
THE ASSET MANAGEMENT REVIEW

SECOND EDITION

EDITOR
PAUL DICKSON

LAW BUSINESS RESEARCH

THE ASSET MANAGEMENT REVIEW

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THE ASSET MANAGEMENT REVIEW

Second Edition

Editor
PAUL DICKSON

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EDITOR'S PREFACE

Twelve months on from the first edition of *The Asset Management Review*, it is clear that these are still challenging times for the asset management industry. While the past year has witnessed signs of recovery from the damage wrought by the global financial crisis, the crisis continues to make its mark on the industry. A backdrop of continuing economic uncertainty and volatile markets constrains new investment and limits returns. Meanwhile, responses to the crisis by regulators and investors present their own challenges.

The financial crisis has drawn attention ever more acutely to the activities of the financial services industry, and the consequences of this focus are manifest in regulatory responses around the globe. Driven by a desire to avoid a further financial crisis, regulators have sought to address perceived systemic risks and preserve market stability through a wave of new regulation, including the Alternative Investment Fund Managers Directive, which has recently been implemented in Europe. For what is a global industry, the challenge of regulatory compliance is complicated by jurisdictional disparities and the introduction of legislation with potentially extraterritorial effects. It is not only regulators who have placed additional demands on the financial services industry in the wake of the financial crisis; a perceived loss of trust has led investors to demand greater transparency around investments and risk management from those managing their funds.

This continues to be a period of change and uncertainty for the asset management industry, as funds and managers act to comply with new regulatory and investor requirements and adapt to the changing geopolitical landscape. There is, however, perhaps some limited cause for optimism. While fundamental issues persist in the eurozone, the prospect of collapse seems less likely than in the recent past, and more positive assessments of the global economic outlook, albeit cautious, raise the prospect of increased investment and returns. Although the challenges of regulatory scrutiny and difficult market conditions remain, there have also been signs of a return of risk appetite; in addition, international expansion continues with an increasing focus on opportunities in emerging markets. The industry is not in the clear, but prone as it is to innovation and ingenuity, it seems well placed to navigate this challenging and rapidly shifting environment.

The second edition of *The Asset Management Review* includes coverage of a number of additional jurisdictions, reflecting the global importance of the industry and this practice area. The publication of the second edition is a significant achievement, and I continue to be grateful for the support of the many lawyers and law firms who have contributed their time, knowledge and experience to the book. I would also like to thank Gideon Robertson and his team at Law Business Research for all their efforts in bringing the second edition into being.

The world of asset management is increasingly complex, but it is hoped that the second edition of *The Asset Management Review* will continue to be a useful and practical companion as we face the challenges and opportunities of the coming year.

Paul Dickson

Slaughter and May

London

September 2013

Chapter 27

SPAIN

Juan Carlos Machuca Siguero and Tomás José Acosta Álvarez¹

I OVERVIEW OF RECENT ACTIVITY

The asset management industry in Spain is comparatively young. Nevertheless, during its approximately three decades of activity it has undergone a remarkable development process to become a highly professional and efficient market.

The downturn in the financial markets following the global credit crisis (and, in particular, the European sovereign debt crisis) severely affected Spanish collective investment schemes and pension funds and, generally, the asset management industry in Spain; 2012 has been the year in which that impact has become noticeable.

On the regulatory side, the authorities have adopted a number of initiatives that purport to set the grounds for a faster recovery. At a European level, the bulk of those initiatives are naturally aimed at the banking sector. These measures, coupled with the satisfaction of the undertakings assumed by Spain in July 2012 under the MoU,² have affected, *inter alia*, the real estate asset management industry in Spain with the introduction of a new (and high-profile) player: SAREB.³ Further, the Spanish government has recently

-
- 1 Juan Carlos Machuca Siguero is a partner and Tomás José Acosta Álvarez is an associate at Uría Menéndez Abogados SLP.
 - 2 Memorandum of understanding on conditions negotiated between the Spanish government and the EU Commission, in liaison with the European Central Bank and the European Banking Authority, with the technical assistance of the International Monetary Fund, dated 23 July 2012 and the Financial Assistance Framework Agreement, dated 24 July 2012 (collectively, the MoU); Council Decision of 23 July 2012 addressed to Spain on specific measures to reinforce financial stability (2012/443/EU).
 - 3 Asset Management Company for Assets Arising from the Bank Restructuring.

published two draft bills for the implementation of the AIFMD,⁴ which are expected to produce a major impact on collective investment scheme activity once enacted.

On the investor side, the prolonged crisis and the deterioration in growth expectations have caused the savings of Spanish households to be devoted to deleveraging, which has resulted in a drop in the savings rate and, thus, in the investment power of Spanish families. Nevertheless, the preliminary data for 2013 suggest a reversal in these trends with an increase in the figures for assets under management and portfolio gains.⁵

II GENERAL INTRODUCTION TO REGULATORY FRAMEWORK

The Spanish asset management industry is not regulated by all-encompassing legislation, applicable across the board. This is, *inter alia*, due to the fact that asset management activities can be carried out in Spain by a wide array of different entities, each of which require specific regulation.

Before giving a brief overview of the rather fragmented asset management regulatory framework in Spain, it is worth noting the remarkable pace of its evolution during the past few years, and the increasing number of amendments to the relatively new laws and regulations in place, the most important of which during 2012 and the first half of 2013, include:

- a* the EU initiative to provide harmonised and comprehensive regulation for collective investment schemes, embodied by the AIFMD and the publication of the draft bills for its transposition in Spain; and
- b* the fulfilment of the undertakings under the MoU.

Below is a brief summary of the main regulations applicable to the asset management industry in Spain.

i Investment firms

Such entities, whose main activity is rendering investment services over financial instruments to third parties on a professional basis, are primarily regulated under Law 24/1988 (the Securities Market Law)⁶ and subject to the regulation of the Spanish Securities Exchange Commission (the CNMV).

4 Directive 2011/61/EU on Alternative Investment Fund Managers.

5 CNMV's Quarter I 2013 Bulletin; www.cnmv.es/DocPortal/Publicaciones/Boletin/QBI2013_weben.pdf.

6 Secondary regulation is usually delivered by means of royal decrees as well as circulars issued by the CNMV covering, *inter alia*, solvency, reserved information or financial disclosures and annual accounts of investment firms. It is worth noting that on 12 June 2013 the CNMV issued a new circular developing the obligations set forth in the Securities Market Law in connection with the evaluation of the appropriateness and suitability of financial instruments.

ii **Collective investment schemes**

Collective investment in Spain is carried out by means of two different types of scheme, depending on the nature of the commitment assumed by the relevant investors: open-ended schemes, which allow investors to apply for the redemption of their investment against the assets of the scheme at any time, or with short notice; and closed-ended schemes, where the investor assumes an irrevocable commitment and may not apply for redemption until a certain deadline .

The regulation of these two categories is currently undergoing a change driven, principally, by two EU Directives: Directive 2009/65/EU on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS and the UCITS Directive) and the AIFMD. Whereas the UCITS Directive was implemented in Spain in October 2011,⁷ the transposition of the AIFMD is still yet to take place. On 16 May 2013 two long-awaited preliminary draft bills of the laws by means of which the AIFMD will be implemented in Spain (the Draft Bills) were published. These new laws were due to enter into force in Spain on 22 July 2013, but such implementation has not yet taken place. In any event, given that the Draft Bills set the grounds for the forthcoming regulations on collective investment schemes in Spain, and considering the general nature of this document (which would make it less vulnerable to any amendments that the Draft Bills may suffer during the parliamentary approval process), the new regime is discussed below.

According to the AIFMD and the Draft Bills:

- a* All Spanish opened-ended collective investment schemes, and their management companies and depositaries will be regulated at a general level under Law 35/2003, as amended after the implementation of the AIFMD by one of the Draft Bills (the CIS Law).⁸
- b* All Spanish closed-ended collective investment schemes and their management companies will be subject to a new law on venture capital and other investment companies (the VC Draft Bill, which is one of the Draft Bills).⁹

The entities referred to above are subject to the supervision of the CNMV.

7 The UCITS Directive was implemented in Spain by means of Law 31/2011, which amended the CIS Law (as defined below).

8 It is worth noting, nonetheless, that free IICs and IICs of free IICs are regulated by Royal Decree 1082/2012 by means of which the regulations developing the Collective Investment Schemes' Law is approved (Regulation 1082/2012). Secondary regulation in this respect is also by means of Circulars issued by the CNMV, such as that issued on 9 May 2013 on the key investor information document of Spanish collective investment schemes.

9 In addition, the VC Draft Bill expressly acknowledges the existence of the European venture capital funds and social entrepreneurship funds, and refers expressly to their rules in EU Regulations 345/2013 and 346/2013 of 17 April, respectively.

iii Pension funds

Pension funds and their management companies are regulated by Royal Legislative Decree 1/2002, as amended (the Pension Funds Law) and its developing regulation, including Royal Decree 304/2004 (the Pension Funds Regulations), as amended.

Both pension funds and their management companies are supervised by the Ministry of Economy and the General Directorate of Insurance and Pension Funds (the DGSFP), which is the same regulator supervising insurance companies.

iv Insurance companies

The management of insurance companies' assets is contemplated in Royal Decrees 2486/1998 and 6/2004 (jointly, the Private Insurance Regulations).

v Real estate investment listed companies (SOCIMIs)

SOCIMIs are specifically regulated under Law 11/2009 (the SOCIMIs Law), a regulation inspired by that regulating US REITs (real estate investment trusts).

vi Asset management companies

In order to comply with the undertakings of the Kingdom of Spain under the MoU, Law 9/2012 and Royal Decree 1559/2012 were enacted (the Credit Entities Resolution Regulations). The purpose of these regulations is to set up a comprehensive framework for the restructuring and resolution of credit entities by the Spanish authorities. One of the most prominent instruments of such a framework is that relative to the use of asset management companies (AMCs), which are entities intended to manage the toxic assets from credit entities in financial trouble. The Credit Entities Resolution Regulations also contemplate a single AMC – SAREB – incorporated to manage the toxic assets from the banks undergoing restructuring or resolutions processes since 2012, as well as certain separate pools of assets defined as BAFs (banking assets funds).

AMCs are supervised by the Bank of Spain, and SAREB and the BAFs are supervised by the Bank of Spain and the CNMV.

III COMMON ASSET MANAGEMENT STRUCTURES

There is a broad panoply of structures under which assets can be managed in Spain. Each structure poses certain specific features that indicates the sector within which its business takes place or the nature of the assets under management.

i Investment firms

Investment firms are those whose main activity is rendering investment services over financial instruments to third parties on a professional basis, those services being listed and described in the Securities Market Law.

Investment firms can be categorised as follows (from the broadest to the narrowest scope):

- a* broker-dealers;
- b* brokers;

- c* portfolio management companies; or
- d* financial advisory firms.

This category depends, broadly speaking, on whether they operate in their own interests or solely in the interests of third parties, and on the variety of services that they are entitled to render.

Typically, asset management business is carried out by portfolio management companies, which are entities that can only render the following investment services: discretionary portfolio management activities on an individual basis and in accordance with a mandate received from a client, and investment advice (i.e., the provision of personal recommendations to a client, either upon the latter's request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments). They may also provide the following ancillary services:

- a* advisory services to companies about capital structure, industrial strategy and related matters, and advice and other services relating to mergers and acquisitions of companies; and
- b* investment research and financial analysis or other forms of general recommendations relating to transactions in financial instruments.

It is worth noting, however, that both broker-dealers and brokers are also legally entitled to render those services (albeit brokers can only do so in third parties' interests), as are credit entities (to the extent that their legal regime, articles of association and administrative authorisation allows them to do so).

Portfolio management companies, which take the form of Spanish open limited liability companies, need, for the purposes of carrying out investment services activities (as well as brokers-dealers and brokers), to be authorised by the Minister of Economy and registered with the relevant registries held by the CNMV. *Inter alia*, portfolio management companies must underwrite an insurance policy in order to be registered.

ii Collective investment schemes

Collective investment structures in Spain are currently undergoing a transformation process as a consequence of the transposition of the UCITS Directive and the forthcoming (although belated) implementation of AIFMD by means of the Draft Bills. The Draft Bills have, however, not even started their parliamentary approval process and modifications to what follows cannot be ruled out. Nonetheless, in order to provide the most up-to-date overview of what the collective investment industry looks like in Spain, this section will outline the situation according to those Draft Bills.

Open-ended schemes

Open-ended collective investment schemes (IICs)

IICs can be described as schemes whose purpose is to attract funds, assets or rights from the public with the aim of investing them in assets, rights, securities or other financial and non-financial instruments, each investor's return being based on collective profits. IICs can be categorised in various manners depending on the criterion followed to do so.

Based on their legal form, IICs can be categorised as investment funds or investment companies. Investment funds are IICs that are structured as a separate pool of assets without legal personality that belong to a number of investors (including other IICs) and whose management and representation is performed by a management company (SGIIC).

Investment funds can be divided into different divisions, each being given a different name, but under the general denomination of the fund. Each division issues its own units, which represents the part of the net worth of the fund that is attributed to that division. The subscribers to the relevant units of the investment fund will be considered unitholders. Each fund must have at least 100 unitholders, who will not be responsible for the debts of the relevant fund, except up to the amount that they have invested when acquiring the corresponding units.

Investment companies are IICs that are structured as Spanish open limited liability companies. The share capital of investment companies needs to be fully subscribed and paid-up from their incorporation date and be represented by shares. As with investment funds, it will be possible to create investment companies with different divisions. Again, the number of shareholders cannot be fewer than 100, and, in certain cases, it is necessary that these companies appoint an SGIIC.

Based on the type of assets in which they invest, IICs can also be categorised as financial IICs or non-financial IICs. Financial IICs are IICs whose purpose involves investing in financial assets and instruments. The investment strategy of financial IICs must be undertaken within certain boundaries, *inter alia*:

- a* only assets that are listed and described in the CIS Law are available for investment;¹⁰
- b* liquidity ratios must be complied with to guarantee investors' refunds; and
- c* the risk profile of the total investments must be adequately diversified (in general, assets issued by a specific issuer cannot exceed 10 per cent of the IICs' assets or 15 per cent in relation to that issuer's group).

These IICs are also known as SICAVs in Spain.

A particularly relevant subcategory of financial IICs is made up of free IICs (or hedge funds) and IICS of free IICs (or funds of hedge funds). These are, basically, IICs that are subject to requirements similar to those of conventional IICs, but with certain features that, in general, tend to allow for more flexible management and investment strategies. These IICs are not UCITS.

In light of the foregoing, potential non-professional investors are required, before acquiring shares or units of these IICs to sign a document declaring themselves aware of the risks arising from the investment. This does not apply to professional investors nor to those cases in which the client has a portfolio management agreement authorising the

10 For instance, securities and financial instruments admitted to trading in certain stock exchanges and other markets or organised trading systems; shares or units in certain UCITS not allowed to invest more than 10 per cent of their assets in shares or units of other IICs or shares or units in certain Spanish open-ended AIFs (as defined below) not allowed to invest in other IICs.

investment in these IICs, and such agreement contemplates similar warnings to those in the aforementioned document.

Non-financial IICs are those IICs that are not financial IICs. The CIS Law only appears to contemplate real estate IICs, which are non-financial IICs whose principal activity involves investing in urban real estate property for letting. Additionally, real estate IICs are allowed to invest in securities admitted to trading in secondary markets. The investments made by this type of IICs must comply with certain liquidity and diversification ratios. These IICs can be incorporated as companies or as funds.

Based on whether they are authorised under the UCITS Directive, IICs can be categorised as UCITS, otherwise as opened ended alternative investment funds (Spanish open-ended AIFs). The latter can be managed by management companies (either SGIICs or managers authorised in another EU Member State) authorised under the AIFMD, the main effect being that these schemes may be freely marketed throughout the EU using a straightforward passporting procedure.

SGIICs

SGIICs are Spanish open limited liability companies incorporated for an indefinite period of time, whose corporate purpose involves managing the investments, controlling and managing the risks, the administration of, acting on behalf of and the management of the subscriptions and reimbursements of IICs. In doing so, SGIICs exercise powers corresponding to those of the owner of the funds without being their owners, and acting jointly with depositaries. SGIICs' share capital (which needs to be represented by registered shares) must comply with a minimum required amount and be fully paid up.

Since the entry into force of Regulation 1082/2012, SGIICs must specify the criteria used to assess the adequacy and proportionality of their risk management policies as to the nature, scale and complexity of the activities of the management companies and the IICs managed by them. Additionally, SGIICs are now required to apply specific rules to control and manage potential conflicts of interest. Finally, Regulation 1082/2012 has modified the equity regime of SGIICs, in order to harmonise it with EU standards.

To incorporate an SGIIC, it is necessary to obtain authorisation from the Minister of Economy after a proposal by the CNMV. Such authorisation is conditional upon meeting a number of requirements, including having a good administrative and accounting organisation, and adequate technical and human resources.

SGIICs are accountable with regard to the unitholders or shareholders of the IICs they manage for any damages arising from infringement of their obligations.

Closed-ended schemes

Spanish closed-ended schemes are, according to the VC Draft Bill, collective investment schemes whose partners' and unit holders' divestment policies comply with the following criteria preventing conflicts of interest: divestments must be made simultaneously by all unitholders, and the amount received by each unitholder must be proportionate to their respective investment.

The VC Draft Bill sets out a comprehensive classification of closed-ended schemes that would encompass venture capital entities (VCEs) and other investment companies. The latter is a new category of company whose corporate purpose is to raise capital from a number of investors with a view to investing it for the benefit of those investors, to the

extent that they do not fall within the scope of the CIS Law or qualify as VCEs. As the VC Draft Bill is quite a preliminary draft, and that such category is under discussion at the time of writing, only VCEs are discussed here.

According to the VC Draft Bill, VCEs are financial entities regulated under the AIFMD the purpose of which is to invest on a temporary basis in the share capital of non-financial, non-real estate and non-listed companies (these three requirements must be met). Additionally, these entities can invest in securities issued by certain real estate companies as well as in listed companies to the extent that they are delisted within 12 months of their acquisition. Investments must be allotted according to certain mandatory investment and diversification ratios.

VCEs may take the legal form of a fund or a company. Venture capital funds are separate pools of assets without legal personality, which belong to a plurality of investors, represented and managed by a management entity. Venture capital companies are Spanish open limited liability companies with the aforementioned corporate purpose.

Venture capital funds and the assets of venture capital companies are managed by closed-ended schemes' management companies or by an SGIIC. Such management entities are open limited liability companies regulated by the VC Draft Bill (once enacted) and the Royal Legislative Decree 1/2010 (the Spanish Companies Law). They must, *inter alia*, have a minimum share capital of €300,000, maintain additional own resources in an amount of 0.02 per cent of the part of their managed portfolios exceeding €250 million, up to a maximum of €10 million, and a good administrative and accounting organisation, as well as adequate technical and human resources.

Both VCEs and their managers are regulated entities in Spain, subject to the supervision of the CNMV. Their incorporation is subject to the authorisation of the CNMV and their operations are subject to information, audit and investment policy requirements.

iii Pension funds

Pension funds

Spanish pension funds are pools of assets without legal personality that are set up as instruments to implement pension schemes.

Each Spanish pension scheme must be related to a pension fund in a manner such that the contributions to the pension scheme made by its constituents and unitholders are deposited in a certain account held within the fund. The obligations with regard to the unitholders in the scheme are satisfied with monies withdrawn from such an account, which will also receive returns from investments made by the fund and attributable to that scheme.

As more fully described below, Spanish law provides for three different types of pension scheme depending on their constituents: an employment system's pension scheme, an associate system's pension scheme and an individual system's pension scheme. Pension funds can either operate for pension schemes within the first category, in which case they would be classified as employment pension funds or within the second and third categories, in which case they are labelled personal pension funds. Additionally, pension funds can be either open-ended or closed-ended depending on whether they

can only channel investments from related pension schemes (i.e., with an account held in the fund).

The incorporation of pension funds is subject to prior approval by the Ministry of Economy as well as of the DGSFP, which holds a registry of pension funds and pension fund management companies.

Pension fund managers

Spanish pension funds are managed by pension fund management companies under the supervision of a control committee.

Pension fund management companies, which take the form of Spanish open limited liability companies, need to obtain suitable administrative authorisations. Also, such companies need to meet a number of requirements, including certain paid-up capital and net-worth minimum requirements and limiting their corporate purpose to managing pension funds. In addition, pension funds may also be managed by insurance companies authorised to operate in the life insurance area in Spain, provided that they meet certain prerequisites, including the minimum requirements as to paid-up capital and net worth previously mentioned.

Pension fund investments

The investment activity of pension fund assets is subject to certain restrictions as set out in the Pension Funds Law. First, investments must be carried out according to certain criteria including security, profitability, diversification, liquidity, monetary consistency and suitable terms. Additionally, pension funds must invest at least 70 per cent of their assets in financial securities traded on regulated markets, derivatives traded in organised markets, banking deposits, mortgage-backed credits, properties and real estate IICs.¹¹ Further limitations to Spanish pension schemes or funds business apply.¹²

iv Insurance companies

There are several types of insurance companies under Spanish law, including insurance companies with a fixed prime, insurance companies with a variable prime and insurance cooperatives. Each type of entity needs to comply with a number of requirements to render insurance services in Spain. One such requirement is the establishment of adequate technical provisions, which must be established and maintained in such an amount that they are able to cover all the risks arising from underwritten insurance and

11 It is worth noting that since Royal Decree-Law 4/2013 was passed in February 2013, Spanish pension funds may also invest in securities admitted to trading on the MAB and in venture capital funds (up to 3 per cent of the fund's assets).

12 For instance, pension funds are subject to maximum investment limits and some establish maximum percentages that certain assets may represent in relation to their total assets; pension funds may not generally borrow funds, with certain exceptions and the financial and actuarial system of the schemes have to be revised by an actuary; such revision needing to be carried out, in general, at least every three years.

reinsurance policies, as well as to support the company's stability against random or cyclical shifts in claims or special risks.

Those technical provisions may be invested in certain acceptable assets¹³ according to the principles of consistency, profitability, security, liquidity, dispersion and diversification; all of the foregoing refer to the type of operations carried out by the insurance company and its commitments.

Finally, Spanish insurance companies must maintain a sufficient solvency margin in terms of all of its activities and a minimum guarantee fund.

v **SOCIMIs**

There are two main types of entities under Spanish law the purpose of which is to invest in real estate assets: real estate IICs¹⁴ and SOCIMIs.

SOCIMIs are Spanish listed open limited liability companies, which may opt for a special tax regime provided that they comply with certain requisites, one such requisite being that their main purpose be direct or indirect investment in urban real estate assets for rental, including both housing and business premises, residences, hotels, garages and offices. Indirect investment may be conducted by means of the acquisition of interests in other SOCIMIs, in other entities that are subject to similar profit distribution requirements, or in real estate IICs.

Investment activity by SOCIMIs must be carried out within certain boundaries. In particular, it can only be made in respect of those assets listed and described in the SOCIMIs Law. Additionally, at least 80 per cent of their assets must be invested in those assets referred to in the previous paragraph. Finally, in relation to fiscal years starting from 1 January 2013, SOCIMIs are required to distribute the following as dividends:

- a* 100 per cent of any dividends and profit participations received as a consequence of its stake in other entities;
- b* at least 50 per cent of any profits deriving from divestment of real estate property and share capital interests; and
- c* at least 80 per cent of any remaining profits.

Given their nature, SOCIMIs are subject to double supervision: the Spanish tax authorities supervise compliance with the necessary requirements for special tax treatment and the CNMV supervises the operation of SOCIMIs in the securities market.

vi **AMCs, SAREB and BAFs**

The bursting of the housing bubble, coupled with a massive unemployment ratio, has left most Spanish credit entities with enormous portfolios of real estate assets, often as

13 The acceptable assets are listed and described in the Private Insurance Regulations. They include securities traded on an OECD country, exchange and deposits held with OECD banks or structured financial assets. The Ministry of Economy can add certain assets to that list to the extent that they comply with the requirements it sets out to cover the technical provisions.

14 See Section II.v, *supra*.

a consequence of mortgage foreclosure proceedings or property-backed non-performing loans. The maintenance of these assets in their balance sheets jeopardises both their solvency and their chances of survival.

In view of the foregoing, the EU resolved in 2012 to put in place a support scheme for the Spanish banking sector within the context of which the MoU was entered into. One of the main objectives of the MoU is the establishment of a well-defined and effective framework for the management of the banking crisis. AMC's are one of the most relevant instruments within such framework (the landscape is completed by SAREB and BAFs).

AMCs

AMCs are Spanish open limited liability companies that are incorporated in the context of the restructuring and resolution process of a credit entity to isolate toxic assets within such entity's balance sheet. The Fund for the Orderly Restructuring of the Banking Sector (FROB) can oblige a credit entity to transfer certain categories of assets in its balance sheet (or to direct an entity under its control to effect such a transfer) to an AMC when those assets are particularly damaged or their maintenance on the balance sheet is deemed detrimental to the entity's viability.

The purpose of these transfers (and the very existence of AMCs) is to ease the transmission of risks to depositors and remote entities, to minimise the need for public funding and the occurrence of market distortion and, ultimately, to facilitate the disposal of dangerous assets in an isolated way.

FROB lists in each case those categories of transferable assets. The Credit Entities Resolutions Regulations set out a number of rules the aim of which are to facilitate the effectiveness of those transfers¹⁵ as well as the obligation to conduct value adjustments on a pre-transfer basis.

Finally, it is worth noting that AMCs are entitled to raise debt by issuing bonds.

SAREB and BAFs

While AMCs are meant to apply all the processes that may need to be undergone in the future, the Credit Entities Resolutions Regulations also set out the rules for the incorporation of an AMC whose purpose was to acquire the toxic assets from those credit entities that were nationalised in 2012:¹⁶ SAREB.

SAREB is a Spanish open limited liability company incorporated by FROB, the exclusive purpose of which is the management and disposal of certain assets received

15 For example, no third-party consent may be needed; no restrictions to the transferability of assets on articles of association or contracts will apply and these transfers are not subject to clawback or mandatory takeover bid rules).

16 Pursuant to Royal Decree-Law 24/2012, such entities are BFA-Bankia, Catalunya Caixa, NCG Banco-Banco Gallego, Banco de Valencia, BMN, Liberbank, Caja3 and Ceiss.

from the nationalised credit entities.¹⁷ Each such transfer has been subject to pre-transfer value adjustments.

FROB holds a 45 per cent minority interest in the share capital of SAREB, while private investors¹⁸ hold the remaining 55 per cent. In terms of corporate governance, SAREB is subject to the Spanish Companies Law. Its management is entrusted to a board of directors within which an auditing committee and a remunerations and appointments committee are set up. SAREB is also subject to the supervision of a monitoring committee.

SAREB's mandate is to complete the disposal of its full portfolio¹⁹ within 15 years of its incorporation (albeit no minimum annual divestment thresholds apply). In order to do so, it has a particularly relevant instrument at its disposal: the BAF.

BAFs are insolvency-remote pools of assets and liabilities without legal personality incorporated by SAREB; any portion of their portfolio can be allocated and must be filed with a certain registry held by the CNMV. These funds (which can be open-ended or closed-ended) are governed by the Credit Entities Resolutions Regulations, as well as by the regulations applicable to asset securitisation funds, mortgage securitisation funds and collective investment schemes, as applicable. BAFs are managed by asset securitisation fund management entities that comply with the requirements set out under the aforementioned Regulations.

BAFs can be divided into different divisions, each of which may issue securities or undertake obligations on a separate basis. The transfer of assets and liabilities from SAREB to each BAF benefits from the same rules as those applicable to the transfer of assets to AMCs. Finally, one of the most notable features of the BAFs is its privileged tax regime.

The disposal by SAREB – and hence, the investment by potential acquirers – will take place through the purchase of units of the BAF.

IV MAIN SOURCES OF INVESTMENT

i Size of the industry and recent trends

During 2012, the asset management industry in Spain has adapted to the deteriorating global economy, where the European economies have been the worst affected – the

17 The assets that SAREB has received are within one of the following categories: foreclosed real estate assets with a net book value above €100,000; loans financing real estate with a net book value above €250,000 (not limited to non-performing loans); or equity in real estate companies controlled by banks.

18 Fourteen Spanish banks (Santander, Caixabank, Banco Sabadell, Banco Popular, Kutxabank, Ibercaja, Bankinter, Unicaja, Cajamar, Caja Laboral, Banca March, Cecabank, Banco Cooperativo Español and Banco Caminos); two foreign credit entities, (Deutsche Bank y Barclays Bank); one utility (Iberdrola) and 10 insurance companies (Mapfre, Mutua Madrileña, Catalana Occidente, Axa, Generali, Zurich, Reale, Pelayo, Asisa and Santa Lucía).

19 SAREB received a portfolio of 197,474 assets valued at €50.653 million; www.sareb.es/cms/estatico/srb/sareb/web/es/portal/sobre_sareb/quienes_somos.

Spanish one being particularly badly hit.²⁰ There are no official data as to the size of the industry as a whole, but some local indicators can be observed.²¹

For example, assets under management in mutual funds dropped by 6.3 per cent in 2012, their lowest level since the second half of the 1990s; such an outflow has its origin in unitholder redemptions, while portfolio returns were positive. Fund numbers continued to dwindle throughout 2012, closing with 2,185 schemes in operation compared with 2,310 at the end of 2011. There was also a small decline in the number of unitholders compared with 2011.

Furthermore, investment in foreign UCITS funds expanded by 26.8 per cent, which matched the previous years' trends. Both the number of schemes and investors rose during 2012.

Assets under management in real estate investment companies dropped by 9.2 per cent in 2012, with six funds in operation at the end of 2012 (although one has since been liquidated).

Investment firms continued to make losses, although the volume of losses this past year was substantially higher. Venture capital investment in Spain fell by 22.5 per cent, although the total number of VCEs increased slightly over the full year of 2012.

The funds under management of pension funds at 31 December 2012 had increased by 3.62 per cent (as opposed to 2011, when assets plummeted by 8.1 per cent) up to €86,536 million (the record-breaking score in pension funds' history in Spain).²² This amount was even higher at 31 March 2013 (€87,810 million).

Due to the high unemployment rate in Spain, contributions to pension schemes went down by nearly €1 billion²³ and the number of schemes was 2,974 (a fall of 12 since the end of 2011).

The number of SICAVs fell for the fourth year in a row, to a total of 2,981. Their aggregated assets increased only very slightly by 0.3 per cent compared with the 2011

20 According to information made available to the public by the CNMV in its Quarter I 2013 Bulletin, Spanish GDP contracted by a full-year average of -1.4 per cent in 2012; unemployment rate reached year-end levels of 26 per cent; and general government deficit closed at nearly 7.0 per cent of GDP. Finally, leading forecasters state that the Spanish economy will remain in recession in 2013 and manage a small advance in 2014; www.cnmv.es/DocPortal/Publicaciones/Boletin/QBI2013_weben.pdf.

21 The information below is taken, except where otherwise stated, from the CNMV's Quarter I 2013 Bulletin.

22 According to the information made available to the public by the Spanish Association of Collective Investment Schemes and Pension Funds (INVERCO); www.inverco.es/documentos/estadisticas/planes_pensiones/espana/informe_trimestrales/1303_Marzo%202013/1303Tfp_0101-PatrimEuros.pdf.

23 According to the information made available to the public by INVERCO in its 2012 report; www.inverco.es/documentos/publicaciones/documentos/0009_MEMORIAS%20INVERCO/C95_Memoria%202012.pdf.

figure, mainly due to the appreciation of their portfolios (profits amounted to €1,307 million).²⁴

Likewise, at the end of 2012, the assets managed by SGIICs totalled €152.6 billion (5.5 per cent lower than the previous year).

ii Type of investors

During 2012, mutual fund investors have been largely Spanish-resident natural persons, which continues the trend of the past two years.

According to INVERCO, at the third quarter of 2012, Spanish households invest 45.4 per cent of their financial assets in bank deposits, while products without bank intermediation, such as investment funds and companies, pension funds, life insurances and direct investment in variable equity, represented 28.8 per cent of their total financial assets. It is also worth noting that as of 31 December 2012, Spanish households had a greater amount of wealth invested in Spanish traded stocks than in investment funds.²⁵

Since the start of the financial crisis, Spanish households have undergone a deleveraging process that led in 2012 to a net divestment in financial assets of about €25.4 billion.

iii Portfolio structure

As of 31 March 2013, the breakdown of aggregated investment funds' portfolios stood at 60.24 per cent fixed income (mainly Spanish fixed income), 19.76 per cent variable income (mainly international) and the remaining 20 per cent other assets, including mathematical provisions.

V KEY TRENDS

The asset management market is expected to continue on its trend towards resizing. All-time highs in unitholder redemptions, the amount of schemes operating at a loss and the bank-restructuring process allow the anticipation of a new wave of reorganisations within the sector. Fund mergers could be one of the most eloquent expressions of this trend.

The deleveraging process of Spanish households may lead to even more conservative behaviour by Spanish investors, with fixed-income assets outweighing riskier products. Given the poor prospects for the Spanish economy,²⁶ risk aversion is likely to remain the watchword in the medium term.

24 Annual Report of the CNMV regarding its actions and the securities markets for 2012; www.cnmv.es/DocPortal/Publicaciones/Informes/IA2012_EN_Weben.pdf.

25 According to the Report on breakdown of Spanish listed shares' ownership drafted by Servicio de Estudios de BME, a research department within Bolsas y Mercados Españoles SA released on 16 July 2013; www.bolsasymercados.es/asp/RevOnLine/Documento.aspx?id=4774.

26 According to the International Monetary Fund, the economic growth will be flat until the end of 2014.

Regulatory initiatives in the wake of the global financial crisis will continue to affect the Spanish asset management industry.²⁷ The main regulatory initiatives that will affect asset management in Spain are EU harmonisation of the regulation on collective investment schemes with the transposition of the AIFMD in Spain and regulation of SAREB's operations in the real estate market, where it is expected to be quite an active player.

VI SECTORAL REGULATION

i Insurance

Asset management by insurance companies is governed by the Private Insurance Regulations. The purpose of such regulations is quite broad, setting up the regime and supervision of private insurance activity in Spain with a view to protecting policyholders, enhancing transparency within the insurance industry and promoting private insurance business in Spain.

In doing so, the Private Insurance Regulations set out, *inter alia*, the conditions and requirements that must be met by an entity to undertake insurance business; the types of legal entity that may engage in such activity; the supervision of insurance companies; the rendering of insurance services on a cross-border basis; reinsurance activity; policyholder protection; and the regime applicable to pension mutual funds.

ii Pensions

Asset management of pension funds is regulated by the Pension Funds Law and the Pension Funds Regulations rather than the Spanish pensions regulations; their purpose is to establish the framework for Spanish pension schemes, including pension funds.

Pension schemes may be classified in various ways according to the Pension Funds Law depending on their constitution²⁸ and the nature of their commitments.

27 The CNMV Plan of activities 2013 sets out a number of objectives at a regulatory level for this year, including new circulars on the marketing of more complex products among retail investors by investment firms, a review of compliance with good practices relating to periodic reporting provided by mutual funds and an horizontal review of the adaptation of the investments in the portfolios of UCITS for purposes of the new UCITS register; www.cnmv.es/DocPortal/Publicaciones/PlanActividad/PlanOfActivities_weben.pdf.

28 According to this criterion, the types of pension schemes are: employment system's pension schemes – those in which the promoter is an entity, company or corporation, and whose participants are their employees; associate system's pension schemes – the promoter is an association, syndicate or trade union, the participants being their associates or members; and – individual system's pension schemes: the promoter is one or several financial entities and they are opened to any participant.

iii Real property

As previously noted, investments in real estate assets are typically conducted in Spain in the form of two types of entity: real estate IICs and SOCIMIs. Real estate IICs are regulated by the CIS Law.

As so few SOCIMIs had been incorporated since 2009, the regime was relaxed in December 2012.²⁹ The general purpose of the reform was to facilitate the application of the tax regime by reducing the applicable requirements. A number of changes were introduced to that effect, one of the most relevant being that the shares of these listed entities can be traded not only in regulated markets, but also, for instance, in the Spanish Alternative Investment Market, whose admission requirements are less stringent. Additionally, the minimum share capital requirement has been reduced from €15 million to €5 million.

Halfway between the real estate market and the regulatory environment for credit entities are AMCS, SAREB and BAFs. Even though their purpose is to serve as instruments for the restructuring or resolutions of banks, the nature of the assets currently under SAREB's management (real properties or real estate-related credits) makes them worthy of note.

iv Hedge funds

Spanish hedge funds are regulated under the CIS Law and the Regulation 1082/2012.

According to the current wording of the Draft Bill, by means of which the AIFMD will be transposed into Spain in relation to open-ended collective investment schemes, these schemes will be contemplated under a specific section of the CIS Law relating to financial IICs that do not qualify as UCITS. Additionally, their regime will be further covered (including, the acceptable assets for investment and their obligations with regard to third parties) by Regulation 1082/2012.

v Private equity

The private equity industry in Spain has traditionally used the legal form of VCEs, currently regulated by Law 25/2005. This law is expected to be superseded by the VC Draft Bill (once enacted).

The purpose of the VC Draft Bill is to update and harmonise the regulatory framework of VCEs and their managers, as well as to regulate the remaining closed-ended schemes.

In relation to VCEs, the proposed new regulation includes changes mainly in relation to their management entities. A number of amendments are also being contemplated in relation to VCEs themselves, some of the most relevant being:

- a* the fact that this new law is not intended to apply to entities receiving funds from only one investor;
- b* the elimination of the prior distinction of simplified regime entities as opposed to regular entities;

²⁹ Law 16/2012, by means of which certain measures of tax nature are adopted for the consolidation of public financials and the promotion of economic activity.

- c* the creation of a new category of VCE – SME VCEs – which need to invest at least 70 per cent of their assets in small and medium-sized companies (as defined in the Draft Bill);
- d* commercialisation to non-professional investors being subject to the investors assuming a minimum investment commitment of €100,000 and signing a declaration as to their understanding of the risks related to their investment; and
- e* the involvement of a depositary being mandatory in certain cases.

The VC Draft Bill also contemplates the obligation of management entities to make available to the public an informative prospectus and an annual report on each venture capital entity under their management.

VII TAX LAW

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

Generally, non-resident taxpayers are subject to NRIT on Spanish-sourced 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 immediately preceding calendar quarter.

Spanish-sourced income includes 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 collective investment schemes, and capital gains on the disposition of shares and units issued by Spanish-resident entities, including IICs. IICs are non-transparent entities, subject to Spanish Corporate Income Tax (CIT), albeit at a rate of 1 per cent.

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 in force, has not been significantly amended (with the exception of a temporary increase during 2012 and 2013 of applicable rates). Therefore, short-term amendments to the NRIT rules are not expected.

As regards managers of collective investment schemes, any Spanish-sourced income so earned when carrying out their management activity (fees, commissions or any other returns) will be subject to the Spanish NRIT at the general 24.75 per cent tax rate, but 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.

Below, we include a brief description of taxation applicable to non-resident investors; the sections below refer 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 the NRIT at a 21 per cent rate (19 per cent as from 1 January 2014). No withholding tax is levied on capital gains, except on those related to an investment in a Spanish IICs.

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

In addition, EU residents are entitled to an exemption on capital gains obtained upon disposal of shares, provided that:

- a* the assets of the company to which the shares belong do not consist mainly, direct or indirectly, of real estate located in Spain;
- b* the non-resident has not held a participation of 25 per cent or more in the share capital of the Spanish company in the 12 months prior to the transfer of the shares; and
- c* 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 subject to the holding being below significant participation thresholds (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 subject to 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. 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.

As it refers to 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 an uninterrupted direct holding in the capital of the Spanish subsidiary of at least 5 per cent for the whole year prior to the date on which the distributed profit is due;
- b* the EU parent company is incorporated under the laws of an EU Member State and subject to Corporate Income Tax in a Member State, without the possibility of exemption; 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 in the event that the majority of the voting rights of the parent company is 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 (e.g., CDTs usually establish rates ranging from 5 per cent to 15 per cent on interest and dividends).

iii Royalties

As of July 2011, and subject to certain requirements, royalties paid to associated EU-resident companies are exempt from NRIT.

iv Spanish holding companies

Spanish holding companies (ETVEs) are defined as companies the corporate purpose of which includes the management of stakes that correspond to active non-resident entities and comply with certain formal requirements. ETVEs may also carry out other non-exempt activities.

One of the main advantages of ETVEs is that dividends and capital gains obtained by non-residents from their participation in an ETVE are not subject to taxation in Spain.

v Spanish real estate investment companies

SOCIMIS are, subject to the fulfilment of certain criteria, subject to zero-rated CIT on qualified real estate income. They may, however, be subject to a 19 per cent tax on the dividends and profit participations paid out to their shareholders provided that the following requirements are met:

- a* the shareholder holds at least a 5 per cent interest in the SOCIMI's share capital;
- b* dividends received by the shareholder in its jurisdiction of residence are exempt or taxed at a tax rate lower than 10 per cent; and
- c* the shareholder does not qualify as an entity regulated under the SOCIMIS Law or as a non-resident listed SOCIMI in respect of which its shareholders hold at least a 5 per cent of the SOCIMI's share capital and the dividends received are exempt or taxable at a tax rate lower than 10 per cent in its tax jurisdiction.

Dividends and profit participations paid out by SOCIMIS are subject to a 21 per cent withholding tax. Nevertheless, such withholding tax will not be applied to those Spanish non-resident shareholders in respect of whom SOCIMIS are subject to a special 19 per cent tax rate. Reduced tax treaty rates, as well as the exemption provided for under the Parent-Subsidiary Directive, may also apply.

vi Regulated Spanish VCEs

VCEs benefit from a full exemption from tax on qualified dividends and a 99 per cent exemption on capital gains triggered by the transfer of shares in qualified entities carried out between the second and the 15th year of holding. In addition, dividends or capital gains triggered by non-resident shareholders of a Spanish VCE are not subject to Spanish taxation (to the extent the shareholder is not resident in a tax haven jurisdiction).

A UCITS fund earning Spanish-sourced income is taxed at the reduced 1 per cent rate (although specific exemptions, as discussed, may also apply).

vii Anti-avoidance rules

No specific anti-avoidance measures have been approved by Spain in connection with these types of investments and investors, except the aforementioned 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

The implementation of the AIFMD in Spain is expected to be a major event in the Spanish asset management market from a regulatory perspective. The majority of changes are expected to occur in respect of management companies of closed-ended schemes. In any event, the main consequence to have noticeable effects on to the market is the right to freely market open-ended and closed-ended collective investment schemes (to the extent that they do not qualify as UCITS, which have their own regulations) throughout the EU, using a simple passporting procedure. The Draft Bills will need close monitoring in the coming months.

On the market side, the dwindling investment capacity of Spanish households is likely to force the industry to scale back and induce further rationalisation within the sector. Additionally, the challenges faced by SAREB and the investor appetite for BAFs may determine what the Spanish real estate market will look like during the remainder of 2013 and onwards.

Appendix 1

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Carlos Costa Andrade has been a partner in the Lisbon office of Uría Menéndez – Proença de Carvalho since 2005. Between 1996 and 1999 he was in-house counsel (Issuers and Market Division) at NYSE Euronext Lisbon – Sociedade Gestora de Mercados Regulamentados SA.

His practice includes M&A, capital markets and banking laws. He has advised on takeovers and other public M&A transactions, public offers and listings of shares, structured bonds and other complex securities, regulated and non-regulated securities markets, regulatory authorities on the drafting of new regulations, corporate governance and structured finance agreements.

Mr Andrade is currently the secretary to the shareholders meeting of OPEX – Sociedade Gestora de Mercado de Valores Mobiliários Não Regulamentado SA and is a member of the Equity, Fixed Income and Derivatives Committee of BM&FBOVESPA – Bolsa de Valores, Mercadorias e Futuros.

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