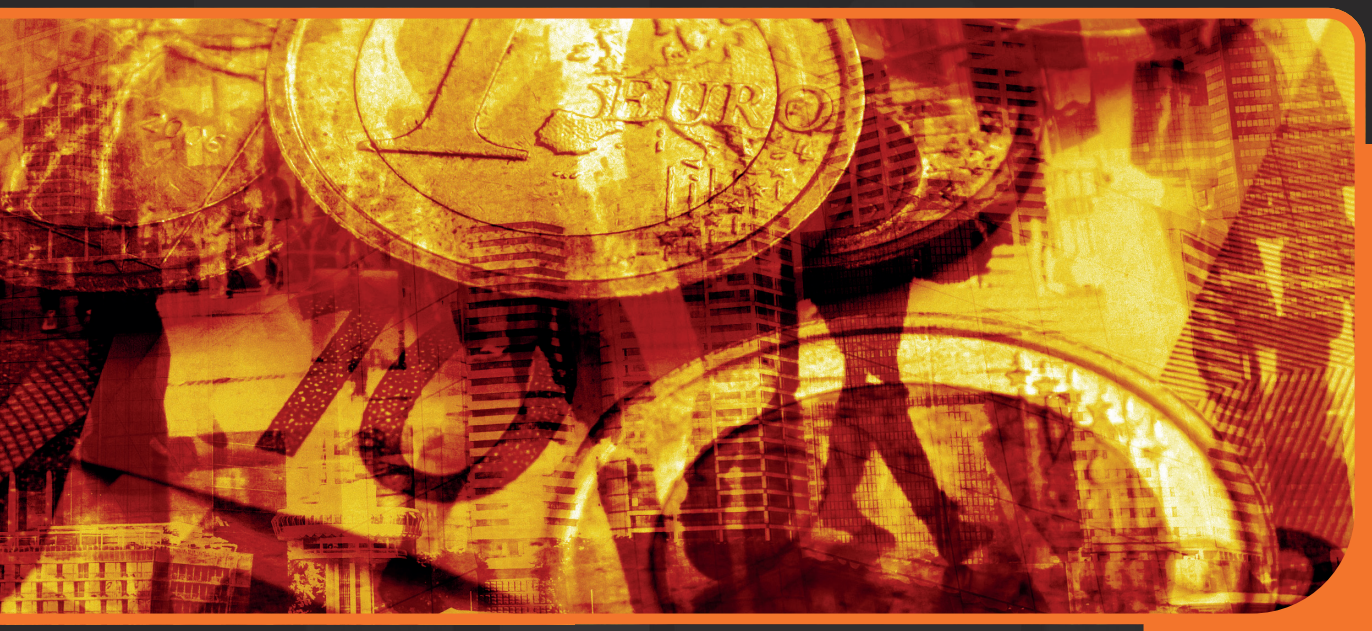
International
Comparative
Legal Guides



Practical cross-border insights into public investment funds

Public Investment Funds 2023

Sixth Edition

Contributing Editors:
Gregory S. Rowland & Sarah E. Kim
Davis Polk & Wardwell LLP

ICLG.com

Expert Analysis Chapters

Q&A Chapters

Spain

Araceli Leyva

Toni Barios

Cases & Lacambra

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 intended to be offered to the public in Spain must be authorised by and registered in the Spanish National Securities Market Commission (*Comisión Nacional del Mercado de Valores*, "CNMV"), the Spanish national competent authority for the supervision of the financial markets.

Specific requirements applicable to the marketing of funds to natural or legal persons located in Spain depend on the specific type and nationality of such fund.

The European fund universe is divided into: undertakings for collective investment in transferable securities ("UCITS") subject to Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ("UCITS Directive"); and alternative investment funds ("AIFs") subject to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers ("AIFMD").

While UCITS are defined as retail funds, AIFs may be retail or non-retail funds. The UCITS Directive and AIFMD (in relation only to open-ended funds) have been implemented in Spain through Law 35/2003, of 4 November, on Collective Investment Undertakings ("LIIC") and Royal Decree 1082/2012, of 13 July, approving the developing regulation of Law 35/2003 ("RIIC").

Any reference in the present document to AIFs shall be deemed made to open-ended AIFs (closed-ended AIFs are not considered public funds in Spain).

Spanish and third country UCITS and all AIFs to be offered to Spain-based potential retail investors must be authorised and registered by the CNMV in accordance with the LIIC and RIIC (passporting for AIFs under AIFMD only allows its marketing to professional investors).

UCITS authorised in other EU Member States may be offered to Spain-based retail investors once they have submitted a notification letter to the competent authority of the relevant EU Member State in accordance with their national laws implementing the UCITS Directive. Such national competent authority will transmit the complete documentation to the CNMV no later than 10 working days (from the filing of all required documentation) and will notify the UCITS about said transmission. The UCITS may be offered to Spain-based retail investors as of the date of that notification ("passport" or "passporting").

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

The fund registration process will vary depending on the specific type of fund intended to be marketed to Spain-based retail investors.

The documentation to be submitted to the CNMV for the authorisation of Spanish UCITS are: (i) a memorandum; (ii) the prospectus; (iii) management regulation; (iv) key investor information document (KIID); (v) incorporation agreement; (vi) evidence of the honourability and professional repute and experience of the fund's directors and managers; and (vii) 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. Additionally, if the UCITS has legal personality and does not appoint a management company (i.e., a self-managed UCITS), it will be necessary to submit to CNMV an additional memorandum explaining the UCITS internal organisation.

If such Spanish fund is to be passported, it shall submit a letter to the CNMV attaching: (i) its rules or instruments of incorporation, prospectus and, where appropriate, the latest annual report and any subsequent half-yearly report; and (ii) its key investor information under article 78 of the UCITS Directive translated into the official language, or one of the official languages, of the UCITS host Member State.

The documentation to be submitted to the CNMV for the authorisation of a third country UCITS or of any AIF requires the filing of: (i) evidence that the Spanish legislation regulates the same category of UCITS; (ii) a favourable memorandum from their home country regulator; (iii) evidence that there are cooperation agreements between the CNMV and the home country regulator to guarantee an efficient information exchange between authorities; and (iv) evidence that the country where the fund's management company is established is not considered a non-cooperative country by the Financial Action Task Force in relation to anti-money laundering and counter-terrorism financing. Subsequently, the following documentation shall also be submitted: (i) identity of the fund's management company and location of the fund; (ii) information regarding how the fund will be marketed in Spain; (iii) management regulation and other constitutive documentation of the fund; (iv) the prospectus and KIID or equivalent document; (v) identity of the fund's depositary; (vi) a description of the fund; (vii) evidence of the regulatory regime applicable to the fund and its management company in its home country; and (viii) the fund's financial and audit reports. Additionally, the management company of the third country UCITS or of any AIF to be marketed in Spain must also be registered with the CNMV.

Please note that the CNMV is legally entitled to reject the authorisation of a third country UCITS/AIF due to the lack of equivalent treatment in their home jurisdiction to Spanish funds.

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

Offering units of UCITS/AIFs to investors in Spain without the CNMV's prior authorisation constitutes an infringement under the LIIC and qualifies as a "very serious infringement".

The sanctions that may be imposed by the CNMV to a management company for such infringement are:

(i) a fine, which may be determined at the discretion of the CNMV:
  (a) 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;
  (b) between 10% and 20% of the total annual turnover of the entity, according to the most recent available accounts approved by the management body; or
  (c) 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 EU, 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.

Additionally, 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) 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, containing 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?

There are no local residency or local qualification requirements that a fund must meet in order to be registered in Spain.

The registration of non-Spanish UCITS/AIFs in the CNMV's registry of entities is subject to the payment of a registration fee to the CNMV. In addition, the CNMV will also charge an annual fee for the ongoing supervision of the marketing activities conducted in Spain. Since the UCITS/AIF will not be a resident in Spain, in accordance with Law 16/2014, of 30 September, regulating the CNMV's fees, the UCITS/AIF is required to appoint a person responsible for the payment of all applicable fees.

In addition to the above, the entities marketing a non-Spanish AIF are required to submit certain statistical information to the CNMV on a quarterly basis in accordance with Circular 2/2011, of 9 June, of the CNMV on the information of collective investment undertakings ("IIC") registered with the CNMV.

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

In accordance with the above, each type of UCITS/AIFs authorised in Spain have their own constitutional documentation that, together with the prospectus and applicable Spanish legislation, will set out the operating rules of the specific fund. However, Spanish and EU laws address governance mainly in relation to management companies and self-managed entities.

Any Spanish UCITS management company must be authorised in accordance with the LIIC and comply with the following governance requirements: (i) to adopt the legal form of a public limited liability companies and have an exclusive corporate purpose circumscribed to, at least, the management of investments, risk management, administration, representation and management or subscriptions and redemptions of the funds and companies managed; (ii) to have its corporate address and effective management located in Spain; (iii) its founding shareholders must not receive any special treatment; (iv) to have a minimum share capital of EUR 125,000 to be increased based on the assets under management; (v) to have a board with a minimum of three board members who must fulfil the required suitability requirements as to honourability, knowledge and experience; (vi) to have a good administrative and accounting organisation with appropriate human and material resources; and (vii) to have adequate internal control mechanisms and proceedings to guarantee a correct and prudent management, including risk-management proceedings; information security mechanisms; anti-money laundering policies and procedures; a regulation on related transactions; and an internal conduct regulation.

The management company must be structured and organised in such a manner that the interests of the UCITS/AIFs managed and those of its clients are not adversely affected by conflicts of interest between: the management company and its clients; clients; or a client and a UCITS/AIF.

In addition to the above, Spanish management companies falling out of the scope of UCITS Directive shall comply with Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 ("DR 231/2013") (e.g.: a duty to act in the best interests of the AIF or the investors in the AIF and the integrity of the market; a duty to apply high standards of due diligence in the selection and ongoing monitoring of investments when investing in assets of limited liquidity, in the selection and appointment of counterparties and prime brokers; a duty to act honestly, fairly and with due skills; a duty to treat investors fairly; the regulation of inducements; rules on conflict of interest; and risk and liquidity management, etc.).

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

There are no specific requirements regarding the selection of advisers under Spanish law provided that the adviser does not provide MIFID investment services.

Additionally, management companies may delegate the portfolio management to an external, duly authorised, experienced and knowledgeable third party. Such delegation must (i) be agreed in writing, (ii) comply with the management company policies and procedures, (iii) be made in favour of another EU management company or any other EU entity authorised to provide the investment service of portfolio management, and (iv) be notified to the CNMV. Provided that certain conditions are met, the portfolio management could be delegated to non-supervised entities and non-EU companies. In any event, the management company may not become an "empty shelf/letter box" due to the delegation of its functions to third parties and will remain responsible for the delegated functions; and the delegation must be objectively justified (e.g.: optimising business functions and processes; cost-saving; expertise of the delegate in administration or in specific markets or investments; and/or access of the delegate to global trading capabilities).

The UCITS/AIFs prospectus will include the legal name of any external investment adviser or external management company, if any, 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 UCITS/AIF: (i) EUR 3 million in the case of funds investing in financial instruments (*IICs financieras*); and (ii) EUR 9 million in the case of funds investing in real estate (*IICs inmobiliarias*). If a financial fund is constituted by compartments, each of them shall have a minimum capital of EUR 600,000, and the aggregate minimum capital of all compartments shall not amount to 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 minimum capital of all compartments shall not amount to 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 suitable for investment or that 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 to guarantee the redemptions regime envisaged under the RIIC. Generally, investments in assets or financial instruments of the same issuer, or of entities of the same group, may not exceed 5% or 15%, respectively.

(ii) Risk diversification: funds should limit the concentration of counterparty risk, thereby ensuring sufficient diversification. Generally, investments in assets or in certain financial instruments issued or guaranteed by the same entity may not exceed than 5% of the funds' net asset value.

(iii) Transparency: funds must clearly define their investment profile, which will be disclosed in the information they provide.

The above limits may be increased under certain circumstances in accordance with the LIIC and RIIC in relation to UCITS; and will not be applicable to open-ended AIFs. Other limits could be applicable based on the prospectus and/or management regulation of the specific fund.

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 may damage the institution itself or its clients as a consequence of a conflict of interest. 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 that 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 on its behalf 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, shareholders and public in general; and (ii) the reporting requirements to the CNMV.

The management company shall make available to its unitholders, shareholders, and 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

Please note that 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?

Advisers providing MIFID services and, in particular, "investment advice" are required to be authorised as investment firms (i.e., brokers dealers (*sociedades de valores or agencias de valores*), portfolio management companies and financial advice companies/individuals).

The incorporation of an investment firm requires the CNMV's prior authorisation. The application for authorisation shall include the firm's statutory documentation, programme of activities, information on its future internal organisation, code of conduct, business plan and, among others, evidence of its directors and executive officers' suitability, knowledge and experience. There are additional requirements such as a minimum share capital, a specific type of legal form and certain financial requirements must be met. The company must be registered in the Commercial Register and the CNMV's public register.

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

No further requirements would apply to investment advisors provided that they are not providing the MIFID services of "investment advice". If MIFID services are provided, compliance with Spanish implementation of MIFID shall be ensured. A case-by-case analysis shall be conducted to determine if MIFID services are being provided.

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

Financial IICs qualifying as UCITS (*FI armonizado*s and *SICAV armonizadas*) may have exposure to cryptocurrencies by means of: (i) financial instruments whose performance depends on such digital currencies provided that they do not include an implicit derivative (any instrument denominated "delta one") if (a) they are traded on a daily basis, and (b) their market price is determined out of trades executed by third parties (where no look through is required); and/or (ii) securities or financial instruments of entities traded in a regulated market or multilateral trading facility under certain circumstances (e.g., they have an investor protection scheme, comply with transparency, access and admission requirements), which in turn have investments in cryptocurrencies.

Open-ended AIFs considered quasi-UCITS (i.e., *SICAVs no armonizadas* and *fondos de inversión no armonizados*) may also invest (within their free disposal ratio, *coeficiente de libre disposición*) in Spanish or foreign open-ended AIFs (e.g., *Spanish IICs de Inversión Libr*e: FIL or SIL), derivatives over such entities, other non-UCITS IICs (e.g., *Spanish IIC de IIC de Inversión Libre*) with crypto exposures. Investment in derivatives with cryptocurrency as an underlying asset is not permitted.

Open-ended AIFs other than quasi-UCITS (i.e., FIL or SIL) may also have exposure to cryptocurrencies through derivatives, since there is not a limitation on their underlying assets provided that such derivative settlement does not entail the physical delivery of the cryptocurrency. However, such AIFs may not be marketed to retail investors.

In any event, the prospectus and KIID of funds investing in cryptocurrencies must expressly state in a highlighted manner their exposure to cryptocurrencies, including the specific risks regarding price formation and liquidity in accordance with the CNMV and Bank of Spain guidelines in this regard.

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

ETFs are considered collective investment schemes and are therefore subject to the LIIC, RIIC and Circular 2/2020, of 28 October, of the Spanish Securities Exchange Commission, on marketing of investment products and services ("Circular 2/2020"). In particular, in accordance with article 79 RIIC, ETFs must obtain the CNMV's prior authorisation to be traded in the market and, accordingly, comply with the regulations of such market. The CNMV has expressly noted that ETFs must comply with the diversification limits under the RIIC.

3 Marketing of Public Funds

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

The marketing of UCITS and open-ended AIFs to Spain-based potential investors is regulated by the LIIC, RIIC and Circular 2/2020.

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.

The marketing of funds to Spain-based individuals is restricted to management companies that have included in their programme of activities: (i) the marketing of funds; (ii) the type of funds that it would market; and (iii) the type of clients to which it will market those funds. For such purpose, the management company may also appoint an agent or representative subject to certain requirements as set forth in article 95 *et seq.* of the RIIC. Additionally, duly authorised financial intermediaries may also market funds in Spain (generally, credit institutions or investment firms duly authorised to provide the investment services of reception and transmission of orders).

Management companies willing to engage with agents/representatives to market funds in Spain must communicate this to the CNMV for their registration. Members of the agent's board of directors must: be honourable; represent the majority of the board of directors as well as its general managers or chief executive officers; and meet the knowledge and experience requirements in relation to the type of fund to be marketed. Agents must: have proper administrative and accounting organisation, as well as human and material resources; comply with minimum capital requirements; carry out their activities without resorting to sub-agents or establishing any legal/personal relationship with clients; and identify themselves as agents when engaging with any client or potential client.

The relationship between the management company and the agent/representative must be formalised through 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).

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. Before formalising the above-mentioned power of attorney, the management company shall verify the agent's 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 relation to agents with legal personality, the verifications must include their economic and financial situation.

Pre-marketing means the provision of information or any communication regarding investment strategies or investment ideas made, directly or indirectly, by a management company authorised in Spain in accordance with AIFMD or by a third party acting on its behalf. The purpose of such marketing will be to ascertain a potential investor's interest in an IIC/sub-fund other than an UCITS (i.e., open-ended AIFs) (i) not yet authorised, or (ii) already authorised in its home Member State but not yet notified for marketing in the EU Member State in which the potential investors are domiciled or have their registered office. In any event, pre-marketing shall not be as specific and detailed that it would be equivalent to an offer or placement of the units/shares of such open-ended AIF. Premarketing is therefore not subject to the prior communication to the CNMV or passporting of the relevant fund into Spain; however, Spanish entities conducting pre-marketing activities in Spain shall inform the CNMV through an informal letter (within two weeks from commencing such marketing) of the characteristics of such pre-marketing and the EU Member States where such pre-marketing has taken place.

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 receive management fees from the funds and subscription and reimbursement fees from the unitholders. Fees or other charges payable out of the assets of the UCITS/AIF must be disclosed in the relevant fund prospectus/management regulation. The prospectus and KIID must reflect the fees calculation method and the maximum fees to be charged, as well as the commissions effectively charged and the beneficiary.

When a distributor is appointed, fees and charges are subject to restrictions and disclosure obligations as envisaged under MiFID II and its implementation in Spain. In any event, distributors subject to compliance with MiFID II shall analyse on a case-by-case basis whether they are permitted to receive such fees.

ii. Advertising

Any kind of advertising conducted by investment firms, credit institutions, crowdfunding platforms, branches or agents of such entities, or by any other entity conducting any advertising activity affecting financial products (e.g., UCITS, AIFs, etc.) and services (e.g., reception and transmission of orders, execution, etc.), regardless of the means of communications and formats used (e.g., television, cinema, radio, press, advertising through the Internet (in any form) or mobile devices, all types of outdoor advertising, direct advertising, advertising at the point of sale, brochures, catalogues, promotional gifts, loyalty campaigns, sponsorship events, home visits or any other form of commercial communication), will be subject to compliance with Circular 2/2020.

Accordingly, entities advertising investment funds in Spain must: (i) approve a commercial communications policy, which must include procedures and internal controls that are both adequate to guarantee compliance with Circular 2/2020 and proportional to its activities and the complexity of the products/services advertised; and (ii) keep an internal updated registry reflecting the entity's advertising activities in an accurate, complete, accessible and traceable manner in order to allow the CNMV to supervise and verify that the entity has complied with the obligations set forth in Circular 2/2020.

The Annex of Circular 2/2020 reflects the principles and criteria applicable to the advertising of funds in Spain.

iii. Investor suitability

The MiFID II regulatory framework and its implementation in Spain, requires entities providing investment services to assess the suitability or the appropriateness of investment services or financial instruments in relation to their clients or potential clients.

The above obligations will apply to management companies, investment firms and credit institutions when providing the investment services of individual portfolio management, investment advice and reception and transmission of orders.

iv. Custody of investor funds or securities

Spanish IICs (i.e., UCITS and open-ended AIFs) are required to appoint by means of a written agreement an independent depositary (i.e., a Spanish/Spanish branch of a credit institution, 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), which must be independent from the management company, duly authorised by and registered in the CNMV and must comply with the obligations established in the LIIC and RIIC.

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

Spanish funds qualifying as UCITS and quasi-UCITS may be marketed to professional and non-professional (retail) potential investors.

On the contrary, open-ended AIFs other than quasi-UCITS (i.e., *IIC de Inversión libre*: FIL or SIL; or *IIC de IIC de inversión libre*) intended to be marketed to retail investors may only invest in certain assets and must comply with liquidity, risk diversification and transparency requirements reflected in the LIIC and RIIC, as well a maximum lock-up period of one year, and must grant subscription and redemptions, generally, on a quarterly basis. Such retail investors must invest at least EUR 100,000 and sign a written acknowledgment of the risk attached to their investment.

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

Compliance with general marketing laws such as Law 34/1988, of 11 November, on General Advertising and Law 3/1991, of 10 January, of Unfair Competition shall also be taken into consideration.

4 Tax Treatment

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

The most common public funds (i.e., those that are generally marketed to retail investors) in Spain are:

(i) UCITS financial funds (*fondos de inversión armonizados* and *SICAV armonizadas*); and

(ii) open-ended AIFs (*fondos de inversión no armonizados*, *SICAVs no armonizadas*, *fondos de inversión libre y sociedades de inversión libre*).

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 established 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 EU 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.

Since 1 January 2022, participants of a Spanish SICAV must invest EUR 2,500, each or EUR 12,500 in case of an umbrella public fund. Also, the number of 100 participants must be met during three-quarters of the total days of the taxable year. SIL (*Sociedades de Inversión Libre*) entities whose shareholders are other public funds and listed SICAVs (*SICAV índice cotizadas*) are exempt from the above-mentioned requirements. There is a transitory regime that allows participants in a Spanish SICAV to relocate their investment in other SICAVs that meet the above-mentioned requirements and to dissolve and liquidate those Spanish SICAVs that do not meet the above-mentioned requirements, benefitting from an *ad hoc* tax roll-over regime. The relevant resolution agreeing on the dissolution and liquidation of the relevant Spanish SICAV was to be adopted before 1 January 2023, and all relevant acts necessary to liquidate and de-register the relevant Spanish SICAV shall be completed by 30 June 2023.

Araceli Leyva is the Secretary General of Cases & Lacambra and a member of the Financial Services Group in Spain, where she provides legal advice on corporate & M&A and on banking and financial services regulation. She is the firm's coordinator of legal criteria in Commercial and Company Law. She is a member of the Madrid Arbitration Tribunal and regularly acts as an arbitrator in banking and finance matters, amongst others. After completing her legal studies in the United Kingdom, she started her professional career at Bufete Olivencia – Ballester in Seville and later joined the legal department of the 1992 Seville Universal Exposition, specialising in the commercial and participants area of the Exposition. In 1993 she joined the financial legal department of Banco Español de Crédito, S.A. (Banesto), where she specialised in derivative products, acting as an advisor to the treasury department of the bank after its intervention by the Bank of Spain.

In 1997, she joined the legal department of the Spanish Confederation of Savings Banks (CECA) as a specialist in financial and derivative transactions, and later became the coordinator of the Commercial Law area of the legal department. During this period, she provided legal advice on a wide range of financial and derivative transactions and corporate transactions of companies in which CECA and the Spanish Savings Banks had an interest, sometimes acting as Secretary of the Board of Directors. She was also the Secretary of the CECA Legal Committee and lead the Corporate Governance Unit of CECA and CECABANK.

Throughout her professional career, she has regularly given lectures and seminars on derivatives master agreements, finance and securities markets at several universities and business schools. She has also been a member of working groups in national and international regulatory bodies and financial markets associations.

Cases & Lacambra
c/Alcalá 61
28014 Madrid
Spain

Tel: +34 910 612 450
Email: araceli.leyva@caseslacambra.com
URL: www.caseslacambra.com

Toni Barios is a Partner at Cases & Lacambra in Spain. His practice is focused on Market & Financial Services.

He advises financial institutions and companies in all types of financing and debt-restructuring transactions; bilateral and syndicated, national and cross-border, including structured finance, corporate and acquisition finance, project finance (real estate, energy, and infrastructures) and in the structuring and granting of guarantees. His practice includes advice to financial institutions, funds, and other non-traditional lenders in debt investment transactions, in secondary debt trading and NPL portfolios and direct lending investments in the middle market.

He began his career in the Corporate and Real Estate practice of Vialegis Asesores Legales y Tributarios. Before joining Cases & Lacambra, he developed his professional career as in-house counsel at the legal department of Caja de Ahorros y Pensiones de Barcelona ("la Caixa") where he gathered extensive experience in Capital Markets (*ECM y DCM*), in both primary and secondary markets and in both own and third-party issues. He later joined the legal department of CaixaBank, S.A., managing the investment banking business legal division.

He has been personally involved in the negotiation of the main public and private financing and debt-restructuring transactions of the last 10 years in Spain, and has extensive experience in all types of financing (corporate financing, acquisition finance, asset finance, leveraged financing, investment grade and project finance) in the energy, infrastructure and real estate sectors, both in Spain and abroad (Canada, France, Germany, Mexico, the Netherlands, United Kingdom and United States) and in secondary debt trading.

Cases & Lacambra
c/Alcalá 61
28014 Madrid
Spain

Tel: +34 910 612 450
Email: toni.barios@caseslacambra.com
URL: www.caseslacambra.com

Cases & Lacambra is a client-focused international law firm, with a deep commitment to offering the best comprehensive advice in business law. The firm, with offices in Europe and America, has a highly tested track record in complex transactions involving the financial sector, special situations, financial markets regulations, cross-border disputes and transactions with a relevant tax sensibility.

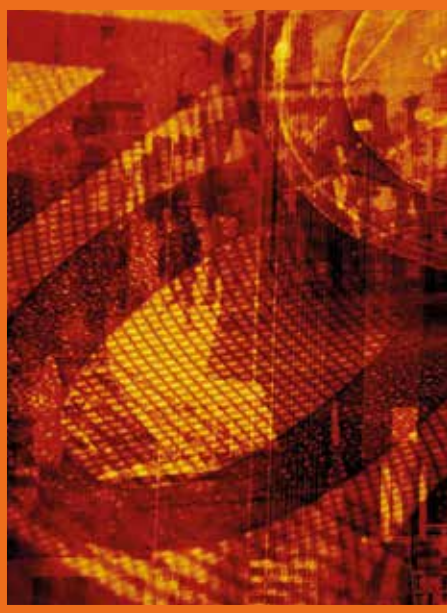
Our advice focuses on providing bespoke solutions to our clients, that include financial institutions, investment services companies, investment funds, family offices, business conglomerates and high-net-worth individuals.

Cases & Lacambra's teams are high profile, committed to excellence and cross-border oriented. Cases & Lacambra has offices in Andorra, Spain (Barcelona and Madrid) and the United States of America (Miami).

www.caseslacambra.com

CASES & LACAMBRA

ICLG.com



Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: global legal group