate fund or not.

As a rule, distributions made available to individuals that are resident for tax purposes in Portugal are subject to withholding tax at the rate of 28%, provided that the income is not obtained within the scope of a commercial, industrial or agricultural activity.

If the distributions are obtained within the scope of a commercial, industrial or agricultural activity of individuals resident in Portugal, or if the investor chooses so, they are subject to tax at the general personal income tax rates ranging between 14.50% and 48%. Furthermore, an additional solidarity surcharge applies to income higher than EUR80.000,00. On an income higher than EUR80.000,00, and up to the amount of EUR250.000,00, the additional solidarity surcharge rate is 2.5%. On an income higher than EUR250.000,00 the applicable rate is 5%.

Capital Gains

Capital gains arising from the sale of units obtained by individuals that are resident for tax purposes in Portugal are subject to personal income tax also at a special rate of 28%, provided that the same are not obtained within the scope of a commercial, industrial or agricultural activity, case in which the individual in accordance with the rules mentioned in the previous paragraph.

Distributions made available to corporate investors resident for tax purposes in Portugal are subject to withholding tax at the rate of 25%. This withholding tax has the nature of an advance payment on account of the final corporate income tax liability of such investor. Capital gains obtained by these investors are subject to corporate income tax in accordance with the general rules.

Non-resident individual investors are exempt from tax in Portugal, including on capital gains provided that the fund is not a real estate fund. Oppositely, non-resident individual investors in real estate funds are subject to tax by means of withholding tax at the rate of 10%. Capital gains obtained by these investors are subject to tax also at the rate of 10%. These rules should not

apply when the non-resident individual investor is resident in a tax haven foreseen in the Portuguese blacklist of off-shore jurisdictions. In this scenario the income is taxable at the rate of 35%. Non-resident corporate investors are also exempt from tax in distributions and capital gains related with funds other than real estate funds.

Differently, income obtained by non-resident corporate investors in connection with real estate funds are subject to withholding tax at the rate of 10% while the capital gains made with the sale of the units in such funds are also subject to tax at the rate of 10%. The income obtained by non-resident corporate investors in connection with real estate funds is considered income from immovable property for the purposes of Article 6 of the applicable double tax treaty and the income derived from the sale, including redemption, of participation units or shares is considered capital gains for the purposes of Article 13 of the applicable double tax treaty.

Benefiting from the Special Tax Regime

In order to benefit from this special tax regime, it is required that the relevant corporate investor:

- is not deemed tax resident in a tax haven;
- does not receive the relevant income through a “jumbo account”; and
- is not directly or indirectly, held in more than 25% by entities resident in Portugal (except for non-resident corporate investors resident in another EU member state or any country with which Portugal has a double tax treaty in force, provided that some additional requirements are met).

If the corporate investor has its tax residence in a tax haven, any distribution made available to it should be subject to withholding tax at the rate of 35%. Capital gains made with the sale of the units should be subject to taxation at the rate of 25%.

There is also a special tax regime for a specific category of alternative investment funds. We are referring to venture capital funds incorporated under Portuguese law that are exempt from corporate income tax in Portugal and therefore, in principle, not covered by the Portuguese network of Double Tax Treaties.

The taxation of the investors in these venture capital funds varies according to the type of investor.

Distributions

Distributions of income made to resident individuals as well as income from the redemption of units are generally subject to a final withholding tax rate of 10%. Capital gains arising from the sale of units obtained by such individuals are also subject to tax at the rate of 10%.

Distributions made available to corporate investors resident for tax purposes in Portugal are also subject to withholding tax at the rate of 10%. This withholding tax has the nature of an advance payment on account of the final corporate income tax liability of such investor. Although not entirely clear it should be considered that capital gains from the sale of units obtained by these investors are subject to corporate income tax in accordance with the general rules.

Non-resident Individuals

In what concern non-resident individuals, the regime is also not entirely clear. Assuming that the concept of “non-resident entities” foreseen in the law also includes non-resident individuals, they will be exempt from tax in Portugal. Otherwise, the income paid by the venture capital fund and the income received in connection with the redemption of units in the fund is subject to a final withholding tax of 10%. Capital gains from the sale of units in venture capital funds by non-resident individuals are exempt from tax in Portugal if the individual is not resident in a tax haven jurisdiction foreseen in the Portuguese blacklist of offshore jurisdictions. Otherwise, capital gains are subject to tax at the rate of 10%.

Finally, non-resident corporate bodies are exempt on the income received from the fund, including income from the redemption of units in the fund as well as capital gains from the sale of units. However, if the non-resident corporate body is resident in a tax haven listed in the Portuguese blacklist of offshore jurisdictions or more than 25% of its capital is held, directly or indirectly, by entities resident in Portugal, the income paid by the venture capital fund and the income received in connection with the redemption of units in the fund is subject to a final withholding tax of 10%. Similarly, capital gains in these circumstances will be taxed at the rate of 10%.

3. Retail Funds

3.1 Retail Fund Formation

3.1.1 Retail Fund Structures

The concept of retail funds does not exactly apply in the Portuguese legal system. In practice, one can characterise retail funds as those which marketing of units is made exclusively or mostly to retail investors (and therefore will be mostly open-ended and/or exchange-traded).

Specifically, the Portuguese legal forms closest to the concept are the UCITS. The UCITS are undertakings for collective investment (or an “investment fund”) which invests in traded and/or liquid securities, ie, in stocks, bonds, units in other liquid funds, as well as in short term treasury instruments and cash.

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As in alternative investment funds, a retail fund can adopt a contractual structure with no legal personality, (in this case the participants will hold units) or be structured by a collective investment company with legal personality, the formation of such entities being subject to the CMVM's authorisation; the participants in these collective investment companies will hold shares.

As in alternative investment funds, the majority of retail funds (whether or not qualified as a UCITS) are contractual structures (rather than incorporated/company structures). The considerations in **2.1.1 Fund Structures** apply here.

3.1.2 Common Process for Setting up Investment Funds

Retail funds must be authorised by the CMVM to be established and marketed in Portugal.

The general provisions of the General Investment Funds Regime apply also to retail funds, so the process of setting up the fund is essentially the same as that described for alternative investment funds in **2.1.2 Common Process for Setting up Investment Funds**. It should be noted, however, that the CMVM shall refuse authorisation for the incorporation of a UCITS if the management entity wishing to manage such fund is not authorised to do so in its home state.

Regarding length and costs associated with the process the conclusions made in what concerns alternative investment funds, the details in **2.1.2 Common Process for Setting up Investment Funds** also apply.

3.1.3 Limited Liability of Retail Fund Investors

See **2.1.3 Limited Liability of Investors**.

3.1.4 Disclosure Requirements

Under Portuguese law (implementing EU law) retail funds are subject to disclosure requirements, including the preparation of a prospectus and a "key information document".

If the investor so requests it, a fund manager should send information regarding the prospectus, a "key information document", as well as annual and biannual accounts. This information should be provided free of charge.

The marketing entity must disclose to the investors:

- the number of units or shares held by the investors;
- value of the units;
- the aggregate value of the investment; and
- investor's bank statement (if applicable).

UCITS managing entities are also bound to make available to investors the value of the participation units/shares in the collective undertakings managed every business day (except if the CMVM authorises a longer period, up to one month).

3.2 Fund Investment

3.2.1 Types of Investors in Retail Funds

Those investing in retail funds are often individual investors, usually through the intermediation of banks, securities brokers and/or securities dealers.

Investor appetite for retail funds, at least as a UCITS, has stayed more or less stable in the last few years but enjoyed a significant increase in 2019. See **1.1 State of the Investment Funds Market**.

3.2.2 Legal Structures Used by Fund Managers

See **3.1.1 Retail Fund Structures**.

3.2.3 Restrictions on Investors

There are no specific limitations on the types of investors that can invest in a retail fund. Subject to other types of considerations, foreign individuals are generally allowed to invest in retail funds.

3.3 Retail Funds Regulatory Environment

3.3.1 Retail Funds Regulatory Regime

See **2.3.1 Regulatory Regime for Alternative Funds**.

3.3.2 Requirements for Non-local Service Providers

See **2.3.2 Requirements for Non-local Service Providers**.

3.3.3 Local Regulatory Requirements for Non-local Managers

The rules established for national managers are, in principle, the same for non-local managers, provided the latter are authorised to manage or market alternative investment funds in Portugal (or both, as applicable).

UCITS management entities authorised in other member states and subject to the supervision of their respective authorities may exercise in Portugal, alternatively or cumulatively, through the establishment of a branch or under the freedom to provide services, the activities covered by their authorisation.

The management entities referred to in the previous paragraph may also market in Portugal the units of a UCITS authorised in another member state which they manage using the passport regime, subject only to certain additional information requirements set out in the UCITS Directive and General Investment Funds Regime (notably on disclosure of information to inves-

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tors in Portugal, such as obligations to translate the fund constitutive documents).

3.3.4 Regulatory Approval Process

See 2.3.4 Regulatory Approval Process.

3.3.5 Rules Concerning Marketing of Retail Funds

See 2.3.5 Rules Concerning Marketing of Alternative Funds.

3.3.6 Marketing of Retail Funds

Retail funds can be marketed to natural and legal persons, subject to other obligations marketing units is subject to (such as anti-money laundering); there are generally no limitations as to whom retail funds can be marketed.

It should be noted that the marketing of UCITS by foreign fund managers is subject to the passport regime under the UCITS Directive.

3.3.7 Investor Protection Rules

See 2.3.7 Investor Protection Rules for what concerns protection of individual investors.

In addition, it is also worth noting that UCITS fund managers should also publish and send the following information to the Portuguese Securities Market Commission:

- the annual accounts, within four months of the end of the financial year;
- the half-yearly accounts within two months of the end of the respective half-year; and
- an inventory of the fund's portfolio of assets.

3.3.8 Approach of the Regulator

See 2.3.8 Approach of the Regulator.

3.4 Operational Requirements for Retail Funds

UCITS may generally only invest in liquid securities and money market instruments and have the following limitations.

Regarding investment limits, a UCITS may not:

- invest more than 10% of their global net value in securities and money market instruments of the same issuer;
- invest more than 20% of their global net value in deposits with the same entity;
- gain exposure to a single counterparty in transactions involving derivatives outside a regulated market in excess of 5% of the fund's global net value, or 10% if the counterparty is a bank; and
- invest more than 40% of the fund's global net value in securities and money market instruments which are issued

by a single issuer and represent more than 5% of the fund's global net value.

There are a number of exceptions to these limits which apply (for example if investments are based in the EU or if investment is made in covered bonds issued by EU credit institutions).

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 UCITS cannot acquire more than:

- 10% of shares without voting rights from the same issuer;
- 10% of an issuer's debt securities;
- 25% of the units of a UCITS or alternative investment fund; and
- 10% of an issuer's monetary market instruments.

Assets of retail funds must also be kept safe by depositaries; in this respect the conclusions set out in 2.4 Operational Requirements for Alternative Investment Funds also apply.

3.5 Retail Fund Finance

The following borrowing restrictions apply for a UCITS:

- provided that the sum of all lending periods does not exceed 120 days, management companies may obtain loans on behalf of the funds they manage;
- there is a limit on indebtedness of 10% of the overall net value of the fund; and
- if the documents of incorporation of a collective investment company provide for the possibility of entering into loan facilities, the amounts specified may not exceed 15% of the total net value of the fund.

3.6 Retail Fund Tax Regime

See 2.6 Alternative Funds Tax Regime.

4. Legal, Regulatory or Tax Changes

4.1 Recent Developments and Proposals for Reform

Relevant changes to the General Regime of Collective Investment Undertakings entered into force on 1 January 2020; this regime approved the transfer to the Portuguese Securities Market Commission of "supervisory powers over investment fund management companies and securitisation funds". Until the end of 2019, the exercise of the activity of management companies and collective investment undertakings was subject to authorisation and registration with the Bank of Portugal and the men-

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tioned Commission. With this transfer of powers, the CMVM now accumulates all the supervisory functions of investment funds and management companies of these funds.

An important recent event in this field was the approval by the Council of Ministers, in July 2019, of the creation of credit funds, with a view to be an alternative financing for Portuguese companies. The measure came into force on 1 January 2020 (through an amendment of the Private Equity Legal Regime) and aims, according to the press release of the Council of Ministers, to strengthen the role of the capital market in the financing of companies. CMVM Regulation 5/2020 has been approved to, among other particularities in the management of private equity funds, regulate credit funds.

Regulation 2/2020 of the Portuguese Securities Market Commission concerning anti-money laundering/anti-terrorism financing (affecting investment fund managers) has been recently published; this regulation substantiates certain duties established in the anti-money laundering and terrorist financing act (Law No 83/2017, of August 18th) and imposes new reporting requirements for entities subject to the supervision of the CMVM.

Finally, Law No 25/2020 has expanded the list of (misdemeanour) punishable offenses for fund managers, both alternative, UCITS and private equity.

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Morais Leitão, Galvão Teles, Soares da Silva & Associados is a leading full-service law firm in Portugal, with a solid background of decades of experience. Broadly recognised, Morais Leitão is a reference in several branches and sectors of the law on a national and international level. Morais Leitão's private equity team offers a holistic, "cradle-to-grave" approach to the private equity sector and brings a wealth of expertise in trans-

actional work (private equity and venture capital), and fund formation/regulatory work. Morais Leitão is headquartered in Lisbon and has additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados) and Mozambique (HRA Advogados).

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Ricardo Andrade Amaro is a partner and heads a corporate team and is a lawyer with great experience in private equity. He has acted as legal adviser in the setting up of the first private equity fund in Portugal exclusively dedicated to the recovery of companies (turn-around fund), which is currently the largest Portuguese private equity fund. He regularly acts as legal adviser in the setting up of and day-to-day regulatory advice to private equity funds. Ricardo has been recognised for his expertise in capital markets, M&A and private equity.



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