

Domestic and cross-border mergers and transfer of registered office of Spanish SICAVs to another EU country

The political uncertainty in Spain is causing concern to some Spanish entities, including SICAVs. Spanish SICAVs are collective investment undertakings ("**CIUs**") regulated, supervised and registered by the Spanish Securities Market Commission ("**CNMV**"), which, as CIUs, are taxed at 1%, compared to the standard Corporate Income Tax rate of 25%. However, the future of Spanish SICAVs may change if some of the proposals of the different political groups are eventually approved, including the establishment of a maximum percentage stake for each investor, the granting of powers to the Spanish Tax Agency to monitor and inspect SICAVs, and the elimination of the 1% tax rate.

In this environment of instability, several options are being analysed by Spanish SICAVs in order to deal with the possible changes: (i) mergers with Spanish investment funds; (ii) cross-border mergers with other similar European entities (SICAVs or funds), and (iii) the transfer of their registered office to other European countries.

This note briefly analyses these three options, setting out the regulatory requirements applicable in each case, but without including detailed corporate or tax considerations, which must undoubtedly be taken into account when assessing these solutions.

Applicable legislation

In Spain, both the merger with domestic or foreign funds and the transfer of the registered office of a Spanish SICAV are governed by Act 35/2003, of 4 November, on collective investment undertakings ("**LIIC**") and the regulation which implements it (Royal Decree 1082/2012, of 13 July) ("**RIIC**") as well as by Act 3/2009, of 3 April, on structural modifications to companies ("**LME**").

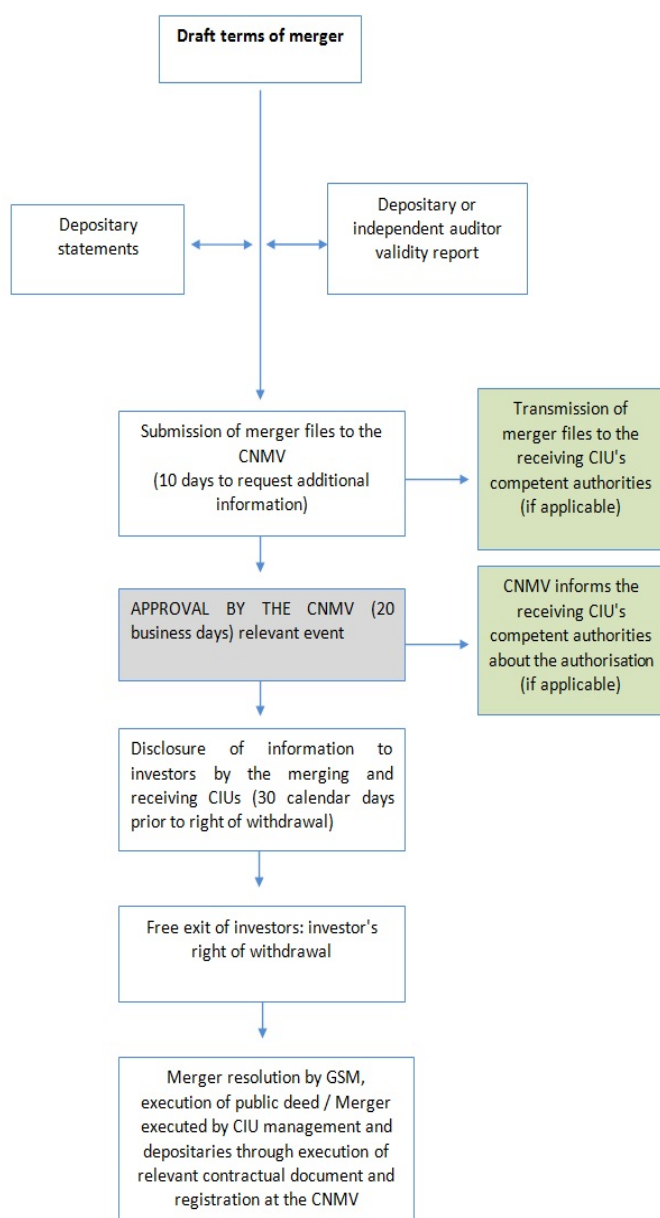
Having identified the legislation applicable to the three options, we will now explain each of them below.

Merger of CIUs

This chart describes the main regulatory steps in a merger of CIUs, applicable to both domestic and cross-border mergers:

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I. Domestic mergers

The domestic merger between a Spanish SICAV and another Spanish CIU is a simple mechanism which has been widely used in the Spanish market for years and which comprises the following steps:

A. Submission of the merger file to the competent authority (CNMV)

The merger process begins with the approval of the draft terms (*proyecto de fusión*) of the proposed merger by both parties, i.e. the merging CIU (absorbed) and the receiving CIU (absorbing), respectively.

In addition, the merger file must be prepared, including all the documentation to be submitted to the CNMV to obtain its authorisation (updated prospectus and KIIDs of the receiving CIU, a statement from the depositaries of both CIUs confirming that they have carried out the necessary verifications, information about the proposed merger to be provided to investors of both CIUs and the validity report prepared by an independent auditor or, if applicable, the depositary, regarding the valuation of the assets and the exchange ratio).

If the CNMV considers that the file is not complete, it will request additional information within ten (10) business days after receiving the merger file.

B. Consideration of the merger file by the CNMV (impact on investors)

The CNMV will consider the potential impact of the proposed merger on investors of the merging CIU and the receiving CIU, to assess whether appropriate information is being provided to them.

In those cases where the information is not clear, the CNMV may request that the information to investors be clarified.

C. Authorisation of the merger by the CNMV

The CNMV will inform the merging CIU whether or not the merger has been authorised within twenty (20) business days of the submission of the complete merger file. The authorisation will be considered a relevant event.

The CNMV will authorise the proposed merger if the following conditions are met:

- a) The proposed merger complies with all the requirements of Spanish legislation relating to CIUs;
- b) The receiving CIU has been duly 'passported' to market its units or shares in all Member States where the merging CIU(s) is/are marketed; and
- c) The CNMV is satisfied with the proposed information to be provided to investors.

As a general rule, the costs of the merger cannot be charged to the CIU or its investors.

D. Information, right of withdrawal and opposition

CIUs participating in the merger must provide their investors with appropriate and detailed information relating to the proposed merger at least thirty (30) calendar days prior to the deadline for requesting the repurchase or redemption or, if applicable, conversion of the shares or units, at no additional cost. The information must be concise and written in non-technical language.

In addition, investors will have a right of withdrawal and may request, at no cost other than that charged by the CIU to cover divestment costs, the repurchase or

redemption of their shares or units, or (when possible), their transfer to the shares or units in another CIU.

Creditors will also have the right to oppose the merger, in the terms set out in the LME.

E. Execution of the public deed

On the effective date of the merger, the competent authority established by the relevant regulation, bylaws or legislation will execute the merger by means of the relevant contractual document or, where appropriate, public deed. In addition, the management company of the receiving CIU, or the CIU itself, if it is self-managed, will confirm to the depositary that it has completed the transfer of assets (and liabilities, where applicable) and will request the registration of the merger at the relevant CNMV registry, subject to compliance, in the case of SICAVs, with the corresponding mercantile formalities. The final exchange ratio will be determined on the basis of the net asset value and number of shares outstanding at close of business on the day prior to the execution of the public deed or contractual document.

Timing and market practice

The timing for the implementation of a domestic merger of CIUs may vary, although it typically takes around six (6) months. There are many examples of domestic mergers in the Spanish market where a SICAV merges with an investment fund (as the receiving entity). There are also standard forms for mergers published by the CNMV, which certainly speeds up the process.

II. Cross-border mergers

A cross-border merger between a Spanish SICAV (merging CIU) and another European CIU (receiving CIU) is carried out following the same steps outlined in the previous section for domestic mergers except that the LME will not apply to it. In addition, the following special characteristics should be taken into account:

- The approval of the draft terms (*proyecto de fusion*) by the receiving CIU (foreign) must be drafted in accordance with the legislation of the European country concerned.
- The documentation of the merger file must be written in Spanish and in one of the official languages of the Member State of the receiving CIU.
- Once the merger file is complete, the CNMV will immediately issue copies of the information contained therein to the competent authority of the Member State of the receiving CIU.
- Both regulators (CNMV and the competent authority of the Member State of the receiving CIU) will respectively consider the potential impact of the proposed merger on investors of the participating CIUs and may request changes to such information in order to make it clearer.
- The CNMV will notify the competent authority of the Member State of the receiving CIU whether or not the merger has been authorised.
- The effective date of the merger and the date used to calculate the exchange ratio will be determined according to the laws of the Member State of the receiving CIU.

These dates will be set prior to the approval of the merger by the investors of all participating CIUs, when such approval is required under the relevant legislation.

Timing and market practice

Cross-border mergers involving Spanish SICAVs and other European CIUs, mainly Luxembourg CIUs, have been used successfully in the past two (2) years, although they can all be counted on one hand. These mergers are usually completed in nine (9) to twelve (12) months.

Transfer of registered office of Spanish SICAVs

The transfer of the registered office of a Spanish SICAV to a different country requires that the company keep its legal status at all times (in other words, the transfer of registered office must not entail the dissolution of the Spanish company or the creation of a new legal status in the foreign country). Thus, the transfer of registered office of the SICAV may only be done to a jurisdiction which allows the company to keep its legal status.

Prior to 2009, only isolated precepts existed in Spanish law which failed to fully regulate the transfer of registered office of a Spanish company to another country and which gave rise to many problems, both interpretative and practical, and hindered the effective execution of these types of transactions. It was not until the publication of the LME in 2009 that uniform legislation was established, which served to clarify all doubts.

The transfer of registered office implies working to a tight deadline in Spain and the chosen jurisdiction, keeping track of time in order to achieve that on the same day in which the SICAV is de-registered from the CNMV, the

company is registered as a SICAV in the supervisory authority of the chosen jurisdiction.

During this transfer of registered office process, which will imply the loss of the status as a Spanish SICAV, to obtain status as a SICAV under the regulation of another European country, there are several aspects that should be taken into consideration, and among others, the following regulatory issues:

1. Change in service providers (custodian, management entity, etc.)

When the Spanish SICAV is removed from the registries of the CNMV, losing its status as a SICAV in Spain, the depositary agreement and the management agreement are terminated.

Simultaneously, if, on the same day that the SICAV is de-registered in Spain, it is registered as a SICAV in another Member State, a new management company and a depositary should be appointed in such European country.

In the event that, according to the transaction timeline, the de-registration of the SICAV in Spain and the registration of the SICAV in the target European country are not automatic (which is certainly the aim), there will be a period of time in which the company remains as an ordinary Spanish joint stock company with a portfolio invested in different financial instruments. Therefore, it will be necessary to keep a custodian in Spain (which could be the same entity acting as custodian of the SICAV or another entity entitled to provide safekeeping and administration of financial instruments on customers' behalf) and to execute the relevant custodian and administration agreement with such entity.

2. De-listing of the shares in the SICAV from the MAB

If the shares in the SICAV are listed on a securities exchange or on the Spanish Alternative Stock Exchange (*Mercado Alternativo Bursatil*) (MAB), once the SICAV is deregistered as a SICAV in Spain, the SICAV's shares will be de-listed from trading, notwithstanding other possible commercial requirements established in relation to the de-listing which may apply. Once the SICAV has been registered in the relevant European country, it can then be listed on the corresponding stock exchange if desired.

3. Corporate issues

From a Spanish corporate law perspective, it will be necessary to follow the steps and meet the requirements set out in Articles 92 to 103 of the LME, governing the international transfer of registered office of Spanish companies, such as preparation by the SICAV's directors of the project and the report on the transfer of registered office with the required content, holding the board of directors' meeting and the general shareholders' meeting of the SICAV, submitting the project to the Commercial Registry, the appraisal by the registrar and publication of the submission in the Official Gazette of the Commercial Registry (BORME), creditors' right of opposition, the cancellation of the entry at the Commercial Registry, etc.

Timing and market practice

We estimate that the transfer of registered office of a Spanish SICAV can be implemented in approximately five (5) to seven (7) months.

As far as we are aware, no transfer abroad of registered office of a Spanish SICAV has been

carried out yet. However, at Clifford Chance we have worked on a large number of cross-border transfers of Spanish companies and on the applicable legal regime for transferring SICAVs.

The above three options are the ones currently being analysed in the market to address the potential legislative changes. However, we will still have to wait several months to know for certain what direction the future regulation of Spanish SICAVs will take, and what the most effective options will then be.

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