The Asset Management Review

Second Edition

Editor
Paul Dickson

Law Business Research

The Asset Management Review

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Paul Dickson

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EDITOR'S PREFACE

Twelve months on from the first edition of *The Asset Management Review*, it is clear that these are still challenging times for the asset management industry. While the past year has witnessed signs of recovery from the damage wrought by the global financial crisis, the crisis continues to make its mark on the industry. A backdrop of continuing economic uncertainty and volatile markets constrains new investment and limits returns. Meanwhile, responses to the crisis by regulators and investors present their own challenges.

The financial crisis has drawn attention ever more acutely to the activities of the financial services industry, and the consequences of this focus are manifest in regulatory responses around the globe. Driven by a desire to avoid a further financial crisis, regulators have sought to address perceived systemic risks and preserve market stability through a wave of new regulation, including the Alternative Investment Fund Managers Directive, which has recently been implemented in Europe. For what is a global industry, the challenge of regulatory compliance is complicated by jurisdictional disparities and the introduction of legislation with potentially extraterritorial effects. It is not only regulators who have placed additional demands on the financial services industry in the wake of the financial crisis; a perceived loss of trust has led investors to demand greater transparency around investments and risk management from those managing their funds.

This continues to be a period of change and uncertainty for the asset management industry, as funds and managers act to comply with new regulatory and investor requirements and adapt to the changing geopolitical landscape. There is, however, perhaps some limited cause for optimism. While fundamental issues persist in the eurozone, the prospect of collapse seems less likely than in the recent past, and more positive assessments of the global economic outlook, albeit cautious, raise the prospect of increased investment and returns. Although the challenges of regulatory scrutiny and difficult market conditions remain, there have also been signs of a return of risk appetite; in addition, international expansion continues with an increasing focus on opportunities in emerging markets. The industry is not in the clear, but prone as it is to innovation and ingenuity, it seems well placed to navigate this challenging and rapidly shifting environment.

The second edition of *The Asset Management Review* includes coverage of a number of additional jurisdictions, reflecting the global importance of the industry and this practice area. The publication of the second edition is a significant achievement, and I continue to be grateful for the support of the many lawyers and law firms who have contributed their time, knowledge and experience to the book. I would also like to thank Gideon Roberton and his team at Law Business Research for all their efforts in bringing the second edition into being.

The world of asset management is increasingly complex, but it is hoped that the second edition of *The Asset Management Review* will continue to be a useful and practical companion as we face the challenges and opportunities of the coming year.

Paul Dickson
Slaughter and May
London
September 2013

Chapter 22

PORTUGAL

Carlos Costa Andrade and Miguel Stokes[1]

I OVERVIEW OF RECENT ACTIVITY

Asset management is a vital source of economic growth, providing a link between investors seeking beneficial savings vehicles and the real economy's financing needs. This holds true for Portugal, where the asset management industry provides important employment opportunities, both in core asset management and related services.

At the end of 2012, the assets managed by the Portuguese asset management industry amounted to €94.074 billion, which continues to reflect the gradual slowdown in activity since 2008.[2]

	2008	*2009*	*2010*	*2011*	*2012*
Assets under management (€ billion)	115.266	128.692	122.886	99.202	94.074
Discretionary management	50.9%	51.1%	53.3%	54.2%	59.6%
Investment funds	49.1%	48.9%	46.7%	45.8%	40.4%

Discretionary mandates, in contrast with investment funds, are generally more conservatively invested with more exposure to low-yield debt. By way of contrast, the assets of investment funds tend to be more heavily invested in equity. In 2012, discretionary mandates represented 59.6 per cent of total assets under management in Portugal, compared with 40.4 per cent in investment funds, both open-ended and closed-ended, investing in securities or real estate.

1 Carlos Costa Andrade is a partner and Miguel Stokes is an associate at Uría Menéndez – Proença de Carvalho.

2 Asset Management Report, CMVM, 4Q, 2012.

The key factor behind such a large proportion of discretionary mandates in Portugal is the significant number of financial conglomerates operating an asset management company that carries out the group's general asset management by way of discretionary mandates.

Due to the financial crisis and the collapse in share prices, asset managers saw a sharp fall in the value of managed assets. The value of assets professionally managed in Portugal has fallen by approximately 27 per cent since 2009.

An important aspect of the industrial organisation of the Portuguese asset management industry is the extent to which asset management firms operate as standalone companies, or form part of financial services groups. The activities of such groups are usually dominated by a particular type of financial services, or may consist of a mix of asset management companies, banks and insurance undertakings.

With the implementation of Directive 2009/65/EC (the UCITS IV Directive), management companies will be permitted to manage cross-border funds and will not be required to appoint service providers in the fund's domicile, excluding the custodian bank. As such, asset management groups might reconsider the structure of their current service provider with a view toward creating an optimal structure. They could potentially reduce their number of management companies of cross-border UCITS and centralise their asset management, administration and risk management operations.

II GENERAL INTRODUCTION TO REGULATORY FRAMEWORK

i Asset management in Portugal

Asset management activities in Portugal are, in general, divided into five core areas:

a securities investment funds;
b real estate investment funds;
c pension funds;
d securitisation; and
e private equity and venture capital.

Securities investment funds and real estate investment funds

Investment funds are regulated under the legal framework on units of collective investment, codified in Decree-Law No. 252/2003 of 17 October 2003 on securities investment funds (as amended) and Decree-Law No. 60/2002 of 20 March 2002 on real estate investment funds (as amended). Both frameworks are regulated in more detail by CMVM Regulation 7/2007. This legal framework is construed in accordance with Directive 2001/107/EC (the UCITS III Directive).

As a result of the implementation of the UCITS IV Directive in Portugal, Decree-Law No. 252/2003 of 17 October 2003 will be replaced by the new framework on securities investment funds approved by Decree-Law 63-A/2013 of 10 May 2013 (Decree-Law 63-A/2013), which will enter in force four months after its publication.

Pension funds

The legal framework on pension funds and management entities is set out in Decree-Law No. 12/2006 of 20 January, implementing Directive 2003/41/EC into Portuguese law.

Pension funds are supervised by the insurance sector's regulator, the ISP.

Securitisation

Securitisation is another area of asset management, having been introduced into Portuguese law through Decree-Law No. 453/99 of 5 November, regulating the process of converting existing assets or future cash flows into marketable securities.

Private equity and venture capital

The legal framework for private equity and venture capital is set out in Decree-Law No. 375/2007 of 8 November and CMVM Regulation 1/2008, which establishes the main prudential rules.

ii Supervision in Portugal - the model of specialised supervision

Portugal's supervisory approach is based on three authorities: the Bank of Portugal, the ISP, and the Portuguese Securities Exchange Commission (the CMVM). These entities are distinct and independent of each other, forming a system referred to as institutional supervision.

The system is considered as specialised supervision given the existence of a supervisor for each financial sector: banking, insurance, securities and investment funds. Notwithstanding the apparent separation, the activities of financial entities are diversifying and interact in very significant ways, making supervision under this model more complex.

Indeed, banks have been carrying out transactions in capital markets and acquiring capacity to mediate insurance, thereby extending the range of services provided. There has been a general increase in the integration of financial services offered by financial conglomerates, providing services in sectors such as banking, insurance and collective investment schemes.

The goals of stability and financial health, traditionally linked to the banking sector, also started being an objective of the securities markets, which idiosyncratic risk is particularly significant, especially in clearing systems and counterparty structures for securities transactions.

Conversely, the Bank of Portugal was granted authority to supervise the conduct of credit institutions and financial companies. As such, this kind of supervision is no longer carried out exclusively by the ISP and the CMVM.

III COMMON ASSET MANAGEMENT STRUCTURES

In Portugal, the main structures used for asset management are investment companies and investment funds.

Investment companies are entities with legal personality that carry out one of the activities referred to in Section II, *supra*, or which purport to manage investment funds that pursue the activities mentioned in that section.

In contrast, investment funds are segregated assets lacking legal personality that are managed by a third entity – a managing entity (which may be an investment company) – which investment policy is determined upon its creation.

In terms of structure, funds may be open- or closed-ended.

Open-ended funds are funds that involve the investment of equity raised with the public and are subject to risk sharing and pursuing the interests of the participants. Open-ended funds are also associated with higher liquidity, where the unitholders are entitled to redeem units and be paid the corresponding net asset value.

Closed-ended funds in Portugal usually have a limited number of participants and the unanimous consent of all unitholders is usually required to amend the status quo of the fund, including any change to the investment policy or to allow the entrance of new unitholders.

The final topic to consider is a *tertium genus* – exchange-traded funds (ETFs) – characterised by (1) an investment policy based on replicating an index or a basket of securities and (2) its admission to trading on a regulated market, with higher liquidity resulting therefrom. Exchange-traded funds involve different types, such as leveraged ETFs, which value increases or decreases exponentially in accordance with the appreciation or depreciation of the underlying asset, and inverse ETFs, which value increases or decreases in connection with the depreciation or appreciation of the underlying asset.

Taking into account the concerns of European regulators regarding these instruments, it is likely that ETFs will soon be subject to more detailed regulation, both at international and domestic levels.

IV MAIN SOURCES OF INVESTMENT

On aggregate, institutional investors account for approximately 60 per cent of assets under management in Portugal, with retail clients accounting for the remaining 40 per cent. This statistic reflects Portugal's ability of attract large institutional mandates from insurance companies, while in other countries this generally comes from pension funds (e.g., the United Kingdom).

In this regard, assets managed for retail clients suffered a much sharper decline in 2008 than those managed for institutional clients. This occurred for two main reasons.

First, the equity exposure of financial portfolios tends to be higher for retail clients than for institutional investors in general. This is explained by the fact that European households tend to hold the majority of their financial wealth in cash, savings accounts and retirement products, which tend to be low-risk stores of value. Retail clients tend to resort to the expertise of asset managers for managing the portion of their savings that is invested in equity and balanced funds, shares and other types of assets carrying more risk.

Second, insurance companies and pension funds – the two largest categories of institutional clients – primarily invest in debt securities and investment funds, which are managed in-house or by third-party asset managers.

V KEY TRENDS

The main innovation expected in 2013 with regard to the regulations on asset management in Portugal is the transposition of Directive 2011/61/EU of 8 June 2011 on alternative investment fund managers (the AIFM Directive), which was due to be implemented by all Member States by 22 July 2013. Portugal was unable to meet the

deadline for the transposition of the Directive and, according to the CMVM, a draft bill of implementation is only expected to be submitted for public consultation around September 2013.

The AIFM Directive aims to provide an internal market for alternative investment fund managers (AIFMs) and a harmonised regulatory and supervisory framework for the activities of managing or marketing by an AIFM (whether EU or non-EU) of any alternative investment funds (AIFs) in a Member State, regardless of whether these are EU or non-EU, funds or investment companies, or open or closed-ended. An AIFM is any legal entity whose regular business is to manage AIFs. AIFs are defined as funds that (1) raise capital from investors, with a view to invest it in accordance with a defined investment policy for the benefit of those investors and (2) do not require authorisation pursuant to Article 5 of the UCITS Directive. AIFs therefore include a wide range of important institutional funds such as hedge funds, private equity funds or real estate funds. This notwithstanding, the AIFM Directive notably does not apply to the management of pension funds, employee participation or savings schemes, or funds supporting social security and pension systems.

The following are the most important aspects set out in and governed by the AIFM Directive:

a authorisation of AIFMs acting within the EU. In this regard the AIFM Directive sets out, *inter alia*:
- the information that an AIFM requesting must provide to the competent authorities of its home Member State upon application for authorisation;
- initial capital and own funds of the AIFM,
- the conditions for granting authorisation; and
- the conditions upon which an authorisation may be withdrawn;

b notification requirements set out for the marketing to professional investors within the EU AIFs managed by EU AIFMs and the management of EU AIFs established in Member States other than the home Member State of the AIFM;

c the conditions upon which authorised EU AIFMs are permitted to market non-EU AIFs to professional investors in the EU and the conditions upon which a non-EU AIFM can obtain an authorisation to manage an EU AIF or to market AIFs to professional investors in the EU with a passport;

d operating conditions for AIFMs, regarding notably:
- organisational requirements;
- implementation of remuneration policies and practices for those categories of staff, including senior management, risk takers and control functions, whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage;
- methodologies and systems for valuing assets of AIFs;
- conflicts of interest;
- risk-management systems; and
- delegation of AIFM functions;

e the obligations of AIFMs to appoint an independent depositary subject to high liability standard to perform depositary functions with respect to AIFs;

f special requirements for AIFMs that employ leverage on a substantial basis at the level of the AIF;

g disclosure obligations of AFIMs, which include the obligations to
- make available an annual report and to disclose information to investors for each of the EU AIFs managed and for each of the AIFs marketed in the EU;
- notify the competent authority of its home Member State of the proportion of voting rights of the non-listed company held by the AIF in the even that proportion reaches, exceeds or falls below certain thresholds; and
- notify the target company, its shareholders and the competent authorities of the home Member State of the AIFM, when a managed AIF acquires, individually or jointly, control of a non-listed company; and

h designation, powers and redress procedures of competent authorities to carry the duties set out in the AIFM Directive.

The AIFM Directive has two key aspects. On the one hand it gives a passport right for AIFMs to market and manage AIFs in the EU, but on the other hand, in exchange, it imposes an harmonised regulatory and supervisory framework for those activities in order to be able to monitor and control the risks arising from the AIFM to investors, financial markets and companies in which they invest.

The transposition of the AIFM Directive is expected to substantially change Portuguese laws on collective investment schemes. This is due to the fact that the AIFM Directive constitutes the first step towards an internal EU-level market for alternative investment funds, which as previously mentioned, covers a wide variety of important institutional funds that were previously regulated only at a national level.

VI SECTORAL REGULATION

i Securities and real estate

Open-ended funds

The incorporation of open-ended funds is subject to authorisation from the CMVM. After the authorisation is granted it can be withdrawn if certain circumstances are met, notably if there is not a dispersion of 25 per cent of the investment units by a minimum of 100 participants.

This type of fund involves the investment of equity raised from public sources and is subject to the principles of the allocation of risk and pursuing of the interests of the investors.

A prospectus must be prepared for each open-ended fund and delivered to its subscribers prior to the subscription of investment units.

Closed-ended funds

The incorporation of closed-ended funds is also subject to authorisation from the CMVM. The authorisation may be withdrawn on the same conditions as for open-ended funds, but as regards the dispersion requirement mentioned above, the minimum participants to consider in closed-ended funds is 30.

The term of closed-ended funds may not exceed 10 years, although they may be renewed for an equal period. If no term is established, authorisation for the creation of

the fund will only be granted if the incorporation documents foresee that the units will be listed and admitted to trading on a regulated market.

Unless otherwise established in the incorporation documents, unitholders of closed-ended funds hold a right of first refusal in connection with the subscription of new units.

Management entities

Both open-ended and closed-ended investment funds are offered by the managing companies, which may be management entities of collective investment funds or, in the case of closed-ended investment funds, credit institutions, such as banks, credit financial institutions or mortgage institutions.

The functions of management entities include (1) selecting the assets comprising the fund; (2) managing the fund's assets; (3) valuating the portfolio and the value of the units; (4) distributing profits; and (5) issuing and redeeming participation units; additionally for managing entities of securities investment funds, functions include conserving documents and marketing the participation units.

Managing entities of both securities investment funds and real estate investment funds must have own funds of at least (1) 0.5 per cent of the net value of the assets under management if the net value of the assets is not greater than €75 million; or (2) 0.1 per cent of the net value of the assets under management if the value of the assets is more than €75 million.

With the entry into force of Decree-Law 63-A/2013, the entities managing securities investment funds regulated under said Decree-Law will need to have own funds of at least equivalent to one-quarter of their previous year's fixed overheads. When the value of the assets under management is greater than €250 million, the managing entity will be required to have their own additional funds of 0.02 per cent of the net value of the assets under management exceeding that value.

Finally, both securities investment funds and real estate investment funds are prevented from carrying out specific transactions, including:

a contracting loans;

b acquiring, on their behalf, participation units in investment funds, excluding cash funds (and monetary market funds for managing entities of securities investment funds as of the entry in force of Decree-Law 63-A/2013), provided that they are not managed by them;

c acquiring, on their behalf, securities (financial instruments, as of the entry in force of Decree-Law 63-A/2013) of any nature (with some exceptions);

d acquiring real estate which is not indispensable for pursuing its commercial purpose; and

e short selling.

Managing entities of real estate investment funds are additionally prevented from granting loans and granting security.

Investment companies

In 2010, Portuguese legislation established a legal framework for securities investment companies and real estate investment companies, which differ from investment funds

and real estate investment funds given that the former have legal personality. Such companies may be self-managed (i.e., managed by its own management bodies, or by another company).

Furthermore, investment companies may be categorised as having either variable or fixed capital. Investment companies with variable capital correspond to open-ended investment funds, whereas investment companies with fixed capital correspond to closed-ended funds.

As with investment funds, investment companies must receive authorisation from the CMVM.

Each investment company might be divided into different compartments. The assets of each compartment are independent and segregated from the investment company, as well as from the assets of other compartments. The creation of each compartment is subject to authorisation from the CMVM.

Hedge funds

With regard to hedge funds in particular, there are no national funds established in Portugal that can really be characterised as hedge funds, neither are there any foreign hedge funds registered for investment by the public. There is, however, a recognised category of fund – the special investment fund – that has some characteristics in common with hedge funds. Of course, this does not mean that hedge fund activity is not seen in Portugal or does not play its part in transactions involving Portuguese companies, as the examples of hedge fund activity set out below illustrate.

That said, hedge funds do not generally play an active role in the conduct and affairs of the companies in which they have an interest in the Portuguese market. In many cases, their exposure to companies is obtained by means of synthetic positions that do not provide them with voting rights or any other possibilities of influencing the course of their businesses. But even when they do possess these rights, their position tends to be of a strictly financial nature and they do not, as a general rule, intervene in the outcome of deals or in the definition of corporate strategy. Whether that changes as the effects of the financial crisis continue to be felt remains to be seen.

ii Pensions

Pursuant to the Portuguese legal framework, the assets of pension funds exclusively cover pension plans underlying the funds, the payment of management and deposit remuneration, and the payment of insurance premiums.

The obligations under pension plans are borne exclusively by the fund's assets or by the assets of each specific compartment of the fund whose net assets are the only security.

Pension plans can be classified as:

a plans with a defined benefit, in which the benefits are previously defined and contributions are calculated in order to guarantee the payment of the benefits;

b plans of defined contribution, in which contributions are previously defined and benefits are determined pursuant to the amount of contributions delivered and accumulated income; and

c mixed plans, which combine features of both types (a) and (b).

With regard to the financing structure, pension plans can be divided into contributive plans (involving contributions from participants) and non-contributive plans (which are financed exclusively by the associate).

Pension funds may be structured as either opened-ended or closed-ended. Open-ended pension funds do not require a connection to exist between the participants; participation is exclusively dependent on acceptance by the managing entity. Closed-ended funds relate to one or more associates with a common corporate, associative, professional or social nature interest. When there is plurality of associates, authorisation is required from each associate to admit new participants.

Pension funds may be managed by companies incorporated exclusively for that purpose or by insurance undertakings that legally operate in the life insurance sector and hold a permanent establishment in Portugal.

iii Securitisation

The state and public legal persons, as well as credit institutions, financial companies, insurance undertakings, pension funds and pension fund management companies are entitled to assign credits for securitisation purposes, as are other legal persons whose accounts for the previous three years have been legally certified by an auditor registered with the CMVM.

Only securitised funds and securitised companies – with the same difference as that between investment funds and investment companies, referred to in Section VI.i – are permitted to acquire credits for securitisation.

Only credits that satisfy all of the following prerequisites may be granted for securitisation purposes:

a their transfer may not be subject to legal or contractual requirements;
b they are pecuniary in nature;
c they are not subject to any conditions;
d they are not subject to litigation;
e they have not been granted as a guarantee; and
f they have not been judicially pledged or subject to charges or encumbrances.

Securitisation funds

Securitisation funds are independent and segregated assets which jointly belong to a group of legal or natural persons. Securisation funds will not, under any circumstances, be held responsible for debts incurred by these persons, by entities responsible for their management, or entities from which the credits have been assigned. The creation of securitisation funds requires prior authorisation from the CMVM.

Funds may invest their assets in the initial or subsequent acquisition of credits, which may not represent less than 75 per cent of the fund's assets. Funds may, as an ancillary activity, apply their liquidity reserves in the acquisition of securities listed on a regulated market and short-term public or private debt securities, provided that such actions are appropriate for the efficient management of the fund.

Securitisation units grant their holders the following cumulative or exclusive rights:

a the right to receive periodic returns;
b the right to redeem the par value of securitisation units; and

c upon termination of the liquidation of the fund and apportionment of the proceeds, the right to receive a proportional quota from the amount remaining after the fund has made payment of periodic returns and all other expenses and charges.

Securitisation companies

Securitisation companies must be public limited companies and have as their sole purpose the performance of credit securitisation transactions by means of the acquisition, management and conveyance of credits and the issuance of securitised bonds in order to repay the assigned credits. The creation of securitisation companies requires prior authorisation from the CMVM.

Securitisation companies may only assign credits to securitisation funds and other securitisation companies.

Securitisation bonds

Securitised bonds fall under multiple categories on the basis of the guarantees established in favour of their beneficiaries, rates of remuneration (whether fixed or floating) and rank. Securitised bonds must have maturity dates that are appropriate in view of the maturity of the underlying credits.

The redemption and remuneration of securitised bonds and the payment of expenses and charges related to the issuance may only be guaranteed by:

a credits directly related to them;
b the proceeds of their redemption;
c the income they generate; or
d other guarantees or risk coverage instruments taken out in connection with their issuance.

Other assets of the securitisation company issuing the securitised bonds may not be used for that purpose.

iv Private equity

As defined by Portuguese law, private equity involves acquiring, for a limited period of time, equity and debt instruments in companies with high development potential in order to benefit from future appreciation.

Private equity activities can be carried out through three different structures: private equity companies, private equity funds and individual private equity investors.

Supervision is carried out by the CMVM, with whom the above entities must register before starting activities.

Private equity companies, private equity funds and individual private equity investors may not enter into transactions not related to its scope or the respective investment policy, invest more than 50 per cent of the respective assets in securities admitted to trading on a regulated market, or hold equity instruments or securities, convertible or exchangeable instruments granting right to acquire the same, or debt instruments, for a period of time (continuous or combined) exceeding 10 or five years, depending on whether it is a private equity company or a private equity fund, respectively.

Private equity funds are independent and segregated assets, with no legal personality, and belong to the respective unitholders. They are managed by managing companies, which may be private equity companies, regional development companies and entities legally able to manage closed-ended securities investment funds.

The private equity assets are evaluated, at least once every six months. The methods and criteria for evaluating the assets of the private equity fund and the private equity company must be expressly established in the corresponding management regulations, internal regulations, annual report and accounts. The methods are consistently utilised in successive financial years.

For non-listed assets valuation is made through the fair value method and the conservative value method. The fair value method uses the value obtained on the basis of the following:

a materially relevant transactions carried out in the six months preceding the valuation;

b multiples of comparable companies with reference to the sector of activity, size and yield; and

c discounted cash flows.

The conservative value method is based solely on the acquisition method.

For listed assets evaluation is made through one of the following methods:

a the last best purchase offer available at the reference time;

b the average between the last best purchase offer and sell offer available in the reference time; and

c the last simple or reference price available at the reference time.

VII TAX LAW

i Securities investment funds

Portuguese tax law provides special tax rules only for income derived from securities investment funds that are created under Portuguese law. Thus, the special rules do not apply to income derived from non-resident securities investment funds (which are taxed under the same rules as apply to other non-resident entities).

Under the special tax regime applicable to income derived by a Portuguese-resident securities investment fund, the following rules apply:

a Income from a Portuguese source received by the securities investment fund, except for capital gains, is subject to a final withholding tax under the same rules as apply to resident individuals. If no withholding tax is due, a flat rate of 25 per cent must be levied and paid by the securities investment fund.

b Income from a foreign source received by the securities investment fund, except for capital gains, is subject to tax at a flat rate of 20 per cent in the case of income derived from bonds, shares or investment funds units, and of 25 per cent in all other cases.

c The positive difference between capital gains and capital losses from Portuguese on foreign source obtained by the securities investment fund is subject to tax of a flat rate of 25 per cent.

Income derived by a Portuguese-resident company from investment units held in Portuguese securities investment funds is exempt from withholding tax, but the investor must include it in its taxable income subject to the standard corporate income tax (CIT) rate, as applicable. In this case, the withholding tax paid or the tax payable by the securities investment fund is in the nature of a payment on account of the final tax due from the investor and, should the relevant income arise at the level of the securities investment fund from a profit distribution or from the liquidation of a corporate entity resident in Portugal and subject to CIT, the investor is entitled to deduct 50 per cent of the income for taxation purposes.

An exemption applies to income paid by a securities investment fund to individuals (whether resident or non-resident), as well as to non-resident companies.

These rules (regarding both taxation of the income and gains derived by the securities investment fund and taxation of the investors regarding the income and gains derived with respect to their investment units) also apply to securities investment companies created under Portuguese law.

ii Real estate investment funds

Income derived by a real estate investment fund created under Portuguese law is generally subject to the following tax rules:

a Income derived from real property after the deduction of conservation and maintenance costs and real property tax, is subject to tax at a flat rate of 25 per cent. Any tax eventually withheld (as a general rule, income derived by real estate investment funds is exempt from withholding) is deemed a payment on account of the final tax due.

b Capital gains arising from the transfer of real property are subject to tax at a flat rate of 25 per cent on 50 per cent of any positive difference between capital gains derived and capital losses incurred.

c Other income derived in Portugal that does not qualify as a capital gain is subject to withholding tax on the same terms as if it were derived by an individual resident in Portugal. If the relevant income is not subject to withholding tax, a separate tax is imposed at a 25 per cent rate on the net value obtained in each year.

d Income derived outside Portugal that does not qualify as a capital gain is subject to tax at a flat rate of 20 per cent in the case of income derived from debt securities, shares or units in investment funds and of 25 per cent in any other case, on the net value obtained each year.

e Other capital gains (not related to property) derived in Portugal or in a foreign country are subject to tax on the same terms as if they were derived by an individual resident in Portugal, at a flat rate of 25 per cent.

Income and gains derived by investors with respect to investment units held in a Portuguese real estate investment fund are subject to the same tax regime as applies to income and gains derived by investors with respect to investment units held in securities investment funds, as explained in Section VII.i, *supra*. These rules (regarding both the taxation of income and gains obtained by the real estate investment funds and the

taxation of the investors regarding income and gains obtained with respect to investment units) also apply to real estate investment companies created under Portuguese law.

iii Pension funds

Income derived by pension funds created under Portuguese law is generally exempt from tax. Provided certain conditions are fulfilled, contributions made by a company to a pension fund for the benefit of its employees are deductible for CIT purposes.

iv Private equity

Private equity companies are entitled to deduct from their taxable income (as computed after the deduction of any losses carried forward) investments made in companies with potential growth and capital appreciation. The deduction is limited to the sum of the CIT due in the previous five tax years (this deduction may be taken in the tax year in which the relevant investment is made or, otherwise, in the following five tax years).

Income derived from private equity funds created under Portuguese law are exempt from taxation.

Income derived by a Portuguese-resident company from investment units held in a Portuguese private equity fund is generally subject to 10 per cent withholding tax on account of the final tax due (the investors must aggregate this income with their remaining taxable income subject to the standard CIT rate, as applicable). Should the relevant income arise from a profit or from the liquidation of a company resident in Portugal and subject to CIT, the investors are entitled to deduct 50 per cent of the income for tax purposes.

As a general rule, income and gains derived by non-resident entities and individuals from investment units held in Portuguese private equity funds are exempt from tax in Portugal (except in the case of non-resident investors resident in a listed tax haven or that are more than 25 per cent held, directly or indirectly, by Portuguese residents, which will be subject to tax at a flat 10 per cent rate).

VIII OUTLOOK

The legal framework regulating the creation and operation of different asset management structures in Portugal has been recently modified (and it is planned to be again very soon) and is prepared to respond to the difficulties arising from the financial crisis.

In this regard, Portuguese legislation on asset management already grants the supervisors of Portugal's financial sector – the Bank of Portugal, the CMVM and the ISP – a wide array of powers to control and sanction the activity of asset managers under Portuguese jurisdiction.

Furthermore, the legal framework for asset management for each sector establishes capital requirements designed to discourage excessive risk-taking. In particular, this is carried out through restrictions on the percentage of assets that may be invested in one sole entity and on the level of leverage that can be raised to finance the corresponding investment policy.

The main novelty expected for 2013 is the transposition of the AIFM Directive into Portuguese law, with the changes mentioned in Section V, *supra*. This legislation will

be an important tool to improve Portugal's position in terms of asset management, with more funds being commercialised in Portugal, more asset managers carrying out business in Portugal and more foreign institutional and retail players investing in the Portuguese market for asset management.

Appendix 1

ABOUT THE AUTHORS

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Tomás José Acosta Álvarez joined Uría Menéndez in Madrid in 2008 and has worked out of the firm's London office since October 2012. His practice focuses on corporate law, M&A, finance, investment funds, private equity and capital markets.

CARLOS COSTA ANDRADE

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Carlos Costa Andrade has been a partner in the Lisbon office of Uría Menéndez – Proença de Carvalho since 2005. Between 1996 and 1999 he was in-house counsel (Issuers and Market Division) at NYSE Euronext Lisbon – Sociedade Gestora de Mercados Regulamentados SA.

His practice includes M&A, capital markets and banking laws. He has advised on takeovers and other public M&A transactions, public offers and listings of shares, structured bonds and other complex securities, regulated and non-regulated securities markets, regulatory authorities on the drafting of new regulations, corporate governance and structured finance agreements.

Mr Andrade is currently the secretary to the shareholders meeting of OPEX – Sociedade Gestora de Mercado de Valores Mobiliários Não Regulamentado SA and is a member of the Equity, Fixed Income and Derivatives Committee of BM&FBOVESPA – Bolsa de Valores, Mercadorias e Futuros.

Mr Andrade is among the most highly regarded banking and finance and capital markets lawyers in Portugal according to *Chambers Global Portugal* and *Chambers Europe*, *IFLR 1000 Portugal* and *Legal 500*.

JUAN CARLOS MACHUCA SIGUERO

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Juan Carlos Machuca Siguero joined Uría Menéndez in Madrid in 1996 and has worked out of the firm's London office since January 2000. He is the current resident partner in the London office.

Mr Machuca's practice focuses on corporate law, banking, finance, regulatory, investment funds, private equity and capital markets. He also advises clients on M&A transactions and on insolvency and restructuring proceedings.

In 2007, he was one of the winners of the *Iberian Lawyer* 40 Under Forty Awards, which recognise the achievements of the new generation of top lawyers in Spain and Portugal.

MIGUEL STOKES

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Miguel Stokes joined the Lisbon office of Uría Menéndez – Proença de Carvalho in September 2009 as a trainee and became a junior associate in September 2011. His practice is focused on M&A, corporate finance and securities law.

Mr Stokes assists entities of different sectors and activities, including in the incorporation and development of their activities, corporate restructurings, negotiation of national and international structured financings, especially of acquisition finance, mergers, privatisations, debt and equity offerings, admission to trading of shares and other financial instruments and regulatory advice.

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