Legal 500
Country Comparative Guides 2024

Spain

Alternative Investment Funds

Contributor

Alter Legal

Carlos de Cárdenas

Partner | carlos.decardenas@alterlegal.es

Rogelio Fernández

Associate | rogelio.fernandez@alterlegal.es

Leticia Travesedo

Associate | leticia.travesedo@alterlegal.es

Soraya Portela

Associate | soraya.portela@alterlegal.es

This country-specific Q&A provides an overview of alternative investment funds laws and regulations applicable in Spain.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

Spain: Alternative Investment Funds

1. What are the principal legal structures used for Alternative Investment Funds?

Although there are several alternative investment funds ("**AIF**") available in Spain (any non-UCITS investment vehicle is considered an alternative investment fund) the main alternative investment structures used in Spain are *Fondos de Capital Riesgo* (Private Equity Funds) and *Fondos de Inversión Libre* (Hedge Funds).

A *Fondo de Capital Riesgo* ("**FCR**") is generally a close-ended fund regulated by law 22/2014, regulating venture capital and private equity entities, other closed-ended investment entities and investment managers for closed-ended investment entities ("Law 22/2014").

A *Fondo de Inversión Libre* ("**FIL**") is generally an open-ended fund (although it could be closed under certain circumstances) subject to Law 35/2003, of 4 November, regulating collective investment institutions ("Law 35/2003") and its Regulation 1082/2012, of 13 July ("RD 1082/2012").

Please note that both vehicles can also be established in the form of corporations, as opposed to funds, (i.e. Sociedades de Inversión Libre ("**SIL**") and Sociedades de Capital Riesgo ("**SCR**")) which might address certain tax requirements for certain types of investors.

Whereas an FCR can be managed by both "*Sociedades Gestoras de Capital Riesgo*" ("**Closed-Ended Fund Managers"**) and "*Sociedades Gestoras de Instituciones de Inversión Colectiva*" ("**CIS Management Companies**"), a FIL can only be managed by CIS Management Companies.

2. Does a structure provide limited liability to the investors? If so, how is this achieved?

Yes.

According to applicable law, AIFs in the form of funds are established as separate pool of assets without legal personality and their investors are generally not liable beyond their contribution to the fund.

According to applicable law, AIFs in the form of corporations are established as public limited companies in which shareholders' responsibility is generally limited to the amount contributed to the company's share capital.

3. Is there a market preference and/or most preferred structure? Does it depend on asset class or investment strategy?

FCRs and FILs are regulated by different laws and regulations, and subject to different limitations to their investment strategies.

Whereas FCRs are aimed at private equity strategies, FILs are vehicles aimed mainly at financial alternative investments.

Law 22/2014 establishes for FCRs a mandatory restricted investment ratio (*coeficiente obligatorio de inversión*), whereby they must have invested, by the end of each fiscal year, at least 60% of their total net assets in the following:

a. Shares or equivalent securities of certain qualifying companies pursuant to the Law 22/2014, which generally exclude listed companies (in the Spanish first market), financial companies and real estate companies ("Qualifying Companies");
b. Certain profit-sharing loans to Qualifying Companies, provided that the returns are fully subject to the performance of the borrower;
c. Other profit-sharing loans to Qualifying Companies, for up to 30% of the FCR's total net assets;
d. Invoices, loans, credit and commercial bills of exchange commonly used in the course of business of portfolio companies, up to 20 percent of the total computable assets (provided that the investment in the assets of letters c) and d) together may not exceed 30 percent of the total computable assets);
e. Shares or units of other private equity and venture capital entities (i) registered in any of the EU Member States; or (ii) registered in third countries that are not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money laundering and terrorist financing, and that have executed with Spain a double taxation

treaty or tax information exchange treaty.

With respect to FILs, the RD 1082/2012 establishes a very flexible investment regime, so this type of funds may invest in any of the financial instruments listed in article 30 of Law 35/2003; in commodities for which there is a secondary trading market; in shares or units of other FILs or FCRs, as well as in similar foreign institutions; in loans and debt instruments and, generally, in any other underlying asset authorized by the Spanish Securities Market Commission ("CNMV"). Certain limitations however may apply if the vehicle is marketed to retail clients.

Therefore, the investment strategy would be a relevant driver in determining the fund structure.

4. Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity vs. hedge)) and, if so, how?

Yes, the regulatory regime distinguishes between open-ended and closed-ended vehicles.

In general terms, FCRs are established as closed-ended funds and FILs are established as open-ended funds. However, certain flexibility is admitted (i.e. FILs may establish certain lock-up periods or restrictions to redemption rights, and even be established as close-ended funds).

5. Are there any limits on the manager's ability to restrict redemptions? What factors determine the degree of liquidity that a manager offers investor of an Alternative Investment Fund?

Restriction of redemptions are allowed in both open-ended and close-ended AIFs in Spain. The recent amendment of RD 1082/2012 does even allow for almost closed-ended FILs to be marketed to retail investors. The main factor determining the degree of liquidity would then be the investment strategy and commercial factors.

6. What are potential tools that a manager may use to manage illiquidity risks regarding the portfolio of its Alternative Investment Fund?

As mentioned above, FCRs are typically closed-ended funds, where no redemption rights are given to investors.

FILs are typically open-ended structures. However, they can be established as closed-ended vehicles (although with certain particularities if marketed to retail investors, in which case the fund might be closed only during the period foreseen for the liquidation of the investment.

Even if established as opened-ended vechiles, managers may still use certain tools offered by the regulation to manage illiquidity risks, such as (i) limiting the number of liquidity windows in which redemptions might be requested by unitholders, (ii) limiting the total amount to be redeemed in each liquidity window, (iii) establishing redemption notice periods, (iv) establishing penalties for early redemption, (v) establishing the possibility of making in-kind redemptions, or (vi) extending the deadline for the payment of redemptions.

Any of such measures must be clearly disclosed to investors prior to their investment.

Finally, both Closed-Ended Fund Managers and CIS Management Companies shall establish liquidity management systems and procedures to monitor the liquidity risk of AIFs under management, to ensure that the liquidity profile of the investments of the relevant AIF complies with its liquidity obligations.

7. Are there any restrictions on transfers of investors' interests?

For AIFs, the legislation does not impose any restriction on transfer of investors' interests. Contractual restrictions may however be imposed under certain circumstances (typically, manager's consent, or less often, certain pre-emption rights).

8. Are there any other limitations on a manager's ability to manage its funds (e.g., diversification requirements)?

As mentioned above, whereas an FCR may be managed by either Closed-Ended Fund Managers or CIS Management Companies, an FIL may only be managed by CIS Management Companies.

From an investment strategy approach, apart from the 60% mandatory investment ratio explained above, an FCR may not invest more than 25% of their net assets in the same company, and not more than 35% in companies belonging to the same group.

No limitations are established by law for the use of

leverage by FCRs.

A FIL is, generally, not subject to any specific diversification limitation, being possible, for example, to establish a FIL as a feeder fund. As for leverage, FILs' indebtedness may not exceed 5 times the value of its assets.

9. What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in Alternative Investment Funds? Does the tax treatment of the target investment dictate the structure of the Alternative Investment Fund?

Spanish residents subject to CIT investing in FCRs or SCRs will generally benefit from a special tax treatment on capital gains obtained upon sale or redemption of units or shares, or dividends distributed to them, regardless the holding period or equity stake. Capital gains or dividens distributed to Spanish resident individuals in FCR or SCRs will be taxed at their relevant tax rate.

No special tax regime applies with respect to investments made by Spanish residents in FILs.

Income or gains obtained by non-resident investors without a permanent establishment in Spain from FCRs or SCRs, will not generally be taxed in Spain.

No special tax regime applies with respect to investments by pension funds or sovereign wealth fund investors in AIFs.

The tax status or preference of certain investors, and the tax treatment of the target investments, may dictate the structure of the AIF.

10. What rights do investors typically have and what restrictions are investors typically subject to with respect to the management or operations of the Alternative Investment Fund?

In general terms, investors do not have any rights with respect to the management or operations of AIFs established as funds.

For those AIFs established as corporations, under the Royal Legislative Decree 1/2010, 2 July, approving The Companies Act, shareholders do retain certain powers under such regulation and the company's Bylaws. Such rights include the possibility of amending the company's Bylaws (and hence, change of investment strategy, or appointment of manager), the appointment of directors, and the approval of annual accounts. These rights might be softened by virtue of a shareholder agreements entered into between the shareholders and the management company.

Also, there is the possibility of establishing corporate self-managed AIFs in which investors -shareholders- would retain management powers.

11. Where customization of Alternative Investment Funds is required by investors, what types of legal structures are most commonly used?

Customization is typically required for tax or governance reasons. In certain cases, investors prefer funds in the form of corporations. Thus, for private equity strategies, SCRs are often used as parallel vehicles to FCRs.

Also, for non-private equity AIFs, SILs and SICAVs are often used by high-net-worth investors.

12. Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

Managers of both AIFs under Law 22/2014 and AIFs under Law 35/2003 are required to be authorized as an alternative investment fund manager (**"AIFM"**) under Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (known as **"AIFMD"**) and are subject to supervision by the CNMV.

With respect to requirements for AIF advisors, advisors providing investment advice under Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (**"MiFID"**) are generally required to be authorized to provide advice in respect of transactions relating to financial instruments, and are generally required to be registered with the CNMV.

Certain other advisors seeking to provide investment advice under MiFID, on a non-professional or occasional basis, may be permitted to provide advice to a particular AIF under a variation of permission under MiFID, provided that specific regulatory rules and standards are complied, and provided further that the advisor completes a registration procedure with the CNMV.

Advisors solely seeking to provide advice to AIFs in relation to non-financial transactions or underlying investments (e.g. real estate, industrial strategy, real economy, corporate finance, M&A) are not required to be authorized or regulated by the CNMV.

13. Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

AIFs under Law 35/2003 are required to be authorized by the CNMV and registered in the CNMV's Official Registry.

AIFs under Law 22/2014 are not subject to the CNMV's authorization procedure. They are, however, required to register in the CNMV's Official Registry.

14. Does the Alternative Investment Fund require a manager or advisor to be domiciled in the same jurisdiction as the Alternative Investment Fund itself?

AIFs that are formed as corporate entities and are internally managed or self-managed are required to have their legal domicile and place of central administration in Spanish territory.

Generally, AIFs that are externally managed can be managed or advised on a passported basis, under the free provision of services principle or through the establishment of a branch in Spain, by an AIFM or advisor authorized in another EU member State, provided that the relevant AIFM / advisor is authorized to manage / advise the equivalent category of AIF in its programme of activity.

Furthermore, Spanish AIFs are generally permitted to appoint advisors domiciled in third countries outside the EU.

15. Are there local residence or other local qualification or substance requirements for the Alternative Investment Fund and/or the manager and/or the advisor to the fund?

i) Local Residence

Spanish AIFMs are required to have and maintain their registered office and their place of effective management in Spain.

ii) Qualification

The governing body of AIFMs shall be a board of managers, comprised of at least three members, all of which are required to have sufficiently good professional and business repute. In addition, the majority of the members are required to have adequate knowledge and experience in the fields of finance or business administration and management.

With respect to advisors to the AIFs, AIFMs are required to verify that advisors shall be of sufficiently good repute and sufficiently experienced in relation to the investment strategies pursued by the AIF managed by the AIFM.

iii) Substance

In general terms, Spanish AIFMs must have sufficient and appropriate technical and human resources to carry out their functions and, where applicable, supervise their delegates.

To that end, Spanish AIFMs are required to take into account the nature, scale and complexity of their business. The actual substance required is to be determined on a case-case basis.

For additional qualifications required for manager / advisors, please see Questions 2.1, 2.2 and 2.3 above.

16. What service providers are required by applicable law and regulation?

The appointment of an AIFM for externally managed AIFs is required by applicable law. AIFM functions comprise portfolio management, risk management, administration and marketing of AIF shares or units. AIFMs may, where necessary, delegate or outsource certain activities to third party service providers, subject to compliance with specific regulatory rules and standards.

The appointment of a depositary is required by law, except for AIFs managed by AIFMs under Law 22/2014 whose assets under management are sub-threshold (i.e. they do not meet the size criteria set forth in AIFMD).

Additionally, AIFMs are required to appoint an auditor for each AIF they manage.

AIFMs must disclose all AIF service providers to investors, together with a description of their obligations and investors' rights.

17. Are local resident directors / trustees required?

Yes, Spanish AIFMs are expected to have local resident directors in order to satisfy the substance requirements described in Question 2.4 and Question 2.3 above.

18. What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?

EU AIFMs seeking to manage Spanish AIFs are permitted to do so, on a passported basis or through the establishment of a branch, under the free provision of services principle.

Non-EU managers seeking to operate in Spain would be required to (i) establish a branch in Spain or (ii) set-up a Spanish AIFM, both of which procedures require a formal authorization and registration process with the CNMV. The grant of authorization in either case is subject to the CNMV's criteria and may be denied for prudential, state reciprocity principle, investor protection and other reasons.

Separately, non-EU managers should not be located in a high-risk third country pursuant to Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, nor in a third country that is deemed non-cooperative in tax matters. In addition, appropriate and effective tax information exchange agreements in line with international standards, such as those laid down in article 26 of the OECD Model Tax Convention on Income and on Capital, should be in place between Spain and any such third country.

For additional information, please see Question 2.3 above.

19. What are common enforcement risks that managers face with respect to the management of their Alternative Investment Funds?

The violation of or non-compliance with the laws and regulations governing the collective investment management activity may result in the adoption of measures or in the imposition of sanctions and penalties by the CNMV. As explained in Question 2.1 above, AIFMs are generally required to be authorized as an AIFM under AIFMD and are subject to an oversight and inspection regime by the CNMV.

In addition, to the extent that AIFMs are entrusted by law with the performance of certain functions and activities in connection to AIFs (e.g. information reporting and compliance with investment mandates, investment restrictions, qualifying assets, diversification requirements and rules on costs and expenses charged to AIFs, among others), failure to comply or breach by AIFMs in respect to the performance of their duties pursuant to law and regulations, may derive in administrative penalties, which may not only affect the AIFM directly, but also its directors and senior managers.

20. What is the typical level of management fee paid? Does it vary by asset type?

There are no restrictions by law with respect to FCRs or FILs that impose a certain level of management fees or restrict the ability of the manager to establish the amount of management fees to be charged to the relevant investment vehicle. Management fees in closed ended funds are typically determined as a percentage that is applied on total commitments during the investment period and hereafter is subsequently applied on invested capital after the end of the investment period. For private equity, the applicable rate depends on the size of the fund, but it is generally set between 1.25%-2.5% p.a.

For open-ended and evergreen funds, the applicable fee percentage is typically set on NAV.

21. Is a performance fee typical? If so, does it commonly include a “high water mark”, “hurdle”, “water-fall” or other condition? If so, please explain.

Carried interest is common in private funds where net proceeds are subject to a distribution waterfall that includes a preferred return (typically 6%-8% IRR, depending on the asset class), catch-up, and a 20% carried interest. A fund of funds may charge a lower carried interest or no carried interest at all.

A high water mark or performance fee based on relative performance as compared to an index benchmark is more common in UCITS that invest in liquid assets.

22. Are fee discounts / fee rebates or other economic benefits for initial investors typical in raising assets for new fund launches?

Early bird discounts are common in private funds, especially for managers who may need to accelerate their fundraising process.

23. Are management fee "break-points" offered based on investment size?

Management fee discounts may be offered to investors making large/significant commitments to the fund.

24. Are first loss programs used as a source of capital (i.e., a managed account into which the manager contributes approximately 10-20% of the account balance and the remainder is furnished by the investor)?

First loss programs are still very seldom in the Spanish market.

25. What is the typical terms of a seeding / acceleration program?

Entrepreneurs get access to working space, resources, investors and mentorship from the sponsor. In exchange, the cost of an acceleration program in Spain typically ranges between 3% – 20% of the equity of the start-up. Some acceleration programs may also charge a fee of €1,000 – €2,000.

The terms generally applicable to this type of investment are negotiated on a case-by-case basis and may include veto rights, enhanced reporting and transparency as well as certain business covenants.

26. What industry trends have recently developed regarding management fees and incentive/performance fees or carried interest? In particular, are there industry norms between primary funds and secondary funds?

Investors are placing managers under higher scrutiny at the level of management fees when marketing their funds during the fundraising process. In order to become more competitive, there is a trend to set lower management fees and outsource certain services to third parties so that the cost of such services become fund expenses as opposed as being paid out from the balance sheet of the manager. It is important to have specialist advice in order to ensure that outsourced services are accurately reflected in fund documentation.

Secondary funds would typically charge lower management fees and carried interest than primary direct funds. The amount of fees would depend on the degree of complexity of the portfolio and whether the secondary fund is a continuation fund (where the portfolio has been already identified) or a blind pool secondary fund (where the manager will need to find secondary opportunities to build the portfolio).

27. What restrictions are there on marketing Alternative Investment Funds?

Marketing of financial instruments must be performed exclusively by management companies, tied agents or entities authorised to provide investment services.

Cross-border marketing of EEA AIFs managed by authorised (or over-the-threshold) AIFMs, benefits from the passporting rights only when marketed to professional investors. Marketing to retail investors of an EEA AIF is subject to a prior registration procedure before the CNMV.

For the cross-border marketing of non-EEA AIFs to professional investors, in general terms, previous authorization by the CNMV is required, provided that (i) appropriate cooperation arrangements are in place with the supervisory authority in the jurisdiction where the non-EEA AIF is located and (ii) such jurisdiction is not listed as a non-cooperative country by FATF.

28. Is the concept of "pre-marketing" (or equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?

Yes, Spain has implemented Directive (EU) 2019/1160 regarding cross-border distribution of collective investment undertakings ("**Directive 2019/1160**").

Pre-marketing is defined as "*the provision of information or communication, direct or indirect, about investment strategies or investment ideas by a management company authorized in Spain (…) or carried out on its behalf to potential professional investors domiciled or registered in the Union (…) in order to verify their interest in a collective investment undertaking or a compartment not yet established or already established but whose marketing has not yet been has notified, in the Member State in which the potential investors are domiciled or have their registered office, and that in each case it is not equivalent to an offer or placement to the potential investor to invest in the units or shares of such collective investment undertakings or compartment*".

It is important to highlight, according to the definition, that premarketing activities are restricted to professional investors and shall not be equivalent to an offer or

placement to the potential investor (i.e. no subscription document shall be delivered).

29. Can Alternative Investment Funds be marketed to retail investors?

FCRs and FILs can marketed to retail investors (i) provided that such investor invests at least 100,000 Euros and signs a risk acknowledgment declaration prior to the investment and (ii) whose investment is based on a personalized recommendation issued by a financial intermediary providing investment advice, provided that, where investor's financial assets do not exceed 500,000 Euros, the investment is at least 10,000 Euros throughout the life of the investment and it does not represent more than 10% of said investor's net wealth.

30. Does your jurisdiction have a particular form of Alternative Investment Fund be that can be marketed to retail investors (e.g. a Long-Term Investment Fund or Non-UCITS Retail Scheme)?

Please see answer to point 4.3.

31. What are the minimum investor qualification requirements for an Alternative Investment Fund? Does this vary by asset class (e.g. hedge vs. private equity)?

Law 22/2014 distinguishes the following types of investor categories for the purposes of offering and marketing ECR (private equity) and/or "other closed-ended investment entities", as applicable:

A. investors considered "professional clients" under the Spanish Securities Exchange and Investment Services Act;

B. in respect to ECR only, other non-professional investors who satisfy certain conditions laid out in Law 22/2014, generally:

i. investor whose investment commitment amounts to at least 100,000 Euros and a sign written statement of acknowledgement of risks associated to the investment; or
ii. investor whose investment is based on a personalized recommendation issued by a financial intermediary providing investment advice, provided that, where investor's financial assets do not exceed 500,000 Euros, the investment is at least 10,000 Euros throughout the life of the investment and it does not represent more than 10% of said investor's net wealth.

C. Directors and employees of the AIFM who invest in an ECR managed/advised by the AIFM;

D. investors investing in ECRs listed in stock exchanges; and

E. investors who are able to prove having experience in managing or advising in ECR similar to the one in which they intend to invest.

Law 35/2003 distinguishes the following types of investor categories for the purposes of offering and/or marketing of FIL, as applicable:

A. investors considered "professional clients" under the Spanish Securities Exchange and Investment Services Act;

B. other non-professional investors who satisfy certain conditions laid out in RD 1082/2012, generally:

i. investor whose minimum investment commitment amounts to 100,000 Euros and, where the FIL has been marketed, sign a statement of acknowledgement of risks associated to the investment; or
ii. investor whose investment is based on a personalized recommendation issued by a financial intermediary providing investment advice, provided that, where investor's financial assets do not exceed 500,000 Euros, the investment is at least 10,000 Euros throughout the life of the investment and it does not represent more than 10% of said investor's net wealth.

C. Directors and employees of the AIFM who invest in a FIL managed/advised by the AIFM; and

D. investors who are able to prove having experience in managing or advising in FIL similar to the one in which they intend to invest.

For information related to restrictions on marketing to specific investor categories, refer to Questions 4.3 and 4.6.

32. Are there additional restrictions on marketing to government entities or similar investors (e.g. sovereign wealth funds) or pension funds or

insurance company investors?

MiFID II excluded public institutions below state-level (from regional and city authorities to town or village councils) from the list of *per-se* professional clients. Consequently, said category of investors or potential investors are now treated as retail investors pursuant to MiFID. AIFMs should be aware of this change when conducting marketing activities to this investor class, to the extent that shares or interests in AIFs are complex financial instruments under MiFID.

With respect to pension funds or insurance company investors, while there are particular information obligations applicable to AIFMs when managing insurance companies and pension funds/plans' assets, there are no additional restrictions purely on "marketing" of AIFs arising solely and directly from their condition as a pension fund or insurance company.

The foregoing answer is provided without prejudice to any special individual right a pension fund or insurance company may require, in order to make the AIF eligible for investment, in accordance with each of their applicable investment regime.

33. Are there any restrictions on the use of intermediaries to assist in the fundraising process?

AIFMs seeking to engage third party intermediaries to assist in the fundraising process within Spanish territory should be aware that shares or interests in AIFs may only be marketed or offered by authorized financial intermediaries.

To the extent that the envisaged fundraising assistance qualifies or amounts to a MiFID investment service or to marketing of shares or interest of an AIF under the laws applicable in Spain, such services must be provided by an authorized intermediary.

34. Is the use of "side letters" restricted?

The use of side letters is not restricted by Spanish law but these are subject to certain transparency requirements and the overall principle of equal treatment of investors that arise from the application of the AIFMD and article 59 of Law 22/2014.

In line with market standards, the constituent documents of a private fund would typically include a Most Favoured Nations provision by which every side letter entered by the manager with an investor must be disclosed to the rest of the investors, so that they may generally elect rights and benefits that may be applicable to them.

35. Are there any disclosure requirements with respect to side letters?

Yes, there are. Article 68 of law 22/2014 establishes an obligation on the manager to disclose any preferential treatment received by an investor.

36. What are the most common side letter terms? What industry trends have recently developed regarding side letter terms?

Most common side letter terms refer to reporting, confidentiality, transfers, tax and regulatory matters, as well as AML and ESG covenants.

The most significant trend that has developed over the last few years is an increase on the investors´ scrutiny on ESG matters, which is reflected in a higher number of requests related to ESG and more elaborated ESG clauses in side letters.

Contributors

Carlos de Cárdenas
Partner
carlos.decardenas@alterlegal.es

Rogelio Fernández
Associate
rogelio.fernandez@alterlegal.es

Leticia Travesedo
Associate
leticia.travesedo@alterlegal.es

Soraya Portela
Associate
soraya.portela@alterlegal.es