

International **Comparative** Legal Guides



Public Investment Funds **2020**

A practical cross-border insight into public investment funds

Third Edition

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1 Registration

1.1 Are funds that are offered to the public required to be registered under the securities laws of your jurisdiction? If so, what are the factors and criteria that determine whether a fund is required to be registered?

Yes. Spanish funds and third-country funds offered to the public require prior authorisation from the Spanish National Securities Market Commission (“CNMV”), the Spanish authorising, supervisory and control authority. Therefore, funds shall not carry out their activities until duly authorised by the CNMV, and once the key investment information document (“KIID”) and information brochure are registered in the relevant CNMV’s administrative register. Please note that the registration of funds at the Spanish Commercial Register is optional.

For UCITS open-ended harmonised funds, the Spanish statutory framework is mainly composed of *Law 35/2003, of 4 November, on Collective Investment Schemes applying to open-ended funds* (“Law 35/2003”), and *Royal Decree 1082/2012, of 13 July, approving the Regulation for the Development of the Collective Investment Schemes Law* (“RD 1082/2012”). The most relevant development has been the approval of Royal Decree 1464/2018 of 21 December in order to complete the transposition of MiFID II to the Spanish legal framework. For the purpose of this questionnaire, the most relevant issue is the new regime for the research cost which implies that research and transactions fees are unbundled in order to provide investors with a more transparent regime. Please note that all references in this chapter to Spanish legislation include the proper amendments carried out in the last years in order to transpose all relevant EU Directives.

Since Spain is a Member State of the European Union, the freedom to provide financial services throughout the European territory applies, so funds already authorised in any of the EU Member States may be able to carry out their activities on a cross-border basis through the EU passport, which mainly requires prior communication by the relevant authority of the fund’s home Member State to the CNMV, and the submission of relevant information of the fund and its management company. In registering non-EU registered funds, please note that the CNMV applies the reciprocity principle.

1.2 What does the fund registration process involve, e.g., what documents are required to be filed?

To address this question, a distinction must be made between (i) Spanish funds, and (ii) third-country funds (non-EU funds), although in both cases, the registration process involves the

filing of an application before the CNMV that must be accompanied with several documents related to the fund and its management company.

In case of Spanish funds, under article 10.2 of Law 35/2003, the registration process involves filing an application before the CNMV, which will be accompanied with the following documents: (i) a report; (ii) a certificate of professional competence and good repute of the fund’s directors and managers; (iii) any further data, reports and information which is considered necessary to verify the fulfilment of the requirements and conditions for the authorisation and registration of the fund; (iv) the prospectus; (v) the KIID; and (vi) its management regulations of the fund.

In order to facilitate this process, during 2019 several guides have been published by the CNMV, more specifically, the Technical Guide 3/2019 on the authorisation procedure for new firms, which offers entities the possibility of more structured initial contacts with the CNMV (pre-notifications), aimed at facilitating the identification of the most relevant aspects for the processing of the application prior to the start of the formal processing of the file, as well as indications to be taken into account when submitting documents.

In case of third-country funds (non-EU funds), prior to its authorisation, the following conditions shall be evidenced to the CNMV:

- (i) that the Spanish laws regulate the same category of fund, and that the fund itself or its management company is subject, in its home country, to specific regulations protecting the interests of the unitholders, similar to the existing regulations in Spain;
- (ii) a favourable report from the fund’s home country authority responsible for the control and inspection of the fund or its management company;
- (iii) the existence of proper cooperation agreements signed between the CNMV and the relevant authorities in the fund’s home country; and
- (iv) the fund’s home country shall not be included in the GAFI’s list of non-cooperative countries and territories (“NCCT”) on money laundering.

Once the aforementioned conditions are proven, the SGIIC shall submit and register in the relevant CNMV’s registry the following information: (i) the identification and domicile of the fund which is intended to be marketed in Spain; (ii) any information concerning the method of distribution of units and shares in Spain; (iii) the fund’s rules or company incorporation documents, including the last annual report; (iv) the prospectus (or equivalent document); (v) the identification of the depositor; (vi) the fund description and any other information available to investors; (vii) measures adopted to avoid marketing to

retail investors; and (viii) documentation evidencing that the fund or its SGIIC is subject to the relevant regulation and statutory provisions in its home country.

Finally, for the proper authorisation of the fund by the CNMV, both the fund and its SGIIC shall be registered at the CNMV. Once they have been authorised and registered, the SGIIC must provide the unitholders with: any payments due; the acquisition by the fund of their units or the redemption of their units; the dissemination of the information that must be provided to the unitholders resident in Spain; and, in general, the exercise of their rights in relation to their investment.

1.3 What are the consequences for failing to register a fund that is required to be registered in your jurisdiction?

Marketing and distribution of units of funds to investors without prior authorisation from the CNMV constitutes a very serious infringement under article 80 of Law 35/2003. The sanctions that may be imposed by the CNMV to a management company (“SGIIC”) in case of infringement of the prior authorisation and registration requirement are:

- (i) a fine of an amount greater than the equal and up to five times the gross profit obtained as a consequence of the acts or omissions in which the infraction consists. If the benefit obtained from the infringement is not quantifiable, a fine of up to EUR 300,000;
- (ii) a revocation of the authorisation with definitive exclusion of the special registers. In cases where the entity itself or the SGIIC is a foreign institution authorised within other Member States of the European Union, the revocation will be replaced by the prohibition to operate or be marketed in Spain;
- (iii) a temporary exclusion of the non-complying entity from the special registers, for not less than two years and not more than five years;
- (iv) a suspension or limitation of the type or volume of transactions that the infringer may carry out for a term not exceeding five years; or
- (v) the mandatory replacement of the depositary, where appropriate.

Furthermore, other sanctions may be imposed on individuals responsible for the infringement who hold directorship or management positions:

- (i) an individual fine of not more than EUR 300,000;
- (ii) removal from office including disqualification from exercising directorship or management responsibilities, whether in the entity or in any other financial institution of the same nature for a maximum period of 10 years; or
- (iii) the suspension of the exercise of their position for a period of up to three years.

Moreover, a public reprimand may be imposed, including the publication of a statement in the Spanish Official State Gazette (“*Boletín Oficial del Estado*”), stating both the identity of the infringer, the nature of the infringement and sanctions imposed.

1.4 Are there local residency or other local qualification requirements that a fund must meet in order to register in your jurisdiction? Or are foreign funds permitted to register in your jurisdiction?

Local residence and other local qualification requirements only apply for Spanish-based funds or management companies (“SGIICs”) registered in Spain, and for those third-country funds (non-EU funds) intended to be marketed or distributed in Spain.

Thus, those funds or SGIICs which carry out their activities in Spain will be subject to local residence or qualification requirements, except in those cases where the SGIIC is already authorised to carry out its activities in Spain on a cross-border basis pursuant to the EU passport.

2 Regulatory Framework

2.1 What are the main regulatory restrictions and requirements that a public fund must comply with in the following areas, if any? Are there other main areas of regulation that are imposed on public funds?

i. Governance

Under Law 35/2003, public investment funds shall be managed by a SGIIC and choice of a depositary. In addition, in order to access and exercise the marketing of funds in Spain, all the managers and directors of the fund shall be persons of good repute and have professional competence. To evaluate professional competence, the CNMV will assess all of the available information on each individual.

ii. Selection of investment adviser, and review and approval of investment advisory agreement

There are no specific requirements regarding the selection of an investment adviser. However, the selected adviser must comply with the general rules under the Spanish statutory regulations regarding professional competence and good repute requirements and the selection of the relevant investment adviser must not imply any conflict of interest for the entity.

Furthermore, and although investment advisers may only issue recommendations, they may also advise the SGIIC on any relevant aspect, provided that they comply with the statutory provisions. Thus, the investment adviser may recommend the purchase or the selling of certain securities, when to carry out the relevant transaction and the order to be executed, etc.

The prospectus will include the legal name of any external investment adviser, all the conditions regarding their engagement which may be of relevance for the participants, including a reference to the assessment costs that will be incurred by the fund.

iii. Capital structure

The initial share capital depends on the type of the fund: (i) article 76 of RD 1082/2012 provides for an initial share capital requirement of EUR 3,000,000 in case of financial investment funds; and (ii) article 93 of RD 1082/2012 provides for an initial share capital requirement of EUR 9,000,000 in the case of real estate investment funds.

If a financial investment fund is constituted by compartments, each of them shall have a minimum share capital of EUR 600,000 and the aggregate of all compartments shall not be less than EUR 3,000,000.

There is an exception in relation to the minimum initial share capital requirement of funds or those funds incorporated by compartments. Funds can be established with an initial share capital of EUR 300,000 and EUR 60,000 in case of funds constituted by compartments, provided that, within a period of six months since the registration date in the relevant CNMV register, these funds achieve the minimum initial share capital of EUR 3,000,000. In case the fund does not meet the minimum share capital requirement within the aforementioned period of six months, the fund shall then be wound up.

If a real estate investment fund is incorporated by compartments, each of them shall have a minimum share capital of EUR 2,400,000 and the aggregate of all compartments shall not be less than EUR 9,000,000.

Moreover, the initial share capital shall be entirely issued and disbursed, subject to the exception mentioned in the paragraph above.

iv. Limits on portfolio investments

Regardless of the assets constituting the object of investment of the relevant fund, and under Law 35/2003, all entities shall carry out their investments in compliance with the following principles:

- (i) Liquidity: funds must have sufficient liquidity according to their own nature, its participants and the assets in which they invest in.
- (ii) Risk diversification: entities should limit the concentration of counterparty risk, thereby ensuring sufficient diversification.
- (iii) Transparency: funds must clearly define its investment profile, which will be reflected in the information they provide.

Moreover, funds must comply with the relevant statutory provisions and Spanish regulations in terms of eligible assets for investment (which will depend on the type of fund, i.e. financial or non-financial funds), investment rules and obligations towards third parties. Those requirements are foreseen, in respect of financial funds, in articles 29 to 31 of Law 35/2003 and 48 to 53 of RD 1082/2012, and, regarding non-financial funds, in articles 36 and 38 to 39 of Law 35/2003 and 90 to 93 of RD 1082/2012.

v. Conflicts of interest

Under RD 1082/2012, management companies (“SGIICs”) shall be organised and structured in such a way that they are able to identify and avoid any potential risk which leads to damage of the institution itself or its clients as a consequence of a conflict of interest arisen between:

- (i) the SGIIC and the funds (or other IICs) it manages or its investors;
- (ii) the directors, employees or a relevant person of the SGIIC, or someone who has a direct or indirect control relationship with the SGIIC, the funds (or other IICs) it manages or its investors;
- (iii) clients;
- (iv) the funds (or other IICs) managed by the SGIIC or its investors and other clients of the SGIIC; and
- (v) the funds (or other IICs) managed by the SGIIC or its investors and any other IIC managed by the same SGIIC or its investors.

For such purposes, the SGIIC must have an appropriate written policy on management of conflicts of interest, according to the size of the organisation and the nature, level and complexity of its activities.

The SGIIC shall guarantee an adequate independence and separation between those tasks and responsibilities which may eventually be considered as incompatible or which could give rise to systematic conflicts of interests. The policies and procedures established in the organisation shall guarantee the existence of a regularly updated registry of those transactions and activities carried out by the SGIIC or in their name in which a conflict of interest emerged or could potentially emerge.

Regarding related transactions, RD 1082/2012 foresees a special regime on conflicts of interest.

vi. Reporting and recordkeeping

Regarding reporting and recordkeeping obligations, a distinction must be made between: (i) the information that must be provided and disclosed to the participants, shareholders and public in general; and (ii) the reporting requirements to the CNMV.

Those SGIICs managing funds must make available to its participants, and to the public in general, the following information and/or documentation: (i) the prospectus; (ii) the KIID; (iii)

immediately, any relevant facts which may affect either the situation or performance of the entity; (iv) an annual report; (v) a semi-annual report; and (vi) two quarterly reports. The content of these documents and information is set forth in articles 23 to 25 and 26 to 30 of RD 1082/2012.

Furthermore, SGIIC must provide the CNMV with: (i) any information regarding the principal markets and instruments in which the SGIIC trades on behalf of the fund; (ii) the main instruments in which the fund trades; (iii) the principal exposures and concentrations of each of the funds it manages; (iv) an annual report of each of the funds managed or marketed by the SGIIC; and (v) prior to the end of each quarter, a detailed list of all the funds (and any other IICs) it manages. Moreover, and on a quarterly basis, the SGIIC of the funds must provide the CNMV with the identification of the participants that, during the relevant quarter, have increased, decreased or acquired certain percentages of units (triggers set at 20%, 40%, 60%, 80% or 100%).

vii. Other

Pursuant to article 21 of Law 35/2003, the annual accounts of public investment funds shall be audited. There are no other relevant requirements or restrictions; however, we do recommend undertaking an in-depth analysis on a case-by-case basis.

2.2 Are investment advisers that advise public funds required to be registered and/or regulated in your jurisdiction? If so, what does the registration process involve?

It depends on the type of adviser. The most common advisers are regulated investment firms (i.e. securities companies, securities agencies, portfolio management companies and independent advice companies), and other companies and agencies.

Under *Royal Decree Law 4/2015, approving the Consolidated Text of the Spanish Securities Market Act* (“Spanish Securities Market Act”), regulated investment firms are subject to an activity reservation, so they require prior authorisation from the CNMV before carrying out their activities. The request for authorisation will include the relevant statutory documentation, the activities programme and information regarding the measures and organisation of the entity. Moreover, they must be incorporated under the legal form of a public limited company, have an internal code of conduct, a business plan and must comply, among others, with the minimum share capital and financial requirements, and suitability of its directors and managers. Moreover, and prior to the commencement of its activities, the regulated adviser shall be registered in both the Commercial Register and in the relevant administrative register of the CNMV. In case of individuals, registration in the CNMV will suffice.

Furthermore, under Law 35/2003, it must be noted that the SGIIC may also carry ancillary activities as an investment adviser regarding one or multiple financial instruments, subject to prior authorisation by the CNMV and the amendment of its articles of association, where appropriate.

Finally, it must be noted that regulated investment firms and SGIICs acting as investment advisers are subject to supervision by the CNMV.

2.3 In addition to the requirements above, are there additional regulatory restrictions and requirements imposed on investment advisers that advise public funds?

There are no other requirements or restrictions from a UCITS perspective, but in the rendering of investment services,

investment advisers shall observe the obligations imposed by MiFID II that were fully transposed in 2018. We recommend undertaking an in-depth analysis on a case-by-case basis, especially regarding the type of client, profile of the UCITS and type of investment service being rendered.

2.4 Are there any requirements or restrictions in your jurisdiction for public funds investing in digital currencies?

The CNMV considers that a collective investment scheme investing in digital currencies cannot be registered as a public investment fund (UCIT open-ended harmonised fund), only as an alternative investment fund (“AIF”) governed by Law 22/2014, of November 2014, regulating private equity entities and other closed-ended investment entities.

In addition, aligned with the European Securities and Markets Authority (“ESMA”), the European Banking Authority (“EBA”) and European Insurance and Occupational Pensions Authority (“EIOPA”) criteria, the CNMV and Bank of Spain have highlighted the risk of virtual currencies for consumers.

It will be necessary to await updates from the European Commission, which published a public consultation at the end of 2019 to assess the creation of a regulatory framework for digital currencies.

2.5 Are there additional requirements in your jurisdiction for exchange-traded funds?

Exchange-traded funds (“ETFs”) are considered collective investment schemes and therefore subject to the requirements provided by Law 35/2003 and the RD 1082/2012. There are no other additional requirements.

However, since ETFs are traded in a specific segment of the “SIBE” electronic trading platform (the interconnection for the country’s four Stock Exchanges), it will be mandatory to observe the criteria for admission to trading and compliance with listing conditions and with the obligations established by MiFID II in terms of transparency.

3 Marketing of Public Funds

3.1 What regulatory frameworks apply to the marketing of public funds?

The Spanish legal framework for the marketing of public funds is mainly composed by: (i) Law 35/2003; (ii) RD 1082/2012; (iii) the Spanish Securities Market Law, which states, in general terms, the basic conditions for marketing materials; (iv) *Act 34/1998, of 11 November 1998, for advertising*; and (v) *Royal Decree 217/2008, of 15 February 2008, on investment firms*, and *Royal Decree-Law 21/2017, transposing MiFID II*.

3.2 Is licensure with a regulatory authority required of persons (whether entities or natural persons) engaged in marketing activities? If so: (i) are there commonly available exceptions that may be relied on?; and (ii) describe the level of substantive regulation applied to licensed persons.

Those SGIICs which carry out marketing activities by themselves or through their own agents or representatives must submit to the CNMV its activities statement evidencing its intention together with an explanatory report on how these

activities will be carried out and justifying its capacity to fulfil the requirements further established by the CNMV.

Under article 95 of RD 1082/2012, when marketing activity is directly performed by the SGIIC, the opening and closing of both Spanish and foreign branches shall be reported to the CNMV. Moreover, when marketing is conducted by agents or representatives, the following requirements must be fulfilled:

- (i) prior (a) communication by the SGIIC to the CNMV, including a specific mention stating that the relevant agent or representative complies with the professional competence and good repute requirements, (b) registration in the Commercial Register, and (c) granting of the relevant power of attorney. They are also required to have the proper administrative and accounting organisation, as well as the human and material resources, in relation with its objectives;
- (ii) neither agents nor representatives must have a labour relationship with the company (or any of its group entities). In case of a legal person, the performance of marketing activities must be compatible with its company purpose;
- (iii) these relationships must be formalised through the granting of a power of attorney that must specify the territorial scope of action, companies and investment funds included, type of clientele and the manner of execution of acquisitions or subscriptions and disposals or reimbursements. In addition, entities may subscribe an agreement which regulates different aspects of the representation (i.e. obligations arising from the contract, incompatibility regime, where applicable, commission billing systems and the rules of conduct for the agent or representative);
- (iv) they cannot carry out their activities through contracted sub-agents or establish any legal relationship creating any personal link with the clients;
- (v) in any of the activities carried out by agents or representatives with clients, they shall clearly identify themselves as representatives of the company; and
- (vi) those agents or representatives of the SGIIC being legal entities must comply with a minimum share capital requirement.

The SGIIC shall implement the appropriate internal control measures and procedures of the activities performed by its agents or representatives to monitor their transactions and relationships with shareholders and participants. Prior to the formalisation of the power of attorney, the entity shall verify the sufficiency and adequacy of the administrative organisation and means, operating procedures, internal control and accounting and, where appropriate, computer systems that will be used to carry out their activities. In case of a legal person, the verifications must include its economic and financial situation. Therefore, the designation of agents and representatives is subject to successful verification of the aforementioned information.

Any delivery of funds shall be made directly between the management company and the investor, without the funds being able to be, even temporarily, in the possession or in the account of the agent or representative. Under no circumstances may the units of the unitholders be in the possession or deposit of the agents or representatives.

3.3 What are the main regulatory restrictions and requirements in the following areas, if any, that must be complied with by entities that are involved in marketing public funds?

i. Distribution fees or other charges

Both SGIICs and depositaries may receive, respectively, management fees or custodian fees from the funds. In case of SGIICs, they must receive subscription and reimbursement fees from the

participants. It may also be possible to apply subscription and reimbursement fees in favour of the funds.

The aforementioned fees will represent a percentage of the fund's assets or performance (or a combination of both) or, as the case may be, the net asset value of the participation, which may not exceed the limits foreseen in the relevant regulations. The prospectus and the KIID must provide for the method of calculation and the maximum limit of the fees, the commissions effectively charged and its beneficiary.

Notwithstanding the foregoing, different fees may be charged to the different classes of units issued by the same fund. In any case, the same management and depositary fees will be applied to all units pertaining to the same class.

ii. Advertising

Advertising activities aimed at promoting the subscription or acquisition of units of a fund will be subject to the general rules set forth in the relevant Spanish regulations and statutory provisions (i.e. the information provided shall be reliable and not misleading).

However, it must be noted that any publicity containing an invitation to acquire units of a fund should indicate the existence of both the prospectus and the KIID, including the place and means for obtaining them. This publicity cannot contradict or diminish the importance of the information contained in either the prospectus or the KIID.

Moreover, it must be noted that, under article 81 of Law 35/2003, the performance of advertising activities infringing the general rules provided therein will constitute a severe infringement.

iii. Investor suitability

Public funds can be marketed and distributed to both retail and professional investors. Please note that the framework provided by MiFID II, has reinforced the level of transparency and protection for retail investors.

iv. Custody of investor funds or securities

Depositaries are those entities which deposit and custody securities, cash and, in general, any assets constituting the object of the fund. Those entities may be banks, savings banks, credit unions, securities companies and securities agencies, provided they hold the condition of a participating entity in the clearing, settlement and registration systems in the relevant markets in which they will carry out their activities.

The depositary must have its registered office or branch, as the case may be, located in Spain and each institution will have a sole depositary. In general terms, no entity can be simultaneously the manager and the depositary of the same entity (except in the cases expressly provided for in the relevant regulations).

The designation of a depositary shall be made by means of a written contract. Furthermore, depositaries shall be authorised by the CNMV and registered in its relevant administrative register.

Also, the depositary of a fund may delegate to third parties who, in turn, can sub-delegate a custodian function in respect of the assets, provided that such third party complies with all of the relevant requirements to act as a depositary, and any conditions, including that there is an objective reason that justifies the delegation.

3.4 Are there restrictions on to whom public funds may be marketed or sold?

Funds can be marketed to both professional investors and retail investors, with the observance of the relevant applicable statutory requirements.

3.5 Are there other main areas of regulation that are imposed with respect to the marketing of public funds?

There are no other areas of regulation imposed regarding the marketing of public funds. However, we recommend to undertake an in-depth analysis in case marketing activities of public investment funds are intended.

4 Tax Treatment

4.1 What are the types of entities that can be public funds in your jurisdiction?

According to Law 35/2003, the entities considered as public investment funds in Spain are:

- (i) Collective Investment Institutions of a Financial Nature ("*Instituciones de Inversión Colectiva de carácter financiero*");
- (ii) Collective Free Investment Institutions ("*Instituciones de Inversión Colectiva de Inversión Libre*");
- (iii) Real Estate Collective Investment Institutions ("*Instituciones de Inversión Colectiva Inmobiliaria*"); and
- (iv) Other non-Financial IIC ("*Instituciones de Inversión Colectiva de Carácter no Financiero*").

4.2 What is the tax treatment of each such entity (both entity-level tax and taxation of investors in respect of allocations of income or distributions, as the case may be)?

Public funds are subject to a special tax regime foreseen in the Spanish Corporate Income Tax Act. If certain requirements are met, public funds will be taxed at a special tax rate of 1% (mainly, it is required that the fund has a minimum of 100 participants).

Individuals will be subject to a 19% to 23% tax rate on the capital gains arising from the public fund. In this regard, Spanish tax-resident individuals will not be taxed on capital gains derived from the redemption or transfer of participations in an investment fund, provided a subsequent investment in a qualifying investment fund is made. In this particular case, and if certain conditions are met, the participations acquired would have the same acquisition cost as the participations redeemed or transferred.

Companies will be subject to a 25% tax rate. Moreover, companies will not benefit from the participation exemption regime on the transfer of participations in public funds.

Capital gains obtained by non-resident investors will be taxed in accordance with the tax treaty in force. However, as a general rule, Spain reserves the right to subject to taxation capital gains at a 19% tax rate. Notwithstanding, capital gains arising from the transfer of funds negotiated in a Spanish secondary official stock market obtained by non-resident investors without permanent establishment are exempt from taxation, as long as the state of residence of the investor has a Double Taxation Agreement with an exchange of information clause with Spain in force.

4.3 If a public fund, or a type of entity that may be a public fund, qualifies for a special tax regime, what are the requirements necessary to permit the entity to qualify for this special tax regime?

Spanish legislation does not foresee any special tax regime for public funds other than the 1% tax rate.



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Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms