

Implementation of the AIFM Directive in Spain

Spanish Law 22/2014 transposes the Directive on Alternative Investment Fund Managers

On 13 November 2014, the Official State Gazette published Spanish Law 22/2014, of 12 November ("**Law 22/2014**"), governing private equity entities, other closed-ended collective investment undertakings, and the management companies of closed-ended collective investment undertakings and which amends Law 35/2003, of 4 November, on Spanish Collective Investment Undertakings (the "**Funds Act**"). Law 22/2014 transposes Directive 2011/61/EU on Alternative Investment Fund Managers ("**AIFMD**") to Spanish law.

Initial assessment

The impact of the AIFMD on the world of Spanish private equity is much higher than on the open-ended collective investment undertakings ("CIU") industry, mainly because the Funds Act already regulated various aspects which the AIFMD entails. In addition, Law 22/2014 brings forward the application of certain measures governed in the UCITS V Directive, such as the legal regime on depositories and the remuneration policy for UCITS managers.

We set out below the most relevant aspects in terms of how Law 22/2014 impacts both scopes.

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What is an AIF?

Unlike other jurisdictions, neither the Spanish regulator (the Spanish Securities Market Commission, "**CNMV**") nor Law 22/2014 have included a specific definition of Alternative Investment Fund ("**AIF**"). In our view, all collective investment undertakings which are not UCITS should be classified as AIFs. And this category should include private equity entities.

Bearing this in mind, we consider that AIFs in Spain can be divided into the following categories:

1. Private equity entities (incorporated as companies or as funds):
 - Private Equity Entities ("**PEE**").
 - SME (Small and Medium-Sized Enterprises) - Private Equity Entities ("**SME- PEE**").
2. Non-UCITS entities, whether these are:
 - **Closed-ended** collective investment undertakings (incorporated as companies or as funds) ("**CCIU**"). Paradoxically, CCIU are defined in Article 4 of Law 22/2014, in the same way as the AIFMD defines AIF (that is, as: *those collective investment undertakings which raise capital from investors by means of marketing activities, for subsequent investment according to a defined investment policy*), although the Spanish legislator has added an additional requirement which

excludes those entities having a "*commercial or industrial objective*" from the category of CCIU.

Unlike what occurs with PEE, Law 22/2014 does not impose a specific investment regime upon CCIU, but instead permits them to invest in all kinds of assets, including non-financial assets.

- **Open-ended** collective investment undertakings (incorporated as companies or as funds), which include:
 - Spanish hedge funds and Spanish funds of hedge funds.
 - Real estate CIUs.
 - Other open-ended non-UCITS CIUs, apart from the above.
3. Other AIFs:
 - European venture capital funds governed by Regulation (EU) No 345/2013 of 17 April 2013.
 - European social entrepreneurship funds governed by Regulation (EU) No 346/2013 of 17 April 2013.

The above-mentioned AIFs will be managed by either Alternative Investment Fund Managers ("**AIFM**") of closed-ended vehicles (*SGEIC* in Spanish), which substitute for all purposes the management companies of PEE (*SGEGR* in Spanish), or by AIFM of open-ended vehicles (*SGIIC* in Spanish).

TYPE OF AIF IN SPAIN	TYPE OF MANAGEMENT COMPANY (AIFM)*	REGULATION
Private equity Entities <ul style="list-style-type: none"> • PEE • SME-PEE 	SGEIC	Law 22/2014
Non- UCITS CIUs <ul style="list-style-type: none"> • Closed-ended: CCIU 	SGEIC	Law 22/2014
<ul style="list-style-type: none"> • Open-Ended: <ul style="list-style-type: none"> ➤ Spanish hedge funds and Spanish funds of hedge funds ➤ Real estate CIUs ➤ Other open-ended non-UCITS CIUs 	SGIIC	Funds Act
Other AIFs <ul style="list-style-type: none"> • European venture capital funds • European social entrepreneurship funds 	SGEIC	Law 22/2014

(*) When we use the term "AIFM" in this Client Briefing it refers to both SGEIC and SGIIC.

Managing AIFs

Spanish AIFM can manage EU AIFs, either directly or by establishing a branch, provided that the AIFM is authorised to manage that type of AIF in Spain. The same provision exists for management companies authorised in other EU Member States wishing to manage Spanish AIFs, either by opening a branch in Spain or under the freedom to provide services regime. In this latter case, the manager must appoint a representative who is tax resident in Spain, to represent it for tax purposes.

In addition, Spanish AIFM will be able to manage AIFs which are not registered in a Member State and not marketed in EU Member States, provided that: (i) the AIFM

fulfils, with respect to such AIF, all the requirements established in the Funds Act/Law 22/2014, except for the requirement to appoint a depository and the obligation to have its annual report audited; and (ii) regulatory cooperation arrangements are in place between the CNMV and the supervisory authorities of the non-EU Member State.

Marketing AIFs

Marketing Spanish AIFs in Spain

The Funds Act maintains the already-existing definition of 'marketing' (*comercialización*), and this is included for the first time in Law 22/2014, for those AIFs falling within its scope of application, thus establishing a specific regime for marketing

shares or participations in Spanish PEE and CCIU through advertising activities. Law 22/2014 states that these entities can market exclusively to any of the following groups: (a) investors considered professional clients, as defined in the Spanish Securities Market Act; (b) non-professional investors who commit to investing a minimum of EUR 100,000 and acknowledge in writing (in a document other than the investment commitment) that they are aware of the risks involved in such commitment; (c) non-professional investors who are directors, managers or employees of self-managed PEE or of AIFM of closed-ended vehicles (regarding the PEE itself, in the first case and regarding PEE managed or advised by AIFM of closed-ended vehicles, in the second case); (d) any non-professional investors who invest in PEE whose securities are on a stock exchange; and (e) non-professional investors who prove that they have experience in investment, management or advice on PEE similar to the targeted PEE.

It is interesting to analyse one section of Law 22/2014 which has gone unnoticed but which states that shares or participations in PEE and CCIU can be subscribed by non-professional investors, provided the latter fulfil the requirements of making a minimum investment of EUR 100,000 and declaring that they are aware of the risks involved. So it seems it can be deduced that, under the passive marketing regime, retail investors will only be able to invest in said vehicles if they fulfil these requirements.

Cross-border marketing

Both the Funds Act and Law 22/2014 govern

the marketing of Spanish AIFs abroad and vice versa, i.e. the marketing of foreign AIFs in Spain.

In relation to the marketing of Spanish AIFs outside of Spain, this will be possible by means of a simple "passport", when targeting professional investors in the EU. The marketing of Spanish AIFs outside the EU is not governed by either the Funds Act or Law 22/2014, so legislation on this aspect is pending.

As for the marketing of foreign AIFs in Spain, both the Funds Act and Law 22/2014 govern the marketing of EU AIFs managed by EU managers to professional investors in Spain through said "passport", which, in relation to alternative open-ended vehicles, was practically impossible until now. Closed-ended vehicles, let us recall, have been generally marketed through the private placement regime.

For the rest of the cases, that is, the marketing in Spain of: (i) non-EU AIFs managed by EU managers, and (ii) AIFs from any jurisdiction (both European and non-European) managed by non-EU managers, both the Funds Act and Law 22/2014 require that the AIFs are authorised and registered at the CNMV, making it necessary to comply with the following new requirements established in the AIFMD:

- (i) That appropriate cooperation arrangements be in place;
- (ii) That the country where the AIF/AIFM is established not be listed as a Non-Cooperative Country and Territory by the FATF; and
- (iii) That agreements be in place with Spain for the effective exchange of tax information, including, if

appropriate, multi-lateral agreements on taxation (required in the case of the marketing of non-EU AIFs managed by EU managers).

Furthermore, in order to market open-ended AIFs to professional/retail investors in Spain and closed-ended AIF to retail investors, it is mandatory to continue fulfilling the requirements previously established in the Spanish legislation on CIUs, namely: (i) that Spanish law governs the same category of AIF; (ii) that the AIF, or the manager acting on its behalf, is subject in its home State to specific investor protection rules similar to those existing in Spain; and (iii) that the home State authority of the AIF/AIFM has issued a favourable report in relation to their activities.

To date, the CNMV has been applying these requirements very restrictively, thus hindering the marketing of open-ended vehicles in Spain. We will have to wait and see if the CNMV continues to apply the same criteria or if it relaxes their application, so as to encourage the marketing of these AIF in Spain.

Regime on depositories

As a general principle, all AIF must have only one depository, whose appointment must be established by written agreement.

Although this requirement has traditionally existed for the Spanish open-ended collective investment industry in which all open-ended CIUs must appoint a depository (except for real estate investment companies, which must now also appoint one, unless the AIFM of open-ended vehicles is excluded), the obligation to have

a depository is a new requirement for PEE and CCIU, which were not required to appoint one, until the entry into force of Law 22/2014. Now, the AIFM of closed-ended vehicles (non-excluded) must appoint a depository for each PEE or CCIU they manage. In any event, Law 22/2014 refers to the Funds Act in relation to the legal regime and responsibility of depositaries.

The depository may delegate the safekeeping function to third parties, which may, in turn, sub-delegate that function to other entities, subject to certain requirements.

As far as the depository's liability is concerned, the general principle is that the depository will be liable to investors for all losses they suffer as a result of the depository's negligent or intentional failure to properly fulfil its legal obligations. In the case of such a loss of a financial instrument held in custody, the depository must return a financial instrument of identical type or the corresponding amount to the AIF without undue delay. The depository will not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable, despite all reasonable efforts to the contrary.

Lastly, for depositories of AIFs, in the event of a loss of financial instruments held in custody by a third party, the possibility exists to transfer such liability contractually to the third party, if certain requirements are met.

It is important to note that the new legal regime for depositories established in the Funds Act applies to both depositories of AIF and of UCITS (with some distinctions), thereby bringing forward the implementation of the UCITS V Directive in Spain in this regard.

Remuneration policy

AIFM of both closed-ended vehicles and open-ended vehicles (the latter both of AIF and of UCITS) must establish remuneration policies and procedures for their senior management, risk takers, control functions and, in general, for any employees whose professional activities have a material impact on the risk profile of the investment entities they manage. These remuneration policies must reflect sound and effective risk management practices and not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the investment entities they manage.

Once again, the Funds Act brings forward the implementation of the UCITS V Directive in Spain in this regard, by applying the remuneration policy for AIFM of open-ended vehicles not only to AIF but also to UCITS.

Transparency obligations: acquisition of significant stakes and asset stripping

Spanish AIFM must notify the CNMV, within a maximum of 10 business days, of any significant stake (10, 20, 30, 50 or 75 percent) which the AIF managed by it acquires or transfers in non-listed companies.

In the case of a controlling stake, the AIFM must notify the CNMV, the non-listed company (asking it to inform the employees' legal representatives) and the company's shareholders and provide them with certain information set out in Law 22/2014. Likewise, the annual report of the AIF acquiring control must include specific information on the non-listed company.

Restrictions are placed on the AIFM during the 24 months following the acquisition of

control of the non-listed company, for example in relation to share capital decreases, the acquisition or redemption of treasury stock, and the distribution of dividends in certain circumstances, in an effort to prevent asset stripping (speculative acquisitions of non-listed companies with the sole objective of subsequently selling off their assets in parts).

An exemption from these obligations exists when the target of the acquisition of the significant or controlling stake is a small or medium-sized enterprise. Additionally, some of these obligations also apply to the acquisition of control of listed companies.

Excluded managers

The restrictions mentioned above do not apply to Spanish AIFM whose assets under management fall below the threshold of EUR 100 million (including any assets acquired through use of leverage) or EUR 500 million (when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF).

The only obligations of these excluded AIFM are: (i) to notify the CNMV of the AIF they manage and provide information on its investment strategies; (ii) to regularly inform the CNMV of the main instruments in which they invest and the main risks and concentrations, and (iii) for AIFM of closed-ended vehicles only, to make certain information on the AIF they manage available to investors, to have their accounts audited and to submit these to the CNMV within the first 6 months of each financial year. We understand that these latter obligations also apply to AIFM of open-ended vehicles, pursuant to the Funds Act.

Excluded AIFM must inform the CNMV if they cease to comply with the above conditions because they exceed the indicated thresholds.

In any event, this exception will not apply to those AIFM which market AIF to non-professional investors, so as to protect retail investors; requiring in this case that these AIFM fulfil all requirements.

Lastly, excluded managers can adhere voluntarily to the general regime, by notifying this to the CNMV, in order to benefit from the managers' own prerogatives, which are fully subject to the obligations described above.

Adaptation period

Law 22/2014 entered into force the day after it was published in the Official State Gazette, i.e. 14 November 2014.

Already-authorized management companies of PEE (or *SGECR*, as they are known in Spain) have been automatically transformed into AIFM of closed-ended vehicles (*SGEIC* in Spanish) upon the Law 22/2014's entry into force, with no need for authorisation, and thus should now be referred to as AIFM of closed-ended vehicles (*SGEIC*). Both the CNMV and the Commercial Registry will adapt *ex officio* their registries to reflect this circumstance.

The table below lists the adaptation periods and obligations of the AIFM in Spain, so as to comply with the provisions of the new Law 22/2014.

Type of management company	Obligation	Period
<i>Management companies of PEE ("SGECR"); and Management companies of open-ended non-harmonised CIUs (AIFM of open-ended vehicles) ("SGIIC")</i>	Submission to the CNMV of a statement confirming the adaptation of the entity to the requirements established in Law 22/2014; and Where appropriate, the amendment of the programme of activities setting out said adaptation.	3 months from the date of entry into force: 14 February 2015
<i>Management companies of undertakings for collective investment in transferable securities (UCITS) ("SGIIC")</i>	Submission to the CNMV of a statement confirming the adaptation of the entity to all necessary measures to fulfil the provisions of the Funds Act as amended by Law 22/2014. Notification to the CNMV of the amendments of the by-laws and of the programme of activities required for this adaptation, as the case may be.	6 months from the date of entry into force: 14 May 2015
<i>All management companies (AIFM)</i>	Submission to the CNMV and update of the rest of the information it is required to have, pursuant to the Funds Act as amended by Law 22/2014.	12 months from the date of entry into force: 14 November 2015

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