The Asset Management Review

Editor
Paul Dickson

Law Business Research

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EDITOR'S PREFACE

2012 is an auspicious year for the first edition of *The Asset Management Review*, coming as it does in the wake of the global financial crisis and in the midst of a continuing period of economic uncertainty in the eurozone, both of which have had a significant impact on asset management activity around the globe. Many governments have spent the past few years reflecting upon the existing frameworks for regulation of their financial services industries with a view to avoiding a repetition of past regulatory failings and encouraging a more appropriate risk appetite among investors and investment managers. The products of that reflection are beginning to emerge in 2012 and it appears that in many cases, large-scale overhaul of asset management regulation and greater intervention in previously lightly regulated industry sectors are likely to be the end result.

In some countries, and particularly at the supranational level in the European Union, it appears that a greater appreciation of the systemic importance of asset management entities in the broader financial system has been another product of the financial crisis, with a corresponding increased focus on transparency and disclosure to permit national regulators to monitor their activities. As a result, the debate about the type and extent of information that funds and their managers may be required to divulge publicly looks set to be another recurring theme throughout the coming year and beyond.

While there has certainly been a rebound in asset management operations since the lows of 2008, it would be fair to say that the outlook for investment fund activity over the next year remains uncertain. The continuing volatility of equities on global stock exchanges and the ongoing turbulence in bond markets, particularly in relation to concerns about the quality of some sovereign debt, have led to changes in investment behaviour and have done little to dispel any nervousness among investors. Nonetheless, there are some bright spots in an otherwise clouded investment landscape, with new prospects opening up in emerging markets, particularly in parts of Asia and Latin America. Perhaps the best that one can say from the present vantage point is that the next 12 months look likely to feature a combination that will be familiar to any seasoned investor – that of risk and opportunity.

The publication of the first edition of *The Asset Management Review* is a significant achievement that would not have been possible without the support of the many lawyers and law firms who have contributed so much of their valuable time, knowledge and experience to this edition. I am grateful to them all. I would also like to thank Gideon Roberton and his team at Law Business Research for all their efforts to bring this book into being.

It is hoped that *The Asset Management Review* will prove to be a useful and practical companion in the increasingly complex, globalised and regulated world of asset management as we face the impending challenges of the coming year.

Paul Dickson
Slaughter and May
London
September 2012

Chapter 27

SPAIN

Juan Carlos Machuca and Miriam Pich-Aguilera[1]

I OVERVIEW OF RECENT ACTIVITY

The asset management market in Spain is relatively young in comparison to other EU jurisdictions. However, after approximately three decades of activity, it has developed significantly in the past few years to become a very professionalised market with high efficiency standards.

The financial crisis, and the European sovereign debt crisis particularly, has substantially affected Spanish undertakings for collective investments and pension funds, and, generally, asset management activity in Spain, which stalled to some extent in 2011.

The prolongation of the crisis and the deterioration of growth expectations means that the savings of Spanish households are destined to address basic needs and to reduce indebtedness, resulting in a decrease in the rate of savings. Indeed, the savings rate of Spanish households declined to less than 12 per cent of disposable income in 2011, compared with its peak levels of above 18 per cent in early 2010.[2]

In particular, assets managed by mutual funds totalled €132,369 million at the end of 2011, a fall of 8 per cent (€11,526 million) from year-end 2010, mainly due to redemptions (€10,853 million), which far exceeded subscriptions. The remainder of the fall in assets (€673 million) were the result of losses in mutual funds' portfolios.[3] As a consequence of the adverse performance of international stock markets in 2011 (including the Spanish stock market), the highest losses were suffered by euro and

1 Juan Carlos Machuca is a partner and Miriam Pich-Aguilera is an associate at Uría Menéndez Abogados, SLP.

2 Annual Report of the Spanish National Securities Market Commission ('the CNMV') regarding its actions and the securities markets in 2011.

3 Ibid.

international equity funds. Likewise, the volume of pension funds assets at year-end 2011 was €82,992 million, registering a decrease of 2.1 per cent in respect of 2010.[4]

Likewise, the number of management companies of undertakings for collective investments ('SGIICs') registered within the CNMV in 2011 amounted to 114, which is nine less than in 2010. Additionally, the number of managed undertakings for collective investments ('UCIs') continued falling significantly as a result of the intense process of mergers between funds.

Finally, during the past year several new regulations have been enacted that have affected the functioning of UCIs and pension funds; we have identified the main ones in Sections II and III, *infra*.

II GENERAL INTRODUCTION TO THE REGULATORY FRAMEWORK

Asset management in Spain is carried out by different entities, and thus asset management is subject to several regulatory frameworks regulating each of these entities as follows:

On the one hand, the Spanish regime on UCIs is regulated in Law 35/2003 of 4 November, as amended ('Law 35/2003'), and its developing legislation, including the recently enacted Royal Decree 1082/2012 of 13 July approving the regulation of the law on UCIs ('Royal Decree 1082/2012'). Spain amended Law 35/2003 on 31 October 2011 following the adoption of Directive 2009/65/EC,[5] generally speaking simplifying the regime of cross-border marketing of shares and collective investment schemes harmonised according to the Directive, and enhancing the supervision of UCIs and their managing entities by the CNMV.

UCIs are defined in Law 35/2003 as entities whose aim is to obtain funds, assets or rights from the public (investors) in order to manage and invest them in assets, rights, securities or other instruments (financial or otherwise), provided that the investors' return is established on the basis of the collective profits.

Law 35/2003 regulates UCIs, as well as their management companies (i.e., SGIICs) and their depositaries, which are entities in charge of the deposit and custody of the securities and, in general, all the assets that are the subject to the investments carried out by the UCIs.

Furthermore, Directive 2011/61/EU on Alternative Investment Fund Managers ('the AIFM Directive') entered into force on 22 July 2011, but has not yet been transposed in Spain (Member States have until 22 July 2013 to transpose it to their national legislation). Its provisions will likely have an impact on the definition of alternative investment funds and their marketing in Spain, as it has for the first time

4 2011 Report of the Spanish Association of Investment and Pension Funds ('INVERCO') on undertakings for collective investments and pension funds, available at: www.inverco.es/acercaDeInverco.do.

5 Directive 2009/65/EC of the European Parliament and the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

created a harmonised set of rules for the marketing and management of investment funds in Europe. Certainly, the management of this type of fund will be substantially affected by the transposition into Spanish law of the AIFM Directive.

Likewise, Law 24/1988 of 28 July on the Securities Market ('LMV') regulates portfolio management companies, while venture capital entities and their management companies are contemplated under Law 25/2005 of 24 November.

The supervisory body for the Spanish securities markets is the CNMV, which, in particular, oversees UCIs and their activities. The CNMV also controls the activity of investment companies (including portfolio asset management companies) and of venture capital entities.

Pension funds and their management companies are regulated in Legislative Royal Decree 1/2002 of 29 November, as amended ('the Pension Funds Law') and its developing regulations, including Royal Decree 304/2004 of 20 February approving the Regulation of Pension Funds, as amended.

The Pension Funds Law has been modified by, among others, the provisions of Law 2/2011 of 4 March on Sustainable Economy, which reduced the equity requirements of management entities of pension funds, and clarified the obligations and responsibilities of the depositories of pension funds.

Pension funds and their management companies are subject to the supervision and inspection of the General Directorate of Insurance and Pension Funds. The same regulator also supervises the activities of insurance companies.

Finally, Royal Decree 6/2004 of 29 October 6/2004 on Private Insurances and Royal Decree 2486/1998 dated 20 November approving the regulation of private insurances (together, 'the Private Insurance Regulations') establish the regime of management of insurance companies' assets.

III COMMON ASSET MANAGEMENT STRUCTURES

Asset management structures in Spain vary depending on the sector and the type of institution that carries out the asset management activity.

i UCIs

There are two types of UCIs under Spanish law, based on their organisational structure: investment companies and investment funds.

Investment funds are UCIs that are structured as a separate group of assets without legal personality, which belong to a number of investors (including other UCIs). Their management and representation are performed by an SGIIC, and their object is to obtain funds, assets and rights from the public in order to invest them in assets, rights, securities or other instruments (financial or otherwise), provided that the investors' return is established on the basis of the collective profits.

Law 35/2003 permits the creation of investment funds with different divisions, each of which is given a different name but which are under the general name of the fund. Each division shall issue its own units, which shall represent the part of the net worth of the fund that is attributed to that division. The subscribers of the relevant units of the investment fund will be considered as 'participants'. Each fund must have at least

100 participants, who (apart from the amount that they have invested when acquiring the corresponding units) will not be responsible for the debts of the relevant fund.

The investment fund's management company, acting jointly with a depositary, exercises the powers corresponding to the owner of the fund, without being its owner. New Regulation 1082/2012 regarding UCIs has introduced novelties as regards SGIICs in terms of risk management, and in particular an obligation to specify the criteria used by the SGIIC to assess the adequacy and proportionality of its risk management policy with regard to the nature, scale and complexity of the activities of the management company and the UCIs managed by them. Similarly, the new Regulation has improved SGIIC rules to control and manage personal transactions in which conflicts of interest may arise as a consequence of the employee, or a person related to him or her or to the management company, having insider information.

In order to incorporate an SGIIC it is necessary to obtain the authorisation of the Minister of Economy (through the prior proposal of the CNMV). An SGIIC must be incorporated as a public limited company for an indefinite period, and have a share capital represented by registered shares and the following corporate purpose: the management, representation, making of investments and management of the subscriptions and reimbursements of investment funds and companies. In addition, its share capital will have to comply with a minimum required amount, fully paid up. The new Regulation enacted through Royal Decree 1082/2012 has modified the equity regime of SGIICs in order to further harmonise it with EU standards.

In addition, the company must have good administrative and accounting, as well as adequate technical and human, resources.

Management companies will be responsible in relation to the participants or shareholders of the relevant investment funds, or the companies they manage, for all damages arising from the infringement of their obligations.

As regards investment companies, according to Law 35/2003, they are UCIs that are structured as public limited companies and whose object is that of UCIs. The share capital of investment companies must be fully subscribed and paid up from their incorporation date, and is represented by shares. As in the case of investment funds, it will also be possible to create investment companies with different divisions. There cannot be less than 100 shareholders in investment companies, and in certain cases it will be necessary that these companies appoint a management company.

In addition, either of the two types of UCIs can be of a financial or non-financial nature (e.g., real estate UCIs). Financial investment companies must add *Sociedad de Inversión de Capital Variable* (or its acronym, 'SICAV') to their name.

ii Portfolio management companies

LMV also regulates portfolio management companies, which are investment services companies defined as companies that carry out financial services on a professional basis. They can perform only the following investment services activities: discretionary portfolio management activities in accordance with a mandate received from a client, and investment advice. In addition, they can perform the following ancillary services: advice to undertakings on capital structure, industrial strategy and related matters, and advice and services relating to mergers and the purchase of undertakings; and investment research and financial analysis, or other forms of general recommendation relating to transactions in financial instruments.

For the purposes of carrying out investment services activities, portfolio management companies will have to be duly authorised and registered with the CNMV in the relevant registries. Among other requisites, portfolio management companies must underwrite an insurance policy in order to be registered.

iii Venture capital entities and their management companies

Venture capital entities may be classified in a venture capital fund ('FGR') or a venture capital company ('SGR').

Venture capital funds and the assets of venture capital companies may be managed by a venture capital management company ('SG') or by an SGIIC regulated by Law 35/2003 (with the prior authorisation of the CNMV). Additionally, the assets of venture capital companies may be managed by certain investment companies authorised by the CNMV.

SGs are open limited liability companies whose main aims are the management and administration of venture capital funds and assets of venture capital companies. They are regulated by Law 25/2005, and subsidiarily by the Spanish Corporate Law. Among other requisites, they must have a minimum share capital of €300,000, and good administrative and accounting, as well as adequate technical and human, resources.

iv Alternative investment funds

Alternative investment funds are regulated under Law 35/2003, Royal Decree 1082/2012 and additional regulations issued by the CNMV. There are two main types of alternative investment funds: free investment UCIs ('IICILs', known internationally as 'hedge funds'), which are funds that are almost completely free to develop their investment strategy; and UCIs of free investment UCIs ('IICIICILs', or 'funds of hedge funds'), which are basically funds of free investment funds that are subject to diversification and investor protection requirements that are similar to those of conventional UCIs, with certain particularities. Investors intending to acquire shares or units of alternative investment funds (except professional investors, or if the client has a portfolio management agreement authorising the investment in alternative investment funds) must sign a document declaring that they are aware of the risks arising from the investment.

v Pension funds and insurance companies

Pension funds are managed by pension funds management companies that have obtained the relevant administrative authorisation, that have the form of open liability companies and that are regulated in the Pension Funds Law (see Section VI.ii, *infra*, for further information). The Private Insurance Regulations set forth the regime for the management of insurance companies' assets, establishing among other requirements the constitution of technical provisions in respect of risks arising from insurance policies that they have underwritten (see Section VI.i, *infra*, for further information).

IV MAIN SOURCES OF INVESTMENT

According to INVERCO, the Spanish Association of Investment and Pension Funds, in 2011 Spanish households invested 44.3 per cent of their financial assets in bank deposits, while products without bank intermediation, such as investment funds, pension funds, insurances and direct investment, represented 45.3 per cent of the total financial assets of Spanish households. Direct retail investment in variable equity registered its biggest decrease in 2011, while short-term fixed-income products registered their highest increase.

On one hand, UCIs assets at year-end 2011 (including IICILs and IICIICILs) amounted to €201,728 million (€199,214 million as of 30 June 2012), which represented a 7.82 per cent decrease in respect of 2010. As regards the number of participants and shareholders, there were 6.2 million at the end of 2011 (7.4 per cent less than the previous year). Moreover, there were 6,169 registered UCIs in 2011: 2,345 investment funds (84 less than in 2010) and 3,068 investment companies (287 less than in 2010).[6] In 2011:

a the total number of SICAVS was 3,056, and their assets amounted to €23,614 million, a fall of 9.7 per cent in comparison with the previous year mainly due to net redemptions and, to a lesser extent, the losses recorded;[7]

b the assets held by IICILs and IICIICILs totalled €1,301 million (a fall of 3 per cent compared with 2010). Overall, IICILs and IICIICILs accounted for less than 1 per cent of the total assets of Spanish UCIs; and

c real estate UCIs assets amounted to €4,817 million, a decrease of 25.1 per cent since the previous year, mainly due to the disappearance of one important real estate fund.

As regards mutual funds investors, resident natural persons made up 97.3 per cent of mutual fund investors and accounted for 80.5 per cent of the total assets, which was similar to the past two years. Likewise, in relation to SICAVS, the relative weight of domestic portfolios in the global composition of portfolios increased.

The number of foreign UCIs marketed in Spain fell by 18.3 per cent in 2011, which represented a larger fall than the decrease seen in Spanish UCIs. However, the number of foreign schemes registered with the CNMV rose from 660 at the end of 2010 to 739 at the end of 2011.

In relation to the structure of portfolios, in 2011 78.1 per cent of UCI portfolios were made up of fixed-income funds, with an increase in national fixed-income funds; and 82.7 per cent of portfolios of pension funds were made up of fixed-income funds.

Likewise, at the end of 2011 the assets managed by SGIICs totalled €164 billion (7.6 per cent less than the previous year) and the assets managed remained highly concentrated (the three largest SGIICs accounted for 38.6 per cent of assets of UCITS at the end of the year).

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6 Data taken from the 2011 Report of INVERCO on undertakings for collective investments and pension funds, available at: www.inverco.es/acercaDeInverco.do; and from the Annual Report of the CNMV regarding its actions and the securities markets 2011.

7 Annual Report of the CNMV regarding its actions and the securities markets 2011.

On the other hand, pension fund assets at the end of 2011 amounted to €82,992 million, representing a reduction of 8.1 per cent in respect of the previous year. Pension funds asset represented 8.1 per cent of Spanish GDP in 2011. Forty-eight per cent of the Spanish population had constituted a pension plan in 2011, which, although low in comparison with other EU countries, is a significant figure; the number of plans was 2,992 (an increase of 28 since 2010).[8]

As regards contributions to pension plans, these amounted to €4,961 in 2011 (€469 million less than the previous year).

V KEY TRENDS

The asset management market tends to move towards 'concentration'. Management companies have continued the process of merging funds in order to rationalise the offer of available funds. Specifically, of the 207 mutual funds withdrawn from the CNMV registries in 2011, 204 were absorbed by another mutual fund.

Additionally, the behaviour of investors in the Spanish market will continue to be predominantly conservative. According to the CNMV, of the total assets managed by mutual funds in 2011, fixed-income funds, as well as mixed-fixed income, guaranteed-fixed income and guaranteed equity, accounted for 79.5 per cent of the total assets managed.

Certainly, the global financial crisis will continue to affect the Spanish asset management market. In fact, the IMF foresees a negative growth in Spain of -1.7 per cent in 2012 and of -0.3 per cent in 2013, so uncertainty will remain as the main characteristic of the Spanish market.

Notwithstanding the above, the restructuring of the financial sector may entail a decrease in the revenues offered by debt products due to its impact on profit and loss accounts; this could lead to the channelling of investments towards other products such as investment funds. INVERCO estimates that, in such a scenario, the result for revenues of domestic UCIs and pension funds, and their net subscriptions, could be positive, and thus the assets managed by such entities could slightly increase.

VI SECTORAL REGULATION

i Insurance

The Private Insurance Regulations establish the regime for the management of insurance companies' assets. There are several types of insurance companies under Spanish law, including insurance companies with fixed premiums, insurance companies with variable premiums and insurance cooperatives.

Spanish insurance companies need to establish technical provisions in respect of risks arising from insurance policies they have underwritten. Such provisions may be invested in a series of acceptable assets, including securities traded on an OECD exchange and deposits held with OECD banks. Additionally, insurance companies must

8 Op. cit. 7.

maintain a sufficient solvency margin in respect of all their activities, and a minimum guarantee fund.

ii Pensions

Under the Pension Funds Law, the different types of pension plans may be classified as follows:

Depending on its constituents:

- *a* employment system pension schemes – the promoter is an entity, company or corporation, and their participants are its employees;
- *b* associate system pension schemes – the promoter is an association, syndicate or labour union, and the participants are its associates or members;
- *c* individual system pension schemes – the promoter is one or several financial entities, and they are open to any participant; and
- *d* employment system pension schemes and associate system pension schemes – these may have a single promoter or several promoters that constitute jointly one pension scheme. Jointly constituted employment system pension schemes are open to any company or are limited to certain companies, according to different criteria (small and medium-sized companies, intra-group companies, etc.). On the other hand, individual system pension schemes have only one promoter.

Depending on the agreed commitments:

- *a* defined contribution schemes – schemes in which the contributions of the promoters or participants, or both, are defined;
- *b* defined benefit schemes – schemes in which the amount of the benefit is defined, and the contributions will vary depending on the returns; and
- *c* hybrid schemes – schemes that consider, simultaneously or separately, the amount of the benefit and of the contribution.

Pension funds are managed by pension funds management companies whose corporate object is exclusively the managing of pension funds. In addition, pension funds may also be managed by insurance companies authorised to operate in the life insurance area, provided that they have the minimum required financial reserves.

In order to be authorised and registered as pension funds management companies, these entities must comply with certain capital and reserves requirements. The main functions of the management company are:

- *a* the fund's bookkeeping;
- *b* determining the amount of the assets of different pension plans;
- *c* controlling the depositary of the fund; and
- *d* disclosing quarterly information to participants and beneficiaries regarding their consolidated and economic rights in the pension plan.

As regards management fees for the services carried out by management companies, there is a maximum annual limit of the value of the account that reflects the pension plan's resources and returns, and that is integrated in the relevant pension fund.

The Pension Funds Law establishes the legal criteria according to which pension fund assets must be invested, including security, profitability, diversification, liquidity, monetary consistency and suitable terms.

Spanish regulations establish the following limits on investments for pension funds, depending on the characteristics of the assets:

Pension funds must invest 70 per cent of their assets in financial securities traded in regulated markets; derivatives traded in organised markets; banking deposits; credits with mortgage guarantees; properties and real estate investment funds; and UCIs.

Pension funds also have maximum investment limits, and some established maximum percentages that certain assets may represent in relation to the pension fund's total assets. Moreover, pension funds may not generally borrow funds (with certain exceptions), and they have restrictions on their use of derivatives. Finally, the financial and actuarial systems of the plans have to be revised by an actuary. This revision must be carried out at least every three years, in general, or annually in the case of pension plans that require solvency margins (such as defined benefit plans).

iii Real property

There are two main types of entities under Spanish law with the object of investing in real estate assets: real estate UCIs and real estate investment listed companies ('SOCIMIs').

Real estate UCIs are defined in Law 35/2003 as non-financial UCIs whose main object is investment in urban real estate assets for the purpose of letting. They can adopt the form of an investment fund or investment company. Real estate UCIs are also managed by SGIICs subject to Law 35/2003, as described in Section II, *supra*.

SOCIMIs are regulated under Law 11/2009 of 26 October ('Law 11/2009'), a regulation influenced by American real estate investment trusts that was intended to create a new investment vehicle for the real estate market (and in particular the rental market): listed open limited liability companies that may opt for a special tax regime provided that they comply with certain requisites (see Section VII, *infra*). To the extent that they are open limited liability companies, SOCIMIs are also subject to the Spanish Corporate Law, and in particular to the rules of conduct and obligations of listed companies.

Given their nature, SOCIMIs are subject to double supervision: on one hand, by the Spanish tax authorities in relation to their compliance with the requirements to opt for special tax treatment; on the other, by the CNMV as regards the operation of SOCIMIs in the securities market.

The object of SOCIMIs is the direct or indirect investment in urban real estate assets for rental, including housing and business premises, hotels, garages and offices. In order to enable indirect investment, SOCIMIs may also participate in other SOCIMIs or in other entities (which may or may not be resident in Spanish territory, and which may or may not be listed) that meet the investment and distribution of benefits requirements required of such entities.

Law 11/2009 also contains an exhaustive regulation regarding the assets in which SOCIMIs may invest. Additionally, at least 80 per cent of their invested assets must be invested in the assets of their main object. Furthermore, Law 11/2009 establishes requisites as regards the revenue generated by a SOCIMIs' investments, financing and the distribution of benefits (dividends).

iv Hedge funds

As outlined in Section III.iii, *supra*, there are two main two types of alternative investment funds regulated by Law 35/2003 and Royal Decree 1082/2012 that may be used to set up hedge funds: the IICIL and IICIICIL.

Free investment funds are not defined as hedge funds, and Law 35/2003 does not intend to create a definition of hedge fund. Free investment UCIs are simply UCIs that are subject to different investment rules. In turn, IICIICILs are UCIs that invest in UCIs that are subject to different investment rules.

Alternative investment funds are subject to the investment rules of financial UCIs, with certain particularities (among others, in relation to the maximum investment limits, minimum initial investment required, minimum number of shareholders, calculation of fees, net asset value, and investment rules on financial instruments and derivatives).

v Private equity

Venture capital entities and venture capital management companies are regulated entities in Spain subject to the supervision of the CNMV. Their constitution is subject to the authorisation of the CNMV. They are financial entities whose main object is investment in non-financial companies, entities of a non-real estate nature and generally non-listed entities, and they must carry out their activities and invest in assets according to the requirements of Law 25/2005.

Regarding their legal structure, there are two types of venture capital entities: venture capital funds and venture capital companies.

Venture capital funds are structured as a separate group of assets without legal personality that belong to a plurality of investors, and are represented and managed by a venture capital management company (which must also be registered within the CNMV) or by an SGIIC. Venture capital companies are open limited liability companies that may be managed by a venture capital management company or may be operated by their corporate bodies.

Regarding their regime, Law 25/2005 foresees simplified venture capital entities (which must meet certain requirements, and are reserved essentially to qualified investors and other large investors) and common regime venture capital entities.

Spanish venture capital entities and venture capital management companies are subject to certain information, audit and investment policy requirements, and to certain rules of conduct.

VII TAX LAW

Although significant tax reforms have been passed during 2011 and 2012, Royal Decree-Law 5/2004 of 5 March 2004, which approved the revised text of the Non-resident Income Tax Law, which is in force, has not been significantly amended (with the exception of a temporary increase of applicable rates during 2012 and 2013). Therefore, short-term amendments to the non-resident income tax ('NRIT') rules are not expected.

Generally, non-resident taxpayers are subject to NRIT on Spanish source income, and must declare and pay NRIT during the first 20 days of April, July, October and January: NRIT is paid on income obtained during the calendar quarter immediately preceding these payment periods.

Spanish-source income would include interest paid by a Spanish-resident taxpayer or with respect to financing used in Spain; gains on the disposition of bonds issued by Spanish-resident persons; dividends distributed by Spanish-resident entities, including UCIs; and capital gains on the disposition of shares and units issued by Spanish-resident entities, including UCIs. Please note that regulated Spanish UCIs are non-transparent entities subject to Spanish corporate income tax (although at a rate of 1 per cent).

Income deemed to be obtained in Spain is generally subject to NRIT at a rate of 24.75 per cent (24 per cent as from 1 January 2014). However, a 21 per cent (19 per cent as from 1 January 2014) reduced tax rate is applied on dividends, interest and capital gains. Each income is subject to taxation separately on a gross basis (with certain exceptions, no expenses are deductible). Normally, a withholding tax equal to the non-resident's final tax liability is levied on interest, dividends and capital gains on UCIs.

As regards investment managers, any Spanish-source income earned when carrying out their management activity (fees, commissions or any other returns) will be subject to NRIT at the general 24.75 per cent tax rate (24 per cent as from 1 January 2014). However, most conventions for the avoidance of double taxation ('CDTs') entered into by Spain provide for an exemption from tax on business profits obtained in Spain.

A brief description of the Spanish taxation applicable to non-resident investors is provided below. Please note that this refers to individuals or entities not resident in Spain for tax purposes, and not acting through a permanent establishment located in Spain.

i Capital gains

In general, capital gains obtained in Spain by a non-resident taxpayer will be taxed under NRIT at a 21 per cent rate (19 per cent as from 1 January 2014). No withholding tax is levied on capital gains, except for those related to an investment in a Spanish UCI.

Domestic legislation provides for an exemption from tax for the benefit of residents of countries having concluded a CDT with Spain, and that includes an exchange of information clause in the case of transfers of shares or reimbursements of units in a UCI in a Spanish official secondary securities market.

In addition, EU residents are entitled to an exemption on capital gains obtained upon disposal of shares, provided that the assets of the company to which the shares belong do not consist mainly (direct or indirectly) of real estate located in Spain; and further provided that the non-resident has not held a participation of at least 25 per cent in the share capital of the Spanish company during the 12 months prior to the transfer of the shares, and that the capital gain is not obtained through a tax haven jurisdiction.

Finally, most CDTs provide for an exemption from capital gains tax, except when the assets are allocated to a Spanish permanent establishment or when the assets are Spanish real property. In some cases, when the assets consist of shares in a Spanish-resident entity, the exemption is conditioned to the fact that the holding is below significant participation thresholds (below 15 per cent or 25 per cent).

ii Interest and dividends

In general, interest and dividends obtained in Spain by a non-resident taxpayer will be taxed under NRIT at a 21 per cent rate (19 per cent as from 1 January 2014) and will be subject to withholding tax.

Domestic rules provide certain tax exemptions on income obtained by non-residents (e.g., income derived from Spanish public debt or interest accrued on non-residents' bank accounts).

In addition, EU residents are entitled to an exemption on interest obtained in Spain, provided that the interest is not obtained through a tax haven jurisdiction.

Regarding dividends, under the Parent-Subsidiary Directive no Spanish withholding taxes should be levied on the dividends distributed by a Spanish subsidiary to its EU parent company, to the extent that:

a the EU parent company maintains a direct holding in the capital of the Spanish subsidiary of at least 5 per cent uninterruptedly during the year prior to the date on which the distributed profit is due;

b the EU parent company is incorporated under the laws of a EU Member State and is subject to corporate income tax in a Member State, without the possibility of being exempt; and

c the distributed dividends do not derive from the subsidiary's liquidation.

The Spanish implementation of the Parent-Subsidiary Directive includes an anti-abuse provision, by virtue of which the withholding tax exemption will not be applicable where the majority of the voting rights of the parent company are held directly or indirectly by individuals or entities not resident in the EU, except where certain requirements apply.

Finally, non-residents that are resident in a country that has entered into a CDT with Spain will be entitled to apply the reduced tax rates provided in the relevant CDT (CDTs usually establish rates ranging from 5 per cent to 15 per cent on interest and dividends).

iii Special tax regimes

Spanish SOCIMIs are subject to a reduced 19 per cent corporate income tax rate on qualified income. They must comply with a number of regulatory requirements, including that they must be listed companies and must distribute least 90 per cent of their ordinary profits as dividends. Non-resident investors will be exempt on the dividend income, and totally or partially exempt on the capital gains, on disposal of the shares (up to the total amount of exempt dividends received, or the amount equivalent to 10 per cent of the acquisition value of the shares multiplied by the number of years during which the participation has been held). The excess gain will be subject to a tax rate of 19 per cent, unless any of the above described exemptions on capital gains tax applies.

Regulated Spanish venture capital entities benefit from a full exemption from tax on qualified dividends and a 99 per cent exemption on capital gains triggered from the transfer of shares in qualified entities. In addition, dividends or capital gains triggered by non-resident shareholders of a Spanish venture capital company are not subject to Spanish taxation (to the extent that the shareholder is not resident in a tax haven jurisdiction). EU UCITS (regulated by Directive 2009/65/EC of the European

Parliament and of the Council) earning Spanish source income are taxed at the reduced 1 per cent rate (although specific exemptions, as discussed, may also apply).

iv Anti-avoidance rules

No specific anti-avoidance measures have been approved by Spain in connection with these types of investments and investors, except for the previously mentioned rules that limit the application of tax exemptions or other tax benefits to investors acting through a tax haven jurisdiction, as defined under Spanish tax provisions.

VIII OUTLOOK

Although household savings rates are often acyclic (decreasing in growth periods and increasing in recession periods), due to the prolongation of the financial crisis and the worsening of expectations of growth, Spanish household saving rates have slightly decreased in the past year and are likely to continue to do so. The deteriorated Spanish and international macroeconomic and financial environment will result in more economic uncertainty in the future, which will also affect asset management activity in Spain. Additionally, several funds and other market players have already undergone merger processes in the past 12 months; this trend is expected to continue, resulting in a decrease in the number of investment funds and entities in general.

From a regulatory point of view, asset management in Spain will be significantly influenced by the implementation of the AIFM Directive and by the adoption by the European Commission of 'Level 2' implementing measures. In particular, it seems that Law 25/2005[9] will be amended in order to transpose the AIFM Directive into Spanish law, and with the aim of introducing additional improvements in the regulation, supervision and administrative intervention regime in order to make it more flexible.

9 According to the CNMV activity plan for 2012.

Appendix 1

ABOUT THE AUTHORS

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Juan Carlos Machuca joined Uría Menéndez in Madrid in 1996 and has worked out of the firm's London office since January 2000. He is the current resident partner in the London office.

Juan Carlos' practice focuses on corporate law, banking, finance, regulatory, investment funds, private equity and capital markets. He also advises clients on M&A transactions and on insolvency and restructuring proceedings.

In 2007, Juan Carlos was one of the winners of the Iberian Lawyer 40 Under Forty Awards, which recognise the achievements of the new generation of top lawyers in Spain and Portugal.

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Miriam Pich-Aguilera joined Uría Menéndez's Barcelona office in 2009 and has worked at the firm's London office since September 2011. She also did a six-month placement in Hengeler Mueller's Berlin office in the corporate – M&A department.

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