REAL ESTATE INVESTMENT TRUSTS

Luxembourg

LEXOLOGY
Getting The Deal Through

Real Estate Investment Trusts

Quick reference guide enabling side-by-side comparison of local insights, including into the definition, advantages and disadvantages of REITS, and market climate; organisational and governance considerations; key regulatory requirements, including for publicly traded REITS; categories of REIT and relevant property sectors; eligible investors; and recent trends.

Generated 08 September 2022

Table of contents

Contributors

Luxembourg

Frank van Kuijk
frank.van.kuijk@loyensloeff.com
Loyens & Loeff

Tom Hamen
Tom.Hamen@loyensloeff.com
Loyens & Loeff

PRELIMINARY CONSIDERATIONS

Definition

What constitutes a real estate investment trust (REIT) in your jurisdiction?

A real estate investment trust (REIT) is a set of tax or regulatory rules adopted by entities investing into domestic or foreign real property. For tax purposes, the rules provide for quasi-tax neutrality at the REIT level combined with mandatory distributions of the real estate-related income subject to a withholding tax in the country in which the REIT is established. Luxembourg law does currently not provide for such a set of rules.

Despite the absence of a bespoken regime, Luxembourg offers a wide range of other legal products to initiators, promoters or sponsors in the real estate investment business. Even though these rules are not specifically tailored to real estate investments, they are suitable to acquire, develop and hold Luxembourgian or foreign real estate property.

For a number of commercial reasons, foreign REITs often opt for Luxembourgian acquisition or holding vehicles that then acquire real estate assets. These acquisition vehicles are organised as private limited liability companies and are regular taxpayers in Luxembourg. When properly structured, they should not be subject to a material tax burden in Luxembourg.

In specific cases foreign REITs prefer to own real property assets through a Luxembourg specialised investment fund (SIF). A SIF is subject to approval by the Luxembourg's financial regulator (CSSF). As the approval process of a SIF is time consuming, entities are frequently launched under the reserved alternative investment fund (RAIF) regime and transformed into SIFs at a later stage. This considerably speeds up the launching process. A RAIF is not subject to approval by the CSSF. The CSSF oversees only the manager of the RAIF. The SIF and the RAIF can be organised as capital companies, limited partnerships, or contractual funds. They are subject to risk diversification rules (ie, exemptions, they shall not invest more than 30 per cent of their assets or commitments in securities of the same kind issued by the same issuer). Under the default tax regime applicable to SIFs and RAIFs, a mere 1 basis point subscription tax is levied at the entity level on the basis of its assets.

A SIF and a RAIF can also be used as an investor-facing real estate fund. Luxembourgian investor-facing real estate funds do not, however, often adopt SIF or RAIF regimes and are by default organised as an unregulated special limited partnership (SCSp). Such special limited partnerships qualify as alternative investment funds (AIFs). AIFs appoint an authorised European Union or European Economic Area (host) manager to strengthen their credibility. This will then facilitate their distribution within the EEA. Funds initiated by emerging managers and managers that have no EU footprint choose to run their funds directly from their home jurisdiction. The distribution of such setups within the EEA is more challenging and may be impossible for specific targeted jurisdictions.

As Luxembourg does not provide for a REIT regime, while being a key jurisdiction for real estate fund initiators, this chapter's questions are, as much as possible, answered with that profile in mind and only address the key attention points of a default investment structure.

Law stated - 17 August 2022

Pros and cons of REITs

Why were REITs created in your jurisdiction? What are the advantages and disadvantages of using REIT structures in your jurisdiction?

This question is not relevant, as Luxembourgian legislation does not provide for a real estate investment trust (REIT) regime.

Law stated - 17 August 2022

Market climate

How would you describe the state of the REIT market in your jurisdiction? How common are REITs in practice?

Despite not having a REIT regime, Luxembourg is a key jurisdiction for initiators that seek to set up European-based private real estate funds. Luxembourgian fund structures can rely on a high reputation among international investors. The diversity in legal forms and fund regimes allows Luxembourgian investment structures to accommodate legal, tax and regulatory concerns arising in the jurisdictions where the real estate is situated.

Law stated - 17 August 2022

ORGANISATION

Choice of entity and organisational requirements

What forms of entity are used for REITs and what basic organisational requirements apply?

Luxembourgian real estate funds are organised as general or limited partnerships. The Luxembourgian special limited partnership is the default legal form for real estate funds. Special limited partnerships closely resemble Anglo-Saxon style limited partnerships and benefit from a wide recognition by international investors and fund managers. The special limited partnership can be formed under a private seal and requires a Luxembourgian general partner. The general partner is organised as a private limited liability company and must be established in front of a notary who, among others, verifies whether the minimum capital amount (€12,000 or the equivalent in another currency) was funded. The incorporation deed – or an excerpt thereof for the special limited partnership – will thereafter be filed with the Luxembourg Register of Commerce and Companies (RCS) and published in the Luxembourg official electronic platform of central publication in respect of companies and associations (RESA).

Law stated - 17 August 2022

Partnerships as subsidiaries

Are REITs permitted to have partnerships as subsidiaries in your jurisdiction?

Subject to the requirement for specialised investment funds (SIFs) and reserved alternative investment funds (RAIFs) to generally abide by specific risk diversification criteria (ie, they should not invest more than 30 per cent of their assets or commitments in securities of the same kind issued by the same issuer), Luxembourg real estate investment vehicles can generally have Luxembourg or foreign partnerships as subsidiaries.

Law stated - 17 August 2022

REITs as subsidiaries

Are partnerships permitted to have REITs as subsidiaries in your jurisdiction?

Yes, Luxembourg-based (special) limited partnerships can invest into other Luxembourgian real estate investment vehicles or foreign REITs, which is common practice.

Law stated - 17 August 2022

Governance

What governance issues should the boards of REITs in your jurisdiction be aware of? How are these issues navigated in practice?

An alternative investment fund (AIF) can generally be defined as a collective investment vehicle that raises capital from a number of investors with a view to investing it in accordance with a defined investment policy. An AIF shall appoint an internal or external fund manager. In order to satisfy distribution and credibility, most sizable AIFs appoint a European Economic Area-based authorised fund manager.

The fund manager is a third-party service provider referred to as a 'host AIFM'. It enters into an agreement with the fund's initiator to delegate portfolio management and offer real estate investment advice. Fund managers are most inclined towards that model since it allows higher levels of control and is more efficient. Whether that model is possible depends on the jurisdiction of residence of the initiator and the type of regulatory oversight that applies.

Law stated - 17 August 2022

KEY REGULATORY REQUIREMENTS

Sources of income

What are the basic source-of-income requirements for a REIT?

Contrary to classic real estate investment trust (REIT) regimes, Luxembourgian real estate funds are not subject to source-of-income requirements other than the risk diversification rules applicable for reserved alternative investment funds (RAIFs) and specialised investment funds (SIFs) (ie, exemptions, they shall not invest more than 30 per cent of their assets or commitments in securities of the same kind issued by the same issuer).

Law stated - 17 August 2022

Asset composition

What are the basic asset composition requirements for a REIT?

Luxembourgian real estate funds are not subject to asset composition requirements other than the risk diversification rules applicable for RAIFs and SIFs only (ie, exemptions, they shall not invest more than 30 per cent of their assets or commitments in securities of the same kind issued by the same issuer).

Law stated - 17 August 2022

Distributions

What are the basic distribution requirements for a REIT?

SIFs, RAIFs and alternative investment funds (AIFs) used in Luxembourg for real estate funds are not subject to distribution requirements.

Law stated - 17 August 2022

Consequences of non-compliance

What happens if a REIT fails to meet the basic regulatory requirements? Is relief available if a company fails to meet any of these requirements?

This question is not relevant, as Luxembourg does not provide for a REIT regime.

Law stated - 17 August 2022

Compliance best practices

What best practices should be considered to ensure compliance with the key regulatory requirements for REITs in your jurisdiction?

Luxembourgian real estate funds should have their central administration in Luxembourg and should generally be able to demonstrate that their board is fit and proper while having sufficient Luxembourg footprint.

Most real estate funds are managed by an external 'host AIFM'. A Luxembourg AIFM is subject to a thorough authorisation process, which, among others, focuses on the team effectively conducting the business, the shareholder structure, renumeration policies and (sub) delegation arrangements. As the fund initiator generally hires the 'host AIFM' and given that authorisation from Luxembourg's financial regulator (CSSF) and oversight are focused on the Luxembourgian AIFM, the initiator is not directly impacted.

The AIFM is, among others, in charge of the annual reporting process and disclosures to investors.

Law stated - 17 August 2022

Public REITs – regulatory treatment

Are the requirements for a publicly traded REIT raising capital different from those imposed on private REITs or public non-REIT companies?

This question is not relevant, as Luxembourg does not provide for a real estate investment trust (REIT) regime.

Law stated - 17 August 2022

Public REITs – ongoing requirements

What are the ongoing securities and disclosure requirements for publicly traded REITs?

This question is not relevant, as Luxembourg does not provide for a real estate investment trust (REIT) regime.

Law stated - 17 August 2022

Public REITs – listing rules

Do the stock exchanges in your jurisdiction have any special rules that do not apply to unlisted or private REITs?

This question is not relevant, as Luxembourg does not provide for a real estate investment trust (REIT) regime.

Law stated - 17 August 2022

SCOPE OF ACTIVITIES AND INVESTMENTS

Categories of REIT and relevant property sectors

What kinds of REIT are available in your jurisdiction? In which real property sectors are REITs used?

The Luxembourg toolbox allows initiators to invest in all real estate asset classes and categories, without being limited by a specific legal or tax regime. The entities and regimes described here above are tailored to invest in all types of real property sectors, be it residential, office, retail, logistic or student housing.

Law stated - 17 August 2022

Special rules

Are there any special rules for different types of REIT?

Luxembourg law does not provide for different kinds of REITs , as it does not provide for a REIT regime.

Law stated - 17 August 2022

Eligible investment property

What assets are treated as qualifying real property under the REIT rules in your jurisdiction? Can REITs located within your jurisdiction invest in real property outside your jurisdiction?

For purposes of the entities used to form Luxembourgian real estate funds (ie, SIFs, RAIFs, etc) the notion of qualifying real property does not exist. Moreover, these entities and regime are well suited to invest both in Luxembourg-based and foreign real property. This being said, the Luxembourg Budget Bill 2021 has made investments into Luxembourg-based real property more onerous for certain specific Luxembourgian fund vehicles. In fact, certain tax-exempt investment vehicles will be subject to a new real estate tax, levied at a flat rate of 20 per cent, on income derived from real estate assets situated in Luxembourg.

Law stated - 17 August 2022

Permitted activities

Are REITs in your jurisdiction allowed to engage in any ancillary non-investment activities, such as real property management and development?

Since no specific REIT regime exists, the possibility for ancillary non-investment activities to be performed, is to be examined under the laws applicable to the investment vehicle chosen for a real estate fund. However, there are no limitations applicable to Luxembourgian investment vehicles. Property management and development activities are carried out through special purpose entities, which may or may not be controlled by the investment vehicle.

Depending on the nature of the ancillary non-investment activity, specific licensing requirements either in Luxembourg or abroad may apply.

Law stated - 17 August 2022

Eligible investors

Who may invest in REITs in your jurisdiction? What types of investor do they typically attract? Are there any restrictions on foreign investors?

Luxembourgian real estate investment vehicles, whether they are formed as regulated or non-regulated vehicles, generally obtain their funding from institutional, professional or sophisticated private investors. However, the SIF and RAIF legislations restrict the offering of an interest in a SIF or RAIF to three 'well-informed' investor groups that are deemed to be able to adequately assess the risks associated with an investment in this type of vehicle. Investors that invest a minimum amount of €125,000 qualify in any case as 'well-informed'. For SIFs and RAIFs, these conditions apply neither to the general partners of limited partnerships and of partnerships limited by shares, nor to their managers or any other persons involved in their management. In addition, the distribution of Luxembourg-based Alternative Investment Fund Managers Directive (AIFMD) compliant funds within the European Union on the basis of the AIFMD distribution passport is restricted to professional investors in the sense of Annex II of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments (MiFID II).

Law stated - 17 August 2022

Transactions with non-REITs

Are there any special considerations when REITs negotiate purchases and sales or leases of investment real estate with non-REITs?

There are no such special considerations from a Luxembourgian perspective.

Law stated - 17 August 2022

Acquiring non-REIT corporations

Are there any special considerations when REITs acquire non-REIT corporations?

There are no special considerations from a Luxembourgian perspective.

Law stated - 17 August 2022

UPDATE AND TRENDS

Recent developments

What have been the most noteworthy recent developments affecting REITs in your jurisdiction, including any significant legal or regulatory changes and commercial trends?

The most noteworthy change was the signing of a new double tax treaty between the United Kingdom and Luxembourg on 7 June 2022. The treaty includes, among others:

- A 'property-right clause' for capital gains on shares holding, directly or indirectly, immovable property. The treaty, therefore, allocates taxing rights to both states in respect of a gain realised in the event of a sale of shares or corporate interests in 'property-rich' entity.
- Moreover, with respect to dividends, the treaty provides for a full tax exemption in the source country provided the recipient is the beneficial owner of the payments. The treaty does, however, not accommodate a withholding tax

exemption for distributions by investment vehicles that annually distribute most of their income and whose income or capital gains derived from real estate are tax exempt. The treaty permits a 15 per cent withholding tax rate on dividends distributed by such investment vehicles, unless the beneficiary is a recognised pension fund.

- Finally, the treaty allows collective investment vehicles set up in the form of a body corporate for tax purposes (eg, a Luxembourg SCA, SA or Sàrl) to qualify as a resident for purposes of the treaty to the extent that the beneficial interests in the vehicle are owned by equivalent beneficiaries.

Law stated - 17 August 2022

Jurisdictions

India	AZB & Partners
Japan	Mori Hamada & Matsumoto
Luxembourg	Loyens & Loeff
Nigeria	Banwo & Ighodalo
USA	Sullivan & Worcester LLP