



# ICLG

The International Comparative Legal Guide to:

## **Alternative Investment Funds 2018**

**6th Edition**

A practical cross-border insight into Alternative Investment Funds work

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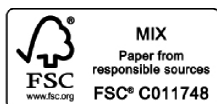
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# Spain



Miguel Cases



Toni Barrios

## Cases & Lacambra

### 1 Regulatory Framework

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

For the purpose of this chapter, Alternative Investment Funds (hereinafter, “AIFs”) means a collective investment scheme undertaking, including investment compartments thereof, which: i) raise 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) do not require authorisation pursuant to article 5 of Directive 2009/65/EC.

Spanish legislation distinguishes between closed-ended and open-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 the 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 the 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 indicated 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 the 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”).

#### 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 “*SGIIC*”, in Spanish official terminology) are governed by Law 35/2003. For additional information, please review the Spanish chapter of the *ICLG to: Public Investment Funds 2018*.

Management companies of closed AIFs (“*Sociedad Gestora de Entidades de Inversión Colectiva de Tipo Cerrado*” or “*SGEIC*” in Spanish official terminology) are governed by Law 22/2014. SGEIC are regulated by the Spanish National Securities Market Commission (“CNMV”) and require its prior authorisation; although it has to be noted that non-Spanish AIFMs already authorised in other EU Member States can be passported with no need of obtaining further authorisation or any other additional requirements.

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 to ensure 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 SGIIC, management companies for UCITS funds, can also carry out activities for close-ended AIFs. When managing AIFs, SGIIC 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. Although, depending on the type of AIF, the requirements and timeline will vary and Spanish AIFMs must be registered in the Commercial Registry 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 by the CNMV,

since it is the authorising, supervisory and control authority. For EU management companies, the cross-border marketing of AIF duly authorised in an EU country is free once the regulator's home country notifies to 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 a EU country, it will be necessary to demonstrate the CNMV that the following conditions are met:

- The existence of cooperation agreement between the CNMV and the home country regulator of the management company, with the purpose to ensure 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 art. 26 of the Organisation for Economic Co-operation and Development (OECD) regulation for the exchange of tax information.

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

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#### 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 v hedge)) and, if so, how?

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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 Spanish Securities Market Commission, "CNMV") nor Law 22/2014 (AIFs) nor Law 35/2003 (UCITS) have included a specific definition of an Alternative Investment Fund ("AIF"). In our understanding, all collective investment schemes which are not UCITS should be classified as AIFs.

The 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 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.

The 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 close-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 "*SICCC*").

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*"). These entities are not considered in this chapter, since the focus of this guide are AIFs.

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

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Given the difference 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 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 must notify the CNMV of this.

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 after 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 after 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 motivated and shall be notified within the three followings months after the initial submission by the management company of its application. Last 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, the guide 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.

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

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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.

### 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 “*SGEIC*” can perform duties of administrative, distribution or fiduciary nature. Furthermore, different types of ancillary services such as: discretionary management portfolio; investment advice; reception; or transmission of client orders can be handled also by any SGEIC.

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 SGEIC are allowed to outsource certain functions, they must retain the ultimate responsibility, establishing reasonable controls of any of 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 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 close-ended funds domiciled in Spain can do so 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 close-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 mother company of another managing company authorised under Directive 2009/65/EC, of an investment services company, of a credit entity, of 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, of an investment services company, of a credit entity or insurance or reinsurance company authorised in another Member State.

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

The CNMV, within the EU supervisory framework, has subscribed to 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 in CNMV webpage which is updated when necessary.

## 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*”) and funds of hedge funds (“*Fondos de Instituciones de Inversión Colectiva de Tipo Libre*”).

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). To sum up, the Law 22/2014 distinguishes between two types of open-ended investment schemes:

“*Sociedades de Inversión de Capital Cerrado*” or “*SICCC*” (Spanish terminology), closed-ended collective investment scheme with company form.

“Fondos de Inversión de Capital Cerrado” or “FICC” (Spanish terminology) closed-ended collective investment scheme with funds form.

## 2.2 Please describe the limited liability of investors.

It must be assumed that the participants will be responsible up to the limit of their contributions, which constitutes limited liability.

## 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* (“SGEIC”). Consequently, the name of SGEIC can only be used by any legal person with this sole purpose. All SGEIC must be a public limited company whose corporate purpose is the managing of AIFs.

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

## 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.

## 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 of 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 close-ended AIFs, Law 22/2014 focus mainly in the authorisation process of management companies (“SGIEC”), considering that this type of fund is more flexible than UCITS and there are no significant requirements for their investment and liquidity structure.

## 3 Marketing

### 3.1 What legislation governs the production and offering of marketing materials?

Legislation governing either production and marketing materials of investment funds will depend on whether it is a closed-ended or open-ended fund. Thus, Law 35/2003 and Regulation 1082/2012 on Collective Investment Entities apply to open-ended AIFs; and Law 22/2014 to closed-ended funds. However, there is a common 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, for 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 (“PRIPS”) came into force last January 2018. SGIIC providing the former Key Investment Information Document (“KIID”) are exempt to apply the new PRIPS regime until 2020. 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 works “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 (“CI”) 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 close-ended AIFs, once the PRIPS has come into force in January 2018, a Key Investment Information Document (“KIID”) is required to be delivered to any retail investor.

### 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 and acknowledge in writing that they understand the risks of the fund 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 Can Alternative Investment Funds be marketed to retail investors?

Please see the answer to question 3.4.

According to AIFMD and MiFID, those 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.

### 3.6 What qualification requirements must be carried out in relation to prospective investors?

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

### 3.7 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.

### 3.8 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, transferral or subscription of participations in AIFs.

### 3.9 Are there any restrictions on the participation in Alternative Investment Funds by particular types of investors, such as financial institutions (whether as sponsors or investors)?

No, there are no specific 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.

## 4 Investments

### 4.1 Are there any restrictions on the types of 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 has been already explained (please see 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 focus on the requirements for management companies (SGEIC). Compared to UCITS, Law 22/2014 establishes only high-level principles regarding due diligence procedures that the SGEIC need to perform in managing close-ended AIFs, especially regarding conflicts of interest, valuation procedures, risk and liquidity levels. Indeed, there is no specific limit on leverage. In any case, SGEIC have to disclose to the potential investors sufficient information regarding the main characteristics of every single fund, level of risks and leverage limits.

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

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While the applicable law does not state a specific cap for closed-ended AIFs, in the case of open-ended AIFs, debt may not exceed five times the value of its assets and must be consistent with the implementation of its strategy and investment policy. In both open-ended and closed-ended funds, the cap on borrowing shall be specified in the prospectus.

### 5 Disclosure of Information

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#### 5.1 What public disclosure must the Alternative Investment Fund or its manager make?

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In general, AIFMs shall disclose any facts considered specifically relevant to the situation or development of the institution and must be communicated 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% to 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%, 40%, 60%, 80% or 100% of the company capital or fund assets).

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#### 5.2 What are the reporting requirements in relation to Alternative Investment Funds or their managers?

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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.

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.

SGIIC, SGEIC 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.

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#### 5.3 Is the use of side letters restricted?

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Any preferential treatment shall be disclosed in the prospectus. However, AIFs shall comply with the relevant provisions in relation to conflicts of interest and the overall obligation to keep investors duly informed.

### 6 Taxation

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

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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 (e.g. 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 full 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.

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

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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.

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#### 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?

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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.

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#### 6.4 What is the tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors in Alternative Investment Funds?

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Both resident and non-resident investors, or 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 23% 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 the 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 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 December 31<sup>st</sup> 2017 with regards 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 6 and 7, 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 not any tax-advantaged structures others than what is 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?

No, there are not.

## 7 Reforms

#### 7.1 What reforms (if any) are proposed?

No reforms at a Spanish level have been proposed so far. Nevertheless, in 2018 we shall see the adaptation of the Spanish legal order to the provisions of Directive 2014/65/EC, on markets in financial instruments and amending Directive 2002/92/EU (recast) (“MiFID II”) and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (“MiFIR”), which have been partially transposed to the Spanish legal system through the Royal Decree 21/2017, of 29 December, on urgent measures to adapt the Spanish legal order to the European regulations regarding the securities market.

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