

LEGAL ALERT

REAL ESTATE INVESTMENT AND MANAGEMENT COMPANIES (“SIGI”)

DECREE-LAW NO. 19/2019

A. SIGI

Decree-Law 19/2019 of 28 January 2019 (“**Decree-Law**”), that will enter into force on 1 February 2019, creates and regulates the so-called “*Sociedades de Investimento e Gestão Imobiliária*” (real estate investment and management companies) (hereinafter referred to as “**SIGI**”) following closely the regulation of the Real Estate Transfer Trusts (REITs), implemented in various European countries.

It is expected that the SIGI, considering its significant drive in promoting the investment and revitalisation of the real estate market, will benefit from the tax framework applicable to alternative investment funds (“**AIFs**”) for real estate investments governed by the General Framework of the Collective Investment Undertakings (“*Regime Geral dos Organismos de Investimento Colectivo*”) (“**AIF Law**”) (that implemented Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011, as amended, and Directive 2015/14/UE, of 21 May of 2013 both on AIFs), that was subject to a substantial reform in 2015. According to this tax framework, the SIGI will be exempted from corporate tax in relation to income arising from the lease of real estate properties, capital gains and capital income, such as dividends paid by entities in which the SIGI holds a shareholding equity interest.

In respect of shareholders, the income distributed by a SIGI to individual shareholders with residence in the Portuguese territory will be subject to a withholding tax at the rate of 28%, and corporate entities with residence in the Portuguese territory will be subject to a rate of 25%. Non-residence shareholders will be taxed at a reduced rate of 10%.

The present note aims to provide a brief review of the main characteristics of a SIGI and the procedures to be taken into consideration in the conversion of pre-existing joint stock companies or AIFs for property investment that have adopted corporate format (*SICAFIs* or *SICAVIs*) into SIGI.

B. MAIN CHARACTERISTICS OF THE SIGI

The SIGI are governed by the Decree-Law and by general legal provisions applicable to joint stock companies (“*sociedades anónimas*”), which means that in all situations that are not ruled by in such Decree-Law, the Portuguese Companies Code in what concerns joint stock companies applies.¹

The main features of the new legal framework of the SIGI can be grouped in the following categories:

1. Structure and corporate requirements;
2. Income distribution;
3. Admission to trading and *free float*;
4. Asset composition and limit to the indebtedness;
5. Loss of the qualification as SIGI.

1. Structure and corporate requirements

To be qualified as SIGI, the company (with **registered office and effective management in Portugal**) needs to be a **joint stock company** (*sociedade anónima*) and adopt the supervisory model corresponding to a **supervisory board** (*conselho fiscal*) **and a statutory auditor** (*revisor oficial de contas*) (or an audit firm which is not part of the supervisory board).² The SIGI should also have a paid-up **share capital** in the minimum amount of **EUR 5,000,000.00** and make reference to “*Sociedade de Investimento e Gestão Imobiliária, S.A.*” or “*SIGI, S.A.*”³ in the respective company name.

¹ See Article 2 (1) of the Decree-Law. It is also referred that, under the terms of numbers (2) and (3) of the same Article, in case the SIGI are qualified as listed companies, the SIGI are also ruled by the legal provisions applicable to listed companies. In addition, Article 101 (1), (2) and (4) of the General Framework of Credit Institutions and Financial Companies (“*Regime Geral das Instituições de Crédito e Sociedades Financeiras*”) (in respect of the relation between the shareholdings and the share capital of the subsidiaries) shall apply to shareholdings held by credit institutions in SIGI.

² See Article 413(1) (b) of the Portuguese Companies Code.

³ See Article 3 of the Decree-Law.

In addition, the SIGI must have the following **corporate purpose**:⁴

- (i) Acquisition of property ownership rights, surface rights or other equivalent rights concerning properties for leasing purposes or other forms of commercial operation;⁵
- (ii) Acquisition of equity shareholding interest in other SIGI or in companies with registered office in other Member States of the European Union or of the European Economic Area that are bound by the administrative cooperation in the field of taxation equivalent to the one established in the European Union and that fulfill cumulatively certain requirements;⁶
- (iii) Acquisition of equity interests corresponding to shares or to investment units of (a) AIFs for real estate investment with an income distribution policy similar to the one required for the SIGI and (b) AIFs for real estate investments in residential lease governed by Article 102 of Law no. 64-A/2008 of 31 December with an income distribution policy similar to the one required for the SIGI.

The SIGI may either directly manage or economically operate properties in relation to which some of the rights referred in (i) above have been acquired or enter into service agreements with third parties for the management or economic exploitation of such properties.

The SIGI may be incorporated with or without public subscription, the provisions of Articles 79 to 283 of the Portuguese Company Code being applicable in case of public subscription, with the specifics set forth in the Decree-Law.⁷

⁴ See Article 7 of the Decree-Law.

⁵ For these purposes, the acquisition of the rights over real estate assets for lease or other forms of economic development includes, *inter alia*, development of construction projects and of refurbishment of real estate, and the use of units or space in shopping centers or offices (see Article 7 (2) of the Decree-Law).

⁶ (i) have an equivalent corporate purpose to SIGI, (ii) the asset composition is in line with the indebtedness limit foreseen in the Decree-Law, (iii) the share capital is entirely represented by nominative shares and (iv) are subject to an income distribution framework similar to that foreseen in the Decree-Law.

⁷ Which are, in general: (i) prohibition of deferral of payment of contributions; (ii) immediate transferability of shares to be subscribed by the sponsors; (iii) prohibition of allocation of any advantage to the sponsors; (iv) independence of the incorporation of the SIGI from the occurrence of the constituent assembly, the members of the company's bodies being appointed in the articles of association; (v) request for definitive registry after the subscription of all shares (with some exceptions), not depending on the submission of the minutes of the constituent assembly; (vi) impossibility of avoidance of the resolution for the incorporation of the SIGI by a subscriber which has not approved such resolution (see Article 4 of the Decree-Law).

2. Income distribution

The Decree-law also sets forth rules related to the income distribution by the SIGI.⁸ On the one hand, it states that the SIGI shall distribute income in a period of **nine months after the end of every fiscal year**, and on the other hand, establishes that the SIGI shall distribute (i) at least **90% of the profits relating to such fiscal year arising from the payment of dividends and income distribution arising respectively from shares or from investment units** held by the SIGI and (ii) at least **75% of the remaining distributable profits** relating to such fiscal year under the terms of the Portuguese Companies Code.

This legal framework contains another important limitation, stating that at least **75% of the net income resulting from the sale of assets** allocated to the business of the SIGI **should be reinvested** in other assets allocated to the SIGI business **within the period of three years counted** from the referred sale.

Finally, the **legal reserve of the SIGI cannot exceed 20% of the SIGI' share capital** and the Decree Law expressly forbids the creation of other *unavailable* reserves.

3. Admission to trading and free float

One of the main characteristics of the framework set forth in the Decree-Law is that **the shares of SIGI shall mandatorily be admitted to trading⁹** in a regulated market or a multilateral trading system **within a period of one year** from the commercial registry of the respective incorporation or of the effectiveness date.

The Decree-Law further requires that, without prejudice to the rules applicable to each platform, at least **20% of the shares** representing SIGI's share capital **must be held** by investors which **hold shareholdings corresponding to less than 2% of the voting rights** in accordance with Article 20 of the Portuguese Securities Code.¹⁰

⁸ Article 10 of the Decree-Law.

⁹ Article 9 of the Decree-Law.

¹⁰ Which means that there shall be at least eleven minority shareholders, not related among themselves and each with a shareholding under 2%.

With the purpose of simplifying the fulfilment of this requirement, the Decree-Law lightens the current framework applicable to the admission to trading in regulated markets, stating that **Article 228 of the Portuguese Securities Code is not applicable** to the admission to trading of shares issued by SIGI. This Article regulates the minimum track record of activity for an issuer of securities admitted to a regulated market.

With the same purpose of clarification of the free float requirement, it should be noted that the legal framework allows the admission to trading of SIGI shares in **unregulated markets**, this makes its creation procedure less burdensome and easier than in the case of admission to trading of shares only in regulated markets, insofar as – in cases in which there is no public offer of SIGI’s shares – the admission to such markets does not depend on the publishing of a prospectus approved by CMVM.¹¹ In addition, these trading platforms are usually ruled by **simpler and less strict duties and requirements**, which also applies, for instance, to the fees to be paid in the context of admission to trading of shares and their permanence in the market.

Furthermore, it should be noted that **the minimum of share capital and free float required by the Decree-Law allows the compliance with the free float requirements for the admission to trading in any of the** (regulated and unregulated) **markets** of Euronext Lisbon.

¹¹ It only depends on the drafting of an information document (*documento informativo*), requiring significantly less preparation and depth than those required of a CMVM approved prospectus for the purposes of a public offer and/or admission to trading in a regulated market.

Below there is a simplified indication of the initial and annual fees payable in each market (regulated and unregulated):¹²

Market	Regular Initial Admission Fee	Annual Fee
Euronext Access ¹³	Fixed fee of EUR 5,000.00 plus a variable fee of 0.125% for EUR of market capitalization, with a potential maximum of EUR 300,000.00.	EUR 2,940.00
Euronext Growth ¹³ (or Euronext ¹⁴)	Fixed fee of EUR 10,000.00 plus a variable fee dependent on the number of securities admitted and market capitalization. ¹⁵	Depends on the number of securities admitted and the market capitalization, with a potential maximum of EUR 55,000.00.

4. Asset composition and indebtedness limits

The Decree-Law also provides requirements concerning the composition of SIGI's assets and limits to its indebtedness.¹⁶

In fact, SIGI's assets, in accordance with its corporate purpose, shall be mainly composed of property ownership rights, surface rights or other equivalent rights over properties, for leasing purposes or other forms of commercial operation respecting some cumulative limits:

- (i) The value of the said rights over properties and shareholdings must represent at least 80% of SIGI's asset value; and
- (ii) The value of the rights over properties subject to lease agreements or other forms of economic exploitation must represent at least 75% of the total value of SIGI's assets.

However, the legal framework only requires that the abovementioned **asset composition requirements** to be met at all times **as from the second year after the incorporation** of the SIGI.

¹² Full price list available at <https://www.euronext.com/pt-pt/cotacaos/processo-de-admissao/comissoes-de-admissao-a-cotacao>.

¹³ Unregulated market.

¹⁴ Regulated market.

¹⁵ In any event, with the absolute maximum limit of €2,000,000.

¹⁶ See Article 8 of the Decree-Law.

Notwithstanding the abovementioned **rights** and shareholdings must **be held for** at least **three years** following their acquisition.

Regarding **indebtedness**, the Decree-Law provides that **it may not exceed**, at all times, to **60%** of SIGI's **total asset value**.

The concept of property used in this context encompasses (i) rural properties (*prédios rústicos*), including for forestry use, that are capable of commercial operation (ii) urban properties (*prédios urbanos*), (iii) condominium units and (iv) plots of land that are developed and qualified as urban properties or as condominium units within 3 (three) years after their acquisition.

It should also be noted that, a set of condominium units in a building under the horizontal property legal regime as well as a set of contiguous buildings functionally connected to each other through the existence of common areas that can be used by all or some of the respective condominium units shall be deemed in this context as one single property.

The value of the properties will only be considered for the purposes of this legal framework in case such properties are free of liens or encumbrances that create difficulties in its sale, except for the security required for the financing of the acquisition, construction or refurbishment of such properties.

5. Loss of qualification as SIGI

Under the Decree-Law, the companies which:

- a) Cease to comply with the requirements concerning the type of company, supervisory model, corporate purpose or minimum share capital;
- b) Default on their obligation to request the admission to trading of their shares under the terms described above with the necessary advance (one year after registration);
- c) Cease to comply, for a period of over six months, with the abovementioned free float requirement;
- d) *Simultaneously* default, for more than six months, with the abovementioned asset composition requirements;

- e) Do not fulfill, for two consecutive exercises, *at least one* of the abovementioned asset composition requirements;
- f) Default on the abovementioned indebtedness limit, shall no longer be deemed as SIGI.¹⁷

SIGI's management body or, in the absence of action of such body, the supervisory body, shall inform the regulated market or multilateral trading system managing entity where the shares are admitted to trading, as well as the Tax and Customs Authority (“*Autoridade Tributária e Aduaneira*”), the verification of any of the abovementioned facts as soon as it becomes aware of them. The company shall no longer be deemed as SIGI from the moment at which any of the situations described above takes place.

The loss of the SIGI qualification (i) prevents such company from obtaining the SIGI qualification in the three following years, (ii) does not preclude the company from remaining a public company and (iii) gives rise to liability of the members of the administration and supervisory boards vis-a-vis the shareholders for the damages **directly** caused to the said members by virtue of the loss of the SIGI qualification.

C. CONVERSION OF EXISTING COMPANIES INTO SIGI

1. Conversion of joint stock companies into SIGI

In case there is no obstacle to the fulfilment of the abovementioned requirements, a **joint stock company already incorporated** may, through a resolution of its shareholders' general meeting¹⁸ adopted by the majority of votes required to resolve on the amendment to the articles of association, **become a SIGI**.¹⁹

This conversion **takes effect on the first day of the taxable period after the date of registration** of the amendments to the articles of association. The provisions regarding distribution of income to

¹⁷ See Article 11 of the Decree-Law.

¹⁸ Which also resolves on the amendments to the articles of association required to comply with the requirements of the Decree-Law.

¹⁹ Article 5 of the Decree-Law.

the reserves and retained earnings of the company in force as of the date of registration of such changes are not applicable to the conversion.

Furthermore, and with the purpose of easing the corporate restructuring of existing companies' groups which intend to adopt this type of company in their business plan, the Decree-Law specifically mentions that **the business sector which includes one or more assets** comprised in the corporate purpose of the SIGI is **deemed as an economic unit** including notably for the purposes of simple demergers.²⁰

Given the procedure's simplicity, the **process of conversion** of existing joint stock companies into SIGI is significantly **fast**, mainly depending upon the resolutions of its shareholders' general meeting and upon its registration with the Commercial Registration Office.

2. Conversion of AIFs for real estate investment into SIGI

Along the same lines, the **AIFs for real estate investment under a corporate form** incorporated under the AIF Law are allowed, through a resolution of its shareholders general meeting adopted by the majority of votes corresponding to 90% of the share capital, **convert into SIGI**.²¹

After the **resolution** and corresponding amendment to the articles of association, these documents are sent to the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*), the former being **immediately disclosed** in the Commission's information disclosure system and, should it exist, in the website of the AIF or the relevant AIF management entity.

The **conversion produces effects on the date set on the abovementioned resolution** (without prejudice to the right of withdrawal of the shareholders which have voted against the conversion²²)

²⁰ See Article 124 (1) (b) of the Portuguese Companies Code.

²¹ See Article 6 of the Decree-Law.

²² The shareholders which have voted against the resolution to convert have the right to withdraw from the collective investment body subject to the conversion, without any costs, through the exercise of redemption rights or, when so decided by the managing entity, through the acquisition of the shares at stake from the collective investment body, by themselves or a third party, communicating such acquisition to the entity responsible for management within 15 days after the disclosure of the conversion resolution. For the purposes of payment of return for the withdrawal, the value for the shares is the value as of the date of the entry into force of the conversion confirmed by an opinion from the auditor of

and **determines the expiry of the AIF regulatory authorization granted by the Securities Market Commission.**

Thus, the adoption of the new legal framework highlights and emphasizes the convenience and swiftness of the incorporation/conversion of/into SIGI, which may quickly become of great relevance in the Portuguese real estate market.

Our multidisciplinary team at Morais Leitão is available to clarify any specific questions and to provide assistance with any related subject.

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the collective investment body subject to the conversion. The financial settlement of the redemption or the acquisition of shares takes place within 60 days after the production of effects of the conversion.