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COMMENTARY

A Guide to Spanish REITs — SOCIMIs

This Commentary provides a summary of Spanish Real Estate Investment Trusts ("REITs"), or sociedades cotizadas de inversión en el mercado inmobiliario ("SOCIMIs"), which are governed by Law 11/2009, as amended.

What is a SOCIMI?

SOCIMIs are Spanish-listed companies introduced for the following purposes:

a) the acquisition and development of real estate properties of urban nature for renting (including their refurbishment);

b) the holding of equity stakes in another SOCIMI;

c) the holding of equity stakes in non-Spanish listed companies with the same corporate purpose and subject to the similar mandatory dividend distribution policy as SOCIMIs (the "foreign listed SOCIMIs");

d) the holding of equity stakes in Spanish or foreign non-listed companies, engaged in the acquisition of urban real estate properties as their main corporate purpose and subject to the similar mandatory dividend distribution policy as SOCIMIs, provided that they comply with the investment requirements for SOCIMIs (the "unlisted SOCIMIs"), provided that certain additional requirements are met.

e) the holding of participations in regulated Real Estate Collective Investment Institutions.

Additionally, SOCIMIS should have:

- a minimum share capital of EUR 5 million which must be fully paid-up;
- no legal restrictions, or restrictions in the SOCIMI's bylaws regarding the transfer of shares.

Listing Requirements

The shares in a SOCIMI must be listed without interruption throughout the tax period on either a regulated market or a multilateral trading system in Spain, the European Union, or European Economic Area, or a regulated market in a country or territory with an effective exchange of tax information with Spain. This listing requirement does not apply during the initial two-year grace period.

Additionally, SOCIMIs should comply with the following requirements when listed in the Spanish multilateral trading market, *Mercado Alternativo Bursatil*, ("MAB"):

a) No minimum investment requirement per investor. However, shareholders owning less than 5 percent of the SOCIMI's share capital must hold a number of shares which is equivalent to or greater than either of the following:

- an estimated market value of EUR 2 million, or
- 25 percent of the total shares issued by the SOCIMI;

c) Lock-up period: significant shareholders and senior officers must generally undertake not to sell shares or engage in any transactions similar to the selling of shares during the first year of the SOCIMI's listing on the MAB;

d) Disclosure of significant shareholdings: SOCIMIs are obliged to disclose to the MAB any significant acquisitions or disposal of shares that increase holdings to above or below 5 percent (1 percent in case of directors and senior executives);

e) Publication and notification of shareholder agreements, (*pactos parasociales*);

f) Change of control of the company: any shareholder who receives a purchase offer which would result in the acquirer obtaining control of the company (more than 50 percent) may not accept such offer unless the potential acquirer makes the same offer to all shareholders.

Investment Requirements

a) At least 80 percent of the total assets held by a SOCIMI must consist of:
   - Urban real estate for lease (including similar foreign assets)
   - Land for development within a three-year period
   - Equity qualifying instruments

b) At least 80 percent of the income (excluding gains arising from the disposal of qualifying real estate assets and equity instruments) must arise from:
   - Leases to unrelated parties
   - Dividends from qualifying equity investments

c) A three-year minimum holding period applies for real estate assets and equity investments.

Dividend Distribution Policy

SOCIMIs must distribute dividends out of the profits obtained in each year (after mandatory company law allocations[1]) equivalent to:

a) 100 percent of the profits arising from qualifying equity investments;

b) 50 percent of the gains obtained from the disposal of real estate. The remaining part of the gain must be reinvested in other real estate within a three-year period. If the reinvestment does not take place, the remaining 50 percent will be distributed in the year in which the reinvestment period ends;

c) 80 percent of all other profits.

The dividend distribution must be resolved within six months after the end of each financial year, and dividends must be effectively distributed within one month after this resolution.

This mandatory distribution policy does not apply to a company which has elected for the SOCIMI regime in respect of income/gains which do not qualify for the SOCIMI regime, e.g., it does not apply to gains arising from the sale of a property prior to completing the three-year minimum period.

The Special Tax Regime

SOCIMI – Corporate Income Tax ("CIT")

Provided that the investment and dividend distribution requirements are met:

a) SOCIMIs are CIT taxpayers, although subject to a tax rate of 0 percent; and

b) SOCIMIs will become subject to a 19 percent tax rate on the gross amount of dividends distributed to shareholders holding at least a 5 percent stake in the SOCIMI when such dividends are (in the hands of the shareholders) either tax exempt or subject to a tax rate lower than 10 percent.[2] These shareholders must inform the SOCIMI if they are in compliance with this requirement.

Shareholders

The tax treatment of dividends and capital gains obtained by shareholders in a SOCIMI is as follows:

a) Spanish CIT shareholders or non-resident shareholders with a permanent establishment in Spain will be taxed on any SOCIMI dividend/gain without any tax credit. General dividend withholding tax rules apply, but no withholding tax applies on dividend payable to Spanish qualifying SOCIMIs.

b) Spanish tax resident individuals will be taxed on any SOCIMI dividend/gain as savings income (subject to tax at the relevant flat rate). General dividend withholding tax rules apply.

c) Non-Spanish investors (not acting through a permanent establishment in Spain) would suffer dividend withholding tax at the general rate (currently 19 percent) but entitled to benefit from tax treaty reduced rates and even the tax exemption under the EU Parent-Subsidiary Directive, depending on their tax residence and tax status. The capital gains tax exemption for listed equities does not apply for investors holding at least a 5 percent stake in the SOCIMI.

Election for the Special Tax Regime

Opting for the special tax regime must be approved by the general shareholders meeting and notified to the Tax Authorities at any time prior to the beginning of the three last months of the tax year. An entity can opt for the application of the SOCIMI tax regime even if the legally imposed requirements are not complied with at the date of opting, to the extent these requirements are fully complied with within the following two-year period (such as listing).

The special tax regime will apply to the same tax year in which the option was duly notified and following tax years until the company communicates to the Spanish tax authorities its waiver of the special tax regime.

Lawyer Contact

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus/.

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Endnotes

1 Mandatory legal reserve cannot exceed 20 percent of the share capital. The company's by-laws cannot introduce any undistributable reserve other than the legal reserve.

2 The Spanish Tax Authorities have issued various tax rulings clarifying this requirement