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Legal Guides

Alternative Investment Funds 2021

A practical cross-border insight into alternative investment funds work

Ninth Edition

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1 Regulatory Framework

1.1 What legislation governs the establishment and operation of Alternative Investment Funds?

For the purpose of this chapter, an Alternative Investment Fund (hereinafter, "AIF") means a collective investment scheme undertaking, including investment compartments thereof, which: (i) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) does not require authorisation pursuant to article 5 of Directive 2009/65/EC.

Spanish legislation distinguishes between closed-ended and opened-ended AIFs.

Spanish closed-ended AIFs are governed by *Law 22/2014, of 12 November 2014, regulating private equity entities, venture capital entities and other closed-ended collective investment entities and the management companies of closed-ended collective investment entities, and amending the Collective Investment Schemes Act* ("Law 22/2014"), which involves the transposition into Spanish law of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers ("AIFMD") applicable to companies managing AIFs. The main purpose of Law 22/2014 is the establishment of the applicable rules for the authorisation and supervision process and governance of management companies managing AIFs, rather than the particular requirements of closed-ended AIFs for which Law 22/2014 is very flexible.

Spanish open-ended AIFs are governed by *Law 35/2003, of 4 November, on Collective Investment Schemes* ("Law 35/2003"), which has been modified by the aforementioned Directive relating to fund management companies of alternative funds, and *Royal Decree 83/2015, of 13 February, amending Royal Decree 1082/2012, of 13 July, approving the Regulation for the Development of Collective Investment Schemes Law* ("RD 83/2015"). The current Spanish legal framework transposes 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").

Regulatory authorities and investors, both in the European Union and Spain, have discussed the possibility of reforming the regulatory framework to democratise alternative investments. In the European Union, an alternative investment fund has already been authorised, offering units of EUR 10,000.

1.2 Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

Yes, management companies of open-ended AIFs (under the regulation of UCITS regime) ("*Sociedad Gestora de Instituciones de Inversión Colectiva*" or "*SGIICs*", in Spanish official terminology) are governed by Law 35/2003. For additional information, please review the Spanish chapter of *ICLG – Public Investment Funds 2020*.

Management companies of closed AIFs ("*Sociedad Gestora de Entidades de Inversión Colectiva de Tipo Cerrado*" or "*SGEICs*" in Spanish official terminology) are governed by Law 22/2014. SGEICs are regulated by the Spanish National Securities Market Commission ("CNMV") and require its prior authorisation; although it has to be noted that non-Spanish Alternative Investment Fund Managers ("AIFMs") already authorised in other EU Member States can be passported with no need of obtaining further authorisation or any other additional requirements, and can thus operate with the freedom to provide services with or without a branch office.

Management companies from non-EU countries providing marketing services in Spain are not required to obtain prior authorisation by the CNMV, although a prior authorisation of the AIF is required prior to its marketing in Spain. This process is governed by the reciprocity principle, and the following conditions shall be evidenced to the CNMV prior to its marketing among Spanish investors:

- The existence of cooperation agreements between the CNMV and the home country regulator of the management company, with the purpose of ensuring proper exchange of information.
- The home country of the management company shall not be listed as a Non-Cooperative Country and Territory ("NCCT") by the Financial Action Task Force on anti-money laundering and terrorist financing.

Please note that SGIICs, management companies for UCITS funds, can also carry out activities for closed-ended AIFs. When managing AIFs, SGIICs must comply with the provisions of Law 22/2014.

The CNMV, as the supervisory authority, has created a special register where AIFMs must register prior to the start of their activities. However, depending on the type of AIF, the requirements and timeline will vary and Spanish AIFMs must be registered in the Commercial Registry ("*Registro Mercantil*") and must have obtained prior authorisation from the CNMV after the approval of their application (demonstrating that they meet the regulatory criteria, including: equity requirements; suitable risk management and investment selection procedures; suitability requirements of the shareholders, managers, directors and other key persons; and, if any, applicable exemptions). Consequently, any AIFM which does not appear to be registered in the special CNMV registry is not able to perform management activities.

1.3 Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

Yes, AIFs themselves must obtain authorisation from the CNMV, since it is the authorising, supervisory and control authority. For EU management companies, the cross-border marketing of an AIF duly authorised in an EU country is free once the regulator's home country notifies the management company that it has sent the notification letter to the CNMV including information required pursuant to the EU Passport Regime. In case an EU management company intends to market an AIF not registered in an EU country, it will be necessary to demonstrate to the CNMV that the following conditions are met:

- A cooperation agreement exists between the CNMV and the home country regulator of the management company, with the purpose of ensuring proper exchange of information.
- The AIF's home country shall not be listed as a Non-Cooperative Country and Territory ("NCCT") by the Financial Action Task Force on anti-money laundering and terrorist financing.
- The AIF's home country has signed a tax agreement with Spain according to the principles stated in article 26 of the Organisation for Economic Co-operation and Development ("OECD") regulation for the exchange of tax information.

Authorisation is not automatic, but depends on the criteria of the CNMV, which may refuse it in any case for prudential reasons.

Non-EU management companies intending to market AIFs are also required to comply with the aforementioned conditions.

1.4 Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity *vs.* hedge)) and, if so, how?

Yes. As set out in question 1.1 above, the Spanish legal system distinguishes between open-ended and closed-ended AIFs, regulated, respectively, by Law 35/2003 and Law 22/2014. Each law establishes different types of structures and, among others, the requirements, aspects and procedures of each of these entities. Neither the Spanish regulator (the CNMV) nor Law 22/2014 (AIFs) nor Law 35/2003 (UCITS) have included a specific definition of an Alternative Investment Fund, which is provided for by the AIFMD. In our understanding, all collective investment schemes which are not UCITS should be classified as AIFs; venture capital entities should be added to this category.

Open-ended AIFs are those whose object is the collective investment of the funds raised from the public and whose operation is subject to the principle of risk sharing, and whose units, at the request of the holder, are repurchased or reimbursed, directly or indirectly, out of the assets of these undertakings. Open-ended AIFs may adopt the form of either an investment fund or an investment company, and can be financial or non-financial, depending on their purpose and on whether or not they invest in financial instruments or assets.

Closed-ended AIFs are those collective investment entities that, lacking a commercial or industrial goal, raise capital from investors, through an advertising activity, to invest in all types of financial and non-financial assets, according to a defined investment policy.

Law 22/2014 designates closed-ended AIFs as "*Entidades de Inversión de Capital Cerrado* or "*EICC*", establishing the following types: (i) closed-ended investment funds ("*Fondos de Inversión de Capital Cerrado*" or "*FICC*"); and (ii) closed-ended investment companies ("*Sociedades de Inversión de Capital Cerrado*" or "*SICC*"). In addition, Law 22/2014 establishes two types of closed-ended entities focused on private equity activity: "*Entidades de Capital Riesgo*" or "*ECR*"; and companies ("*Sociedades de Capital Riesgo*" or "*SCR*").

1.5 What does the authorisation process involve and how long does the process typically take?

Given the difference of treatment between open-ended and closed-ended AIFs, the authorisation process will depend on the type of fund and, in addition, on whether it is already authorised outside or within the EU.

Those AIFs authorised within the EU will not require specific authorisation by the CNMV and are enabled to operate in the country through the EU passport. However, non-EU AIFs shall be required to obtain prior authorisation by the CNMV in order to carry out any activity in Spain.

An AIF seeking to set up in Spain shall submit its application and draft constitution documents for approval by the CNMV. The authorisation request must, in all cases, include the following documents: (i) a report; (ii) accreditation of the good reputation and professionalism, in the terms stated in the regulations, of those who hold a position of fund administrator; (iii) in general terms, any data, reports or records deemed appropriate to verify compliance with the conditions and requirements legally established; (iv) the prospectus and the key investor information document; and (v) the rules of management.

In the case of both AIFs and investment companies which designate an AIFM already authorised by the CNMV as their management company, they are obliged to notify such appointment to the CNMV.

AIFs cannot start their activity until they are registered in the special CNMV register.

The resolution of the CNMV shall be notified within two months of submitting the authorisation request or having presented all the required documentation. If no management company has been appointed, the resolution will be notified within three months of submitting the authorisation request or having presented all the necessary documentation. The resolution shall be considered denied if it has not been resolved five months after having submitted the application or all the needed documents.

Regarding the formal authorisation of a "*Sociedad Gestora de Entidades de Inversión Colectiva de Tipo Cerrado*" or "*SGEIC*", the final resolution of the CNMV must be made and shall be notified within the three months following the initial submission by the management company of its application.

In February 2017, the CNMV published a welcome programme for investment and management firms; although this dossier is for informational purposes only and does not entail any legal or administrative responsibility for the CNMV, it highlights that the CNMV will try to complete its authorisation process within two months, provided that the applicant meets the mandatory requirements and the required documentation has been substantially presented. This initiative was mainly due to the still ongoing Brexit process.

1.6 Are there local residence or other local qualification or substance requirements?

Local residence and other local qualification requirements only apply for Spanish-based AIFs or AIFMs registered in Spain and for those foreign AIFs intended to be marketed in Spain.

Thus, those AIFs or AIFMs which carry out their activities in Spain will be subject to local residence or qualification requirements, except in those cases where the AIFM is authorised to carry out its activities in Spain on a cross-border basis through the EU passport, as noted in question 1.2 above.

Foreign AIFs marketed in Spain shall designate a legal person responsible for complying with the general provisions of disclosure of information and communication of any change affecting the essential elements in its offering to investors or data registration with CNMV. In addition, all foreign AIFs will be required to submit to the CNMV statistical data on a regular basis.

Management companies operating with the freedom to provide services in Spain will be obliged to appoint a representative with tax residence in Spain for the purpose of complying with any tax obligations that may arise.

1.7 What service providers are required?

In addition to the management of an AIF, the "*Sociedad Gestora de Entidades de Inversión Colectiva de Tipo Cerrado*" or "*SGEICs*" can perform duties of an administrative, distribution or fiduciary nature. Furthermore, different types of ancillary services, such as: maintenance of a discretionary management of investment portfolios, including those of pension funds and employment funds; investment advice; and reception or transmission of client orders can also be handled by SGEICs.

The applicable law and regulations set out that there shall be a depositary institution in which: (i) securities, cash or any other products; and (ii) management companies (in case of investment funds) need to be deposited.

Although SGEICs are allowed to outsource certain functions, they must retain ultimate responsibility over their functions, establishing reasonable controls over any such outsourced functions. The information related to the outsourcing of functions shall be at the disposal of the CNMV.

In addition, please note that AIFs may be marketed by financial intermediaries, which mainly tend to be banks, securities firms or securities agencies.

1.8 What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?

Under Law 35/2003, foreign managers or advisers wishing to manage, advise or operate open-ended funds domiciled in Spain can do so if they have been authorised by Directive 2009/65/EC, 13 July 2009, in another Member State. If they have been authorised in another Member State, they can operate in Spain either through a subsidiary or under the free provision of services regime. As established in article 55.2 of Law 35/2003, under any circumstances the establishment of subsidiaries or the free provision of services can be conditioned to the acquisition of an additional authorisation or contribute to an endowment fund or any measure of equivalent effect.

Under Law 22/2014, foreign managers or advisers wishing to manage, advise or operate closed-ended funds domiciled in Spain can do so by filing a request for authorisation before the CNMV if they have been authorised in another Member State under Directive 2009/65/EC.

According to article 82 Law 22/2014, EU management companies are also allowed to manage closed-ended AIFs domiciled in Spain, as well as to provide services in Spain either through a subsidiary or under the free provision of services regime with similar procedures to those mentioned in Law 35/2003 for open-ended AIFs.

For foreign management companies to be registered in Spain, article 49 of Law 22/2014 establishes the obligation for the CNMV to, prior to authorisation of the manager, consult with the national authority of the Member State where the manager was authorised if:

- The manager wishing to operate in Spain is a subsidiary of another manager company authorised under Directive 2009/65/EC in another Member State.
- If the manager company is the subsidiary of the parent company of another managing company authorised under Directive 2009/65/EC, an investment services company, a credit entity, or an insurance or reinsurance company authorised in another Member State.
- If the managing company is under the control of the same natural or legal persons as another managing company authorised under Directive 2009/65/EC or Directive 2011/61/EU, an investment services company, a credit entity or an insurance or reinsurance company authorised in another Member State.

Please note that Directive (EU) 2019/1160, amending Directives 2009/65/EC and 2011/61/EU on cross-border distribution of collective investment undertakings, has included additional information obligations to be fulfilled by UCITS in each Member State where they intend to market their units.

1.9 What relevant co-operation or information sharing agreements have been entered into with other governments or regulators?

The CNMV, within the EU supervisory framework, has entered into many information exchange agreements with other jurisdictions and supervisory bodies from within the EU and abroad; for example: Argentina; Australia; Belgium; Bolivia; Brazil; Canada; Chile; China; Colombia; Costa Rica; the Czech Republic; the Dominican Republic; Ecuador; El Salvador; France; Germany; Hong Kong; Italy; Mexico; Panama; Peru; Portugal; Romania; Taiwan; the United Arab Emirates; and the USA.

Specifically with regard to information-sharing agreements, these include, amongst others: (i) the European Union Agreement on Cooperation Between the Financial Supervisory Authorities, Central Banks and Finance Ministries – On Financial Stability in the European Union; (ii) the International Organization of Securities Commissions ("IOSCO") Multilateral Agreement; (iii) the European Securities and Markets Authority ("ESMA") Multilateral Agreement for the Exchange of Information and Supervision of Securities Activities; (iv) the Co-operation Framework Agreement for Mutual Assistance in the Supervision and Monitoring of an AIFM, its Delegates and Depositaries; (v) the Securities and Exchange Commissions ("SEC") and Committee of European Securities Regulators ("CESR") (currently ESMA) Work Plan; and (vi) the exchange of confidential information between the SEC and the CNMV, in accordance with International Financial Reporting Standards ("IFRS"), on companies issuing securities in both markets.

All information regarding sharing agreements is available on the CNMV's website.

2 Fund Structures

2.1 What are the principal legal structures used for Alternative Investment Funds?

Essentially, AIFs can be constituted through either an investment fund or an investment company. However, investment

funds can only be managed by a management company since they have no legal personality, whereas an investment company can be managed directly (by its own board of directors), or by delegating management to an authorised institution.

The main legal structures for open-ended AIFs are investment funds whose objective is to obtain the highest possible return using all the investment opportunities available to the manager ("hedge fund" or "*Instituciones de Inversión Colectiva de Tipo Libre*" or "*IICIL*"), funds of hedge funds ("*Fondos de Instituciones de Inversión Colectiva de Tipo Libre*" or "*IICIICIL*"), as well as real estate CIIs and non-UCITS open-ended CIIs other than those mentioned above.

The main legal structures for closed-ended AIFs are: private equity entities (which can take the form of funds or companies); and other types of entities (i.e. closed-ended collective investment entities, which can be either funds or companies, as noted in question 1.4 above). The Spanish legislator requires that closed-ended collective investment entities do not have a "commercial or industrial purpose", and does not impose a specific investment regime, allowing investment in all types of assets, including non-financial assets. To sum up, Law 22/2014 distinguishes between two types of open-ended investment schemes:

- "*Sociedades de Inversión de Capital Cerrado*" or "*SICC*" (Spanish terminology), a closed-ended collective investment scheme in company form.
- "*Fondos de Inversión de Capital Cerrado*" or "*FICC*" (Spanish terminology), a closed-ended collective investment scheme in funds form.

Other AIFs include the European Venture Capital Fund, regulated by Regulation (EU) No. 345/2013 of 17 April 2013, and the European Social Entrepreneurship Fund, regulated by Regulation (EU) No. 346/2013 of 17 April 2013.

On the other hand, there are other types of funds, such as:

- "*Fondos de Emprendimiento Social Europeos*" or "*FESE*", which refers to European social entrepreneurship funds.
- "*Fondos de Inversión a Largo Plazo Europeos*" or "*FILPE*", which refers to European Long-Term Investment Funds.

2.2 Please describe the limited liability of investors in respect of different legal structures and fund types (e.g. PE funds and LPACs).

The investors (i.e. participants of the AIF) will be responsible up to the limit of their contributions to the AIF.

2.3 What are the principal legal structures used for managers and advisers of Alternative Investment Funds?

As mentioned, managing both investment funds, being either UCITS or AIFs, is a regulated activity, limited to licensed institutions. Any legal persons whose regular business is to manage one or more closed-ended AIFs must be registered at the CNMV under the official name of "*Sociedad Gestora de Entidades de Inversión Colectiva de Tipo Cerrado*" ("*SGEICs*"). Consequently, the name of SGEICs can only be used by any legal person with this sole purpose. All SGEICs must vest the form of public limited company whose corporate purpose is the managing of AIFs.

Please take into account that management companies managing UCTIS or open-ended AIFs ("*Sociedad Gestora de Instituciones de Inversión Colectiva*" or "*SGIICs*", in Spanish terminology) can also manage closed-ended AIFs complying with Law 22/2014. The legal status of SGIICs is similar to SGEICs.

2.4 Are there any limits on the manager's ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds?

The management companies of open-ended AIFs issue and redeem shares at the same intervals as net asset value calculations upon the request of any participant, under the terms established in the relevant regulations. Notwithstanding the foregoing, AIFs do not have to grant the requested redemption on a net asset value calculation date set by the participant, and so it does not constitute any right by itself and shall be expressly stated in the prospectus. However, in the CNMV, on its own initiative or upon the request of the management company, this may temporarily suspend the subscription or redemption of units when it is not possible to determine its price or concur on other *force majeure* events. In principle, subscription or redemption of shares may only be restricted or suspended if there is just cause or in cases of *force majeure*.

Closed-ended AIFs can establish restrictions on redemptions and will be subject to their own ruling provisions.

Furthermore, please note that Law 22/2014 was amended by means of the Royal Decree-Law 22/2018, of 14 December, establishing macro-prudential tools ("*Real Decreto-ley 22/2018, de 14 de diciembre, por el que se establecen herramientas macroprudenciales*") ("RD-Law 22/2014"). Namely, based on the stability and integrity of the financial system, the CNMV is entitled to demand AIFM to reinforce the level of liquidity of their portfolios and, particularly, to increase the percentage invested in especially liquid assets, as defined by the CNMV itself. This order may be justified on necessity and proportionality ground and must be adopted for a specified timeframe.

In fact, due to the public health emergency caused by COVID-19, a series of economic measures have been approved in Spain, among which is the modification of Law 35/2003, which establishes that: (i) AIFMs will be required to reinforce the level of liquidity of the portfolios of the managed IIC and, in particular, to increase the percentage of investment in liquid assets, as defined by the CNMV; and (ii) AIFMs may establish notice periods for redemptions managed by them without applying the requirements of time, minimum amount and prior notice in the management regulations. Such notice periods may also be established by the CNMV.

2.5 Are there any legislative restrictions on transfers of investors' interests in Alternative Investment Funds?

No, there are no specific legislative restrictions. However, general principles of public order and company law may apply.

2.6 Are there any other limitations on a manager's ability to manage its funds (e.g. diversification requirements, asset stripping rules)?

As mentioned, for closed-ended AIFs, Law 22/2014 focus mainly in the authorisation process of management companies ("*SGEICs*"), considering that this type of fund is more flexible than UCITS and there are no significant requirements for their investment and liquidity structure.

It is worth noting the liquidity enhancing requirements that may be ordered by the CNMV to the AIFM as provided by RD-Law 22/2014 (please see question 2.4).

3 Marketing

3.1 What legislation governs the production and use of marketing materials?

Legislation governing the production and the offering of marketing materials of investment funds will depend on whether it is a closed-ended or open-ended fund, based on the "advertising activity" concept.

Thus, Law 35/2003 and Regulation No. 1082/2012 on Collective Investment Entities apply to open-ended AIFs; and Law 22/2014 to closed-ended funds.

However, there is a common generic regulation for both types of AIF, which consists of: (i) the revised text of the Securities Market Law 4/2015, which states, in general terms, the basic conditions for marketing materials, as well as Act 34/1998, of 11 November 1998, on General Advertising; and (ii) Royal Decree 217/2008, of 15 February 2008, on investment firms.

3.2 What are the key content requirements for marketing materials, whether due to legal requirements or customary practice?

For retail investors, the new legislation of Packaged Retail Investment Products ("PRIIPS") came into force in January 2018. SGIICs currently providing Key Investment Information Document ("KIID") are exempt from applying the new PRIIPS regime until 2022, following the vote to postpone the PRIIPS application to UCIT funds issued by the Committee on Economic and Monetary Affairs ("ECON") of the European Parliament (although an in-depth review of PRIIPS regime is expected by European industry funds in the short term). Moreover, on 3 February 2021, EIOPA (the European Insurance and Occupational Pensions Authority) accepted the new PRIIPs RTS, enabling the introduction of PRIIP KIDs by the end of the year. The fund shall not carry out their activities until the current KIID and information brochure is registered in the relevant CNMV's administrative register.

The KIID shall include information containing the essential characteristics of the fund. The words "key investor information" shall appear prominently at the top of the first page of the document in Spanish or another language that accepts the CNMV. Specifically, information shall include the following data: (i) identification of the AIF; (ii) a brief description of its investment objectives and investment policy; (iii) a presentation of the historical returns or, where appropriate, profitability scenarios; (iv) costs and associated expenses; and (v) risk/reward investment, with appropriate guidance and warnings in relation to the risks associated with investments in the Council of Institutional ("CII") considered warnings profile.

The KIID will be drafted in concise, non-technical language and presented in a common format, allowing for comparison, and must be easily analysable and comprehensible to the average investor in order that he/she is reasonably able to understand the essential characteristics, nature and risks of the investment product that is offered and make investment decisions without recourse to other documents. The document must be continuously updated and any amendments thereto should be sent to the CNMV.

Regarding closed-ended AIFs, upon the entry into force of PRIIPS a KIID is required to be delivered to any retail investor. Additionally, there are pre-investment disclosure obligations for each closed-ended fund (e.g. strategy and investment policy), as well as periodic reporting requirements to investors and the CNMV.

3.3 Do the marketing or legal documents need to be registered with or approved by the local regulator?

Yes, the CNMV establishes the standard model applicable to all the documentation to be submitted to investors. In this sense, it keeps a record of brochures, documents with key investor information, and annual and quarterly reports on the AIF, to which the public will have free access.

All documents published in the public domain will be forwarded simultaneously to the CNMV in order to keep the above-mentioned records updated.

In the case of the dissemination of the prospectus and the document containing key investor information, prior registration by the CNMV is required. Registration of the prospectus and the document containing key investor information will require prior verification by the CNMV.

3.4 What restrictions are there on marketing Alternative Investment Funds?

From a client perspective, there is a very relevant distinction between the marketing of UCITS and AIFs. UCITS can be marketed both to retail or professional investors. However, as a general rule, AIFs are to be marketed to professional clients, as defined in the Spanish Securities Market Act. The marketing to retail clients is an exception limited to those retail clients who commit to invest a minimum of EUR 100,000 and acknowledge in writing that they understand the risks of the fund being marketed.

AIFs and their management companies must respect, in any event, the regulations concerning marketing and advertising in Spain. The CNMV monitors compliance with these obligations.

It is especially relevant that authorisation is required for marketing in Spain. The CNMV monitors compliance with these obligations. Authorisation for marketing in Spain may be refused due to prudential reasons, specifically: (i) not being treated in an equivalent manner to investment funds in the respective country of origin; (ii) non-compliance with the rules of order and discipline in the Spanish securities markets; (iii) not sufficiently ensuring the adequate protection of investors resident in Spain; or (iv) the existence of disruption in the conditions of competition between AIFs authorised outside Spain and those authorised in Spain.

3.5 Is the concept of "pre-marketing" (or equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?

There is no express legal definition of "pre-marketing" (or equivalent) recognised under the laws of Spain as of today. Please note that in this sense Directive (EU) 2019/1160 is complemented by Regulation (EU) No. 2019/1156 of the European Parliament and of the Council.

Both the Directive and the Regulation are aimed to establish uniform rules on the publication of national provisions concerning marketing requirements for UCITS and AIFMs in relation to their cross-border activities. In particular, the Regulation further strengthens the principles applicable to marketing communications governed by UCITS Directive and extends the application of those principles to AIFMs, thereby resulting in a high standard of investor protection, regardless of the type of investor. As a novelty, these pieces of regulation introduce a harmonised definition of "pre-marketing", whose rules on pre-marketing will only apply to authorised EU AIFMs.

These rules must be addressed to potential professional investors and will need to be considered as from 2 August 2021. This introduces an additional burden, especially for non-EU AIFMs, and will have a big impact around reverse solicitation insofar as any subscription within 18 months of the AIFM, having begun pre-marketing activities, shall be considered to be the result of marketing and therefore subject to the applicable notification procedures.

Please note that the new regime on pre-marketing introduced by Directive (EU) 2019/1160 has not yet been transposed in Spain, the deadline being 2 August 2021.

3.6 Can Alternative Investment Funds be marketed to retail investors?

Please see the answer to question 3.4.

According to AIFMD and MiFID, AIFs managed by AIFMs regulated by AIFMD may be marketed and advertised to retail investors but subject to enhanced investment requirements set forth in the Spanish legislation in order to ensure protection for such retail investors.

Accordingly, open-ended funds can be marketed to retail investors provided the following conditions are fulfilled: (i) an investment of, at least, EUR 100,000; and (ii) a written declaration from the retail investor confirming that it is aware of the associated risks.

Despite the fact that the advertising of closed-ended AIFs is targeted to professional investors, this does not preclude the possibility for retail investors to invest in closed-ended funds, provided they fulfil the conditions mentioned above.

Additionally, and without prejudice to the obligations aforementioned, the Directive (EU) 2019/1160 introduces a new Article 43 a) to Directive 2011/61/UE setting out additional information obligations for AIFM to be made in each Member State where it intends to market units or shares of an AIF to retail investors.

3.7 What qualification requirements must be met in relation to prospective investors?

Prior to investment, investors shall declare, in writing, that they acknowledge the investment risks.

3.8 Are there additional restrictions on marketing to public bodies such as government pension funds?

The legislation does not provide any additional restrictions on marketing to public bodies.

3.9 Are there any restrictions on the participation in Alternative Investments Funds by particular types of investors (whether as sponsors or investors)?

No, other than in relation to pension funds, there are no general restrictions in the applicable laws or regulations. However, we would recommend that an in-depth analysis be carried out, on a case-by-case basis, on the individual restrictions resulting from legal or statutory provisions of the relevant sponsor or investor.

3.10 Are there any restrictions on the use of intermediaries to assist in the fundraising process?

Financial intermediaries, which can be banking or non-banking entities, shall perform activities related to the selling, buying, transferal or subscription of participations in AIFs. Investors cannot buy and sell securities listed on organised markets on their own, it being necessary to turn to financial intermediaries for such activities.

4 Investments

4.1 Are there any restrictions on the types of investment activities that can be performed by Alternative Investment Funds?

Compared to UCITS, AIFs have lower investment rules and the possibility to have a higher leverage ratio. Their investment object can consist of either financial or non-financial activities. The distinction between open-ended and closed-ended funds is explained in question 1.4.

Closed-ended funds are subject to different restrictions regarding their object, as this cannot constitute a commercial or industrial purpose. The object of closed-ended funds must be related to a predefined investment policy.

4.2 Are there any limitations on the types of investments that can be included in an Alternative Investment Fund's portfolio, whether for diversification reasons or otherwise?

Law 35/2003 states that requirements for financial UCITS are applicable to open-ended AIFs.

To comply with the principle of risk diversification, AIFs must comply with the limitations that are imposed regarding the minimum percentage of the assets which shall be invested (in some cases, investment in assets and financial instruments may not exceed certain thresholds).

In both open-ended and closed-ended AIFs, a minimum of 60% of their assets shall be invested. However, open-ended AIFs cannot invest more than 10% of their assets in another hedge fund. In the case of closed-ended funds, the aforementioned minimum of 60% of their assets must be invested in financial instruments as shares or profit-participating loans.

Those AIFMs authorised within any Member State of the EU or in those countries not included in the Financial Action Task Force ("FATF") list of countries not co-operating in the exchange of information, are able to invest up to 100% of their assets in other ECRs.

As mentioned, Law 22/2014 mainly focuses on the requirements for management companies (SGEICs). Compared to UCITS, Law 22/2014 establishes only high-level principles regarding due diligence procedures that the SGEIC need to perform in managing closed-ended AIFs, especially regarding conflicts of interest, valuation procedures and risk and liquidity levels. Also, SGEICs shall establish a maximum level of leverage to which they may recourse. SGEICs have to disclose sufficient information regarding the main characteristics of every single fund, level of risks and leverage limits to the potential investors.

4.3 Are there any local regulatory requirements which apply to investing in particular investments (e.g. derivatives or loans)?

There are no additional requirements for AIFs in any particular investments beyond those stipulated in Law 35/2003; more specifically, AIFs will be authorised to invest in the assets listed in Article 30 of the same without any limitations other than those explained in previous questions, as well as the limitations established by the statutes of each of the entities involved.

4.4 Are there any restrictions on borrowing by the Alternative Investment Fund?

According to Art. 30(7) Law 35/2003, in the case of financial open-ended AIFs, their debt may not exceed 10 times the value of their assets. Likewise, investment companies, when indebted for the acquisition of immovable assets which are essential for the direct pursuit of the business, may not exceed this limit. In such cases, financial open-ended FIAs' debts may not exceed 15 times the value of their assets. In both open-ended and closed-ended funds, the cap on borrowing shall be specified in the prospectus.

4.5 Are there are any restrictions on who holds the Alternative Investment Fund's assets?

Securities and assets comprising open-ended AIFs portfolios must be held in custody under a regulated depositary.

5 Disclosure of Information

5.1 What disclosure must the Alternative Investment Fund or its manager make to prospective investors, investors, regulators or other parties, including on environmental, social and/or governance factors?

In general, AIFMs shall disclose any facts considered specifically relevant to the situation or development of the institution and must be reported immediately to the CNMV. Once analysed, the CNMV must disseminate and include any relevant development in the quarterly and annual or semi-annual report immediately.

The legislation applicable to open-ended AIFs states that a series of documents must be provided on a mandatory basis, the most important of which are: (i) a prospectus, containing the investment fund rules; (ii) the document containing the main information for the investor; (iii) an annual report containing, among others, the annual accounts, the management report and the audit report; and (iv) two quarterly reports. These are provided in order to ensure that all relevant circumstances that may influence the determination of the value of the assets and prospectus of the institution are publicly known, on a continually updated basis, as well as the inherent risks involved, and compliance with the applicable laws.

In the case of closed-ended funds, AIFMs must notify the CNMV, within 10 days, of any acquisition or loss of a significant interest held by the AIF, provided that the voting rights of the AIF in such company increase or decrease from a certain triggering percentage (10%, 20%, 30%, 50% or 75%). However, in the case of open-ended funds, the obligation to inform the CNMV arises when the investor position reaches, goes above, or falls below the triggering percentage (20%, 30% or 50%, as well as any stake that allows control over the managing company) of the company capital or fund assets). In terms of disclosure of information to investors, an annual report must be provided.

5.2 Are there any requirements to provide details of participants (whether owners, controllers or investors) in Alternative Investment Funds or managers established in your jurisdiction (including details of investors) to any local regulator or record-keeping agency, for example for the purposes of a public (or non-public) register of beneficial owners?

There are no specific AIFMD-Spanish legislation requirements to provide details of participants in AIF. However, AIF managers must keep details of participants' data (with no reporting obligations).

On a side note, there is a register obligation which applies as per Act 10/2010, of 28 April, on the prevention of money laundering and terrorism financing "*Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo*" following provisions of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("IV AML Directive") and "*Orden Ministerial 319/2018*" regarding the register of beneficial owners, which follows that of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

5.3 What are the reporting requirements to investors or regulators in relation to Alternative Investment Funds or their managers, including on environmental, social and/or governance factors?

An AIFM must provide the CNMV with any information it requires at any time, and shall provide, on a regular basis, information about: (i) the principal markets and instruments in which it trades on behalf of the fund, company or entity it manages; (ii) the main instruments in which the fund trades; and (iii) the principal exposures and concentration of each of the funds it manages. In particular, and as noted in question 5.1 above, AIFMs shall provide the CNMV with an annual report.

Open-ended AIFs must submit to the CNMV a monthly memorandum containing the operational statistics, and another investment portfolio. Also, they must provide every investor with a semi-annual and a quarterly report.

Closed-ended AIFs should inform the CNMV about, *inter alia*: (i) the percentage of the fund's assets that are subject to special arrangements arising from their illiquid nature; (ii) any new arrangements for managing the liquidity of the fund; (iii) the actual risk profile of the fund and risk management systems used by the management company for, among others, market risk, liquidity risk, counterparty risk and operational risk; (iv) the main categories of assets in which the Collective Investment Undertaking ("CIU") has invested; and (v) the results of the stress tests.

SGIICs, SGEICs or any other management companies providing services on a cross-border basis need to report statistical information on a regular basis to the CNMV. Circular 2/2017 of the CNMV defines the information requirements.

5.4 Is the use of side letters restricted?

Any preferential treatment granted to an investor(s) shall be disclosed in the prospectus. Moreover, AIFs shall comply with the relevant provisions in relation to conflicts of interest and the overall obligation to keep investors duly informed.

6 Taxation

6.1 What is the tax treatment of the principal forms of Alternative Investment Funds identified in question 2.1?

The tax treatment of the main forms of Alternative Investment Funds depends on whether the fund is an open-ended or a closed-ended fund.

Open-ended funds are subject to a special tax regime foreseen in the Spanish Corporate Income Tax Law, which includes the application of a 1% tax rate if certain requirements are met.

Closed-ended funds (i.e. private equity entities) are subject to the general Spanish Corporate Income Tax rate of 25% on their worldwide income. However, these sorts of funds will benefit from: (i) a 99% tax exemption for capital gains derived from the sale of subsidiaries; and (ii) a 95% exemption for dividends obtained from their subsidiaries, both subject to certain requirements.

These tax measures are compatible with the existing participation exemption regime, which may also be applicable.

6.2 What is the tax treatment of the principal forms of investment manager/adviser identified in question 2.3?

The Spanish tax system does not foresee any special tax treatment for investment managers or advisers. Consequently, the provisions set out in the Spanish Corporate Income Tax Law will apply and the tax rate will be 25% on their worldwide income.

The management of the fund may be exempt from VAT if several requirements are met.

6.3 Are there any establishment or transfer taxes levied in connection with an investor's participation in an Alternative Investment Fund or the transfer of the investor's interest?

No. However, further analysis would be required on the tax implications derived from the transfer of participations in a fund with more than 50% of its assets in real estate located in the Spanish territory. In particular, Spain has introduced an anti-abuse clause in order to avoid the transfer of real estate through the sale of real estate companies. However, this clause will not apply if the real estate owned by these companies is used for business activities.

6.4 What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in Alternative Investment Funds?

Both resident and non-resident investors, as well as pension fund investors, will be taxed on dividends and capital gains, if any, derived from the sale of shares. Capital gains will be assessed for the difference between the transfer value and the acquisition cost.

Residents

Individuals will be subject to a 19% to 26% tax rate, and companies will be subject to a fixed 25% tax rate.

It is important to point out that Spanish tax-resident individuals will not be taxed on the capital gains derived from the sale of participations in an investment fund, provided a subsequent investment in a qualifying investment fund is made.

Non-residents

Depending on the tax treaty enforced with Spain, capital gains may be taxed at the source or only in the country of residence of the seller. In addition, EU residents may apply for an exemption on the capital gains obtained in Spain. As a general rule, the applicable tax rate will be 19%. However, if the non-resident constitutes a permanent establishment ("PE") in Spain, the tax rate will be 25% and the Corporate Income Tax provisions will apply.

Capital gains arising from the transfer or reimbursement of participations in a closed-ended Alternative Fund obtained by a non-resident investor would not be considered to be obtained in Spain for tax purposes. However, this rule will not apply if the non-resident investor resides in a country qualified as a tax haven for tax purposes or if capital gains are obtained through a tax haven.

Pension fund investors

Tax treatment of pension fund investors will depend on their tax residence as indicated in previous paragraphs.

Income obtained by a Spanish-resident pension fund will be subject to Corporate Income Tax at 0% over its income if it is covered under the scope of Act 1/2002 of 29 November.

Dividends obtained by a pension fund resident in the EU or EEA will not be subject to withholding tax in Spain.

6.5 Is it necessary or advisable to obtain a tax ruling from the tax or regulatory authorities prior to establishing an Alternative Investment Fund?

It is not strictly necessary to obtain a tax ruling from the Administration as a step prior to establishing an AIF. However, it would be advisable to file a tax ruling in order to foresee the tax treatment given by the Administration to a particular AIF.

The ruling must be issued by the General Tax Directorate within six months following the request. Tax rulings duly requested are binding on the tax authorities, and their criteria must be compulsorily applied to taxpayers in similar cases, provided the regulations existing at the time of issuance and the applicable case law remains unchanged. However, in practice, the tax authorities may change their criteria on newly issued tax rulings from time to time, but such changes will not have retroactive effects for taxpayers (the new criteria will supersede the previous ones for future cases).

The filing of a tax ruling prevents penalties in case of a tax audit, provided the facts are the same.

6.6 What steps have been or are being taken to implement the US Foreign Account and Tax Compliance Act 2010 (FATCA) and other similar information reporting regimes such as the OECD's Common Reporting Standard?

FATCA has been developed in Spain by "*Orden HAP/1136/2014*", which regulated Form 290, and which is used to provide information to the Spanish tax authorities in order to comply with the FATCA provisions. Spanish Royal Decree 1065/2007 Regarding the Obligation to Report Information on Financial Accounts, has also been adapted to incorporate the FATCA provisions.

Like many other jurisdictions, Spain will begin to report information after a maximum of nine months after 31 December 2017 with regard to complying with the CRS provisions.

6.7 What steps are being taken to implement the OECD's Action Plan on Base Erosion and Profit-Shifting (BEPS), in particular Actions 2 (hybrids) (for example ATAD I and II), 6 (prevention of treaty abuse) (for example, the MLI), and 7 (permanent establishments), insofar as they affect Alternative Investment Funds' operations?

Spain has passed measures to adopt the actions of the OECD's Action Plan with regard to Action 6 ("Prevent treaty abuse"). Spain has signed tax treaties with several countries (Belgium, Bolivia, Croatia, Cuba, Ireland, Israel, Nigeria, Portugal, Russia, Slovenia, etc.), with a specific Limitation on Benefits ("LoB") clause. The tax treaty between Spain and the United

States contains a global LoB clause. Spain has also introduced excluding clauses for several entities or regimes (for example, in the tax treaties with Barbados, Jamaica, Luxembourg and Uruguay).

In addition, in 2017 Spain signed the multilateral Convention to Implement Tax Treaty Related Measures to prevent BEPS.

6.8 Are there any tax-advantaged asset classes or structures available? How widely are they deployed?

There are no tax-advantaged structures other than as described in question 6.1.

6.9 Are there any other material tax issues for investors, managers, advisers or AIFs?

No, there are not.

6.10 Are there any meaningful tax changes anticipated in the coming 12 months other than as set out at question 6.6 above?

No, there are not.

7 Trends and Reforms

7.1 What have been the main trends in the Alternative Investment Funds space in the last 12 months?

As a result of the COVID-19 pandemic, many managers had to outline business continuity plans. In this sense, valuation procedures have played an important role, especially in the case of open-funded funds, given that such valuations are the basis for fees, subscriptions and redemptions. On the other hand, liquidity issues have struck hard, although in truth most open-ended funds have a variety of measures in place to limit the impact of the liquidity crisis (redemption gates, distributions in kind, side pockets, suspension of redemptions). However, liquidity issues are less significant in closed-end funds as investors do not have redemption rights.

Furthermore, in recent years, there has been a trend of creating customised products for large investors. Environmental, social and governance (ESG) reflections continue to rise in the financial sector in general. Also, co-investment remains attractive.

7.2 What reforms (if any) in the Alternative Investment Funds space are proposed?

With regard to the Spanish regulator, the CNMV has made a series of recommendations.

In this regard, the CNMV points to the possibility of introducing a regulatory amendment to harmonise the regime for marketing alternative investment funds to retail investors with Europe. To this end, they specify that a series of requirements must be met: (i) the suitability of the instrument for the client must be assessed; (ii) if the investor's financial assets are less than EUR 500,000, the investment must represent less than 10% of the same; and (iii) the investment must be at least EUR 10,000.

The CNMV presents the need to modify the regulatory framework to bring it in line with the rest of the EU countries in the following scenarios: (i) the limitation of the liability regime for fund managers marketing global accounts in EU countries; and (ii) the possibility for funds to use securities lending.

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