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LISTED CORPORATIONS FOR INVESTMENT IN THE REAL ESTATE MARKET (SOCIMIs)

One of the most important new pieces of legislation in the new Tax Measures Law (Law 16/2012, of December 27, 2012), published in the Official State Gazette of December 28, 2012 is the overhaul of SOCIMIs (*Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario* which translates as listed corporations for investment in the real estate market), which seeks to simplify and add flexibility to their tax and legal regime and bring them into line with the REITs (*Real Estate Investment Trusts*) existing in Spain's neighboring countries.¹

Readers will recall that SOCIMIs are an investment vehicle aimed at the real estate market, created by Law 11/2009 with the aim to kick-start the rental market in Spain and give citizens access to investment in urban rental properties.

Faced, however, with the scant success in the use of SOCIMIs to date—primarily as a result of the financial and real estate crisis that accompanied the appearance of these companies and of their tax regime, which is very different from the tax treatment of REITs in neighboring countries—Spanish lawmakers found it necessary to undertake a major overhaul of the regime governing these entities in light of the current climate, with the goal to kick-start the Spanish real estate market generally, and property leasing, in particular.

Given its importance, in this news bulletin we will review the new SOCIMI regime in force for tax periods commencing after January 1, 2013.

The other changes introduced by the Tax Measures Law were analyzed in our news bulletin number 11/2012.

¹ Such as the Dutch “*Fiscale Beleggingsinstelling*” (FBI) or the French “*Société d’Investissements Immobiliers Côtée*” (SIIC).

1. COMMERCIAL/CORPORATE LAW REQUIREMENTS FOR SOCIMIS

1.1 Corporate form

SOCIMIs must be listed “SA” corporations.² They must have a minimum capital stock of € million;³ they can have only one class of shares; and they must include in their corporate name the marker “*Sociedad Cotizada de Inversión en el Mercado Inmobiliario, Sociedad Anónima*”, or its abbreviation, “SOCIMI, S.A.”.

Their shares must be traded on a regulated market, and they may now, as a new feature, be traded on a Spanish multilateral trading system (such as the *Alternative Stock Market*, or “MAB” by its Spanish abbreviation) or such a system in any other member state of the European Union or in the European Economic Area or in any other country with which there is an effective exchange of tax information (uninterruptedly throughout the entire tax period).

It is worth noting, however, that in addition to SOCIMIs, the special tax regime can also be taken for companies known as *unlisted SOCIMIs* (despite the contradiction in the expression itself), as was already the case under the former regime. Unlisted SOCIMIs are Spanish-resident companies that are wholly owned by SOCIMIs or foreign REITs (i.e. by nonresident companies listed on European markets that have the same corporate purpose as SOCIMIs and have a similar regime concerning a compulsory policy, by statute or in their bylaws, under which they have to distribute their income).⁴

In the new regime there is an added requirement for the shares of all SOCIMIs to be registered shares, which applies also to the nonresident REITs that have invested in “unlisted SOCIMIs”. In practice, this should mean that the SOCIMIs can identify their shareholders at any time.⁵

Any nonmonetary contributions of real estate for the formation or increase in capital of a SOCIMI must be appraised by one of the approved companies in the mortgage market legislation and their appraisal will be made in accordance with corporate/commercial legislation. This obligation affects contributions made both to SOCIMIs and to the unlisted entities in which they invest.

² They will be governed, therefore, by the provisions of corporate/commercial law, as well as by the special provisions of Law 11/2009 on SOCIMIs (after the reform brought in by the Tax Measures Law).

³ The minimum capital stock that these entities must have (formerly, €5 million) has therefore been reduced under the new regime.

⁴ Therefore, any references in this newsletter to SOCIMIs should also be deemed to include unlisted SOCIMIs unless indicated otherwise.

⁵ The difficulties entailed by reconciling having registered shares and trading the shares on the markets may have been overcome in other cases, i.e., the requirement that the shares of listed companies must be registered already applies in Spain in industries such as the banking and airline industries.

1.2 Corporate purpose

Their corporate purpose must consist of acquiring and developing urban real estate to lease, whether directly or through entities which, in turn, meet certain requirements. They can also carry on ancillary activities so long as the total income from those activities accounts for less than 20 percent of their income in each tax period.

SOCIMIs may carry on the following activities:

- Acquiring and developing urban real estate for lease, including renovating buildings.⁶
- Holding shares in other SOCIMIs or in other nonresident REITs.
- Holding shares in unlisted SOCIMIs or in unlisted nonresident companies,⁷ provided that one and the other have as their corporate purpose the acquisition of urban real estate for lease, have a similar income distribution policy and are wholly owned by SOCIMIs or nonresident REITs.⁸
- Investing in shares or units of the real estate collective investment vehicles (mutual funds and real estate investment companies) governed by Collective Investment Vehicle Law 35/2003.

The investments and activities that may be undertaken by unlisted SOCIMIs, the shares of which must also be registered, are confined to the acquisition of urban real estate to lease and, as a new addition, to the performance of development activities. They cannot, however, own shares in any type of entity (i.e. SOCIMIs can invest in real estate through just one tier of corporate vehicles).

Identical restrictions apply to nonresident entities with properties for rent in which a SOCIMI may invest. From an international standpoint, these restrictions mean that a SOCIMI cannot co-invest in real estate abroad through a corporate vehicle unless the shareholders of that vehicle are also nonresident SOCIMIs or REITs listed on a securities market in the European Union.

⁶ On the terms established in the value added tax legislation.

⁷ Provided that they reside in a country or territory with which there is an effective exchange of tax information.

⁸ By nonresident REITs we mean nonresident companies that are subject to the same listing requirements, have the same corporate purpose as SOCIMIs, are subject to a similar income distribution policy, and reside in countries or territories with which there is an effective exchange of tax information. The law does not specify what “similar income distribution policy” must mean, although it may be assumed that they do not have to be identical.

1.3 Distribution of dividends

As with the REITs in neighboring countries, SOCIMIs must systematically distribute a high percentage of the income that they obtain. More specifically, SOCIMIs must resolve to distribute dividends out of the income obtained in the year within six months after the year-end (and to pay them within one month after the distribution resolution) as follows⁹:

- A total of 100% of the income from dividends and shares in income from companies qualifying as eligible investments under the regime.
- A total of 50% of the income derived from transfers of real estate and of shares or units. The remaining income must be invested in eligible assets within three years after the transfer. If the reinvestment does not take place, the remaining 50% will be distributed in the year in which the period for the reinvestment ends (the legislation makes no reference to having to pay late-payment interest on the tax that is paid three years later).
- A total of 80% of all other income obtained.

In addition, where a dividend is distributed out of reserves coming from income for a year in which the special tax regime has been applied, the decision to distribute that dividend must be approved in the dividend resolution adopted in compliance with the rule on the compulsory distribution of dividends by SOCIMIs.

Lastly, it is established that a SOCIMI's legal reserve may not exceed 20% of the capital stock, and no other restricted reserves can be allowed by the bylaws.

2. INVESTMENT REQUIREMENTS FOR SOCIMIS

2.1 Assets requirement

SOCIMIs must invest at least 80% of the value of their assets in the following elements:

- Urban real estate to be leased out.
- Land for developing the real estate referred to above provided that the development is commenced within three years after it is acquired.
- Investments in the capital or in the equity of the entities indicated in the above section (i.e. SOCIMIs or nonresident REITs, unlisted SOCIMIs, unlisted nonresident entities wholly owned by SOCIMIs, REITs or collective investment vehicles).

⁹ The new regime eliminates the former reference to the effect that the provisions on the compulsory distribution of income did not cover income subject to the standard tax rate. Consequently, we consider that the lawmakers intended to extend this requirement to all income obtained by the SOCIMI.

This minimum investment requirement will be computed by reference to the following rules:

- The 80% will be calculated by reference to the consolidated balance sheet (if the SOCIMI is the parent company of a corporate group) and the company may opt to replace carrying amounts with market values for the purposes of making this calculation.
- The real estate must be acquired for ownership, which includes real estate held by the company under finance lease agreements for corporate income tax purposes or resulting from surface, air or underground building rights registered at the Property Registry.
- Neither the special-feature assets under article 8 of the Cadaster Law (motorways, ports, airports, etc.), nor the assets provided to third parties under finance lease agreements qualify for the purposes of this calculation. Real estate operated under a concession arrangement does not qualify for these purposes either.
- Real estate located abroad must have equivalent characteristics to the real estate located in Spain and there must be an effective exchange of tax information with the country or territory in which they are located.

Lastly, the new regime eliminates the diversification requirement existing under the former regime.¹⁰

2.2 Income requirement

The same 80% threshold applies to the income obtained by a SOCIMI from leasing the real estate used to pursue its primary corporate purpose¹¹ together with the dividends or shares in income from interests in entities qualifying as an eligible investment as described in the section above and that are used to pursue its primary corporate purpose.

For these purposes, gains from transfers of shares qualifying as eligible investments and of properties are excluded from the calculation, provided that the minimum holding requirements (discussed below) have been met. As in the calculation of asset size, it will be based on the consolidated balance sheet if the SOCIMI is the parent company of a corporate group.

There must be separate accounting records for development and leasing activities for each property developed or acquired, and the accounts must be broken down to the necessary extent to show the income relating to each property or registered property into which it is

¹⁰ The former regime required the SOCIMI to own at least three properties, none of which could account for more than 40% of its assets.

¹¹ Excluding income obtained in the period that is derived from leasing real estate to entities from the same corporate group (as defined in article 42 of the Commercial Code).

divided. Likewise, any transactions arising from other activities must also be accounted for separately to be able to determine the income derived from them.

2.3 Asset holding period requirement

The real estate acquired or developed by the SOCIMI must remain leased for at least three years.¹² The time for which the real estate has been offered for lease will be counted up to a maximum of one year. The three-year holding requirement also applies to shares in entities that qualify as an eligible investment under the regime.

The three-year period starts to run from the time the properties were leased or offered for lease for the first time or, in the case of assets owned by the company before the regime applied, from the start date of the tax period to which the special regime applies.

3. BORROWINGS OF SOCIMIS

Unlike the former regime, the new regime places no restrictions whatsoever on the borrowings that SOCIMIS can incur.¹³

4. THE TAX REGIME FOR SOCIMIS

As noted in the introduction to this Bulletin, the main objective of the reform is to bring the tax regime for SOCIMIS into line with that of the REITs existing in Spain's neighboring countries (such as Dutch FBIs or French SIICs), in order to further the use of SOCIMIS as an investment vehicle in the Spanish real estate market.

Accordingly, after the reform, the key features of this new regime are as follows:

- Like their European counterparts, SOCIMIS will, as a general rule, be subject to 0% corporate income tax on the income they obtain in pursuing their corporate purpose, since they will be taxed in the hands of their shareholders (in the period in which the income is distributed).

SOCIMIS will be subject, however, to a special charge (of 19%) on the amount of income they distribute to the shareholders who own shares equal to 5% or more of the capital stock of the entity, provided that the dividends are exempt for the shareholder or are taxed at a rate below 10%.

¹² The former regime required a holding period of seven years for real estate developed by the SOCIMI.

¹³ The former restriction whereby a SOCIMI's borrowings could not exceed 70% of its assets has therefore been eliminated.

- As regards indirect taxation, the new regime keeps in place the special treatment brought in by Law 11/2009 consisting of a 95% reduction in transfer tax under the “transfers for consideration” heading and in stamp tax on the acquisition of dwellings intended to be used for lease and of land for the development of dwellings to be leased, provided they meet the investment holding requirement.

The direct taxation noted above is described in detail below.

4.1 Corporate income tax treatment of SOCIMIs

As noted above, the reforms introduced into the new special regime for SOCIMIs have been made to bring the tax treatment of SOCIMIs into line with that of the European REITs in Spain’s neighboring countries. In this connection:

- The corporate income tax rate for SOCIMIs has been set at 0%.

However, where the dividends that the SOCIMI distributes to its shareholders that own shares equal to or above 5% are exempt or taxed a rate lower than 10%, the SOCIMI will be subject to a special 19% charge (which will be treated as corporate income tax payable) on the sum distributed as a dividend to those shareholders.¹⁴ If it applies, this special charge must be paid by the SOCIMI within two months after the dividend distribution date.

Likewise, it is established that this special charge will not apply where the payee of the dividends is a SOCIMI or a nonresident REIT, with respect to the shareholders that own shares equal to 5% or more in that entity and are taxed on the dividends at a tax rate of at least 10%.

When it comes to evidencing that the dividends have been taxed at a rate of 10% or higher, the SOCIMI’s shareholders must notify the entity of this circumstance within ten days after the date on which the dividends are paid. If they fail to do so, the requirement will be deemed not met and the special 19% charge will apply.

In the case of unlisted SOCIMIs (i.e. those which are wholly owned by other SOCIMIs or listed REITs), the shareholders can evidence that the dividend taxation requirement has been met by stating that, in light of the composition of their ownership structure and of the applicable legislation when the dividends are distributed, the dividends should be taxed at the entity or at its shareholders at a rate

¹⁴ The special 19% charge will be applied to the income for accounting purposes that is distributed by the SOCIMI in the form of dividends, and not to the proportional part of the tax base relating to that income (this would mean, for example, that even if the special 19% charge applied, it would not be affected by any tax adjustments that might be made to the entity’s income for accounting purposes, such as those relating to the deductibility of finance costs).

of 10%. However, the special 19% charge will only not be applicable if the taxation is actually evidenced once the dividends have been distributed. This special rule is due to the fact that SOCIMIs and listed REITs might not know what the composition of their ownership structure will be when they, in turn, distribute the dividend received from the unlisted SOCIMI.

- If the three-year holding requirement applicable to the entity's leased properties is not met, all the income generated by the properties will be taxed at the standard corporate income tax rate (generally, at 30%) in all of the tax periods in which the special regime has been applied.

The same rule will apply where the holding requirement is not met in the case of shares or units, as well as where the company becomes subject to a different corporate income tax regime before the end of a three-year period.

4.2 Withholding tax treatment applicable to the dividends distributed by SOCIMIs

The dividends distributed by SOCIMIs will be subject to the standard withholding tax treatment that applies, with certain exceptions. For these purposes:

- The dividends distributed to Spanish tax resident shareholders (individuals or entities) or to nonresident shareholders with a permanent establishment in Spain will be subject to a 21% withholding tax.
- The dividends distributed to non-Spanish residents will be subject to the standard withholding rules that apply under Spanish domestic law and/or under the applicable tax treaties or EU Directives. No withholdings will be required from the dividends distributed to non-Spanish resident REITs that originate from income taxed at 0% at the SOCIMI.¹⁵

4.3 Tax treatment applicable to the SOCIMI's shareholders

4.3.1 Dividends

The dividends distributed out of income or reserves with respect to which the special tax regime has been applied to Spanish tax resident shareholders (individuals or entities) or to the nonresident shareholders (with or without a permanent establishment) will be included in the applicable tax base under the standard rules for each tax.

¹⁵ In other words, according to the strict wording of the law, the only dividends that will not be subject to withholding tax in Spain under the special SOCIMI regime will be those distributed by SOCIMIs to nonresident REITs, the shareholders of which own shares equal to at least 5% in the REIT and are taxed at a tax rate of at least 10%.

In these cases, however:

- The domestic double taxation tax credit will not be available for the dividends obtained by Spanish entities or by nonresident entities established in Spain.
- The exemption on €1,500 per year will not be available for the dividends received by Spanish resident individuals or by nonresidents without a permanent establishment in Spain.

4.3.2 Gains obtained on the transfer or redemption of shares in SOCIMIs

The tax treatment of these kinds of gains will also depend on the nature of the shareholder of the SOCIMI, as follows:

- Where the shareholder is a corporate income taxpayer or a nonresident income taxpayer with a permanent establishment in Spain, the gains obtained on their shares in the SOCIMI will be included in the tax base for these taxes, and will be taxed at the rate applicable to them (generally, at 30%), and the domestic double taxation tax credit for reserves originating from income obtained in periods in which the special regime has been applied will not apply in this case.
- Where the payee is a personal income taxpayer, the gains obtained on their shares in the SOCIMI will be taxed under the standard rules on that tax.
- Where the payee is a nonresident not established in Spain, the gain obtained will be taxed at 21% under the standard nonresident income tax rules (they will not be able to apply the exemption for transfers of securities or redemptions of shares in mutual funds on Spanish official secondary markets) or, as the case may be, under the provisions of the applicable tax treaty.

4.4 Start of application of the special regime: entry rule

The following special rules are established for companies that have been taxed under the standard regime and that begin to be taxed under the special regime for SOCIMIs:

- Any tax adjustments yet to be reversed in the corporate income tax base will be included in the SOCIMI's tax base in accordance with the standard regime and the standard tax rate.
- Any tax loss carryforwards can be offset against the income obtained by the SOCIMI that are taxed under the standard regime.

The same holds true for any tax credits yet to be used, which can be used to reduce any gross tax payable which arises under the rules in the standard regime for the tax.

- If a gain is obtained on the transfer of properties owned before the special SOCIMI regime was applied, there will be a rebuttable presumption that the gain was generated on a straight-line basis over the period in which the transferred property

was owned. The portion of that gain attributable to prior tax periods will be taxed at the tax rate and under the tax regime that applied before the special tax regime came into effect. This same rule will apply to gains on the transfer of shares in other companies.

- Lastly, for the purposes of applying the tax neutrality regime, the new regime maintains the presumption that valid economic reasons exist in restructuring transactions that are necessary to create one or more companies that are capable of applying the special SOCIMI regime or to adapt pre-existing companies for the same reason.

4.5 End of the application of the special regime: exit rule

With regard to SOCIMIs exiting the special regime, a single special rule is established, on similar terms to those noted above on the entry rule, that there will be a rebuttable presumption that the gain on the transfer of a property was generated on a straight-line basis over the entire period of time in which it was owned, and will be taxed under the applicable tax regime in each period (standard regime or SOCIMI regime).

This same rule will apply equally to gains on the transfer of shares in other companies.

5. MAKING THE ELECTION TO APPLY THE SPECIAL SOCIMI REGIME

5.1 Formalizing the election to apply the regime

The election to apply the special tax regime must be (i) adopted by the shareholders' meeting, and (ii) notified to the tax office of the State Tax Agency pertaining to the entity's registered office, before the three-month period preceding the end of the tax period to which the special regime will apply. Notification of the election after the start of the above-mentioned three-month period will preclude application of the special regime in that tax period.

Once the election has been notified in a timely manner, the regime will be applicable in the first fiscal year ending after the notification and in successive years until the taxpayer waives the application of the regime. Unlike what happened under the former regime, where it is the first tax period in which the special SOCIMI tax regime is being applied, the entity is not required to be listed on a regulated market from the date of the election to apply the regime (i.e. we understand that the listing requirement can be met in the two-year transitional period that we discuss in the next section).

The special tax regime is incompatible with the regime for consolidated tax groups and with any other special regimes regulated in Title VII of the Revised Corporate Income Tax Law, except for:

- The special tax neutrality regime (special regime for mergers, spin-offs, asset contributions and securities exchanges).

- The special international fiscal transparency regime.
- The special regime for certain finance lease agreements.

5.2 Transitional period for fulfilling the requirements under the regime

Transitional provision 1 of Law 11/2009 grants a period of two years for companies electing to apply this regime to meet the requirements set forth in the law. This transitional provision has not been amended, so the transitional period will also apply for new SOCIMIs. Regarding the practical implications of this transitional provision, we consider that a variety of complex scenarios could arise that should be analyzed on a case-by-case basis.

For example, during the two-year transitional period, a listed SOCIMI could invest in real estate through different tiers of corporate vehicles, provided that, before the two-year period has expired, its corporate or investment structure has been adapted to the requirements established in the law (e.g. direct investment in real estate or through a single tier of corporate vehicles). Also, if the future SOCIMI is the parent of a consolidated tax group, it will have to be taxed on an individual basis if it intends to apply the SOCIMI regime but, at the same time, the question arises of whether the investees would also be able to apply the SOCIMI regime even if they do not yet meet the requirements for it.

Other particular cases could be, as noted above, the fulfillment of the requirement to be listed on regulated markets (i.e. unlisted companies that begin to apply the regime with a view to going public before the two-year period has elapsed), or companies not yet owned by a SOCIMI or a nonresident REIT but which start to apply the regime if they have well-founded expectations of being acquired by one of these investment vehicles before the two-year period has expired following the election to apply the regime.

The provisional application of the regime means that if, in the end, the requirements are not met within the established time period, the company must pay over the difference between the tax that would have been payable under the standard regime and that actually paid under the special SOCIMI regime, along with any applicable interest, surcharges and penalties. It could logically be expected for penalties to be imposed where the company has applied the regime without having reasonable expectations of meeting the requirements. This issue may be essential in a context like the present one where there are difficulties securing financing in the markets.

With regard to the SOCIMI's shareholders that are resident individuals or nonresidents without a permanent establishment, they may apply the special regime if the SOCIMI meets the requirements established in the law when the shareholders file their personal income tax or nonresident income tax returns. If the company were to meet the requirements later but within the two-year transitional period, the shareholders may apply for correction of their returns. This transitional regime envisaged in the former regime is less relevant with the new regime applicable to the SOCIMI's shareholders who are personal income taxpayers, except as regards the dividend exemption up to €1,500.

In the case of shareholders that are corporate income taxpayers or nonresident income taxpayers with a permanent establishment, the transitional regime works in the opposite way: they must apply the SOCIMI regime in any case when filing their returns, and if the SOCIMI does not meet the necessary requirements before the end of the two-year period, they will be able to correct their returns.

6. REPORTING REQUIREMENTS FOR SOCIMIS

Companies that have elected to apply the special tax regime are required to disclose certain information in the notes to their financial statements. This information must be included in a special section of the notes entitled “Reporting requirements derived from SOCIMI status, Law 11/2009”. It would appear that these disclosure obligations also apply to companies that apply the special tax regime and are not SOCIMIs (i.e. unlisted SOCIMIs).

The information to be included in the notes to the financial statements is very detailed and covers practically all the aspects and parameters that need to be identified in order to be able to correctly apply the special tax regime contained in the law, such as:

- Reserves deriving from years preceding the year of application of the special regime.
- Reserves deriving from years in which the special tax regime has been applied, distinguishing the portion that derives from income subject to the 0% charge, or the 19% charge, from any income that has been taxed at the standard tax rate (generally 30%).
- Dividends distributed out of the income for each year, distinguishing the portion that derives from income subject to the 0% or 19% charge, from any income that has been taxed at the standard tax rate.
- Where dividends are distributed out of reserves, the entity must specify the year from which the used reserve originates and whether the dividends have been taxed at the 0%, or 19% charge or at the standard rate (30% or such rate as may apply).
- Date of the resolution to distribute the dividends.
- Date of acquisition of the real estate and shares eligible for the special SOCIMI regime.
- Identification of the assets included to calculate the 80% of assets requirement.
- Reserves used for purposes other than the distribution of dividends and the offset of losses.

These disclosures must be made in the notes to the financial statements as long as the entity has the reserves referred to above on its balance sheet.

Apart from the information that is to be included in the notes to the financial statements, the company must be able to furnish, at the tax authorities' request, information on the allocation of expenses among the different sources of income, which is necessary to the extent that there will be income subject to different tax rates.

The failure to fulfill these disclosure obligations may lead to the forfeiture of the special tax regime if there has been a material breach. The law establishes specific fines for omitting data or for providing inexact or false data, which range from €1,500 to €5,000 for the omission of an item or a set of data, and which amount to €30,000 if the breach refers to the allocation of expenses among the different sources of income.

7. FORFEITURE OF THE SPECIAL TAX REGIME

The entities applying this special regime will begin to be taxed under the standard regime in the same tax period in which any of the following circumstances arises:

- Exclusion from trading on regulated markets or on a multilateral trading system.
- Substantial breach of the reporting requirements set forth in the law governing SOCIMIs.
- Absence of a resolution to distribute and pay, even partially, the dividends in accordance with the law. In this case, the regime is forfeited in the year to which the income to be distributed relates.
- Waiver of application of the special regime.
- Breach of any other requirement established in the law, unless the reason for the breach is remedied in the following year. The provisions established in this section do not apply to the breach of the real estate holding period, in which case the law does not provide for the forfeiture of the regime but rather the taxation of the income under the standard regime.

After forfeiting the special regime, the company may not elect to apply it again in the three years (previously five years) following the end of the last tax period in which it was applied.

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