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# Legal Ease: Spain's ETF tax regime

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Exchange-traded funds (ETFs) offer many advantages, including efficiency, high liquidity, and speed in gaining exposure to the securities market.

Since 2016, ETFs not listed in the Spanish securities market have been able to benefit from the so-called Spanish tax deferral regime ("*Traspasos*"). Under this regime, Spanish individual investors may transfer their shares in an ETF indefinitely to another ETF or collective investment scheme (CIS), or vice versa, without being taxed on capital gains (except when they are recovered in cash).

Under the *Traspasos* regime, which only applies to individuals who are resident in Spain for tax purposes, when the amount obtained from recovering or transferring shares in CIS is used to acquire or subscribe other shares in CIS, the profit or loss is not triggered. Also, the new shares subscribed continues to have the value and acquisition date of the shares transferred or recovered.

This regime involves deferring taxation -not exempting taxpayers from their tax liabilities- if the investor rolls over investments in CIS. Therefore, the investor may defer the taxation of the income accrued until the date it recovers the investment in CIS.

Historically, this regime did not apply to ETFs in general. However, it started to apply ETFs listed outside Spain from 2016, when the tax authorities introduced a different criteria for them through a binding ruling.

However, this ruling did not apply to ETFs listed in Spain. Therefore, although the *Traspasos* regime applies to Spanish and foreign UCITS, as well as ETFs not listed in Spain, it does not apply to ETFs listed in Spanish markets.

Consequently, investing in a Spanish ETF would (tax-wise) be equivalent to investing in the listed shares directly.

However, this discriminatory regime seems to be coming to an end. The Spanish Government is working on a bill[1] under which ETFs listed abroad will be treated in the same way as those listed in Spain. Therefore, investors in ETFs listed abroad will no longer benefit from the *Traspasos* regime.

From a tax and regulatory perspective in the UCITS framework, ETFs and other CIS (e.g., SICAVs and mutual funds) could be considered equivalent, as they are subject to uniform regulation. Therefore, are there any reasons for supporting this differentiated tax treatment?

The most appropriate way to avoid the current discrimination between ETFs listed outside Spain and ETFs listed in Spain would be probably to do the opposite. All individuals with tax residence in Spain who reimburse or transfer units in CIS, including ETFs, and generate a profit, should be able to apply the *Traspasos* regime.

ETFs had started to become more important in the Spanish market, particularly in the new MiFID II context and its restrictions on the payment of rebates and inducements. In response to this demand, several institutions had already launched distribution platforms for ETFs.

However, if these tax measures are approved, retail investors and private banking clients will be lured away from ETFs, in which most investors are currently institutional.

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[1] The Preliminary Draft Law on Prevention and Control Measures against tax fraud and transposition of Directives (EU) 2016/1164 and 2017/1852