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Public Investment Funds 2021

A practical cross-border insight into public investment funds

Fourth 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?

Funds offered to the public in Spain require prior authorisation from the Spanish National Securities Market Commission (*Comisión Nacional del Mercado de Valores*, "CNMV"), the Spanish supervisory authority. Funds shall not be offered in Spain until duly authorised by the CNMV, and once the key investment information document ("KIID") and prospectus have been registered with the CNMV.

Funds already authorised in any of the EU Member States may be able to be offered on a passporting basis, 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.

As regards funds from non-EU countries, prior authorisation from the CNMV is required (which is granted on the basis of reciprocity).

Please note that this guide does not cover collective investment undertakings taking the form of companies, nor alternative investment funds.

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

A distinction shall be made between (i) funds incorporated in Spain, and (ii) funds from non-EU countries (the passporting process for funds already authorised in any of the EU Member States being similar to the ones in place in any other EU country).

In the case of funds incorporated in Spain, the registration process involves filing an application before the CNMV, which will be accompanied with the following documents: (i) the prospectus; (ii) the regulation; (iii) the KIID; (iv) a certificate of professional competence and good reputation of the fund's directors and managers; and (v) any further data, reports and information considered necessary to verify the fulfilment of the requirements and conditions for the authorisation and registration of the fund.

In case of funds from non-EU countries, the following 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;

(iii) the existence of proper cooperation agreements signed between the CNMV and the relevant authorities in the fund's home country; and

(iv) that the fund's home country is not included in the GAFI's list of non-cooperative countries and territories on money laundering.

Once the aforementioned conditions are proven, the management company shall submit and register in the relevant CNMV's registry the following information: (i) the identification and domicile of the fund that is intended to be marketed in Spain; (ii) any information concerning the method of distribution of units in Spain; (iii) the fund's regulations, including the last annual report; (iv) the prospectus (or equivalent document); (v) the identification of the depositary; (vi) the fund description and any other information available to investors; and (vii) documentation evidencing that the fund or its management company are subject to the relevant regulation and statutory provisions in its home country.

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 Spanish Law. The sanctions that may be imposed by the CNMV to a management company in the case of infringement of the prior authorisation and registration requirements are:

(i) a fine, which may be, at the discretion of the CNMV: (i) between two and five times the gross profit obtained or losses avoided as a consequence of the acts or omissions in which the infraction consists, where they are quantifiable; (ii) between 10 per cent and 20 per cent of the total annual turnover of the entity, according to the most recent available accounts approved by the management body; or (iii) between EUR 5 million and EUR 6 million;

(ii) a revocation of the authorisation with definitive exclusion of the special registers. In cases where the entity itself or the management company 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) a fine between EUR 5 million and EUR 6 million;
(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;
(iii) the suspension of the exercise of their position for a period of up to three years; or
(iv) disqualification from holding administrative or managerial positions in the same or any other financial institution of the same nature.

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

Please see above. Local residence and other local qualification requirements only apply for funds incorporated in Spain and funds from non-EU countries intended to be offered in Spain.

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

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").

Funds shall be managed by a management company and have a depositary. In addition, managers and directors of the fund shall be persons of good reputation and have professional competence. To evaluate professional competence, the CNMV will assess all 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 reputation requirements. 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 management company 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 and all conditions regarding their engagement that may be of relevance for the unitholders, including a reference to the assessment costs that will be incurred by the fund.

iii. Capital structure

The minimum capital depends on the type of fund: (i) EUR 3 million in the case of financial funds; and (ii) EUR 9 million in the case of real estate funds.

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

If a real estate fund is incorporated by compartments, each of them shall have a minimum share capital of EUR 2.4 million, and the aggregate of all compartments shall not be less than EUR 9 million.

Moreover, the initial capital shall be entirely issued and disbursed (subject to certain particular exceptions). Furthermore, contributions for the constitution shall be made exclusively in: cash; securities admitted to trading on an official secondary market; or any other financial assets that are suitable for investment or comply with the principle of liquidity.

iv. Limits on portfolio investments

Funds shall carry out their investments in compliance with the following principles:
(i) Liquidity: funds must have sufficient liquidity.
(ii) Risk diversification: funds should limit the concentration of counterparty risk, thereby ensuring sufficient diversification.
(iii) Transparency: funds must clearly define their investment profile, which will be reflected in the information they provide.

Moreover, funds must comply with the limits set out in their particular prospectus and regulation, as well as with the particular limits set out by Law 35/2003 and RD 1082/2012 for financial funds and real estate funds.

v. Conflicts of interest

Management companies shall be organised and structured in such a way that they are able to identify and avoid any potential risk that will lead to damage of the institution itself or its clients as a consequence of a conflict of interest between the management company and:
(i) the funds it manages;
(ii) the directors, employees or a relevant person of the management company, or someone who has a direct or indirect control relationship with the management company, the funds it manages or its investors;
(iii) the unitholders; and
(iv) other clients of the management company.

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

The management company shall guarantee an adequate independence and separation between those tasks and responsibilities that may eventually be considered 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 management company or in its name in which a conflict of interest emerged or could potentially emerge.

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 unitholders and public in general; and (ii) the reporting requirements to the CNMV.

The management company shall make available to its unitholders, and to the public in general, the following information and/or documentation: (i) the prospectus; (ii) the KIID; (iii) immediately, any relevant facts that may affect either the situation or performance of the entity; (iv) an annual report; (v) a semi-annual report; and (vi) two quarterly reports.

Furthermore, management companies must provide the CNMV, with respect to the fund, with: (i) information regarding the principal markets and instruments in which the management company trades on behalf of the fund; (ii) the main instruments in which the fund trades; (iii) the principal exposures and concentrations of the fund; and (iv) an annual report regarding the fund. Moreover, and on a quarterly basis, the management company must provide the CNMV with the identification of the unitholders 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

The annual accounts of the fund shall be audited.

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?

Yes. Most frequent investment advisers to public funds are regulated investment firms (i.e. securities companies, securities agencies, portfolio management companies and independent advice companies).

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 required, 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 their directors and managers. Moreover, and prior to the commencement of their activities, the regulated adviser shall be registered in both the Commercial Register and in the relevant administrative register of the CNMV.

In the case of individuals, registration in the CNMV is required.

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 public fund perspective, but in the rendering of investment services, investment advisers shall observe the obligations imposed by MiFID II, as implemented by Spanish Law. Particular rules may apply depending on the particularities of the investment advisers and/or structure.

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

Currently, digital currencies do not constitute eligible investments for public funds.

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

Yes; since ETFs are traded in regulated markets, they will need to comply with the relevant market rules.

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; and (iii) the Spanish Securities Market Law, which states, in general terms, the basic conditions for marketing materials

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.

Management companies that carry out marketing activities by themselves or through their own agents or representatives must submit to the CNMV their activities statement evidencing their intention together with an explanatory report on how these activities will be carried out and justifying their capacity to fulfil the requirements established by the CNMV. Once compliance with the applicable requirements has been verified, the activity may be carried out directly or through agents or representatives.

When marketing is conducted by agents or representatives, the following requirements must be fulfilled:

(i) prior: (a) communication by the management company to the CNMV, including a specific mention stating that the relevant agent or representative complies with the professional competence and good reputation requirements; (b) registration, where applicable, 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 human and material resources;

(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 their company purpose;

(iii) these relationships must be formalised through the granting of a power of attorney that must specify the territorial scope of action, funds included, types of clients and manner of execution of acquisitions or subscriptions and disposals or reimbursements. In addition, entities may subscribe an agreement that 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 management company that are legal entities must comply with a minimum share capital requirement.

The management company 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 their 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

Management companies may perceive management fees from the funds. Besides, they may receive subscription and reimbursement fees from the unitholders.

The aforementioned fees may be calculated as 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 unit, 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.

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.

iii. Investor suitability

Public funds can be marketed and distributed to both retail and professional investors.

iv. Custody of investor funds or securities

Public funds shall have a depositary. Depositaries may be banks, savings banks, credit unions, securities companies and securities agencies, provided they hold the condition, where applicable, of a participating entity in the clearing, settlement and registration systems in the relevant markets in which they will carry out their activities.

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.

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 simultaneously be the manager and the depository of the same entity (except in the cases expressly provided for in the relevant regulations).

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 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 retail and professional 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 carrying out a particular analysis on a case-by-case basis (in particular, where there is any type of link to countries that are not member of the European Union).

4 Tax Treatment

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

The entities considered public funds in Spain that are most common are:
(i) financial funds; and
(ii) real estate funds.

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%.

As regards investors, individual investors will be subject to a 19% to 26% tax rate on the dividends distributed by public funds and the capital gains arising from the transfer of units in public funds. In this regard, Spanish tax-resident individuals will not be taxed on capital gains derived from the redemption or transfer of units in a public fund, provided a subsequent investment in a qualifying fund is made. In this particular case, and if certain conditions are met, the units acquired would have the same acquisition cost as the units redeemed or transferred.

Companies will be subject to a 25% tax rate on the dividends received from public funds and capital gains deriving from the transfer of units in public funds. Companies cannot benefit from the unit exemption regime on such dividends or capital gains obtained.

Capital gains and dividends 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 capital gains and dividends to taxation at a 19% tax rate. Notwithstanding, capital gains arising from the transfer of funds obtained by non-resident investors without permanent establishment in Spain and resident in the European Union or the European Economic Area would be exempt if certain requirements are met. Moreover, 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. The main requirement of the public fund to qualify for this special tax regime is to have a minimum of 100 participants.

Ignacio Ramos is a Partner at Cases & Lacambra, practising in its Market & Financial Services Group in Spain, where he is based in Madrid. He is specialised in the design of tailor-made solutions in the area of financial markets for companies, institutional investors and financial entities in Spain, Europe and Latin America, including in the context of restructuring and insolvency, covering regulatory, transactional and dispute resolution. Ignacio has experience in all segments of the financial markets, including credit markets, capital markets, insurance markets, collective investment undertakings, AIFs and pension funds, as well as all sectors of the energy spectrum, including renewables, electricity, gas and oil.
Ignacio holds a Ph.D. and is an Associate Professor on different areas of law, including financial markets law, and ethics, speaking and publishing regularly on both areas.

Cases & Lacambra
Paseo de la Castellana 8
28046 Madrid
Spain

Tel: +34 91 061 24 50
Email: ignacio.ramos@caseslacambra.com
URL: www.caseslacambra.com

Ignacio Hervás is an Associate at Cases & Lacambra, practising in its Market & Financial Services Group in Spain. He has experience in restructuring and refinancing operations of financial instruments, advising entities in the securities market, supervision and advice on relations with regulatory authorities to obtain operating licences and registration for the development of the activity of different entities, as well as experience in recurrent advice on AML to different clients (national and international).

Cases & Lacambra
Paseo de la Castellana 8
28046 Madrid
Spain

Tel: +34 91 061 24 50
Email: ignacio.hervas@caseslacambra.com
URL: www.caseslacambra.com

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