

## INFORMATIVE NOTE



# Real Estate Investment Trusts (REITS)

Decree-Law no. 19/2019 of January 28<sup>th</sup> (**DL 19/19**), which came into force on February 1<sup>st</sup>, provided the Portuguese market with a new real estate investment vehicle, seeking to meet the needs already expressed by the sector and by investors and to align the national regime with the reality of international markets.

To this end, investment and real estate management companies (the SIGIs) are expected to fulfill a set of requirements, of which we highlight the minimum share capital of five million euros, being that it is not possible to defer the making of any entries, and the obligation of their shares to be admitted to trading on a regulated market or selected for trading in a multilateral system.

On the other hand, the new regime establishes the following as the

main activities (*i.e.*, corporate purpose) of the SIGIs:

- a. Acquisition of real rights on real estate (property, surface or equivalent rights) for leasing (covering atypical contractual forms which comprise not only lease agreements but also the provision of services required for the use of the properties);
- b. Holding of stakes in other SIGIs;
- c. Holding of stakes in other companies with registered offices in Portugal, that meet requirements (corporate purpose, composition of its active, dividend distribution policy) equivalent to those of the

SIGI's, with headquarters in Portugal or in another Member State of the EU or the European Economic Area;

- d. Holding stakes in Portuguese collective investment vehicles that have income distribution policy similar to those of SIGIs.

We note that each one of those rights and/or holdings must be held for at least three years after its acquisition. It follows, for example, that a right to own a property for rental or holding (through the acquisition of units) in a real estate investment fund for rental housing shall remain in the ownership of the SIGI for at least three years. In addition, at least 75% of the net proceeds from the disposal of assets referring to the pursuit of the corporate purpose of the SIGIs must be reinvested in other assets intended for the pursuit of such object within three years from the date of disposal.

With a view to achieving these objectives, this law sought to impose greater flexibility and transparency on the regime at two different levels: (i) prediction of various specificities to the way the SIGIs are constituted with public subscription (as opposed to the rule set forth in the Commercial Companies Code (the **CSC**)); and (ii) imposition of several limits on the SIGIs' operating model.

With regard to the specificities for the constitution of the SIGIs, we would like to point out the following:

- a. The possibility of immediate transmission of the shares to be subscribed by the promoters (thus disregarding the general rule of inalienability of these shares for two years from the definitive registration of the company provided for in the CSC);
- b. The impossibility of conferring any advantages on the promoters;
- c. Converting the commercial registration of constitution of the SIGIs into final no longer depends on the delivery of the minutes of the respective constituent assembly.

DL 19/19 also allows for the possibility of conversion into SIGIs of public limited companies already constituted, it being sufficient that such conversion is deliberated at a general meeting of shareholders, by a majority of two thirds of the votes cast (the same majority required by the CSC for the amendment of its Articles of Association).

In addition, and in line with the proposed objectives, it is important to mention the limits

imposed on the SIGIs' operating mode with respect to (i) the composition of its assets, (ii) the maximum indebtedness ceiling, and (iii) the obligation to distribute profits.

In this context, it should be pointed out that DL 19/19 imposes that 75% of the total value of the SIGIs' assets must respect rights on leased real estate (covering atypical contractual forms which comprise not only lease agreements but also the provision of services required for the use of the properties). It should be noted, however, that the diploma grants a "grace period" of two years (after the constitution of the SIGI) to verify the requirements imposed for the composition of the SIGIs' assets. It should also be noted that the SIGI's indebtedness cannot (at all times) exceed 60% of the SIGI's total assets.

Regarding the limits imposed on the distribution of profits, we emphasize the obligation for the SIGIs to distribute, in the form of dividends, at least (i) 90% of the profits that result from the payment of dividends or results distributed by entities held by the SIGIs in pursuit of its principal purpose, and (ii) 75% of the remaining profits for the year distributable under the terms of the CSC.

As for the tax framework, it should be noted that the first amendment to the DL 19/19

(introduced by the Law 97/2019, of 4 September) implemented its own tax regime, stating that the SIGIs benefit from the regime for Collective Investment Undertakings (the OIC) provided for in Article 22 of the Statute of Tax Benefits (the EBF).

Thus, in order to strengthen the competitiveness of the national real estate investment market, the SIGIs are subject to the general IRC tax regime and, thus, to a 21% rate on the taxable income determined. On the other hand, the EBF establishes that, in determining the taxable income of the OICs, shall be excluded income from capital, property and capital gains, referred to in the IRS Code, unless such income derives from entities resident or domiciled in a country, territory or region subject to a clearly more favorable tax regime, as set out in a list approved by the member of the Government responsible for the area of finance.

As is well understood, for the purposes of determining taxable income, expenses related to income excluded from taxation (thus taking into account any risk of mismatch) are not deductible, as well as any other expenses expressly set forth in the IRC Code.

The income and expenses relating to management fees and other commissions that revert in favor of the OICs also do not contribute

to taxable income. The SIGIs are also levied on Stamp Duty, by virtue of *Verba 29* of the General Stamp Duty Table, applying a quarterly rate of 0.0125% on the total value of the net assets.

As for investors, they will be taxed *on exit*. In the case of an IRS taxpayer, dividends will be withheld at the rate of 28%, and shall be definitive when the income is obtained outside the scope of their professional activity.

Income from the sale of shares representing the capital of the SIGIs shall be subject to taxation, through a final withholding tax at the rate of 28%. With respect to IRC taxpayers, the withholding tax is made at a rate of 25% and is in the nature of a tax payment on account, unless the investor benefits of an exemption that excludes capital income, in which case the withholding tax shall be final. If the necessary requirements are present, the *Participation Exemption* regime provided for in the IRC Code may be applied, as regards the distribution of dividends as well as capital gains at the time of the disposal of the shares.

Non-resident investors, without a permanent establishment in Portugal, shall be subject to withholding tax at an autonomous rate of 10%.

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