The Asset Management Review

Twelfth Edition

Editor
Paul Dickson

The Law Reviews

The Asset Management Review

Twelfth Edition

Editor
Paul Dickson

The Law Reviews

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
© 2023 Law Business Research Ltd
www.thelawreviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at August 2023, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to info@thelawreviews.co.uk.
Enquiries concerning editorial content should be directed to the Content Director,
Clare Bolton – clare.bolton@lbresearch.com.

ISBN 978-1-80449-203-1

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAET BAHR AS

ARTHUR COX

CHRYSSES DEMETRIADES & CO LLC

DEYNECOURT

HAN KUN LAW OFFICES

HENGELER MUELLER

KING & SPALDING LLP

LENZ & STAEHELIN

MARVAL, O'FARRELL & MAIRAL

MORI HAMADA & MATSUMOTO

PINHEIRO NETO ADVOGADOS

SLAUGHTER AND MAY

STUDIO LEGALE CROCENZI E ASSOCIATI

URÍA MENÉNDEZ

YULCHON LLC

Chapter 16

SPAIN

Juan Carlos Machuca Siguero and Ignacio Zapata Benito[1]

I OVERVIEW OF RECENT ACTIVITY

The asset management industry in Spain is relatively young. Nevertheless, during approximately three decades of activity, it has undergone a remarkable process of development 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) in 2007 and 2008 severely affected Spanish collective investment schemes and pension funds and, generally, the asset management industry in Spain. The recovery started in 2013 and continued until the end of 2019. At the macroeconomic level, Spain's GDP grew during the second decade of the 2000s, driven primarily by a slight increase in private consumption and, above all, investment. However, this positive trend stopped in 2020 when, as a result of the covid-19 crisis, Spanish GDP dropped by 10.8 per cent.[2] However, the measures implemented during 2020 and 2021 to counteract the effects of the covid-19 crisis (especially the national vaccination programme) have led to a recovery in GDP to levels seen before the covid-19 pandemic. However, inflation, energy market difficulties as a consequence of the war in Ukraine and constraints on the supply chain have led to a lower GDP increase for 2022 of approximately 2.6 per cent (below the approximately 4.7 per cent experienced in 2021).

However, positive signs for the Spanish economy have been seen during the first quarter of 2023. Spanish GDP has increased approximately 4 per cent and inflation has decreased to approximately 2 per cent (although underlying inflation sits at approximately 6 per cent), which is one of the lowest levels in Europe (the lowest level in Spain since March 2021). Causes for this positive economic outlook are lower prices for food, gas and electricity.

On the regulatory side, the European Union launched two major legislative initiatives in recent years: the Alternative Investment Fund Managers Directive (AIFMD) and the revised version of the Markets in Financial Instruments Directive (MiFID II). The AIFMD, which aims to provide a regulatory framework for alternative investment managers, was transposed into Spanish law in 2014 by means of Law 22/2014 of 12 November on venture capital entities, other closed-ended collective investment undertakings and their management companies (Law 22/2014). On the other hand, MiFID II aims to increase transparency, safety and efficiency in European financial markets and, although it should have been fully transposed by 3 January 2018, by such date Spain had carried out only a partial transposition

---

1 Juan Carlos Machuca Siguero is a partner and Ignacio Zapata Benito is an associate at Uría Menéndez Abogados, SLP.

2 Information made available by the World Bank: https://datos.bancomundial.org/indicator/NY.GDP. MKTP.KD.ZG.

as regards the legal regime applicable to Spanish trading venues for financial instruments by means of Royal Decree Law 21/2017 of 29 December on urgent measures to adapt Spanish law in accordance with EU regulations in relation to the securities market (RDL 21/2017). The transposition of the pending sections of MiFID II was completed at the end of 2018 through Royal Decree Law 14/2018 of 28 September 2018, which amends Royal Legislative Decree 4/2015 of 23 October, approving the restated text of the securities market law (the Securities Market Law and RDL 14/2018, respectively) and Royal Decree 1464/2018 of 21 December (RD 1464/2018),[3] which, among other things, develops the Securities Market Law and the RDL 21/2017. Also at the EU level, Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 amending the UCITS and AIFM Directives (Directive 2019/1160) and Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings[4] (Regulation 2019/1156) were approved. Both intend to harmonise the marketing of undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs) across EU countries. Directive (EU) 2019/1160 was recently transposed into the Spanish national legal system through Royal Decree-Law 24/2021 of 2 November (pursuant to which certain key aspects of Law 35/2003 of 4 November on Collective Investment Schemes (the CIS Law) have been modified).

Additionally, on 28 June 2022, the Spanish Council of Ministers approved the draft of the new securities markets and investment services law, which was finally approved through Law 6/2023 of 17 March on the securities markets and investment services (the Securities Markets and Investment Services Act), which has introduced substantial amendments to the current regulations for issuers, intermediaries and other participants in the securities markets. Key aspects of the new Securities Markets and Investment Services Act are as follows:

a Various primary market and issuer reforms are introduced, most notably to simplify the supervision of issues and admissions to trading on regulated securities markets, to extend the rules on takeover bids to companies issuing shares admitted to trading on BME Growth and to include a new chapter in Title XIV of the Spanish Companies Law to regulate specific features applicable to listed special purpose acquisition companies in order to facilitate the development of this type of company on the Spanish securities markets.

b The current prudential requirements regime to investment services companies, to which the equivalent regime for financial institutions generally no longer applies, is amended along with the rules of conduct of entities providing investment services in the market, whose application is made more flexible in specific scenarios when the clients are eligible or professional counterparties. In addition, national financial advice companies are created.

c The use of distributed ledger technology is envisaged for the registration, clearing and settlement of transferable securities and financial instruments, and the necessary provisions are being set out for Spanish legislation to adopt the imminent EU crypto-assets regulations.

3 RD 1464/2018 also amends, among others, RD 1082/2012 to regulate the research fees that collective investment schemes can be charged. The new regulation requires, among other aspects, the unbundling of research and brokerage fees and that charges for research services not be influenced by or conditional upon levels of payment for brokerage services.

4 It also amends Regulations (EU) No. 345/2013, (EU) No. 346/2013 and (EU) No. 1286/2014.

d At an institutional level, changes are made to the regulation of the Comisión Nacional del Mercado de Valores and to supervisory aspects of infringements and sanctions.

e Finally, various other developments are included in other matters and issues regulated by the Law.

Additionally, on 30 June 2022, the Spanish Parliament passed Law 12/2022 on regularisation for the enhancement of employment pension plans, which was further developed through Royal Decree 668/2023 of 18 July modifying pension plans regulations. These regulations have brought to Spain a new key instrument, the publicly promoted employment pension plan (FPEPP): private employment pension plans (not funded by public funds) managed or promoted by the Spanish government (being their day-to-day management delegated to certain private pension plan management entities). The goal with this new instrument is for 10 million employees to benefit from this complementary pension fund scheme in 2030 (only 2 million employees currently benefit from such a scheme).

On the investor side, data for 2022 shows that assets under management of collective investment schemes suffered a substantial decrease of about 7.6 per cent (probably as a rebalancing against the material 16.5 per cent increase experienced in 2021), whereas assets under management by pension funds decreased even more by 10.5 per cent against the 2021 levels.[5] Assets under management of collective investment schemes and pension funds had increased steadily since 2008, only interrupted in 2018 because of the negative performance of the securities markets and in 2020 because of the impact on investment and savings resulting from the covid-19 pandemic (in the latter case, the pandemic only resulted in a slowdown of the pre-existing positive trend, it did not result in decreased assets under management of collective investment schemes or pension funds). While significant increases were experienced until 2021 resulting from, among other things, the highest level of financial savings of Spanish families ever (reaching €2.69 trillion), current levels have suffered from high inflation levels and the loss of value of the Spanish families' savings.[6]

II GENERAL INTRODUCTION TO REGULATORY FRAMEWORK

The Spanish asset management industry is not regulated by all-encompassing legislation applicable across the board, although the Securities Market Law codifies and organises some of the regulations in this field. The existing dispersion in regulations is due, inter alia, to the fact that asset management activities can be carried out in Spain by a wide array of different entities, each of which requires 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.

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

5 Information made available to the public by the Spanish Association of Collective Investment Schemes and Pension Funds (INVERCO): https://www.inverco.es/archivosdb/2212-ahorro-financiero-de-las-familias-espanolas.pdf.

6 https://www.inverco.es/archivosdb/2203-ahorro-financiero-de-las-familias-espanolas.pdf.

i Investment firms

Such entities, whose main activity is rendering investment services over financial instruments to third parties on a professional basis, are now primarily regulated under the new Securities Markets and Investment Services Act, Royal Decree 217/2008 of 15 February on the legal regime of investment firms (RD 217/2008)[7] and Commission Delegated Regulation (EU) 2017/565, and are subject to the supervision of the Spanish Securities Exchange Commission (CNMV).

RD 14/2018 and RD 1464/2018 introduced significant changes to the legal regime applicable to investment firms. The main novelties introduced a focus, inter alia, on the concept of significant investment firms, the combined buffer requirement for investment firms, the provision of investment services by third-country firms, internal organisational measures in relation to asset management, and title transfer financial collateral arrangements and inducements. Perhaps one of the most significant novelties in terms of impact on the market is the prohibition on accepting or retaining inducements when independent advice and discretionary management portfolio services are rendered, as well as having to comply with specific requirements if inducements are accepted or retained when rendering other investment services.

With regard to the provision of investment services in Spain by companies from third countries, the main change is that these companies need to establish a branch in Spain to provide investment services or activities to retail clients or professional elective clients. In addition – and this is something that goes beyond the scope of MiFID II – depending on the volume of the activity or the complexity of the products or services, or for reasons of general interest, the CNMV may require that a third-country company establish a branch if it provides or intends to provide investment services or activities in Spain to professional clients per se or to eligible counterparties.

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 upon 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 in Spain has undergone a change driven, principally, by two EU directives and their transposition into Spanish Law: the UCITS Directive,[8] implemented in Spain by means of Law 31/2011, which amended Law 35/2003 of 4 November on Collective Investment Schemes (the CIS Law); and the AIFMD,[9] as transposed in Spain by means of Law 22/2014. These categories are regulated in Spain as follows: Spanish open-ended collective investment schemes and their management companies and depositaries are regulated at a general level under the CIS Law and by Royal

7 Secondary regulation is usually delivered by means of royal decrees, orders issued by the Ministry of Economy and Business Support and circulars issued by the CNMV covering, inter alia, solvency, reserved information or financial disclosures and annual accounts of investment firms.

8 Directive 2009/65/EU on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

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

Decree 1082/2012, by which the regulation expanding upon the CIS Law was approved (RD 1082/2012);[10] and Spanish venture capital entities (VCEs) and closed-ended collective investment schemes as well as their management companies are subject to Law 22/2014.[11] Collective investment undertakings that do not qualify as UCITS should be considered AIFs. Therefore, AIFs may take the form of closed-ended schemes, open-ended schemes, private equity firms, VCEs and other minority entities. Depending on the form they take, AIFs may be managed by an open-ended schemes management company (SGIIC) or a closed-ended schemes management company (SGEIC).

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

iii Pension funds

Pension funds and their management and depositary companies are regulated by Royal Legislative Decree 1/2002 as amended by, inter alia, Law 22/2014 and Law 12/2022 (the Pension Funds Law) and its developing regulation, including Royal Decree 304/2004 and Royal Decree 668/2023 (the Pension Funds Regulations), and Royal Decree 304/2004 of 20 February passing the new regulation on pension funds, as amended pursuant to Royal Decree 668/2023 (which substitutes the original one from 1988, partially amended in 1999).

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

A briefly referred to above, on 30 June 2022, the Spanish Parliament passed Law 12/2022 on regularisation for the enhancement of employment pension plans, which was further developed through Royal Decree 668/2023 of 18 July, modifying pension plans regulations. These regulations have brought to Spain a new key instrument, FPEPPs, private employment pension plans (not funded with public funds) managed or promoted by the Spanish government (being their day-to-day management delegated to certain private pension plans management entities). FPEPPs' key features are as follows:

a FPEPPs are promoted by the Comisión Promotora y de Supervisión, a new body of the Ministry of Social Security. Additionally, a new Comisión de Control Especial will monitor and control management of these funds by the private management entities appointed to do so.

b FPEPPs are managed by private pension plans management entities appointed by the Ministry of Social Security every three years. These management entities are entitled to invest funds following the risk strategy defined by the Comisión Promotora y de Supervisión, on the basis of profitability, risk, and social and environmental impact criteria.

c Maximum limit on the amount employees can devote to FPEPPs is increased from €4,250 to €5,750 annually (although some exceptions allow an increase to such annual limit to €8,500).

d Contributions by employees to FPEPPs benefit from certain social security and tax exemptions (e.g., 10 per cent of the contributions will be deductible from an income tax perspective).

10 It is worth noting, nonetheless, that open-ended collective investment schemes (IICs) and IICs of free IICs are mainly regulated by RD 1082/2012.

11 In addition, Law 22/2014 expressly acknowledges and regulates the existence of European venture capital funds and social entrepreneurship funds.

iv Insurance companies

The management of insurance companies' assets and their rules are contemplated in Law 20/2015 of 14 July on Regulation, Supervision and Solvency of Insurance and Reinsurance Entities and Royal Decree 1060/2015 of 20 November on the Regulation, Supervision and Solvency of Insurance and Reinsurance Entities (jointly, the Private Insurance Regulations).

The Private Insurance Regulations transpose into Spanish law the Solvency II Directive,[12] aiming to improve the corporate governance of insurance entities. Among other matters, it strengthens the requisites of honourableness and professional skills to perform the effective management of insurance and reinsurance companies, develops the legal framework on risk management and compliance, and strengthens the requirements of solvency and financial transparency.

Insurance and reinsurance entities are supervised by the DGSFP.

v Securitisation funds

Securitisation funds and their management companies are now regulated in Law 5/2015 of 27 April on the promotion of business financing (Law 5/2015), which, among other issues, consolidates into one piece of legislation the dispersed legal framework on securitisation existing before. The entry into force of Law 5/2015 has brought relevant novelties to the landscape of securitisation in Spain, with one of the most significant being the faculty of management companies that manage securitisation funds to actively manage the securitised portfolio of assets of open-ended securitisation funds. As this ability was not previously contemplated under Spanish law, the role of this type of management company was limited to merely passive actions such as monitoring the credits rights securitised, collecting them or, eventually, enforcing them.

Both securitisation funds and their management companies are supervised by the CNMV.

vi Real estate investment listed companies

Real estate investment listed companies (SOCIMIs) are specifically regulated under Law 11/2009 of 26 October (SOCIMIs Law), a regulation inspired by that regulating US real estate investment trusts (REITs). The corporate purpose of SOCIMIs is to invest in urban real estate assets for the purposes of leasing them to the public. Subject to certain requirements, profits earned by SOCIMIs on the leasing activities will be subject to a zero per cent corporate income tax rate.

vii Asset management companies

To comply with the undertakings of Spain under the memorandum of understanding (MoU) on financial sector policy conditionality signed by the Spanish and European authorities in July 2012 (the MoU), Law 9/2012 and Royal Decree 1559/2012 were enacted. The purpose of these regulations was 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 the use of asset management companies (AMCs), which are entities intended to manage the 'toxic' assets from credit entities in financial trouble.

12 2009/138/EC Directive of the European Parliament and of the Council of 25 November 2009 on the Taking-up and Pursuit of the Business of Insurance and Reinsurance.

Law 9/2012 and Royal Decree 1559/2012 also contemplated a single AMC – a company for the management of assets proceeding from restructuring of the banking system (Sareb) – incorporated to manage the toxic assets from banks undergoing restructuring or resolution processes since 2012, as well as certain separate pools of assets defined as banking assets funds (BAFs).

Law 9/2012 was partially superseded by Law 11/2015, and only some of its provisions amending other regulations and certain additional provisions remain in force.

Law 11/2015 constitutes a continuation of the regime set forth in Law 9/2012 and shares the same principles as it replicates, to a great extent, its structure and sections; however, it applies not only to credit institutions but also to investment firms (hereinafter, Law 9/2012, Royal Decree 1559/2012 and Law 11/2015, jointly and as in force in each case, the Credit Entities Resolution Regulations).

Among other amendments introduced by Law 11/2015, there is the reform on securities clearing, settlement and registration, and the creation of the national resolution fund, which received contributions from credit institutions and investment funds and will be replaced by the EU single resolution fund. Credit institutions will need to contribute to the EU single resolution fund in the coming years (investment firms will continue to contribute to the national resolution fund).

III COMMON ASSET MANAGEMENT STRUCTURES

There is a panoply of structures under which assets can be managed in Spain. Each structure poses certain specific features that indicate 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 new Securities Markets and Investment Services Act.

Investment firms can be categorised as follows (from the broadest to the narrowest scope) as per Section 128 of the new Securities Markets and Investment Services Act:

a broker-dealers;
b brokers;
c portfolio management companies; and
d financial advisory firms.

This category depends, broadly speaking, on whether investment firms 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 render only 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 those ancillary services specifically foreseen in the Securities Market Law.

However, both broker-dealers and brokers are also legally entitled to render those services (albeit brokers can do so only in third parties' interests), as well as credit entities (to the extent that their legal regime, articles of association and administrative authorisation allow them to do so). Portfolio management companies may not own or hold in their name either the funds or the financial instruments made available to them by their clients for their discretionary management or that are the result of said management.

Investment firms must be authorised by the CNMV and be registered in the CNMV's relevant registries.

Key aspects introduced by the new Securities Markets and Investment Services Act to the investment firms' regulatory regime can be summarised as follows:

a a new concept of national financial advisory firm (EAFN according to its Spanish initials) is created, whose main feature is that it does not have the status of investment services firms but is subject to the same rules, albeit with lower initial share capital requirements and without the capacity to provide services outside Spain;

b foreign financial advisory firms (but only legal persons) will have the status of investment firms; and

c other changes have been passed to adapt the Spanish legislation to the new EU regime for investment firms set out in Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November on prudential requirements for investment firms.

ii Collective investment schemes

Open-ended collective investment schemes

Open-ended collective investment schemes (IICs) can be described as schemes whose purpose is to collectively invest funds attracted from the public, whose functioning is subject to the principle of risk allotment and whose units are repurchased with a charge to the assets of the institution upon request of the investor. IICs can be categorised in various manners.

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 are performed by an SGIIC with the assistance of a depositary entity.

Investment funds can be divided into separate divisions, each being given a different name but under the general denomination of the fund. Each division issues its own units, which represent 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 liabilities of the relevant fund except up to the amount of their investment.

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 is 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 for these companies to appoint an SGIIC unless in the case of self-managed investment companies. Besides, since Law 22/2014 came into force, the general rule is that investment companies also need to appoint a depositary entity.

Based on the type of assets in which they invest, IICs can also be categorised as financial IICs or non-financial IICs. Financial IICs, which, when incorporated as investment

companies, are also known as SICAVs, 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, only assets that are listed and described in the CIS Law are available for investment,[13] liquidity ratios must be complied with to guarantee investors' refunds, and the risk profile of the total investments must be adequately diversified (in general, assets issued by a specific issuer cannot exceed 5 per cent (which figure, under certain circumstances, may be increased to 10 per cent) of the IICs' assets or 15 per cent in relation to that issuer's group).

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 (not qualifying as UCITS) that are subject to requirements similar to those of conventional IICs but with certain features that, in general, allow for more flexible management and investment strategies.

For instance, investment in these free IICs requires a minimum disbursement of €100,000, except for those qualifying as professional investors, and 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, except in those cases in which the client has a portfolio management agreement authorising the investment in these IICs, and such agreement contemplates similar warnings to those in the aforementioned document.

The CIS Law appears only to expressly contemplate as non-financial IICs those real estate 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 IIC 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 Spanish open-ended AIFs. If open-ended AIFs are managed by SGIICs or managers authorised in another EU Member State, they may be freely marketed throughout the European Union using a straightforward passporting procedure.

SGIICs

SGIICs are Spanish open limited liability companies incorporated for an indefinite time, whose corporate purpose involves managing the investments and controlling and managing the risks, the administration 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 act jointly with depositaries. SGIICs' share capital (which needs to be represented by registered shares) must comply with a minimum required amount requirement and be fully paid up.

After the entry into force of Law 22/2014, SGIICs are also allowed to manage, represent and commercialise VCEs, closed-ended schemes, European venture capital funds and social entrepreneurship funds. 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

13 Inter alia, 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 open-ended AIFs (Spanish open-ended AIFs) not allowed to invest in other IICs.

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.

To incorporate an SGIIC, it is necessary to obtain authorisation from the CNMV. This authorisation is conditional upon meeting a number or requirements, some of which may involve having a good administrative and accounting organisation and adequate technical and human resources. Furthermore, to ensure fair treatment among shareholders or unitholders of IICs, or to maintain the stability and integrity of the financial system, the CNMV can temporarily require one or several SGIICs to reinforce their portfolio liquidity.

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

Additionally, on 13 April 2021, Law 5/2021 of 12 April, which amends the revised text of the Companies Act, adopted by Royal Legislative Decree 1/2010 of 2 July, Royal Legislative Decree 4/2015 of 23 October, which adopts the revised text of the Securities Market Act and other financial regulations, concerning the promotion of long-term shareholder involvement in listed companies, was published in the Spanish Official State Bulletin. While this new Law 5/2021 introduced key changes for listed companies, it also provided certain novelties applicable to AMCs: mainly the obligation for each management company to pass an 'implication policy', which should include the investment policy and approach with respect to those listed companies in which they invest; a description of the implementation of the implication policy, including how voting rights are managed and the use of proxy advisers; and a description of the measures to detect, monitor, avoid and manage conflicts of interest. The implication policy should be publicly available on the website of the management company, and the SGIIC must publish each year the application of its implication policy.

Closed-ended schemes

Law 22/2014 brought into effect the existing Spanish legal regime for closed-ended investment structures. These closed-ended schemes consist of collective investment mechanisms that raise capital from a number of investors by means of marketing activities to invest the funds in any type of assets (financial or non-financial) according to a defined investment policy and that have no commercial or industrial target.

Law 22/2014 also regulates VCEs, categorising them as a type of closed-ended investment scheme that raises capital from investors by means of marketing activities, the commercial aim of which is to generate gains or returns for its investors, and the basic corporate purpose of which involves acquiring temporary interests in the share capital of non-financial or non-real estate companies (or both) that, as of the moment when the interest is acquired, are not listed companies. Additionally, these entities can invest in securities issued by companies in which real estate properties represent more than 50 per cent of their aggregate assets to the extent that at least 85 per cent of such real estate assets are devoted, on a continuing basis, during the entire time when the shares are held by the VCE, to the development of an economic activity. Closed-ended collective investment schemes are managed by specific management entities (SGEICs) or by SGIICs that in both cases need to be authorised for such purposes. Besides, management entities have to appoint a depositary entity for every fund or company they manage whose assets under management are above certain thresholds. Additionally, closed-ended collective investment schemes may take the legal form of a fund or a company. Both closed-ended collective investment schemes and their managers are regulated entities

in Spain and are 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.

Closed-ended collective investment schemes shall be marketed only to professional investors, except when the same requirements as those in respect of hedge funds or funds of hedge funds are met.[14] As mentioned above, AIFs may take the form of closed-ended schemes. The legal regime on cross-border marketing of closed-ended AIFs according to Spanish law may be summarised as follows: marketing of Spanish AIFs in the European Union and EU AIFs in Spain is possible through the passporting process, and marketing of non-EU AIFs by EU alternative investment fund managers (AIFMs) and by non-EU AIFMs is possible by prior verification of the relevant conditions and submission for filing all the requested information in order to apply for the authorisation and registration of the non-EU AIFs. Both EU AIFMs and non-EU AIFMs need to be registered with the CNMV.

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 described below, Spanish legislation contemplates three different types of pension schemes 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 operate for pension schemes either 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 are limited to only channel investments from related pension schemes (i.e., with an account held in the fund). The Private Insurance Regulations have further developed the rules on open-ended pension funds, widening and making their scope of operation more flexible and allowing for more diversified investment policies and management. The incorporation of pension funds is subject to prior approval by the Ministry of Economy and Business Support and the General Directorate of Insurance and Pension Funds, 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 with the assistance of depositary entities and 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 and are subject to the supervision of the DGSFP. Such companies also need to meet a number of requirements,

14 See Section II.ii.

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 previously mentioned minimum requirements as to paid-up capital and net worth.

Pension fund investments

The investment activity of pension fund assets is subject to certain restrictions as set out in the Pension Funds Law and the Pension Fund Regulations. 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 or real estate IICs.[15] Further limitations to Spanish pension schemes or funds business apply.[16]

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 setting up 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 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 assets[17] according to the principles of consistency, profitability, security, liquidity, dispersion and diversification; all of the foregoing refer to the types of operations carried out by the insurance company and its commitments.

v Securitisation funds

Securitisation funds are separate pools of assets and liabilities without legal personality and with a zero capital net worth whose patrimony will consist of, on the assets side, credit rights (current or future) that meet the criteria set forth in Law 5/2015 and, on the liabilities side, fixed interest rate issuances carried out by them as well as the loans they have been granted.[18] Securitisation funds can be either open- or closed-ended depending on whether new assets and liabilities can be added to their patrimonies once they have been incorporated.

15 Spanish pension funds may also invest in securities admitted to trading on the Alternative Stock Market, the Alternative Fixed Income Market and in venture capital funds (up to 3 per cent of the fund's assets).

16 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.

17 The acceptable assets are listed and described in the Private Insurance Regulations as well as in EU regulations directly applicable to insurance companies.

18 It is worth noting that, under certain circumstances, management companies of securitisation funds are allowed to enter into swaps or other types of derivative contracts on behalf of the funds under their management.

As regards open-ended funds, Law 5/2015 allows their management companies to actively manage their securitised portfolio of assets. Such faculty shall have to be contemplated in the fund's incorporation deed, which shall describe its management policies. In addition, if applicable, the prospectus in relation to the fund shall also contain a description of such policies.

Since the entry into force of Law 5/2015, the assignment in favour of a securitisation fund of credit rights recorded as assets of the originator no longer has to be in full, unconditional and for the entire remaining term until maturity, which gives much more flexibility to this type of structure.

Securitisation fund managers

Securitisation fund managers are Spanish open limited liability companies, incorporated for an indefinite time, whose corporate purpose comprises the incorporation, management and legal representation of securitisation funds as well as BAFs. In addition, their minimum share capital amounts to €1 million and needs to be fully subscribed and paid up as well as represented by nominative shares.

These entities are subject to a wide range of organisational and transparency requirements that are more stringent in respect of securitisation fund managers that choose to actively manage the securitisation funds they manage (mainly as regards management's and employees' remuneration rules).

The incorporation of securitisation fund managers is subject to the prior authorisation of the CNMV. In addition, once authorised and prior to the commencement of their activities, they need to be registered with the CNMV.

vi SOCIMIs

Under Spanish law, there are two main types of entities the purpose of which is to invest in real estate assets: real estate IICs[19] and SOCIMIs.

SOCIMIs are Spanish listed open limited liability companies (most of them listed on the Spanish Alternative Stock Market (MAB)), which may opt for a special tax regime provided that they comply with certain requirements, one of which is 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 be made only 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, SOCIMIs are required to distribute the following as dividends: 100 per cent of any dividends and profit participations received as a consequence of their stake in other entities; at least 50 per cent of any profits deriving from divestment of real estate property and share capital interests; and at least 80 per cent of any remaining profits.

19 See Section II.v.

Tighter regulation of these entities was enacted in 2017, requiring SOCIMIs to comply with a minimum threshold of minority shareholders (i.e., shareholders who hold less than 5 per cent of the SOCIMIs' share capital) to become listed companies. Previously, SOCIMIs were allowed not to comply with this minimum threshold for the first year of their listing.

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 listed in the Spanish securities market.

vii AMCs, Sareb and BAFs

The bursting of the housing bubble, together with the collapse of the real economy, left most Spanish credit entities with enormous portfolios of real estate assets, often as 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 European Union resolved in 2012 to put in place a financial assistance programme for the Spanish banking sector by means of the MoU. One of the main objectives of the MoU was the establishment of a well-defined and effective framework for the management of the banking crisis. AMCs are one of the most relevant instruments within such framework (the landscape is completed by Sareb and BAFs).

A decade later, Spanish banks have significantly reduced their exposure to problematic assets such as non-performing loans and foreclosed assets, moving closer to the EU average;[20] however, the current economic outlook may change Spanish banks' exposure.

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 the entity's balance sheet, and are currently regulated by Law 11/2015. 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 direct the transmission of risks to entities as remote from the depositors as possible, 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 fashion.

The FROB lists in each case the categories of transferable assets. The Credit Entities Resolutions Regulations set out a number of rules, the aim of which is to facilitate the effectiveness of those transfers[21] as well as the obligation to conduct value adjustments on a pre-transfer basis.

Finally, AMCs are entitled to raise debt by issuing bonds.

20 Information made available by the International Monetary Fund; IMF Country Report No. 18/330: https://www.imf.org/~/media/Files/Publications/CR/2018/cr18330.ashx.

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

Sareb and BAFs

While AMCs are meant to apply to all the processes that may need to be undergone in the future, the Credit Entities Resolution Regulations also set out the rules for the incorporation of Sareb, whose purpose was to acquire the toxic assets from those credit entities that were nationalised in 2012.[22]

Sareb is a Spanish open limited liability company incorporated by the FROB. It was created with the exclusive purpose of managing and disposing of certain assets received from the nationalised credit entities.[23] Each such transfer has been subject to pre-transfer value adjustments.

The FROB holds a 46 per cent interest in the share capital of Sareb, while private investors (mostly Spanish credit entities) hold the remaining 54 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 portfolio[24] within 15 years of its incorporation (albeit no minimum annual divestment thresholds apply). 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 Resolution 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 that are applicable to the transfer of assets to AMCs. Finally, one of the most notable features of the BAF is its privileged tax regime.

When using this instrument, the disposal by Sareb – and, hence, the investment by potential acquirers – will take place through a purchase of units of the BAF. There are only six BAFs currently registered with the CNMV, clearly reflecting that the BAF is not investors' preferred route.

Sareb created its own SOCIMI, Tempore, which made its debut on the MAB in April 2018 and manages 2,565 rental homes valued at €383 million. In July 2019, an investment fund acquired shares of Tempore representing 75 per cent of the total share capital of the company. Almost all the remaining share capital was acquired by such fund in December 2021.

22 Pursuant to Royal Decree-Law 24/2012, these entities were BFA-Bankia, Catalunya Banc, NCG Banco-Banco Gallego, Banco de Valencia, BMN, Liberbank, Caja3 and Ceiss.

23 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.

24 Sareb received a portfolio of 197,474 assets valued at €50.781 million (80 per cent are financial assets and 20 per cent are real estate assets).

IV MAIN SOURCES OF INVESTMENT

According to the latest report issued by the CNMV,[25] assets under management by financial investment funds remained stable at €324.701 billion in 2022 (when a 4.1 per cent decrease occurred due to a decrease in the value of the investment portfolio). With respect to new investment inflows, there was an approximately €17 billion in 2022 (€8.5 billion of which was raised during the fourth quarter of the year). Most of the investment inflows were deployed to fixed income (approximately €15 billion). Passive finds also received significant inflows, amounting to approximately €4.5 billion, 90 per cent of which occurred during the fourth quarter.

Regarding real estate schemes, the main figures continue to worsen, mainly because of a shift of investment towards SOCIMIs. The number of redemptions has resulted in the liquidation and winding up of most of the real estate funds, whereas the number of SOCIMIs continues to increase – at the end of 2020 reaching a total of 76 companies listed in the SOCIMIs section of the MAB.

The amounts under management of pension funds in 2022 amounted to €119.978 billion,[26] a decrease of 10.5 per cent compared with the 2021 figure, which entailed a return to pre-pandemic levels due to, among other things, inflation and its negative impact on Spanish families' savings.

Since 2015, the number of SICAVs has been decreasing. In particular, during 2020, 143 SICAVs were deregistered from the CNMV, whereas only one new entity has been registered, resulting in 2,427 entities at the end of 2020. However, 2022 has been a landmark year for this investment vehicle. Since January 2022, the 1 per cent corporate tax rate SICAVs traditionally benefited from was materially limited to SICAVs with more than 100 investors having a minimum €2,500 investment each one (to avoid a non-legitimate use of this kind of investment vehicle by one investor or a reduced number of investors). Such drastic tax change entailed the deregistration and liquidation of more than 2,000 SICAVs, 86 per cent of the existing ones in Spain.

V KEY TRENDS

i Increase of investments in collective investment schemes, pension funds and insurance products by Spanish households

Although most of Spanish households' savings are still concentrated in real estate, historical data shows that households have been gradually increasing their investment in collective investment schemes, pension funds and insurance products.

ii Concentration of asset managers

The instability and increase in redemptions owing to the covid-19 crisis are eroding the profitability of asset managers. The asset management industry in Spain, which is highly atomised (there are 91 asset managers with assets under management worth between

25 This information is taken, except unless otherwise stated, from the CNMV's Quarter I 2023 Bulletin, which is up to date as at 30 March 2023.

26 All the information in this section related to pension funds, except unless otherwise stated, is taken from the information made available to the public by the Spanish Association of Collective Investment Schemes and Pension Funds (INVERCO): ahorro-financiero-de-las-familias-iics-y-fp-2022.pdf (inverco.es).

€100 million and €1 billion), was undergoing a concentration process prior to the pandemic. The covid-19 crisis suspended merger and acquisition transactions over asset managers. However, as experts expected, this kind of transaction resumed in the last two quarters of 2020 (e.g., in the Spanish market, the acquisition by Houlihan Lokey of Fidentiis Capital, the combination between Altamar Capital Partners and CAM Alternatives, and the recent acquisition by Singular Bank of the UBS private wealth division). No further consolidation has occurred since the pandemic period, other than the required from the UBS takeover of Credit Suisse, which also has an impact on the Spanish divisions of the two Swiss banks.

iii Towards a more flexible and efficient operational structure for asset managers

Asset managers are working to implement more flexible and efficient operational structures that allow them to access new markets, client sectors and distribution channels. To do so, in the majority of cases, asset managers need to simplify their legal structures to avoid duplications and obtain a more cost-efficient structure in which back office functions and non-core activities are usually outsourced.[27]

iv Increasing monitoring on secondary transactions involving succession funds

The CNMV published on 17 July a Q&A document on open-ended and closed-ended collective schemes and their asset managers. Among other clarifications on with diversification of asset allocation and pricing, CNMV put focus on secondary transactions involving a succession or continuation fund managed by the same asset manager to the seller. The CNMV views this kind of transaction with strong criticism and establishes strict rules on their supervision.

The CNMV insists on their exceptional nature, requiring from the asset manager a duty to monitor and ensure that they are made in both parties' interests (i.e., the seller and the buyer and, ultimately, their limited partners) and that they are carried out on an arm's-length basis. Additionally, the CNMV requires for these transactions to be subject to strict and tight procedures to avoid conflicts of interest and transparency for investors. Likewise, the CNMV is sceptical and cautious of third-party independent valuations used in this kind of deal, so they seem not to be a complete safe harbour.

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:

a the conditions and requirements that must be met by an entity to undertake insurance business;
b the types of legal entity that may engage in such activity;
c the supervision of insurance companies;
d the rendering of insurance services on a cross-border basis;

27 https://es.fundspeople.com/news/la-gestion-de-activos-en-situacion-de-crisis.

e reinsurance activity;
f policyholder protection; and
g 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, the purposes of which are 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 constitution and the nature of their commitments.

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.[28] 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 MAB, whose admission requirements are less stringent. Additionally, the minimum share capital requirement has been reduced from €15 million to €5 million.

These changes have proven effective: on 31 December 2019, 83 SOCIMIs were listed on either the Continuous or the Alternative Stock Market, nine more entities than by the end of 2018, and the investment in SOCIMIs since 2013 has surpassed €21 billion (more than €5 billion in 2018 alone, which is approximately two-and-a-half times more than in 2017).[29] Therefore, Spain is now effectively the second highest country with most SOCIMIs (or equivalent figures) in the world, surpassing Japan's 63 J-REIT (SOCIMIs in Japan), and only behind the United States, although their total capitalisation is still behind that of several countries (as at March 2019, Spain is the 10th largest market in the world, with a total asset value of €23.18 billion).[30]

In the coming years, though, more competition can be expected in the Iberian market, as Portugal enacted a law approving the SIGI (equivalent to SOCIMIs and REITs) in order to attract more foreign investment in the sector.[31] Additionally, certain changes to the corporate income tax (CIT) regime applicable to Spanish SOCIMIs approved on 30 June 2021 (going from a zero to a 15 per cent tax rate on non-distributed dividends, subject to other certain requirements) might have an impact on the willingness of investors to deploy capital through this kind of real estate investment vehicle (although it is still too early to see the consequences resulting from such tax increase).

---

28 Law 16/2012 which adopts tax measures aimed at consolidating public financing and promoting economic activity.

29 https://elpais.com/economia/2018/12/20/actualidad/1545326836_846803.html.

30 https://elpais.com/economia/2019/03/25/actualidad/1553537169_582242.html.

31 https://cincodias.elpais.com/cincodias/2019/01/30/companias/1548876658_474047.html.

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 resolution of banks, the nature of the assets currently under Sareb's management (real property or real estate-related credits) makes them noteworthy.

iv Hedge funds

Spanish hedge funds are regulated under the CIS Law within a specific section relating to financial IICs that do not qualify as UCITSs and RD 1082/2012 (which, inter alia, foresees the acceptable assets for investment as well as their obligations with regard to third parties).

v Private equity

The private equity industry in Spain has traditionally used the legal form of VCEs, which are now regulated by Law 22/2014. The sector has adapted itself to the new regime and regulations and also grows exponentially.

VCEs need to have a defined investment policy that covers, inter alia, the sectors and geographical areas where the investments will be focused, the minimum and maximum stake that the VCE will hold in the relevant companies, and the type of financing that will be granted to the companies they hold an interest in.

At least 60 per cent of the calculable assets of a VCE needs to be invested in:

a shares or other securities or financial instruments that confer the right to acquire such securities in the capital of companies that comply with the requirements set out by Law 22/2014;

b participative loans in such type of entity, the interest of such loans being fully correlated to the results of the borrower in a manner that, if the borrower's results are negative, no interest will be paid on the loan;

c other participative loans to companies within its corporate purpose with a limit of 30 per cent of its aggregate computable assets; and

d shares or interests in other VCEs.

Management entities are subject to transparency obligations in respect of the VCEs they manage (e.g., to make available to the public an informative prospectus and an annual report).

VII TAX LAW

Since the new government came to power in 2019, several tax regimes have been modified. In this regard, as of 1 January 2021, with the entry in force of Law 11/2020 of 30 December 2021 on the General State Budget for the year 2021 (Law 11/2020), the full exemption on dividends and capital gains given by the Corporate Income Tax Law[32] has been reduced to 95 per cent, which implies an effective tax rate of 1.25 per cent (i.e., 25 per cent, general CIT rate of 5 per cent). That said, 100 per cent exemption is still allowed if the following conditions are met:

a the entity receiving the dividends:
- has a net turnover of less than €40 million;
- shall not be considered a passive entity;

32 Law 27/2014 of 27 November on corporate income tax.

    - shall not be part of a company's group, regardless of the residence of the entities and the obligation to prepare consolidated financial statements; and
    - shall not have, prior to the incorporation of the investee entity, a direct or indirect shareholding in the capital or equity of another entity equal to or greater than 5 per cent;

b the investee entity that distributes dividends must have been incorporated after 1 January 2021, and the entity that incorporates it must hold directly, and since its incorporation, the totality of its capital or equity; and

c the total exemption applies to dividends or shares in profits received in tax periods ending in the three years immediately following the year of incorporation of the distributing entity.

On 11 July 2021, Law 11/2021 of 30 June on measures to prevent and combat tax fraud, transposing Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, amending various tax rules and on the regulation of gambling (Law 11/2021) entered into force. Law 11/2021 modifies numerous taxes, in particular CIT and non-resident income tax (NRIT), and, as its name suggests, it transposes the ATA Directives.[33] The more relevant measures adopted by Law 11/2021 are summarised below.

In the first place, the SOCIMIs Law is amended to establish a special tax of 15 per cent on the portion of non-distributed profits or earnings deriving from income that has not been taxed at the general CIT rate and is not within the legal reinvestment period. The tax is accrued on the date of the resolution to apply the profit for the year and must be self-assessed and paid by the SOCIMI within the following two months.

Second, regarding domestic UCITS qualified as collective investment schemes incorporated as SICAVs, the application of the reduced CIT rate of 1 per cent is now reserved with effect for tax periods beginning on or after 1 January 2022 to those SICAVs whose minimum number of shareholders (100) is reached with investors who have acquired shares whose net asset value at the date of acquisition is equal to or greater than €2,500. Excluded from these changes are unrestricted investment SICAVs, SICAVs wholly owned by other collective investment undertakings and listed index SICAVs. As explained above, this new approach has resulted in the deregistration and liquidation of more than 2,000 SICAVs during 2022, 86 per cent of the existing ones in Spain.

A transitional regime is established for SICAVs that, affected by the change, agree to be dissolved with liquidation in 2022 and, within six months of that date, have completed all the legal acts and transactions necessary for the cancellation of the company in liquidation.

Last, with effect for tax periods beginning or having begun on or after 1 January 2021, certain changes are implemented to align the rules on international tax transparency with the provisions of the ATA Directives. As a consequence, income derived from insurance, credit, financial leasing and other financial activities may be included as taxable income for the Spanish resident controlling shareholder when it does not come from economic activities, as well as income obtained in transactions carried out with related entities in which the non-resident entity adds little added value.

33 Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market and Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (together, the ATA Directives).

Regarding Spanish resident collective investment schemes, open-ended IICs are non-transparent entities subject to Spanish CIT, albeit at a rate of 1 per cent. As for closed-ended IICs (including VCEs), these are subject to the general 25 per cent Spanish CIT rate. Spanish resident pension funds remain taxed under the CIT Law but at a rate of zero per cent.

Income deemed to be obtained in Spain by a non-resident is subject to NRIT, generally at a rate of 24 per cent; however, income obtained by residents in an EU Member State[34] is subject to a rate of 19 per cent. Certain income items are specifically taxed at a reduced rate of 19 per cent regardless of the residence of the non-resident taxpayer, namely dividends, interest and capital gains. Each income stream is subject to taxation separately on a gross basis (no expenses are deductible, with certain exceptions applicable to EU residents). Normally, a withholding tax equal to the non-resident's final tax liability is levied on interest, dividends and capital gains on IICs.

In addition, on the basis of the Spanish regulations and recent several rulings issued by the Spanish Supreme Court, following the EU Treaty and the principle of free movement of capital, non-Spanish resident investors (that are similar in nature to Spanish resident investors, which are subject to a favourable tax regime on their investment profits) are entitled to be taxed on their Spanish source investment income similarly to their Spanish resident equivalents. As a consequence, 'equivalent' non-Spanish resident pension funds and sovereign funds will be taxed on their Spanish source investment income at a rate of zero per cent, while UCITS will be taxed at a rate of 1 per cent.

As regards non-Spanish resident managers of collective investment schemes, any Spanish sourced income earned when carrying out their management activity (fees, commissions or any other returns) will be subject to Spanish NRIT at the general 24 per cent rate (or 19 per cent when earned by residents in an EU Member State, Norway or Iceland), 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 (unless those profits are earned through a Spanish permanent establishment). 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.

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.

Below is 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.

34 Or by residents in a Member State of the European Economic Area with which Spain has an effective exchange of tax information as defined in Law 36/2006 of 29 November on Measures to Prevent Tax Fraud.

i Capital gains

In general, capital gains obtained in Spain by a non-resident taxpayer will be taxed under the NRIT at a 19 per cent rate. No withholding tax is levied on capital gains, except on those relating to an investment in a Spanish open-ended IIC (with the exception of qualified exchange-traded mutual funds).

Domestic legislation provides for an exemption from taxation 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, legal persons resident in an EU Member State, Norway or Iceland are entitled to an exemption on capital gains obtained upon a disposal of Spanish shares, provided that the non-resident entity has recently owned, for an uninterrupted period of one year, a minimum 5 per cent participation and to the extent that the assets of the company to which the shares belong do not consist mainly, directly or indirectly, of real estate located in Spain.

Natural persons resident in an EU Member State, Norway or Iceland are also entitled to an exemption on capital gains obtained upon the disposal of Spanish shares, unless the non-resident taxpayer has owned, at any time during the year prior to the transfer, shares representing 25 per cent or more of the transferred entity, or if the assets of the company to which the shares belong consist mainly, directly or indirectly, of real estate located in Spain. The exemption will not apply if the said gains are obtained through tax haven jurisdictions.

Finally, most CDTs entered into by Spain 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 (generally, 15 or 25 per cent).

Specifically with respect to carried interest (a key element of private equity houses), in Spain, there are no specific tax regulations that ensure capital gains treatment. However, for the first time, in 2020, two regions of Spain (the Basque Country and Navarre) enacted regulations that reduced the tax burden on certain carried interest income earned by private equity investment managers who are resident for tax purposes in one of those regions. Marginal tax rates range between 24.5 per cent and 26 per cent depending on the region. In order for the income to qualify for this special carried interest tax treatment, the following requirements (among others) must be met:

a the managers' remuneration must be set out in the investment vehicle's by-laws, which must also make reference to the minimum guaranteed internal rate of return for the private equity investors;
b the managers' (direct or indirect) stake in the target entity must be held for a minimum period of five years; and
c the application of the special tax regime must be notified to the tax authorities.

In the same vein, Law 28/2022 of 21 December 2022 to promote the start-up ecosystem provided for the Spanish common territory that income from carried shares realised by managers will be treated as employment income, subject to Spanish personal income tax (at marginal rates up to 45 per cent to 54 per cent). However, only 50 per cent of this income will be subject to tax and, hence, carried interest will be taxed at an effective maximum tax rate between 22.5 per cent and 27 per cent. Such Law included a number of conditions for the application of the 50 per cent reduction of carried interest income:

a The grantor must be a specific type of entity (Spanish VCEs, European venture capital funds, European social entrepreneurship funds, European long-term investment funds and other analogous entities).

b A minimum return must be guaranteed to the remaining investors and included in the entity's by-laws.

c The shares or rights must be held for five years (with exceptions).

d The 50 per cent reduction cannot be applied if this 'carried interest' derives directly or indirectly from an entity that is tax resident in a tax haven or in another territory without a tax exchange of information agreement with Spain.

ii Interest and dividends

In general, interest and dividends obtained in Spain by a non-resident taxpayer will be subject to NRIT at a rate of 19 per cent and will be subject to withholding tax.

Domestic rules provide certain tax exemptions on income obtained by non-residents. In addition, EU, Norway and Iceland residents are entitled to an exemption on interest obtained in Spain, provided that the interest is not obtained through a tax haven jurisdiction and provided further that they are the beneficial owners.

Regarding dividends, no Spanish withholding taxes are levied on the dividends distributed by a Spanish subsidiary to its parent company resident in an EU Member State, Norway or Iceland to the extent that the parent company maintained 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; the parent company is incorporated under the laws of an EU Member State, Norway or Iceland and is subject to CIT in a Member State, without the possibility of an exemption; and 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 dividend withholding tax exemption will not be applicable if the majority of the voting rights of the parent company is held directly or indirectly by individuals or entities not resident in an EU Member State, Norway or Iceland, except if the taxpayer evidences that the incorporation of the parent company took place and its operations are conducted on the basis of valid economic reasons and substantial business motives.

In this respect, a recent judgment of the Spanish National Court held that the burden of proof of abuse falls on the Spanish tax authorities and that the Spanish anti-abuse rule infringes EU law. The ruling represents a turning point in the case law of the Spanish Supreme Court and the Spanish National Court. Both had previously ruled that the burden of proving the absence of abuse or fraud falls on the taxpayer where a Spanish company distributes dividends to an EU-resident parent entity controlled by third-country residents. The Spanish National Court based its rulings on the Court of Justice of the European Union judgments dated 7 September 2017 (Case C6/16), 20 December 2017 (accumulated cases C504-16 and C613-16) and 26 February 2019 (accumulated cases C-116/16 and C-1117/16). However, such ruling is currently under review by the Spanish Supreme Court.

This change in approach is very relevant for non-resident income tax payers, which would frequently be investing in Spanish entities through these types of corporate structures. In each case, the Spanish tax authorities would have to establish and evidence the particular reasons that may lead them to objectively conclude that an abuse or fraud situation exists (that would warrant the application of the anti-abuse rule) and that therefore the dividend withholding tax exemption of the Parent–Subsidiary Directive would not be applicable.

Finally, non-residents that reside for tax purposes 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 zero to 15 per cent on interest and dividends).

iii Royalties

Royalties paid to qualified associated EU-resident companies are exempt from NRIT provided that certain requirements are met. Otherwise, a 24 per cent tax applies (19 per cent when earned by residents in an EU Member State, Norway or Iceland), which may be reduced by applicable CDTs.

iv Spanish holding companies

ETVEs are defined as standard domestic companies subject to CIT, the corporate purpose of which includes the management of stakes that correspond to active domestic or non-Spanish resident entities and comply with certain formal requirements. ETVEs may also carry out any other non-exempt activities.

It seems that, despite the changes introduced by Law 11/2020, dividends and capital gains obtained by non-Spanish resident shareholders from their interest in an ETVE remain not subject to tax if they indirectly derive from dividends and capital gains obtained by the ETVE from its interest in non-Spanish resident companies or permanent establishments located outside Spain.

v Spanish real estate investment companies

As outlined above, one of the changes of Law 11/2021 is that SOCIMIs are now subject to a special CIT rate of 15 per cent on the portion of non-distributed earnings or profits deriving from income that has not been taxed at the general CIT rate and is not within the legal reinvestment period. The tax is accrued on the date of the resolution to apply the profit for the year and must be self-assessed and paid within the following two months.

That said, SOCIMIs are still subject to a zero-rated CIT on qualified real estate income, provided that certain criteria are fulfilled. They may, however, be subject to a 19 per cent CIT 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 an effective 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 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.

In conclusion, the tax regime for SOCIMIs remains unchanged, except for non-distributed earnings or profits, which are subject to a special CIT tax rate of 15 per cent.

vi Regulated Spanish VCEs

VCEs benefit from the same 95 per cent exemption from CIT on qualified dividends and qualified capital gains as any other CIT taxpayer. In addition, VCEs not meeting the requirements to apply the 95 per cent exemption are entitled to a 99 per cent exemption

on capital gains 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 that the shareholder is not resident in a tax haven jurisdiction).

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.

On 30 April 2021, Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, also known as DAC6, was transposed in Spain by Law 10/2020 of 29 December amending Law 58/2003 of 17 December, the General Tax Law (Law 10/2020).

The objective of DAC6 and Law 10/2020 is to enable the tax authorities to react quickly to potentially aggressive tax practices by adopting rules to close loopholes in the system and, failing that, to focus inspection efforts on areas of risk. The ultimate goal is also to dissuade taxpayers from engaging in these potentially aggressive tax planning practices.

VIII OUTLOOK

Over the past few years, we have witnessed sustained growth in Spain's asset management industry, which, despite the covid-19 crisis, continued its steady increase and development until 2021. However, after that positive evolution of the industry in Spain during 2021, 2022 saw a decrease in the volume of assets under management of around 9.7 per cent (a €12,358 billion reduction). Inflation, an increase of interest rate rises by central banks, the recovery from the supply chain disruptions and, of course, the war in Ukraine were the key causes for such a negative result for the Spanish asset management industry. The mix of all these external factors has resulted in a decrease in both the value of the portfolio of assets under management and the inflows and contributions from Spanish families' savings.

The implementation of the AIFMD in Spain has been a major event in the Spanish asset management market from a regulatory perspective, and will continue to be so in future years, since various of its provisions are still pending further development by means of regulations and CNMV circulars. In any event, the main consequence to have noticeable effects on the market is the right to freely market open-ended and closed-ended EU collective investment schemes (to the extent that they do not qualify as UCITS, which have their own regulations) throughout the European Union using a simple passporting procedure.

Another European directive that has certainly affected the industry is Directive 2019/1160, which was aimed at removing certain barriers that still hamper the ability of fund managers to fully benefit from the internal market by addressing the divergences among national legal systems in the cross-border distribution of these products, in particular in relation to the pre-marketing definition for AIFMs, the denotification process for marketing UCITS and AIFMs and the provision of facilities to retail investors. It was transposed into Spanish national law through Royal Decree-Law 24/2021 of 2 November, which, with respect to collective investment schemes in Spain, introduced certain key changes:

a a new pre-marketing regime, focusing on the regulation of information supply with respect to investment strategies or ideas relating to AIFs (addressed to professional investors);

b the amendment of certain information details within the context of cross-border marketing of harmonised and non-harmonised collective investment schemes;

c the suppression of the requirement of a physical presence in Spain to carry out cross-border marketing activities in this jurisdiction; and

d certain new obligations with respect to the notification that should be delivered at the time a Spanish harmonised or non-harmonised collective investment scheme ceases to be distributed on another EU market.

As stated before, Spain has completed its MiFID II transposition, and the effects of the measures adopted in this context have become evident. One of the major effects is the prohibition on accepting or retaining inducements when independent advice and discretionary management portfolio services are rendered. This prohibition, together with the comprehensive, accurate and understandable disclosure to clients of fees, commissions and other payments received by investment firms, has been a game-changer. Since the transposition of MiFID II in Spain, the percentage of inducements has decreased by approximately 10 per cent, and the trend is for this percentage to continue decreasing.[35] In fact, in the context of the European Commission open public consultation launched on 17 February 2020 to gather stakeholders' views on the experience of two years of application of MiFID II, the CNMV expressed its support for the possible introduction of a complete inducement ban for all retail products across the European Union, provided that the prohibition would apply not only to MiFID products but also to MiFID-like products, such as investment insurance instruments.[36]

In relation to the real estate asset management landscape, in the past few years, we have witnessed a change that is likely to last in the middle term, as investment in this sector is now mainly conducted through SOCIMIs (which play the role traditionally performed by real estate investment funds and companies). However, recent key changes in the taxation of non-distributed revenues held by these entities (moving from a zero to a 15 per cent tax rate) have certainly imposed further disincentives to using this type of investment vehicle.

Finally, a brief remark should be made on the status of a number of amendments or new regulations currently going through the legislative process for approval. The political situation during the recent months (i.e., the weakness of the coalition government and the call for general elections in July 2023) has put some new regulations on hold. Amid others, reference could be made to the legislative projects on cross-border distribution of collective investment undertakings or on the amendment to the regulation to the Spanish collective investment law. However, with a new government expected to be formed after the 2023 summer, several taxes and regulations may change in the following year.

35 https://es.fundspeople.com/news/el-porcentaje-de-retrocesion-en-espana-cae-10-puntos-porcentuales-desde-la-aplicacion-de-mifid-ii.

36 CNMV comments on certain aspects of MiFID II in the context of the public consultation launched by the European Commission in February 2020.