

LEGAL ALERT

REAL ESTATE INVESTMENT AND MANAGEMENT COMPANIES (“SIGI”)

NEW DEVELOPMENTS

I. GENERAL OVERVIEW

The Portuguese Parliament has recently approved several amendments to the [Decree-Law no. 19/2019, of 28 January](#), which has introduced the *Sociedades de Investimento e Gestão Imobiliária*, the so-called Portuguese REITS. In order to enter into force, these amendments should now be enacted by the Portuguese President and published in the *Official Gazette*.

First of all, the tax regime applicable to SIGI, which was not included initially, was approved. Furthermore, the Portuguese Parliament has also introduced several amendments in the following matters:

- i) Corporate purpose;
- ii) Asset composition; and
- iii) Free float rules.

The new regime arising from these amendments has the merit of reinforcing the alignment of SIGI with the best international practices on REITS, as well as to clarify certain aspects that were not clear under the initial regime, strengthening the legal certainty for the investors.

II. ANALYSIS OF THE AMENDMENTS

a) Tax regime

It is now expressly foreseen that the tax regime applicable to SIGI is the one that is set forth for Collective Investment Undertakings, under articles 22 and 22-A of the [Tax Benefits Code](#) (*Estatuto dos Benefícios Fiscais* – EBF). The regime originally approved did not contain any tax rules, since the same was approved by decree-law and the parliament had not granted an authorization to Government to legislate on tax matters. As a result of these amendments, the Parliament has now clarified one of the major legal uncertainties regarding the original SIGI’s regime.

Consequently, the investment income, the rental income and the capital gains obtained by a SIGI are expressly excluded from corporate income tax taxation.

However, this tax regime also foresees that the income arising from the transfer of real estate properties will only be excluded from taxation when such properties have been held by a SIGI for at least three years.

At shareholders’ level, the relevant tax regime establishes that the income distributed by a SIGI to individuals that are resident for tax purposes in Portugal should be subject to a withholding tax at the rate of 28%, while resident corporate entities should be subject to withholding tax at the rate of 25%. In what concerns to non-resident shareholders, the same should be subject to withholding tax at the reduced rate of 10%.

On the other hand, according to the amendments now approved, a SIGI that loses its qualification will no longer be able to benefit from the special tax regime. In this scenario, the taxable income will be determined and taxed in accordance with the general terms arising from the [Corporate Income Tax Code](#). As a result, the period between the loss of the qualification as SIGI and the end of the civil year in which this event has occurred will be considered the taxable period for corporate income tax purposes.

Finally, the dividends distributed by a SIGI to its shareholders after the termination of the application of the special tax regime, as well as the capital gains obtained by shareholders with the sale of their

shares, will be subject to taxation pursuant to the general terms established by either the [Personal Income Tax Code](#) or the Corporate Income Tax Code.

b) Corporate purpose

In what concerns to the rules regarding the corporate purpose of a SIGI, it has been introduced a broader concept of leasing in accordance with the best international practices. Therefore, the new regime states that a SIGI must have as main corporate purpose the acquisition of property ownership rights, surface rights or other equivalent rights concerning properties for leasing purposes, **‘including atypical contractual forms under which are rendered services related with the use of the property’¹**.

Moreover, it should be noted that for the purposes of application of this regime, the broader concept of acquisition of property for leasing purposes continues to include, *inter alia*:

- (i) The development of construction projects and of refurbishment of real estate;
- (ii) The use of units or space in shopping centers or offices.

On the other hand, the new regime expressly allows SIGI to hold participations in other corporate entities with registered office in Portuguese territory (which do not qualify as SIGI), provided that such corporate entities fulfill some requirements that also apply to SIGI².

As a result of these amendments it has been clarified that SIGI may hold subsidiaries (other than SIGI companies) resident in the Portuguese territory or in other Member States of the European Union or of the European Economic Area. Therefore, SIGI have now more options to structure their investments through “share deals” instead of “asset deals”, benefiting from a favorable tax regime at the level of Property Transfer Tax (“IMT”).

¹ In turn, the previous regime established that the SIGI must have as main corporate purpose the ‘acquisition of property ownership rights, surface rights or other equivalent rights concerning properties for leasing purposes **or other forms of commercial operation**’.

² (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.

c) Asset composition

The rules regarding the asset composition have also been subjected to amendments in order to update them in accordance with the broader concept of leasing that has been established by the new regime.

Accordingly, it is now established that the SIGI's assets shall be mainly composed of property ownership rights, surface rights or other equivalent rights over properties, for leasing purposes, including atypical contractual forms under which are rendered services related with the use of the property. These assets shall also respect the following cumulative thresholds:

- (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, including atypical contractual forms under which are rendered services related with the use of the property, must represent at least 75% of the total value of SIGI's assets.

It was also introduced an additional compliance rule for controlling that these requirements are effectively met. Under this new rule the board of a SIGI shall request an evaluation of the assets held by the company each seven years. Such evaluation shall be made by an independent auditor registered before the Portuguese Securities Commission (CMVM).

d) Free float

In general terms, the new regime establishes more flexible rules to meet the current minimum 20% free float threshold and, simultaneously, establishes a new minimum free float limit of 25% which is applicable from the fifth year after the admission to trading of the SIGI's shares.

Thus, it is now foreseen the following minimum *free float* thresholds³:

³ Corresponding to SIGI's share capital held by investors holding shares corresponding to less than 2% of the voting rights, in accordance with Article 20 of the [Portuguese Securities Code](#).

- (i) 20% since the final of the third complete civil year after the admission to trading of SIGI's shares; and
- (ii) 25% since the final of the fifth complete civil year after the admission to trading of SIGI's shares.

III. FINAL REMARKS

As it has been stated above, the amendments now introduced improve and reinforce the SIGI's legal regime. On the one hand, the SIGI's regime becomes more aligned with the best international practices on REITs around the world and, on the other hand, certain aspects which were not entirely clear under the previous regime are now clarified, reinforcing the legal certainty for the investors (see [here](#) the Legal Alert prepared when the previous regime was published).

Within this scope, it is particularly relevant the approval of a favorable tax regime applicable to SIGI (similar to the one applicable to Collective Investment Undertakings), under which investment income, rental income and capital gains obtained by SIGI are expressly excluded from corporate income tax. On the other hand, shareholders are subject to different tax rates on income distributed by SIGI (*i.e.*, tax residents individuals are subject to a withholding tax rate of 28%; tax resident corporate entities are subject to a withholding tax rate of 25%; and non-residents are subject to a withholding reduced tax rate of 10%).

Furthermore, it should also be highlighted as a positive outcome the new rules regarding the corporate purpose of SIGIs, which have extended the possibility of holding Portuguese subsidiaries (other than SIGI companies), allowing SIGI (acting as parent companies) to set up more flexible corporate groups, as well as to structure more investment transactions through "share-deals".

On the other hand, the regime has been consolidated in accordance with the best international practices, allowing the use of SIGIs not only for property leasing purposes, but also to other atypical forms of property leasing such as the rental of units in shopping and/or office buildings.

Therefore, the amendments now introduced represent an important step forward consolidating SIGI as a new vehicle for investment and/or restructuring opportunities 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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