MORAIS LEITÃO
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WHY IBERIA? IBERIAN INVESTMENT BRIEFING

Investment Vehicles in Portugal – news and trends

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- **1. LIMITED LIABILITY COMPANIES**
- **OVERVIEW**

- Limited liability companies are the most common vehicles in Portugal to structure real estate investments
- Limited liability companies by quotas (*sociedades por quotas* – aka "**SQ**") and joint stock companies - limited liability companies by shares (*sociedades anónimas* – aka "**SA**") are the most used structures; *sociedades em comandita* also exist but are not used in practice
- Generally characterized by limited liability (shareholders are not liable for company's debts) and asset partitioning (company is not liable for shareholders' debts)
- Generally straightforward to structure, incorporate and register
- Non-regulated structures (not subject to authorization) **but beware of AIFMD when doing fundraising outside of the "regulated" realm**

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- **2. PRIVATE EQUITY FUNDS AND PRIVATE EQUITY COMPANIES**

- **OVERVIEW (1/2)**

- **Legal framework**: Law 18/2015 of 4.03

- **Alternative structures**:
  - private equity funds = *Fundos de capital de risco (no legal personality)* – require management by AIFMs
  - private equity companies = *Sociedades de capital de risco (corporate form equivalent to joint stock company)*

- **Private equity investment scope:** *"acquisition for a limited time period of interests in companies with high growth prospects as a mean to benefit from the increase of value of the latter"*

- **Regulated structures**: subject to prior registration before Portuguese Securities Market Commission (CMVM). Managers subject to reporting obligations and prudential supervision

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- **2. PRIVATE EQUITY FUNDS AND PRIVATE EQUITY COMPANIES**
- **OVERVIEW (2/2)**

- **Minimum share capital**:
  (i) private equity funds = €1,000,000 represented by investment units
  (ii) private equity companies = €125,000

- **Eligible assets**: equity or debt instruments issued by companies (Portuguese or foreign). Private equity funds are not allowed to invest directly in real estate assets

- **Eligible indirect real estate investments**: companies developing real estate projects, *however* projects must have a value-add component and not be merely passive (v.g. private equity funds cannot have a "buy-to-rent" strategy). Operating real estate based businesses (v.g. hospitality, student housing) may generally fit into the latter category however, it is a regulatory grey area with high scrutiny by the CMVM

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- **3. REAL ESTATE INVESTMENT UNDERTAKINGS**

- **OVERVIEW (1/2)**

- **Legal framework**: Law 16/2015, of 24.02 REIU are AIFs – Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD) and Regulation 231/2013 apply

- **Minimum share capital**: €5,000,000

- **Alternative structures**:

  (i) Contractual based REIUs, i.e. real estate funds (*fundos de investimento imobiliário*), with fixed share capital (closed-ended) or variable share capital (open-end)
  (ii) Corporate REIUs, i.e. real estate companies (*sociedades de investimento imobiliário*), with fixed share capital (SICAFIs) or variable share capital (SICAVIs) - features board of directors and audit body. Generality of company law provisions not applicable to it

- **Subscription type:** most of the REIUs are of private subscription

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- **3. REAL ESTATE INVESTMENT UNDERTAKINGS**

- **OVERVIEW (2/2)**

- **Management of REIUs**:
  (i) Contractual based REIUs: always managed by AIFMs
  (ii) Corporate REIUs: may be self managed or externally managed by an external AIFM

- **Regulated structures:** Must be authorized by CMVM. Managers subject to reporting obligations and prudential supervision

- **Eligible assets of REIUs:**
  - Real Estate (urban buildings and condo units); in some instances, authorized by CMVM, investment in rural properties is admissible (the so called "special REIUs")
  - Property rights, surface rights or rights with equivalent content
  - Co-ownership only admissible in limited situations
  - Shareholdings in real estate companies (subject to strict requirements)
  - Investment units in other REIUs
  - Cannot invest in real estate assets which have encumbrances or charges which make its transfer excessively difficult

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- **4. REITS**
- **OVERVIEW (1/2)**

- **Legal framework**: Decree-law 19/2019 of 28.01

- **Concept:** *Sociedades de Investimento e Gestão Imobiliária (SIGI).* The regime attempts to replicate the successful real estate investment trust (REIT) model; akin to Spanish SOCIMIs

- **Minimum share capital / corporate structure**: joint stock company (SA) where the governance model requires a supervisory board and a statutory auditor, with a minimum share capital equivalent to €5,000,000

- **Main corporate purpose**: (i) acquisition of property ownership rights, surface rights or other equivalent rights for leasing purposes over real estate; (ii) acquisition of equity shareholding interests in other SIGIs or in companies with registered office in the EU or EEA (with cooperation mechanisms in the taxation field equivalent to the EU) that fulfill certain requirements applicable to SIGIs (e.g.., portfolio, dividend policy and corporate purpose); (iii) acquisition of shares or units in REIUs, with an income distribution policy similar to the one required for the SIGIs

- **Mandatory admission to trading**:
  (i) listed vehicle in a regulated market located in PT, in the EU or in the EEC OR in a multilateral facility
  (ii) minimum free float to ensure liquidity for small investors : 20% to 25% of the shares representing SIGIs' share capital must be held by investors which hold shareholdings corresponding to less than 2% of the voting rights

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- **4. REITS**
- **OVERVIEW (2/2)**

- **Mandatory income distribution:** must distribute at least
  (i) 90% of its profits resulting from the payment of dividends deriving from holdings in other investment vehicles
  (ii) 75% of remaining profits
  within a 9-month period following each fiscal year

- **Mandatory reinvestment**: 75% of the net income proceedings from the sale of assets under SIGIs corporate activity shall be reinvested in other assets within three years from said sale

- **Leverage threshold:** indebtedness may not exceed at all times 60% of SIGIs total asset value

- **Eligible real estate assets**: (i) urban properties; (ii) plots of land developed and qualified as urban properties or as condominium units three years post acquisition; (iii) condominium units; (iv) rural properties capable of commercial operation.

- **Restrictions to asset composition**: (i) rights over real estate and shareholdings shall represent at least 80% of the total value of SIGIs assets; (ii) rights over properties for lease or other equivalent forms of use must represent at least 75% of the total value of SIGIs' assets

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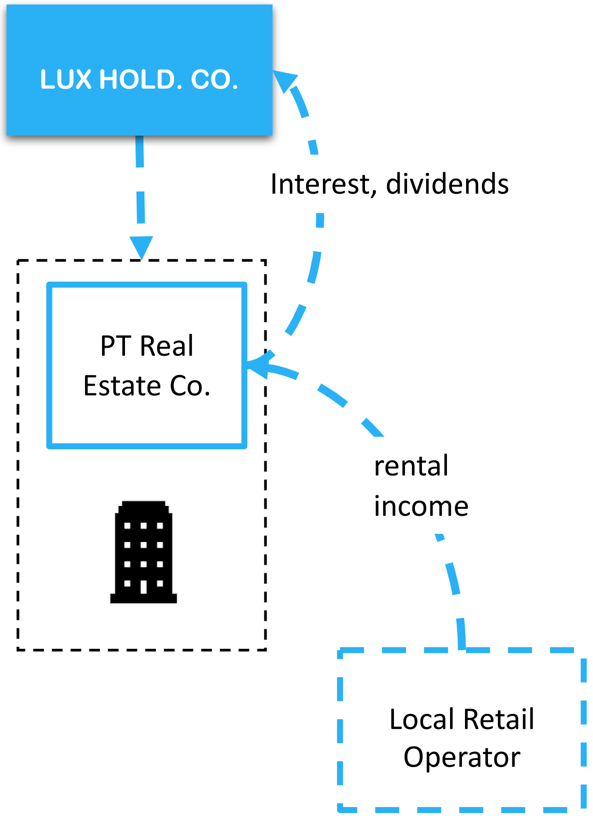
- 5. TAX ASPECTS – WIDELY USED INVESTMENT STRUCTURES
  - A. INVESTING THROUGH A LUX CO. AND A PORTUGUESE LLC

- PT Co. taxed at 21% (normal CIT rate) on worldwide income, but subject to additional Municipal Surcharge (normally 1,5% of taxable income) and State Surcharge (3% from 1,5 to 7,5 M€ of taxable profits; 5% from 7,5 to 35M€; 9% above 35M€)
- Interest limitation rule in principle not applicable – no "exceeding borrowing costs"
- No local WHT on interest payments from retail operator
- Loan to PT Co. subject to Stamp tax unless it qualifies as shareholders loan
- Interest payment to Lux Hold Co. subject to WHT at 10% unless conditions of Interest and Royalties Directive (2003/49/CE) apply; if so, WHT exemption kicks in after two years
- Parent-Subsidiary Directive (PSD) may apply to dividends, but substance at the level of Lux Hold Co. is key to exemption (PSD anti-abuse rule). Can ATAD III (Unshell Directive) be used as safe harbour already?
- However, there is a special participation exemption in the Portugal/Lux tax treaty for shareholdings above 25% which may fall outside the scope of antiabuse provisions of the PSD, but beware of MLI rules, namely PPT
- Exit on sale of shares of PT Co. not taxed under Portugal/Lux DTT, but again beware of MLI rules, namely PPT



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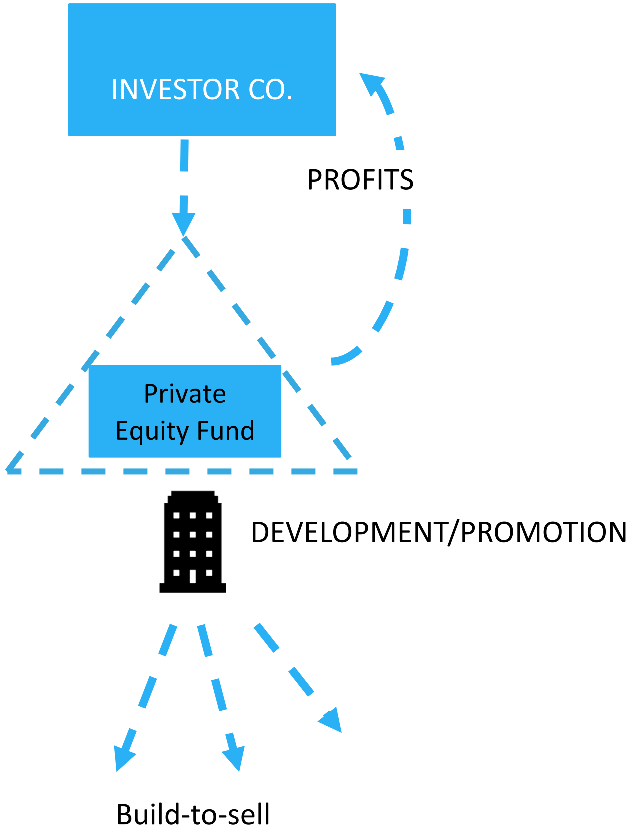
- 5. TAX ASPECTS – WIDELY USED INVESTMENT STRUCTURES
- B. SETTING UP A PRIVATE EQUITY FUND ("FUNDO DE CAPITAL DE RISCO")

- In the context of real estate, private equity funds are only allowed to invest in new development & promotion and not on mere leasing activities
- Contrary to regulated Real Estate Investment vehicles (funds or companies, as explained), the only have a "fund" form
- They enjoy a special tax regime which foresees a general exemption for all types of income
- No WHT on distributions to foreign entities, unless located in blacklisted territories or owned in more than 25% by resident entities
- In principle, no taxation of capital gains on sale or redemption of units by non-resident entities
- Widely used for residential developments as income is generated through sale of residential units (build-to-sell and not build-to-rent)
- Not eligibile for Parent/Sub. exemption (ie., in principle, dividends paid to EU companies are taxed at domicilie), but exemption in Portugal may perhaps be matched with exemptions applicable to foreign vehicles that can invest in private equity funds such as a Lux SICAR; in principle not caught by anti-hybrid arsenal



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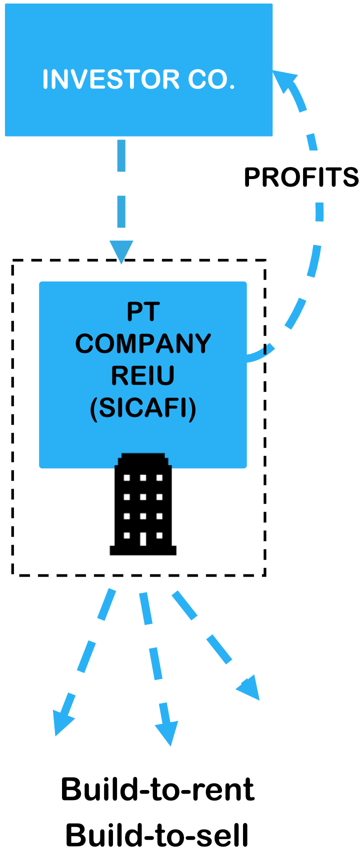
- 5. TAX ASPECTS – WIDELY USED INVESTMENT STRUCTURES
- C. INVESTING THROUGH A CLOSED-ENDED COMPANY REIU ("SICAFI")

- SICAFIs are regulated investment companies (as seen previously) which have a mixed tax status
- Special tax regime but not general exemption for all types of income
- Very comprehensive exemption encompassing income from capital, rents and capital gains
  - Letting of spaces in shopping centres, even with ancillary services – EXEMPT
  - Assignment of the exploitation of a hotel – NOT EXEMPT
- 10% withholding or autonomous tax on outbound income received by non-residents with no PE in Portugal (distributions, redemptions, sales)
- No withholding on distributions to resident entities; thus, 10% tax may be in contravention with recent TJEU jurisprudence [ie. Allianzgi-Fonds Aevn, Case C-545/19)]
- For purposes of applying this special regime, the income distributed by a SICAFI is deemed to be *real estate income;* thus, in the country of residence of the investor income may not be qualified as dividend, ie., participation exemption relief may not be available.
- However, in the Portugal/Luxembourg tax treaty income from Portuguese-situs real estate is exempt from tax in Luxembourg when received by a resident company
- SIGIs (listed real estate investment companies) enjoy the same regime but capital gains from the sale of property shall be exempt only when that property has been owned and leased by the SIGI for at least three years.



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