

Marketing of foreign collective investment vehicles in Spain

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At long last, the Alternative Investment Fund Managers Directive 2011/61 (“**AIFMD**”) has been transposed into Spanish law by Act 22/2014, which regulates Private Investment Entities, Collective Investment Entities of a Closed-Ended Type and Managers of Collective Investment Entities of a Closed-Ended Type (“**PIEA**”), whilst amending the Collective Investment Schemes Act 35/2003 (“**CISA**”) and repealing the Private Investment Entities and their Managers (Regulation) Act 25/2005.

The transposition of the AIFMD will bring about a major change in Spain since, subject to compliance with certain requirements which we explain below, freedom of movement is allowed to a wide range of collective investment vehicles that until now could not be marketed but in very limited cases. In the case of the PIEA, the marketing of foreign private investment entities (i.e. venture capital and private equity companies) (“**ECRs**”) is regulated, a possibility that was not envisaged in the previous Act 25/2005, whereas in the case of the CISA, a door is opened to non-harmonised collective investment schemes (i.e., those schemes not covered by Directive 2009/65 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (“**UCITS Directive**”).

Foreign collective investment vehicles that according to the PIEA and the CISA may be marketed in Spain are:

- a) ECRs incorporated as private investment (venture capital/private equity) funds or firms.
- b) Collective investment entities of a closed-ended type (“**EICCs**”) formed as funds or firms, new

vehicle introduced by the PIEA with a wide variety of apt asset options and investment policies.

- c) Collective investment schemes (“**IICs**”) incorporated as investment funds or firms subject to the UCITS Directive.
- d) IICs incorporated as funds or firms subject to the AIFMD.

Before explaining the requirements for the marketing of each of the above vehicles, it is important to know what the PIEA and CISA regard as marketing. In this respect, both statutes define the term marketing as the acquisition through advertising, on behalf of the collective investment entities or any entity acting on its behalf or in that of one of its marketers, of clients for their contribution to the collective investment entity of funds, property or rights. Similarly, both statutes deem that there is advertising when the public is addressed through telephone calls initiated by the entity or its manager, house calls, personalised letters, emails or any other telematic means, which form part of a publicity, marketing or promotion campaign.

Knowing in what circumstances there is marketing of a collective investment vehicle, in order to carry out such activity it will be necessary to meet the following requirements and conditions:

1. Marketing of EU (“European Union”) ECRS or EICCs managed by EU managers under the AIFMD:

When marketing is directed at professional investors, it will be free from the moment the

competent authority of the Member State that has authorised the managers thereof notifies the latter that it has submitted to the Spanish Securities Market Authority (abbrev.: "CNMV") written notification containing the following information:

- a) Identification of the ECR or EICC and place of establishment.
- b) The provisions on and methods of marketing the shares or units (and, where appropriate, their class or series) in Spain.
- c) The fund's rules or the firm's incorporation documents;
- d) The investment entity's prospectus, if required, and the latest annual report;
- e) The particulars of the investment entity's depositary;
- f) A description of the investment entity or any information regarding the entity that is available to the investors.
- g) Where appropriate, information on any measures taken to avoid the marketing of shares/units in the investment entity to retail investors.
- h) A certificate issued by the competent authorities in the manager's home Member State evidencing that it is authorised under the AIFMD.

For the purposes of the foregoing, the following are regarded as a professional investor: (i) financial institutions and other legal persons which, to operate on the financial markets, must be authorised or regulated by States, whether or not members of the European Union; (ii) States and regional administrations, public bodies that manage public debt, central banks, international and supranational organisations such as the World Bank, the International Monetary Fund, the European Central Bank, the European Investment Bank and others of their ilk; (iii) individual entrepreneurs who meet at least two of the following conditions: total asset items equals or exceeds 20 million euros and / or its annual turnover is equal to or greater than 40 million euros and / or equity and reserves are not less than 2 million euros; (iv) institutional investors, not included

in point a), regularly invest in securities or other financial instruments; and (v) other clients who request such treatment in advance, and expressly waive their treatment as retail clients, subject to compliance with certain requirements.

2. Marketing of non-EU ECRs or EICCs managed by EU managers under the AIFMD:

When marketing is directed at professional investors, evidence of compliance with the following must be submitted in advance to the CNMV:

- a) The existence of cooperation agreements between the home and host competent authorities to ensure effective exchange of information for supervisory purposes.
- b) That the ECR or EICC does not come from a non-cooperating country or territory (List of the International Financial Action Task Force on Money Laundering).
- c) That the country of the ECR or EICC has signed with Spain an OECD Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters.

Once proof of the above has been provided, the ECR or EICC manager must submit to the CNMV, in addition to the documents listed in section 1, a document evidencing that the investment entity incorporated in a non-EU Member State and the shares, units or securities representing its capital or assets, are subject to the applicable legal regime.

In order for ECRs and EICCs to be marketed in Spain, they must be expressly authorised by the CNMV and both ECRs and EICCs and their managers must be registered with the CNMV. The authorisation may be refused (i) for prudential reasons; (ii) on the grounds of the entity's home country not giving an equivalent treatment to ECRs and EICCs; (iii) because compliance with the rules on organisation and discipline of the Spanish securities markets is not ensured; (iv) by reason of adequate protection of investors resident in Spain not being sufficiently ensured; and (v) on account of the existence of disturbances in the conditions

of competition between these investment entities and investment entities authorised in Spain.

3. Marketing of ECRs or EICCs managed by non-EU managers:

When marketing is directed at professional investors, evidence of compliance with the following must be submitted in advance to the CNMV:

- a) The existence of cooperation agreements between the home and host competent authorities to ensure effective exchange of information for supervisory purposes.
- b) That the ECR or EICC does not come from a non-cooperating country or territory (List of the International Financial Action Task Force on Money Laundering).

Once proof of the above has been provided, the ECR or EICC manager must submit to the CNMV, in addition to the documents listed in section 1, a document evidencing that the manager incorporated in a non-EU Member State and the shares, units or securities representing its capital or assets, are subject to the applicable legal regime.

In order for ECRs and EICCs to be marketed in Spain, they must be expressly authorised by the CNMV and both ECRs and EICCs and their managers must be registered with the CNMV. The authorisation may be refused (i) for prudential reasons; (ii) on the grounds of the entity's home country not giving an equivalent treatment to ECRs and EICCs; (iii) because compliance with the rules on organisation and discipline of the Spanish securities markets is not ensured; (iv) by reason of adequate protection of investors resident in Spain not being sufficiently ensured; and (v) on account of the existence of disturbances in the conditions of competition between these investment entities and investment entities authorised in Spain.

4. Marketing of EU ECRs managed by EU managers under the AIFMD, non-EU ECRs managed by EU managers under the AIFMD and ECRs managed by non-EU managers:

When marketing is directed at *non*-professional investors, in addition to providing evidence of compliance with the items under section 2 above, a favourable report must be submitted

from the home State authority of the ECR or the manager acting on its behalf regarding its activities.

Once proof of the above has been provided, the ECR's manager must send to the CNMV, in addition to the documents mentioned in section 1 above, the following:

- a) Documents evidencing that the manager incorporated in a non-EU Member State and, where appropriate, the ECR incorporated in a non-EU Member State, as well as the shares, units or securities representing their capital or assets, are subject to the applicable legal regime.
- b) The ECR's financial statements and relevant audit report, prepared in accordance with the law applicable to such ECR.

In order for ECRs to be marketed in Spain, they must be expressly authorised by the CNMV and both ECRs and their managers must be registered with the CNMV. The authorisation may be refused (i) for prudential reasons; (ii) on the grounds of the entity's home country not giving an equivalent treatment to ECRs; (iii) because compliance with the rules on organisation and discipline of the Spanish securities markets is not ensured; (iv) by reason of adequate protection of investors resident in Spain not being sufficiently ensured; and (v) on account of the existence of disturbances in the conditions of competition between these investment entities and investment entities authorised in Spain.

According to the new PIEA, marketing to professional investors in EICCs is not covered by the PIEA and, therefore, is not possible in Spain.

5. Marketing of EU IICs subject to the UCITS Directive:

Marketing will be free from the moment the competent authority of the IIC's home Member State notifies such IIC that it has submitted to the CNMV written notification with the following:

- a) Information regarding the provisions on and methods of marketing the shares or units in Spain:
- b) Classes of shares or units:

- c) Fund's rules or firm's incorporation documents;
- d) Prospectus;
- e) Last annual report and, where appropriate, successive half-year report;
- f) Key Investor Information Document (KIID);
- h) Certificate evidencing that the IIC complies with the requirements imposed by the UCITS Directive.

Implemented with the transposition of the UCITS Directive, the registration procedure for UCITS in Spain is straightforward.

6. Marketing of EU IICs managed by EU managers under the AIFMD:

When marketing is directed at professional investors, it will be free from the moment the competent authority of the manager's home Member State notifies such manager that it has submitted to the CNMV written notification including the information under section 1 above.

7. Marketing of non-EU IICs managed by EU managers under the AIFMD:

When marketing is directed at professional investors, evidence must be provided to the CNMV in advance of compliance with the requirements listed in section 2 above, that Spanish legislation regulates the same category of IICs to which the foreign scheme belongs and that the IIC is subject in its home State to specific rules aimed at protecting shareholder or unitholder interests similar to those of Spanish legislation on the matter.

Once proof of the above has been provided, the IIC or its manager must submit to the CNMV the documents referred to in section 1 above.

In order for IICs to be marketed in Spain, they must be expressly authorised by the CNMV and both IICs and their managers must be registered with the CNMV. The authorisation may be refused (i) for prudential reasons; (ii) on the grounds of the entity's home country not giving an equivalent treatment to IICs; (iii) because compliance with the rules on organisation and discipline of the Spanish securities markets is not ensured; (iv) by reason of adequate

protection of investors resident in Spain not being sufficiently ensured; and (v) on account of the existence of disturbances in the conditions of competition between these investment entities and investment entities authorised in Spain.

8. Marketing of IICs managed by non-EU managers:

When marketing is directed at *non*-professional investors, in addition to providing evidence of compliance with the items under section 2 above, also:

- a) Spanish legislation regulates the same category of IICs to which the foreign scheme belongs and that the IIC or manager acting on its behalf is subject in its home State to specific rules aimed at protecting shareholder or unitholder interests similar to those of Spanish legislation on the matter.
- b) Favourable report from the home State authority responsible for the supervision and inspection of the IIC or the manager acting on its behalf regarding its activities.

Once proof of the above has been provided, the IIC or its manager must submit to the CNMV the documents referred to in section 1 above.

In order for IICs to be marketed in Spain, they must be expressly authorised by the CNMV and both IICs and their managers must be registered with the CNMV. The authorisation may be refused (i) for prudential reasons; (ii) on the grounds of the entity's home country not giving an equivalent treatment to IICs; (iii) because compliance with the rules on organisation and discipline of the Spanish securities markets is not ensured; (iv) by reason of adequate protection of investors resident in Spain not being sufficiently ensured; and (v) on account of the existence of disturbances in the conditions of competition between these investment entities and investment entities authorised in Spain.

9. Marketing of EU IICs managed by EU managers under the AIFMD, non-EU IICs managed by EU managers under the AIFMD and IICs managed by non-EU managers:

When marketing is directed at non-professional investors, evidence of compliance with the items under section 8 above must be provided.

Once proof of the above has been provided, the IIC's manager must send to the CNMV, in addition to the documents mentioned in section 1 above, the following:

- a) Documents evidencing that the manager incorporated in a non-EU Member State and, where appropriate, the IIC incorporated in a non-EU Member State, as well as the shares, units or securities representing their capital or assets, are subject to the applicable legal regime.
- b) The IIC's financial statements and relevant audit report, prepared in accordance with the law applicable to such IIC.

In order for IICs to be marketed in Spain, they must be expressly authorised by the CNMV and both IICs and their managers must be registered with the CNMV. The authorisation may be refused (i) for prudential reasons; (ii) on the grounds of the entity's home country not giving an equivalent treatment to IICs; (iii) because compliance with the rules on organisation and discipline of the Spanish securities markets is not ensured; (iv) by reason of adequate protection of investors resident in

Spain not being sufficiently ensured; and (v) on account of the existence of disturbances in the conditions of competition between these investment entities and investment entities authorised in Spain.

To conclude, we can say that the marketing of EU ECRS or EICCS managed by EU managers under the AIFMD, of EU IICs subject to the UCITS Directive and of non-EU IICs managed by EU managers under the AIFMD is free, while marketing of other collective investment vehicles requires prior authorisation from the CNMV. Moreover, foreign ECRs and IICs may be marketed, upon compliance with all of the above, to professional and non-professional investors, while foreign EICCS may be marketed only to professional investors.

Finally, it is noteworthy that the CNMV withholds the discretion to authorise and register some of the aforementioned collective investment vehicles and, given its restrictive record on all matters relating to collective investment vehicles not subject to the UCITS Directive, one must wait to see how the authorisation and registry process evolves to confirm whether the aim pursued by the AIFMD, of expanding the collective investment market, is achieved or not in Spain.

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