LOYENS LOEFF

FEBRUARY 2022

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Moving on from 2021 to 2022

In 2021, the property law reform was by far the most important news in Belgian real estate legislation. Since the law largely took effect for the future, we will only see its effects gradually.

We mentioned another important change in 2021 in our last issue of the Real Estate Update: the EU Taxonomy. The first Delegated Act on sustainable activities for climate change adaptation and mitigation objectives was published in the EU Official Journal on 9 December 2021. In the course of 2022, this regulation will be further elaborated.

On the tax side, a key development is the temporary reduction of the VAT rate for demolition/reconstruction, which should already come to an end this year. But there is talk of an extension.

Furthermore, in September 2021, Belgium and France concluded a new tax treaty which might enter into force by 1 January 2023.

What is going to be the most important news of 2022? That seems difficult to predict.

We know that in the framework of the reform of the Civil Code, a new series of legal provisions on contract law is being worked on. This reform will have an impact on all contracts, including those relating to the real estate sector.

Furthermore, taxation remains a subject that must be constantly monitored. The budget deficits for the support measures of the past two years give little or no margin for tax reductions or incentives. In 2021, the Flemish Government has for example neutralised the budgetary impact of a reduction of transfer taxes for the acquisition of a first and only dwelling with an increase of the applicable rate for all other acquisitions.

But perhaps the most important tax reform will come from the European Union. On 22 December 2021, the European Commission published a proposal for a Directive “laying down rules to prevent the misuse of shell entities for improper tax purposes and amending Directive 2011/16/EU.” This Directive is also known as ATAD 3. In the main article of this issue of the Real Estate Update, you can read how the measure that would only enter into force on 1 January 2024 might already have had an impact on current investment decisions.

We wish you a pleasant read.

Ariane Brohez and Christophe Laurent

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ATAD 3 – what to expect for the real estate sector?

The European Commission has deposited a proposal for a Council Directive laying down rules to prevent the misuse of European shell entities for tax purposes (ATAD 3). This proposal is one of the initiatives to improve the current tax system with a focus on ensuring fair and effective taxation. If adopted, ATAD 3 might have immediate consequences as it proposes applying a 'reference period' of the two preceding years to assess substance. Since the proposal foresees 1 January 2024 as the date of entry into force, this reference period may already have started as of 1 January 2022.

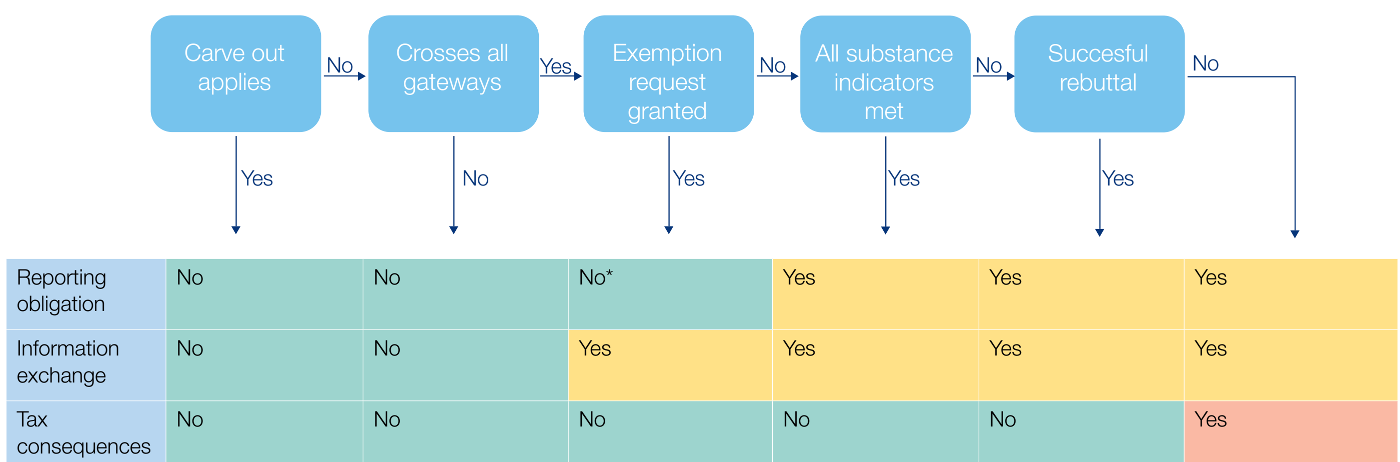
Below we describe this proposal in more details and from a real estate sector perspective.

ATAD 3 in a nutshell

What is the general purpose?

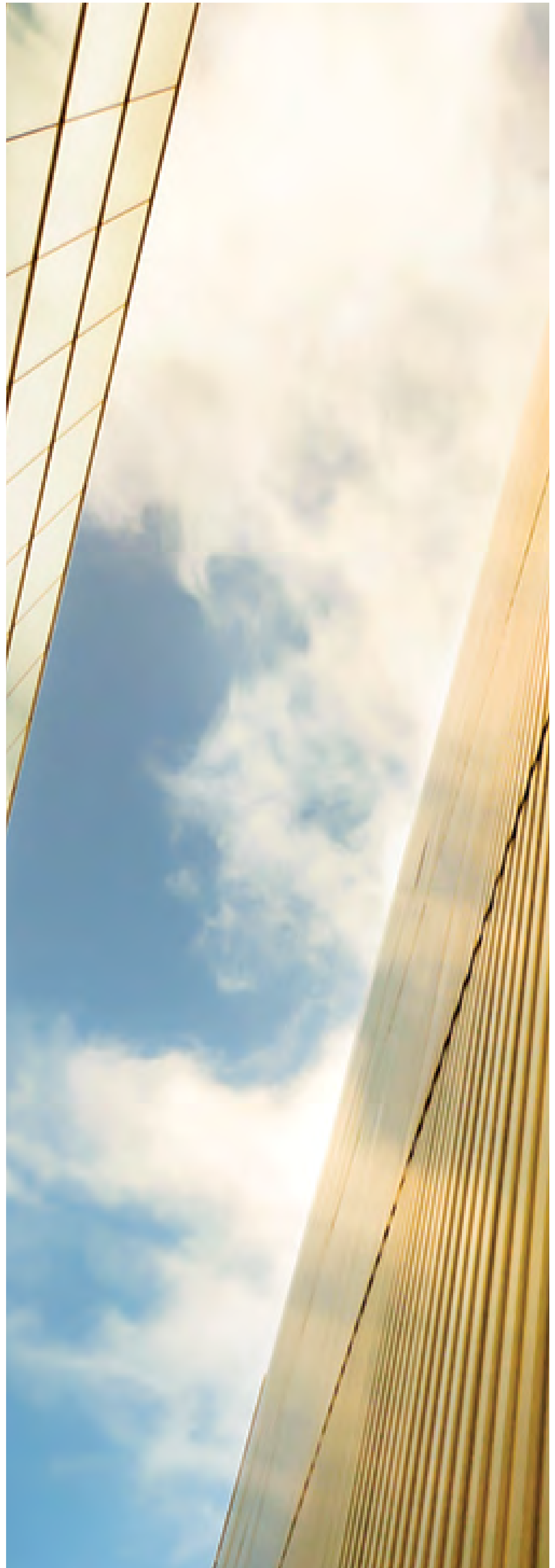
The purpose of ATAD 3 is preventing tax avoidance and evasion using shell entities. To this end, common rules are introduced to identify EU undertakings that are at risk, to impose a reporting obligation to low substance entities, and in case the entity is deemed to be a shell and cannot rebut this presumption, to attach tax consequences to this qualification.

From the Explanatory Memorandum, it appears quickly that a common definition of "shell entity" is not an attainable goal. One can indeed read that "shell entities" are "undertakings which are presumably engaged with an economic activity but that, in reality, do not conduct any economic activities" or "undertakings that are engaged in an economic activity, but which do not have minimal substance and are misused for the purposes of obtaining tax advantages". Instead of proposing a general definition, ATAD 3 lays down indicators of minimum substance and introduces a "substance test" through a series of steps. These steps determine whether (i) a reporting obligation, (ii) an information exchange and (iii) tax consequences apply.



Reporting obligation	No	No	No*	Yes	Yes	Yes
Information exchange	No	No	Yes	Yes	Yes	Yes
Tax consequences	No	No	No	No	No	Yes

*In case an exemption is requested, the undertaking shall have to provide evidence thereof.



Is being outside ATAD 3 a safe haven?

ATAD 3 is about **substance** and, in case the **minimum substance requirements** are not met, the possibility of a **successful rebuttal** to avoid the tax consequences of a lack of substance. The proposal is clear on that aspect: *"where an undertaking has been found to have sufficient substance under this Directive, this should not prevent the Member States from continuing to operate anti-tax avoidance and evasion rules, provided that they are consistent with Union law."*

Based on this general statement, it remains to be seen how ATAD 3 will influence current case law and administrative positions on the concept of **beneficial ownership**. Indeed, falling outside the scope of ATAD 3 should not automatically mean that the undertaking is the beneficial owner of dividends and interest. As far as tax consequences are concerned, the proposal only provides for the (negative) consequences of a qualification as shell but does not contain any provision confirming a tax treatment in case of non-shell. Consequently, in addition to the attention to be paid to the substance criteria, one should also continue to comply with the (minimum) beneficial ownership criteria: (i) the undertaking freely determines use and enjoyment of the up-streamed income (no contractual obligation nor practice passing on (all) income received) and (ii) it uses up-streamed income to fund its operational expenses and/or new investments.

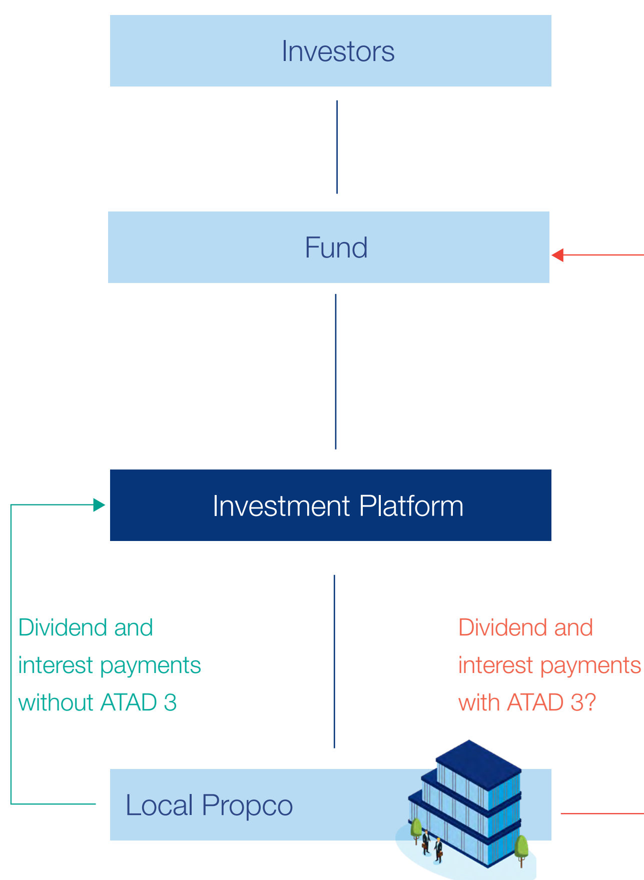
Why is ATAD 3 relevant for the real estate sector?

Many cross-border real estate investments are structured through investment platforms. Looking at these investments solely from a tax perspective, they usually allow the investors to repatriate their investment proceeds with a minimum tax leakage, **while the real estate income remains subject to taxation in the Member State where the asset is located**.

ATAD 3 might increase the tax leakage on the repatriation of investment proceeds.

Let's take three basic examples, assuming that the investment platform is a shell for which the presumption cannot be rebutted.

1st example



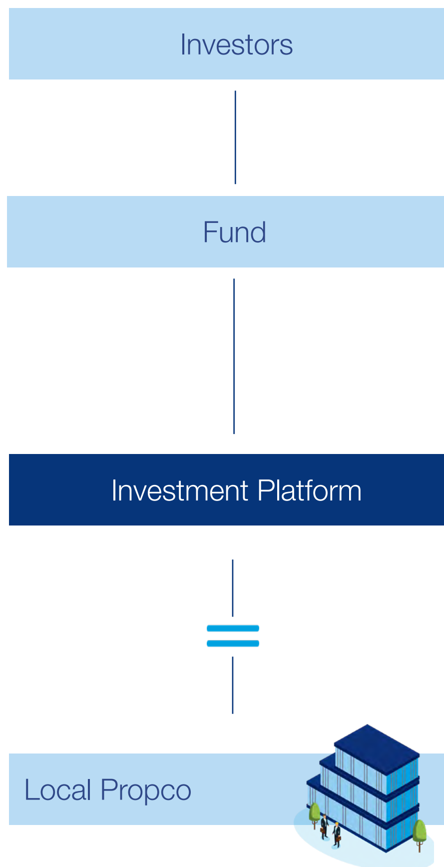
Several investors are pooled in an investment fund. This investment fund has incorporated an EU investment platform with a view to invest in European real estate via local property companies.

The acquisition, as well as the financing needs of these local property companies, are financed by a mix of equity and shareholder's debt, resulting in dividend and interest payments during the investment lifetime.

As a result of ATAD 3, the Member State of the investment platform will deny the delivery of a tax residence certificate (or will deliver a qualified certificate). Consequently, the investment platform shall lose the benefits of the EU Directives and/or tax treaties that allow an exemption or reduction of withholding taxes.

The source state, being the Member State where the property company is located, will subject these dividends and interest to withholding tax. The question remains whether this Member State will consider the shareholder when determining the applicable withholding tax (provided this shareholder is not itself a shell in an EU context).

2nd example

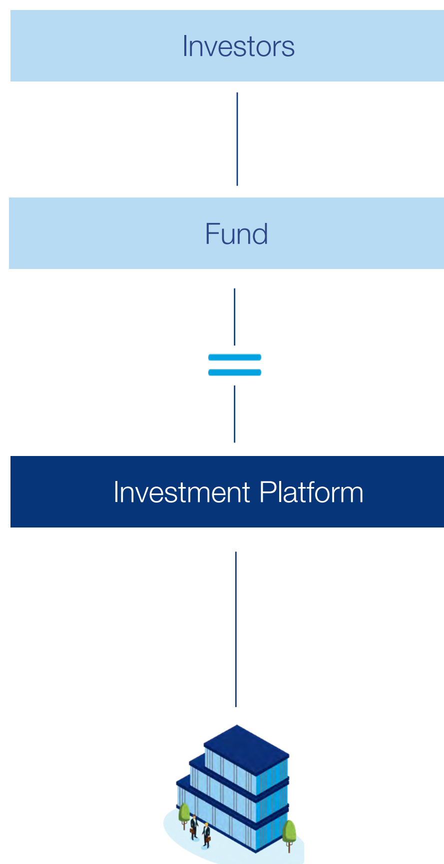


For the same structure, the exit is designed as the sale of the shares in the property company. The tax treaty entered into by the Member State of the investment platform and the Member State of the property company does not contain a real estate asset rich clause, with as a consequence that the power to tax the realised capital gain should be allocated to the Member State of the investment platform.

If the latter is a shell and is denied a tax residence certificate, it is unclear whether:

- the Member State of the property company shall only apply its own non-resident taxation rules; or
- the Member State of the property company shall first determine whether it is granted taxation rights on the basis of the tax treaty entered into with the shareholder of the investment platform (assuming the latter is not itself a shell).

3rd example

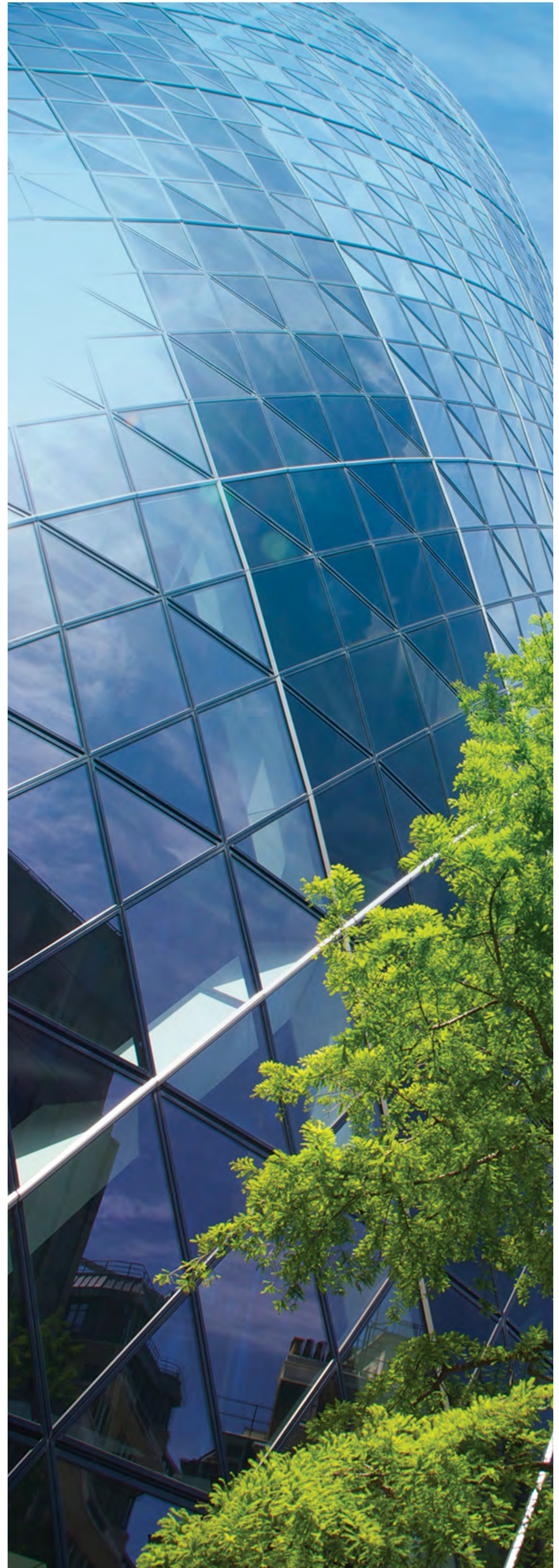


In our last example, the European real estate is directly owned by the investment platform.

During the investment lifetime, the real estate income is subject to tax in the Member State where the real estate is located. ATAD 3 should therefore not have (adverse) tax consequences, except as the case maybe for withholding tax purposes in case interest is allocated to this real estate.

The situation on exit is more complicated in case this exit is structured by the sale of the shares of the investment platform since ATAD 3 provides that (i) the Member State where the property is located shall tax this property in accordance with its national law and (ii) the Member State of the shareholder shall tax such property as if it is owned directly by the shareholder, without prejudice to any tax treaty for the elimination of double taxation.

In case the shell is totally disregarded, it should mean that the share deal is requalified in an asset deal for direct taxation purposes.



How does ATAD 3 work?

In practice, investors and managers of real estate investment structures should answer three questions:

- Do I have a reporting undertaking? The key concept in ATAD 3 is the "**gateways**". When an undertaking does not benefit from a carve-out, it must be verified whether it crosses all gateways, which means that the undertaking is "at risk".
- If so, does it pass the minimum substance requirements? An undertaking "at risk" can demonstrate, through reporting and adequate documentation in its annual tax return, that it complies with the **minimum substance requirements** laid down in ATAD 3. In such a case, only the reporting requirement shall apply but not the tax consequences provided for in ATAD 3. As mentioned above, this is however no "safe haven". If the minimum substance requirements are not met, the undertaking is presumed to be a shell.
- Can the undertaking rebut the presumption of being a shell? Tax consequences laid down in ATAD 3 can still be avoided through the **rebuttal of the presumption**. Here as well, the undertaking will have to report and demonstrate that it is used for "valid reasons". If the presumption is successfully rebutted, the undertaking shall be obliged to report but the tax consequences will not apply. In absence of successful rebuttal, tax consequences are attached to the qualification as shell.

The gateways

ATAD 3 in principle applies to all undertakings, irrespective their legal form, that are considered tax resident in a Member State. Since the goal is however to only target “entities at risk” and to subject them to a reporting obligation, “gateways” are introduced to narrow the scope of ATAD 3. Only those non-carved-out undertakings that cross all gateways are considered at risk.

The undertakings must meet the following cumulative criteria to determine whether it goes to the next step:

- more than 75% of the revenues of the undertaking in the preceding two tax years consists of passive income including interest, royalties, dividends and capital gains, income from financial lease or real estate (defined as “Relevant Income”). When the undertaking has holding activities or owns real estate, this condition is deemed met if the book value of the assets that can generate dividends and capital gains represents more than 75% of the total book value of its assets;
- the undertaking is engaged in cross-border activities when:
  - at least 60% of the Relevant Income is earned or paid out via cross-border transactions or
  - more than 60% of the book value of the undertaking’s real estate or other private property of high value are located outside the jurisdiction of the undertaking in the preceding two tax years;
- the undertaking outsourced the administration of day-to-day operations and the decision making on significant functions in the preceding two tax years.

Platforms engaged in cross-border real estate investments will most likely cross the quantitative gateways. For them, the most relevant gateway concerns **the outsourcing of the administration of day-to-day operations and the decision making on significant functions.**

The proposal insists that this criterion should point out “undertakings which have no or inadequate own resources to perform core management activities” and therefore engage third party services providers or associated enterprises. Outsourcing of certain ancillary services only, such as bookkeeping services, while the core activities remain with the undertaking, would not in itself suffice to pass this gateway.

Considering this proposal and the reference period, managers should immediately reorganise their operations – if not yet already done – to ensure the insourcing of day-to-day operations and significant functions, bearing in mind that, as the moment from all gateways are crossed, a reporting obligation kicks in.

The minimum substance requirements

When it crosses all gateways and cannot benefit from an exemption, the undertaking is subject to a reporting obligation, and it must first declare in its annual tax return whether it meets the substance indicators and provide satisfactory supporting evidence:

- the undertaking has own premises or premises available for the exclusive use of the undertaking;
- the undertaking has at least one own and active bank account in the EU; and
- at least one qualified director of the undertaking that is authorized to take decisions in relation to the activities generating the Relevant Income, is: (i) a tax resident in the Member State of the undertaking (or resides sufficiently close to the Member State to perform the duties); and (ii) is not employed by a non-associated enterprise and does not perform the function of director in another non-associated enterprise, or alternatively, the majority of the qualified full-time employees of the undertaking is tax resident in the Member State of the undertaking (or reside sufficiently close to the Member State to perform their duties).

The first minimum substance requirement, i.e., **having own premises or premises available for exclusive use**, will probably be the most debated topic in the coming weeks in the framework of the public consultation, especially in a scenario where several undertakings of the same group share the same premises. At this stage, it is advised to lease (or own) dedicated premises and, in a group scenario, to have (sub-)leases in place at market conditions.

If the undertaking provides satisfactory supporting documents, it is presumed to have minimum substance for that tax year. If the undertaking declares not to meet the minimum substance requirements, or does not provide sufficient supporting evidence, it is presumed to be a shell.

The rebuttal of the presumption

If the undertaking cannot evidence it meets the minimum substance requirements, it can still rebut the presumption of being a shell. The Explanatory Memorandum acknowledges that "there can be valid reasons for the use of such entities". Stakeholder consultations also reveal that undertakings that could be considered to be shell companies, are not put in place to obtain tax advantages but rather for valid commercial reasons: ensuring the limitation of liability, protecting investors and maintaining the value of the portfolio, meeting the requirements of third-party lenders to ring-fence assets and liabilities, facilitating joint ventures, streamlining decision making, and providing a convenient vehicle for sale or partial sale. Most of these reasons are often seen in cross-border real estate investment structures.

ATAD 3 therefore includes a rebuttal mechanism whereby the undertaking can challenge the outcome of the previous steps, by evidencing the commercial, non-tax motives, underlying a certain structure. The presumption of being a shell may indeed be rebutted, in the Member State of the undertaking, with additional evidence on

- information on the commercial rationale behind the establishment of the undertaking;
- information on the employee profiles; and
- concrete evidence that decision-making concerning the Relevant Income generating activity takes place in the Member State of the undertaking. This evidence should demonstrate that the undertaking has performed and continuously had control over, and borne the risks of, the business activities that generate the Relevant Income or, in absence of such income, the assets of the undertaking.

The Member State of the undertaking confirms the rebuttal of the presumption for the tax year concerned and the validity of the rebuttal can be extended for another five years if the legal and factual circumstances do not change.

Carve-out and exemption

As detailed above, ATAD 3 only targets undertakings “at risk”. Consequently, a series of undertakings are explicitly carved out (and do not have to determine whether they cross the gateways) and some non-carved out undertakings that cross the gateways can request for an exemption without having to demonstrate they meet the minimum substance requirements.

The carve-out

A series of undertakings are explicitly carved-out from further obligations as they are considered being low-risk and irrelevant for the purposes of ATAD 3. These carve-outs include inter alia companies that have securities admitted to trading or listed on a regulated market or MTF and certain regulated financial undertakings like AIFs managed by an AIFMD.

Two specific carve-outs are of particular importance:

- undertakings with at least five own full-time equivalent employees or members of staff exclusively carrying out the activities generating the relevant income;
- undertakings with holding activities that are resident for tax purposes in the same Member State as the undertaking’s shareholder(s) or the ultimate parent entity (this term is defined in annex III to the Directive 2011/16/EU on administrative cooperation in the field of taxation) (the so-called **Shareholder’s carve-out**). The Shareholder’s carve-out requires a direct participation or a participation through EU entities that do not meet the minimum substance requirements. It should be assumed that the shareholder itself is not a shell. For the purposes of the Shareholder’s carve-out, it remains unclear whether this holding company must limit its activities to the holding of shares in subsidiaries to benefit from the carve-out or can also grant loans to these subsidiaries.

The exemption

Undertakings that can demonstrate that their existence does not reduce the tax liability of its beneficial owners (in the sense of the AML Directive) or of the group, as a whole, can request an exemption. The undertaking must then provide sufficient and objective evidence that its existence does not lead to tax benefits by including information about the group and its activities. A comparison must be made between the amount of overall tax due by the beneficial owner(s) or the group as a whole, with and without the undertaking.

The availability of such an exemption might be interesting for the real estate sector but may also appear challenging depending on the factual circumstances.

Take these two examples:

- A pension fund that is totally tax exempt in its country of residence has incorporated an EU investment platform with a view to invest in real estate, these investments being equity-funded. This pension fund (or its pseudo-UBO) should qualify as beneficial owner under the AML Directive. Via this investment platform, the pension fund receives a flow of dividends. When Member State where the real estate assets are located, would allow a distribution of dividends exempt from withholding tax in case of direct investment and the investment platform crosses all gateways, then this investment platform can request an exemption in its Member State.
- A limited number of investors have set-up a fund that invests, via an investment platform, in real estate debt. The flow of interest is repatriated to these investors under a withholding tax exemption. In case the investors would have granted loans directly to the local property companies, they would have either benefitted from a withholding tax exemption or from a tax credit. The existence of the investment platform therefore does not lead to a decrease of the tax burden and this investment platform can request an exemption in its Member State.

It appears from these two examples that the tax position of the investor(s) should be considered in case of a captive fund, or a fund dedicated to a limited number of investors, since these investors should qualify as beneficial owners (under the AML Directive). On the contrary, the same investors might suffer a tax burden in case they invest through real estate funds with a large investor-base and via intermediary shell(s), as they should not qualify as beneficial owners in the sense of the AML Directive and therefore their tax position should not be considered when assessing whether an exemption can be obtained.

This exemption is granted by the Member State of the undertaking concerned for the tax year under review. Provided that the factual and legal circumstance remain unchanged, this exemption can be extended for another five years. Note that if the exemption is granted, an information exchange with the other Member States applies.

Tax consequences of being a shell

Once an undertaking is considered to be a shell for purposes of ATAD 3 it will not be able to access the benefits of the EU Directives and/or of the tax treaties of its Member State concluded with other Member States.

The Member State where the shell is resident will either deny the shell company a tax residency certificate or the certificate will specify that the company is a shell. This will serve as an administrative check, informing the relevant source country that it should not grant tax treaty benefits or apply EU Directives towards the shell. Nevertheless, the Member State of the shell would remain free to continue considering the shell as resident for local tax purposes and levy tax on the relevant income flows and/or assets.

At the same time:

– EU source jurisdictions shall ignore the shell for tax purposes and will tax or exempt the outbound payment according to the tax treaty or EU Directive in effect with the country of the shareholder(s) of the shell, or in absence of such treaty in accordance with its national law.
– Third country source jurisdictions may apply domestic tax on the outbound payment or may decide to tax according to the tax treaty in effect with the jurisdiction of the shareholder(s) of the shell.
– EU shareholder jurisdictions shall include the payment received in the shareholder's taxable income and may allow relief for any tax paid at source but will also deduct any tax paid by the shell in its Member State.
– Third country shareholder jurisdictions are not compelled to apply any consequences but may consider applying a tax treaty in force with the source jurisdiction to provide relief.

With regard to real estate assets directly owned by a shell, ATAD 3 contains a specific provision stating that (i) the Member State where the property is located shall tax this property in accordance with its national law and (ii) the Member State of the shareholder shall tax this property in accordance with its national law as if the property was owned directly by the shareholder, without prejudice to the provisions of applicable tax treaty.

Procedural aspects

Exchange of information

Information will be exchanged among Member States through a central directory – by way of an update of the DAC – when undertakings fall within the gateways. Information exchange will also apply where the tax administration of the Member State decides to certify that an undertaking has rebutted the presumption of being a shell or should be exempt from the obligation under ATAD 3.

In other words, no exchange of information shall take place (i) when an undertaking is carved-out from the scope of ATAD 3 or (ii) when an undertaking does not cross all gateways.

Administrative penalties

ATAD 3 leaves it to the Members States to lay down penalties applicable against a violation of the national provisions implementing the directive. Those penalties should include an administrative pecuniary sanction of at least 5% of the undertaking's turnover in the relevant tax year in case of breach of reporting obligations or false declaration in relation to the minimum substance requirements.

Request for tax audits

Member States will be able to request the Member State of the undertaking to perform tax audits when it has reason to believe that an undertaking has not met its obligations under ATAD 3.

Practical questions

Assessment of gateways in the two preceding years

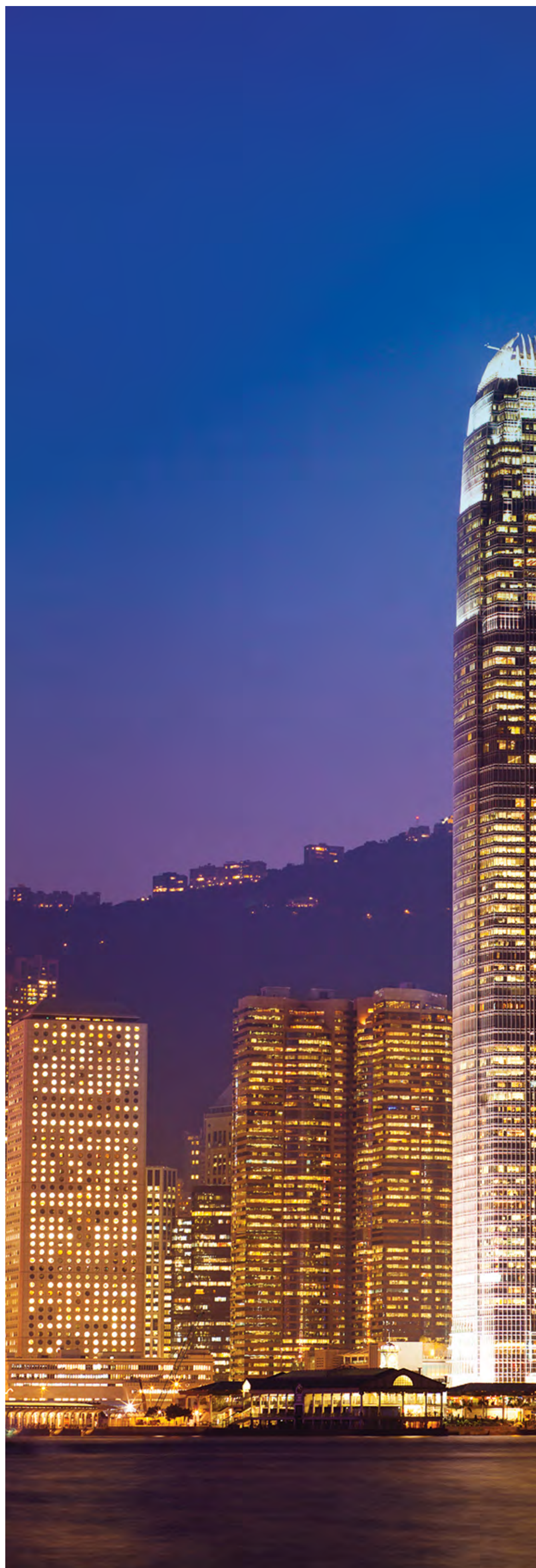
Whether an undertaking crosses all gateways is determined considering the situation in the two preceding years. How will (or can) this rule be applied to newly incorporated undertakings? The proposal including working documents does not contain any provision or guidance in this respect.

Collection of withholding taxes

Withholding taxes are usually applied at the time of the payment or attribution of the relevant revenues. From a procedural standpoint, what will happen during the tax year under review? Does the payor have to withhold at source taking the prudent approach that the undertaking shall be considered a shell and if it appears not to be the case, request a reimbursement? Or can the withholding tax exemption be applied, and then the corresponding amount be transferred (if the qualification of shell is confirmed) to the Member State after the assessment has been made? In such a case, will penalties or late payment interest apply?

DAC 6

If an undertaking is a shell under ATAD 3, then the question of whether it is the beneficial owner of interest in the sense of hallmarks C under DAC 6 arises. The timing of the reporting obligation under DAC 6, basically in advance of the implementation of a structure, does not match the timing of the assessment under ATAD 3 which is based, firstly on factual and legal circumstances in the two preceding years. How are DAC 6 and ATAD 3 to be combined?

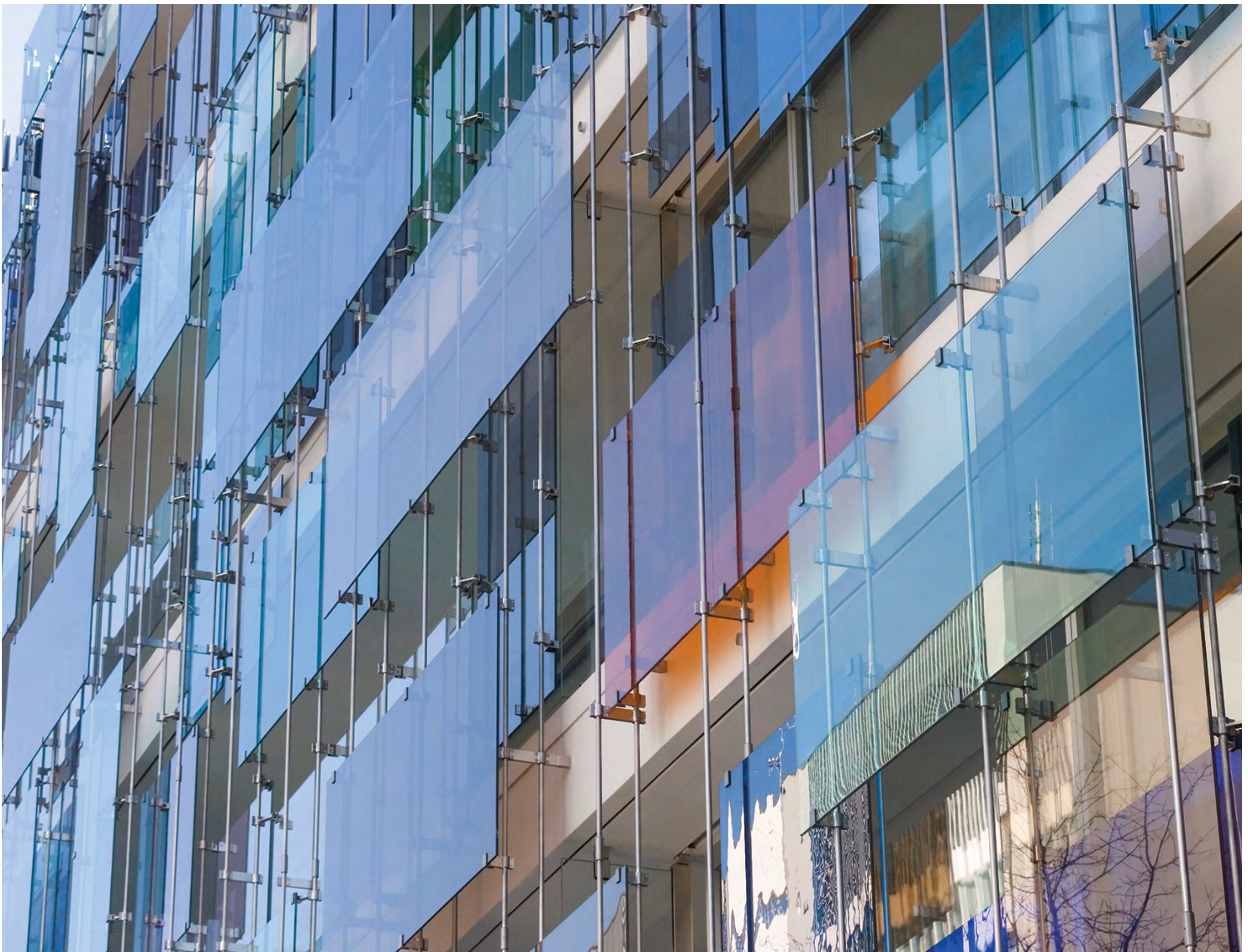


Next steps

This proposal is open for consultation until 6 April 2022, with the EU Commission expecting an entry-into-force on **1 January 2024**. Note that since this proposal uses a reference period of two preceding years this reference period, if the proposal is adopted without modification, may already have started on **1 January 2022**.

In addition, on 25 January 2022, Members of the European Parliament recommended, in the Committee on Economic and Monetary Affairs (ECON Committee), the reforming of withholding tax regimes in the European Union to prevent tax avoidance, while reducing barriers for companies and investors that operate cross-border. The Members of the European Parliament have approved a draft resolution prepared by the ECON Committee, which includes e.g., the support of the Commission's intention to put forward a proposal by the end of 2022 establishing a European withholding tax framework. This draft resolution should be put on a vote on 7 March 2022 but remains non-binding.

A new legal framework on this field is near and all parties concerned should assess the consequences and prepare without delay.



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COVID-19 and lease: first appeal decisions

Recently, the Brussels court of appeal rendered two decisions on the question whether rent remains due by the tenant during the COVID-19 lockdown periods. Previously rendered judgments in first instance lacked consistency and were divided (see our article: Leases management in COVID-19 times: is the rent (fully) due?) making the COVID-19 case law unpredictable. The motivations for these judgments went from force majeure (Fait du prince), over the obligation of the landlord to guarantee the peaceful enjoyment, to hardship and abuse of rights, with judgements 50/50 in favour of the landlord or the tenant.

In this article we analyse the motivation and initial conclusions of two recent judgments of the (French-speaking) Court of Appeal (5th Chamber on 26 October 2021 and 6th Chamber on 29 October 2021)

Brussels Court (5th Chamber) 26 October 2021

The decision of the 5th chamber (Brussels (5th Chamber) 26 October 2021, R.G. n° 20/7370/A) concerns the operation of a restaurant.

The Court considers that the sanitary measures do not prevent the landlord from providing the tenant with the peaceful enjoyment of the leased premises. It is the tenant, as operator of the premises, that is totally or partially unable to enjoy them: "*Durant l'application de ces arrêtés, le bailleur a continué à assurer la jouissance paisible des lieux mais c'est l'exploitant des lieux et, en l'espèce, le locataire qui a été, le cas échéant, dans l'impossibilité totale ou partielle de pouvoir en jouir, celui-ci s'étant vu interdire par lesdits arrêtés d'en autoriser, en tout ou partie, l'accès au public.*" The Court rules out the application of the theory of risks, and also refers to certain payment measures granted to these operators.

On the other hand, the Court refers extensively to the theory of abuse of right and accepts this argument. In the circumstances at hand, by continuing to impose the performance of the contract, the economics of which are radically unbalanced, leading to inequal damages to the tenant, the landlord committed an abuse of right. According to the Court, the latter goes clearly beyond the limits of what is considered as a normal execution of this right by a normal, diligent, and prudent person.

Consequently, the sanction for this abuse of rights is the reduction of the rent by 50% during the hard lockdown in April, May, and June 202w0 and by 25% from 19 October 2020, taking into account the conditions imposed by the government during the soft lockdown period to limit this imbalance, including the takeaway sale.

Brussels Court (6th Chamber) 29 October 2021

In another case (concerning a retail shop) the 6th Chamber of the Brussels Court of Appeal (Brussels (6th Chamber) 29 October 2021, R.G. n° 20/7256/A) distinguishes 3 phases in the first year of the corona-crisis:

- From 19 March until 10 May 2020: mandatory closure of all non-essential shops (hard lockdown);
- From 11 May until 1st November 2020: deconfinement period;
- From 2 November until 13 December 2020: mandatory closure of all non-essential shops with the possibility of delivery and take-away (soft lockdown).

The Court deduces that, for the first period, the landlord was unable to provide the tenant with the intended enjoyment of the leased premises during the hard lockdown.

Contrary to the previous decision, the 6th chamber of the Brussels Court of Appeal rules that the impossibility of providing the intended enjoyment (i.e., for retail lease, access to the public in general) weighs on the landlord. Pursuant to article 1719 of the (old) Civil Code, it is the landlord who must provide the tenant with the peaceful enjoyment. The Court gives this obligation an active and not a passive nature (contrary to the arrest of the 5th Chamber – see above). The landlord does not fulfil his obligation by making the leased premises merely available. He is in fact responsible for making the premises accessible to the public.

The Court concludes that the tenant's correlative obligations under the lease agreement are suspended during the hard lockdown. Consequently, he is released from paying the rent.

This part of the decision is, in our view, disputable. Indeed, Article 1722 of the (old) Civil Code presupposes that the impossibility of guaranteeing this peaceful enjoyment exists on the part of the landlord, who is bound by this obligation. However, in the present case this impossibility is due to a measure taken by a third party, the public authority, for which the landlord is not responsible under Article 1725 of the (old) Civil Code. Moreover, one could argue that the tenant's inability to carry on business in the leased premises is not the consequence of a failure by the landlord to fulfil his obligation to ensure peaceful enjoyment, but of a decision by the authorities which is binding on the tenant.

For the second period, the Court rules that the same motivation does not apply. The shops were open and accessible under certain conditions. Therefore, the tenant is held to pay the rent.
Finally, the Court examines the claim for full payment of the rent during the soft lockdown on the basis of the theory of abuse of rights. In the particular context of the health crisis, demanding full payment of the rent and charges during this period could create an imbalance in the contract and therefore constitute an abuse of right.

The shops could operate and remain open by appointment or click and collect. But by claiming the full rent and charges during the soft lockdown, the landlord may commit an abuse of rights. The court requires the tenant to produce evidence of this imbalance by for instance demonstrating an important drop in turnover in the concerned period (compared to the previous year).

Conclusion

Although based on totally different grounds, the two decisions arrive at a fairly similar decision. Whereas the decision of the 6th Chamber is remarkable ruling the impossibility of the landlord to provide the peaceful enjoyment as a case of force majeure, the decision of the 5th Chamber is motivated extensively on the abuse of rights theory.

To summarise, the following conclusions can be taken away from the two above decisions:

- For the 'hard' lockdown period where all non-essential shops were obliged to close: the case law is in favour of a significant rent reduction (going from a 100% rent waiver to a 50% reduction for that period).
- For the soft lockdown period: the case law is in favour of a partial rent reduction (between 25 and 50%, depending on the circumstances);

In other circumstances and even when (minor) restrictions apply that do not significantly restrict the access to the premises (e.g. wearing a mask or a limitation of persons per square metre): the case law confirms that the tenant is not entitled to rent reductions.

Although the legal debate around article 1722 of the (old) Civil Code will probably not come to an end soon, the differentiation between the "lockdown phases" should be encouraged. We however insist on the fact that it depends on the specific circumstances of the case such as:

- the tenant is a SME, a big local player with several shops or a multinational,
- the tenant has always fulfilled its obligations,
- the tenant has answered to the landlord's call for a negotiation.

Indeed, each case should be reviewed carefully.

It therefore remains recommended that both landlord and tenant negotiate and enter into an addendum to the lease agreement clarifying the respective obligations of both parties, including in particular on the rent, per type of lockdown phase. Such addendum can also regulate the consequences in case of breach in the execution and will provide more legal certainty to the parties, rather than going to court.

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VAT and real estate: **new legislation**

VAT and real estate: new legislation

In principle, the lease of immovable property is exempt from VAT in Belgium. However, there are numerous exceptions that lead to VAT liability. With the Law of 27 December 2021, the legislator attempted to bring extra clarity to one area: the so-called provision of furnished accommodation (new article 44, §3, 2°, third indent of the Belgian VAT Code). As of 1 July 2022, the concept of furnished accommodation will be defined more broadly and concretely, which should lead to less discussion in the future.

Below you will find a brief analysis of the most relevant legislative changes for the real estate sector.

Provision of furnished accommodation

The letting of immovable property is in principle exempt from VAT (Article 44, §3, 2° Belgian VAT Code). The provision of furnished accommodation in hotels, motels and establishments where paying guests are accommodated is one of the exceptions to the principal VAT exemption and subject to the reduced VAT rate of 6%. What exactly is to be understood by the term "furnished accommodation" was not defined by the legislator and was, in practice, often a factual matter.

Based on doctrinal and administrative guidelines, establishments operating under the regulations specific to hotels or under a similar regime and having a permanent structure of human and material resources that contributes to ensuring the reception of guests, including the provision of assistance upon request, housekeeping and regular cleaning of rooms, etc. were eligible for VAT on their services.

Establishments that do not offer these services were also eligible to subject their services to VAT if they provide services that included the provision of furnished accommodation, the reception of guests and at least one of the following additional services: maintenance and regular cleaning or the replacement of household linen.

In practice, however, this qualitative criteria does not enable a clear distinction between the VAT exempt and VAT taxable provision of furnished accommodation.

The legislator now wants to prevent a too broad application of this exception to the principal VAT exemption (e.g., in the case of student accommodation or holiday homes) and henceforth provides a legal definition for a VAT-taxable letting of furnished accommodation, namely:

- The letting must be for a period of less than 3 months. In this context, in the case of successive contracts between the same parties, the aggregate durations of the individual contracts will be taken into account. The application of VAT on the letting of aparthotels - characterised by a rental for more than 3 months - thus might become impossible.
- In addition, there must be a minimum supply of services whereby at least one of the services listed below must be offered:
  - the physical reception of the guests;
  - the provision of household linen and, when furnished accommodation is provided for a period exceeding one week, its replacement at least once a week;
  - the daily provision of breakfast, by the accommodation provider or by a third party at his expense.

These services may be offered at a separate price or at an overall price and may be optional. In addition, these services may also be outsourced to a third party.

This legislative amendment will enter into force on 1 July 2022.

Letting of immovable property through electronic sharing platforms

Private individuals renting out furnished accommodation under the above new definition can no longer benefit from the exemption scheme for small enterprises. This scheme allows companies with an annual turnover lower than 25,000 EUR to opt for VAT exemption.

The intention of the legislator is to put an end to the unfair competition between the hotel sector on the one hand and the private individuals who use electronic sharing platforms and do not have to charge VAT on the other hand. Therefore, the exemption from VAT for small enterprises in the area of furnished accommodation will come to an end.

As from 1 January 2022, these activities will be excluded from the VAT exemption for small enterprises, with as a result that the rental of furnished accommodation with ancillary services will, in principle, be subject to VAT.

However, the normal VAT rules for “small” suppliers of furnished accommodation can be avoided by using the sharing economy scheme. The conditions for the application of this scheme are:

- the letting of furnished accommodation must be carried out by an individual;
- the place of the services is in Belgium;
- the letting must be offered through an electronic platform approved or organized by the government; and
- the maximum annual turnover is 6,540 EUR (income year 2022).

Given the fact that there are currently no qualifying platforms for furnished accommodation, it is tolerated until 31 June 2022 to offer the aforementioned services via a “non-approved platform”. Providers of furnished accommodation via platforms are therefore advised to monitor this carefully.

VAT deduction of mixed taxable persons according to the actual use method

A final highlight is the reform of the procedure for mixed VAT taxable persons who exercise their VAT deduction according to the actual use method. Operations by mixed taxable persons are partly subject to VAT and partly exempt from VAT. Therefore, they cannot fully deduct their input VAT.

Their VAT deduction is, in principle, determined on the basis of a pro rata which expresses the portion of the turnover of the VAT taxable transactions in the total turnover. By way of derogation from this method, a mixed taxable person may also be authorized to exercise its VAT deduction in accordance with the actual use method (which means that the deduction is 100% for the costs related to the VAT taxable activities and zero for the costs related the VAT-exempt activity). Under the current procedure, a taxable person that opts to apply this method, must submit a written and motivated application to the competent VAT Authorities for approval.

As from 1 January 2023, contrary to the current procedure whereby an authorization is required, a prior notification to the Belgian VAT Authorities will be sufficient to deduct the VAT input according to the actual use method. Only when the VAT Authorities consider that the application of this method is in breach of the principle of neutrality, a decision to reject its application will be issued.

Note that taxable persons who currently apply the actual use method will also have to submit this (electronic) notification by 30 June 2023 at the latest.

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Short News

Short News

Demolition and reconstruction – towards a prolongation of the reduced VAT rate?

On 7 December 2021, the Council of the European Union reached an agreement on a proposal regarding the update of the EU rules on reduced VAT rates. This should allow the Member States to apply reduced VAT rates on a more flexible basis. Among other things, the focus is on environmental priorities.

Based on that, the Ministers of Finance agreed to amend Annex III of the VAT Directive in relation to the field where the reduced VAT rates can be applied. In particular, the EU proposal now clearly includes the demolition-reconstruction.

This amendment allows Belgium to indefinitely extend the application of the current favorable VAT rate on demolition-reconstruction throughout the Belgian territory, which came into force on 1st January 2021 for a period of 2 years.

This should therefore be monitored closely at the Belgian federal level in the coming months since the Belgian minister of Finance already expressed his wish to effectively take a legislative initiative to continue the lower rate after 2022.

Reference rent in Brussels: first step against abusive rents in Brussels

Since 2 December 2021, both new residential lease agreements and renewals of such leases pertaining to premises located in Brussels must mention not only the rent charged by the landlord, but also the reference rent (or the range of rent around the reference rent).

The reference rent is based on the indicative rent grid ("grille indicative des loyers de référence / indicatief rooster van referentiehuurprijzen") and is expressed in the form of a range. The online platform "Brussels Housing - Homepage - loyers.brussels / Homepage - huurprijzen.brussels" offers help for the calculation of the reference rent based on the answers given to a few questions, such as

- type of housing,
- location,
- number of rooms,
- surface,
- year of construction,
- EPB, etc.

This obligation was introduced by the ordinance of 28 October 2021 and constitutes the first step against abusive rent by introducing not only (i) the reference rent in the Brussels residential lease agreements, but also (ii) the notion of "presumed abusive rent" and (iii) the establishment of a joint rental committee.

According to the ordinance, a charged rent is presumed to be abusive if it exceeds the reference rent by 20%. The presumption can be rebutted when elements of comfort intrinsic to the dwelling or its surroundings are present (e.g., villas with four facades, a mansion, remarkable or prestigious architecture, a luxury kitchen, solid wood flooring, abundance of green spaces, particular calm, remarkable view).

Even when the charged rent does not exceed 20% of the reference rent, it can be considered abusive. This will be the case if important quality defects are present in the dwelling or its surroundings, such as the absence of individual electricity or water meter, the absence of a private room reserved for sanitary facilities, the absence of kitchen equipment, the absence of a lift, or the absence of a door phone, etc.

If a landlord or a tenant believes its rent is "abusive" (too low or too high), a revision can be claimed by the parties either before the Justice of Peace, or a free advice can be requested from the Rental Committee (commission paritaire locative / paritaire huurcommissie). This committee composed equally of landlords and tenants has been given the task, upon request of one of the parties, to give opinions on the fairness of the rent in case of residential leases and will thus play a role in reducing the workload of the courts.

Although the range of rent around the reference rent is not binding so long as the landlord can justify the reason for exceeding the reference rent, we expect that the indicative reference rent will become more important. As the online platform is supposed to be updated during the spring of 2022, the reference rent may even become more relevant and possibly even binding.

BE-REIT specialising in residential care or health care units

Since 1 January 2017, Belgian regulated real estate companies (BE-REITs) specialising in investments in the residential care or health sector have been subject to a reduced withholding tax rate on dividends paid. The main condition is that the company focuses at least 60 per cent of its investments on real estate that is used or intended exclusively or primarily for residential care or health care units. This includes real estate such as rest homes, service flats, assisted living facilities as well as other real estate destined to provide continuous care.

The Program Law of 27 December 2021 increases the minimum percentage of the ratio of investments in care real estate from 60 to **80 percent**. The condition applies to dividends paid out from **1 January 2022**.

The law also specifies how the ratio of investments in care real estate to investments in total real estate should be determined.

The **numerator** is the fair value at the end of the financial year to which the dividend relates of the following properties

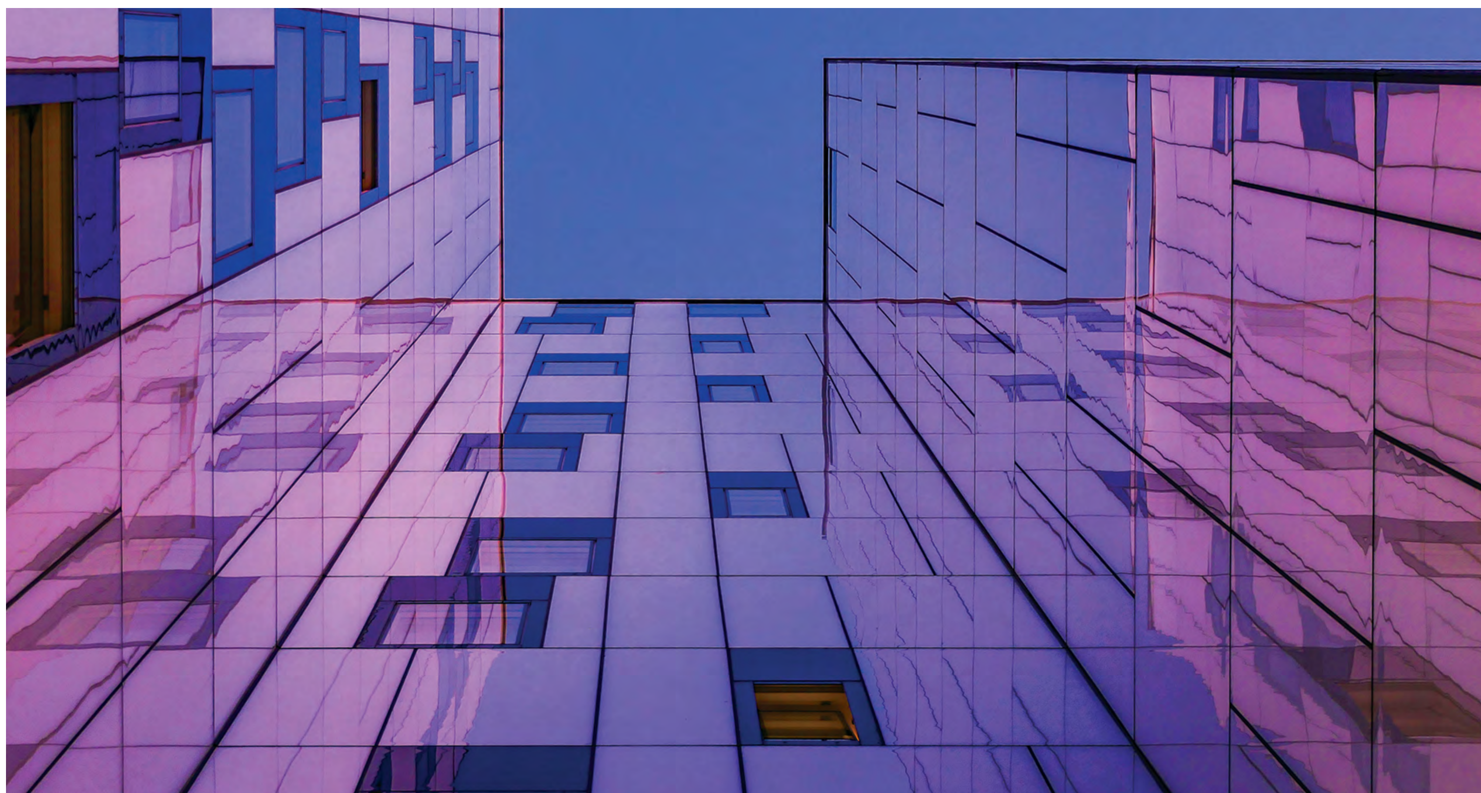
- the immovable property and the rights in rem on immovable property, held by the company, with the exception of the assets that, in application of the IFRS standards, are booked as receivables within the framework of a lease;
- option rights on immovable property held by the company as well as the immovable property to which these rights relate; and
- rights from contracts whereby one or more assets are leased to the company, as well as the underlying immovable property.

to be increased by updates of the above value at the end of each of the first three quarters of the financial year to which the dividend allocated relates.

The property concerns only property that is located in a member state of the European Economic Area and that is used or intended to be used exclusively or primarily for residential care or health care.

The **denominator** contains the same amounts but for all immovable property.

The percentage that reflects the ratio between the care property and the total property of the BE-REIT must be at least 80 percent to benefit from the reduced rate of withholding tax.



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A unique approach

Tax and law are heavily intertwined. That is why we integrate these fields of expertise as much as needed. It results into high-end, extremely efficient solutions for our clients. As an independent full service law firm we assist multinationals, SME's, entrepreneurs and private clients internationally and locally. We offer our clients integrated tax and legal solutions. Our clients inspire us. And that makes the difference.

Independent cross-border expertise

Our international focus results into cross-border expertise. We advise our clients in implementing their business objectives in order to create tax and legal efficiencies. Consequently it empowers them to grow their business. Additionally we maintain excellent relationships with the most prominent law practices worldwide, and we are highly regarded for being able to work seamlessly together with them on cross-border matters.

In-depth knowledge of business sectors

We have long-lasting and in-depth knowledge of practically all business sectors. As soon as we believe we have developed a thorough and an exhaustive expertise related to a specific industry sector, we build a dedicated team to further expand those specific competencies and know-how. By combining this knowledge with our international focus and tax and legal expertise, we provide our clients the best advice on a local and a global level.

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BE-21-07-REU