

The BE-REITs

Société immobilière réglementée (SIR)
Gereguleteerde vastgoedvennootschap (GVV)

Société immobilière réglementée institutionnelle (SIRI)
Institutionele gereguleteerde vastgoedvennootschap
(institutionele GVV)

Société immobilière réglementée à but social (SIR sociale)
Sociale gereguleteerde vastgoedvennootschap (sociale GVV)

Under the current Belgian REIT regime, an undertaking investing in real estate can either take the form of

- a SICAFI / Vastgoedbevak (*société d'investissement en immobilier à capital fixe / vastgoedbeleggingsvennootschap met vast kapitaal*);
- a SIR / GVV (*société immobilière réglementée / gereguleteerde vastgoedvennootschap*) commonly named **BE-REIT**; or
- stay unregulated (meaning that only the laws applicable to companies in general, as set forth in the Companies Code will apply).

Due to their status of collective investment undertaking, SICAFI / Vastgoedbevak are subject to additional obligations deriving from the AIFM Law.

As an alternative to maintain the attractiveness and competitiveness of Belgium, the possibility to take the form of a BE-REIT has been introduced by the Law of 12 May 2014 (the **BE-REIT Law**) (as further implemented by the Royal Decree of 13 July 2014, the **BE-REIT Decree**) to allow undertakings investing in real estate that wish to opt for a regulated status (and thus benefit from a preferential tax regime) to avoid the burden of compliance with the

Belgian AIFM Law. All former SICAFI / Vastgoedbevak have converted into BE-REIT, and therefore only the BE-REIT regime is discussed below, including the institutional BE-REIT and the social BE-REIT.

The Belgian REIT regime knows three type of REITs:

- the stock-listed or retail REIT, named BE-REIT;
- the non-stock listed REIT dedicated to institutional investors, the institutional BE-REIT;
- the non-stock listed REIT dedicated to investment in “care”, the social BE-REIT.

Their key features are further described below.

1 Alternative Investment Fund – AIF

An important difference between the SICAFI / Vastgoedbevak and the BE-REIT is, indeed, that the latter is not an AIF, i.e. an entity that “raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors”.

The BE-REIT must thus mainly engage in an **operational activity** instead of an investment activity, being the putting at disposal of properties to users. The BE-REIT does therefore not follow a defined investment policy, but has a **business strategy based on creating long term value** (instead of engaging in buying in order to sell within the framework of a defined investment policy). The fact that the BE-REIT engages in an operational/commercial activity, also entails that, contrary to what is the case for the SICAFI / Vastgoedbevak, the BE-REIT is not exclusively managed in the interest of the shareholders, but must take into account the overall interest of the company.

This operational activity requires an **active management**, implying the daily management of the properties, direct relationships with clients and suppliers, and the existence of an **operational team** that represents a substantial part of the BE-REIT’s employees. The BE-REIT can delegate the management of the portfolio to a perimeter company¹ or to an affiliated company specialised in the management of the assets concerned². In case of delegation to a perimeter company, the latter is allowed to render services also to third parties but within strict boundaries.

¹ More than 25% of the capital is held by the BE-REIT.

² A controlled company or a company subject to the same control.

2 BE-REIT

2.1 Eligibility requirements

2.1.1 Licence

The BE-REIT must obtain a licence as a collective investment undertaking from the FSMA. Then it can be registered on the list of Belgian regulated real estate companies (**BE-REIT List**). The granting of the licence by the FSMA is based on a licence request comprising the following information, out of which the FSMA can assess the compliance with the BE-REIT Law and the BE-REIT Decree:

- the articles of association and the fact whether the company has been incorporated for an indefinite term;
- if it has an appropriate administrative, accounting, financial and technical organisation which ensures an independent management;
- that its directors and the persons in charge of daily management, have the appropriate professional reliability and experience to ensure an independent management;
- that at least two persons in the board of directors supervise the daily management;
- that a minimum investment budget has been determined for a period of three years as of the registration on the BE-REIT List;
- that it has called upon one or more independent real estate experts which are responsible for the valuation of the invested real estate. Such experts have to be chosen from a list annexed to the application and may not have direct links to the so-called “promoter” of the BE-REIT;
- that the real estate expert has the required professional reliability and experience, including the organisation;
- that it complies with the rules on risk diversification;
- that an entity in charge of the financial services is appointed;
- that the identity of its so-called “promoter” is known and the confirmation of its obligations;
- that it engages to comply with the listing requirements.

2.1.2 Actors

The regulation focuses on two main actors:

- The promoter is the person that exclusively or jointly controls the REIT, or the GP in case of a limited partnership by shares. Its role with respect to the minimum 30% float is a permanent best efforts obligation.

- The real estate expert is in charge of appraising the real estate portfolio. This expert cannot be related to the promoter, and its remuneration cannot be related to the value of the real estate portfolio. Moreover, the expert is appointed subject to a double rotation requirement, i.e. for a renewable term of 3 years at most, and it can appraise the same real estate asset during a maximum 3 consecutive years followed by a 3-year cooling-off period.

2.1.3 Eligible investors

All shares of a BE-REIT must be listed on a stock exchange, with a minimum of 30% free float. Listing can only occur after a registration on the BE-REIT List and after publication of a prospectus. There are specific prospectus requirements for BE-REITs in Belgium. There are no other specific shareholder conditions to fulfil in order to achieve BE-REIT eligibility.

2.1.4 Eligible investments

In order to assess the investment policy, the BE-REIT and its subsidiaries must be seen as one single economic entity. In other words, thresholds are to be verified on an IFRS consolidated basis, and a distinction is made between exclusively controlled subsidiaries (for which assets and liabilities are considered regardless of the participation) and joint subsidiaries (for which assets and liabilities are considered only proportionally to the participation). Risk diversification is also assessed on an IFRS consolidated basis.

a) Risk diversification

A **standard diversification rules** applies, i.e., an investment in a single real estate project (*ensemble immobilier / vastgoedgeheel*) cannot account for more than 20% of the consolidated assets at the time the investment is made. The real estate project is defined as one or more real estate objects subject to the same investment risk.

Exemption may apply in case of qualified investment in infrastructure.

b) Immovable property

BE-REITs are allowed to invest only in **immovable property** and public-private partnerships (as further discussed below), whether located in Belgium or not, which includes the following categories of assets:

- real estate, including rights *in rem* relating thereto;
- shares of real estate companies (including intermediary holding), whose share capital is held (directly or indirectly) for more than 25% by the BE-REIT;
- option rights to real estate;

- shares of BE-REITs, and shares of institutional BE-REITs, whose share capital is held (directly or indirectly) for more than 25% by the BE-REIT;
- rights deriving from financial leases as defined by IFRS standard, and analogous rights of use;
- shares issued by (institutional) SICAFI / Vastgoedbevak;
- units of foreign undertakings for collective investment in real estate registered with the FSMA;
- units of undertakings for collective investment in real estate established in the EEA and subject to an equivalent control;
- shares of EEA REITs (as further defined by the BE-REIT Law);
- real estate certificates; and
- shares of Belgian specialised real estate investment funds.

With respect to **financial leases**, the regulation further provides that

- the BE-REIT and its subsidiaries can act as lessee. However, and for the BE-REIT only, in the case of a financial lease without purchase option, the net investment as determined by IFRS cannot exceed 10% of the BE-REIT's assets at conclusion of the contract.
- The BE-REIT and its subsidiaries can act as lessor, subject to statutory authorisation, but this activity must remain ancillary, with one exception, being a principal activity of lessor under financial leases as long as the underlying real estate assets are intended for public purposes (e.g. social housing and teaching).

As an exception, the BE-REIT is allowed to invest in **transferable securities** to the extent that the articles of association authorise such investments. In such cases, investments in transferable securities must be considered additional or temporary. Belgian law does not provide for any specific minimum or maximum requirements. The FSMA will exercise its discretion when examining the BE-REIT's articles of association.

The BE-REIT may hold **hedging instruments** covering its financial risk to the extent that the articles of association authorize such transactions. Speculative transactions are not allowed. The hedging strategy must be disclosed in the BE-REIT's financial reports.

A BE-REIT may **develop** real estate, provided that the BE-REIT maintains the completed developments for at least five years. However, if the development activities are ancillary, the BE-REIT may transfer the real estate prior to five years.

c) Public-private partnerships

The list of authorised activities of a BE-REIT includes the participation to **public-private partnerships**. Important to note: the BE-REIT can conclude this type of contracts directly or in joint venture in a project company.

a. The infrastructure activity

The BE-REIT's activities include the execution, as the case maybe indirectly and/or in a joint venture, with a public partner, of DBF agreements, DB(F)M agreements, DBF(M)O agreements, or agreements for the concession of public works.

These agreements must relate to buildings or infrastructures for which:

- the BE-REIT is liable for their putting at disposal and maintaining or operating, for a public entity or the citizen as final user; and
- the BE-REIT can assume, in whole or in part, the financing risk, the availability risk, the demand risk or the operation risk, and the construction risk.

The BE-REIT should also be allowed to take care, in the long term, of the development, establishment, management and operation, as the case maybe in joint venture and through sub-contracting, of:

- installations and warehouses for the production, transport, distribution or stocking of energy in the broad sense;
- installations for the transport, distribution, stocking and purification of water; and
- incinerators and waste installations.

b. The project company

The infrastructure activity can also be operated by a project company, in which the BE-REIT shall participate. The BE-REIT is allowed to take initially a participation of less than 25% in the share capital of the project company concerned, provided that this percentage is increased within two years (or a longer period of time if required by the public partner) after the construction phase, in order to comply with the below requirements for investing in joint venture. The project company can also opt for the status of institutional BE-REIT and benefit from its tax regime.

c. Risk diversification requirement, and leverage limits

The risk diversification requirement and limit of 20% of the B-REIT's assets does not apply when the tenant, user or beneficiary of aforementioned infrastructure is an EEA Member State.

It is also specified that the restriction for the BE-REIT to grant loans or vest securities for third parties does not apply in the framework of the infrastructure activities described below in view of a bid bond or similar mechanism. Subject to a series of conditions, the limit according to which a mortgage or other guarantee cannot exceed 75% of the relevant asset's value is also not applicable and the indebtedness related to those infrastructure projects is also not subject to the leverage limit and not taken into account to determine the leverage limit of a BE-REIT.

d) Joint ventures

Considering the interests of the BE-REIT's investors, the regulation also contains specific provisions applicable to **joint ventures**. It must be kept in mind, though, that the relevant provisions of the BE-REIT Decree combine the provisions of Belgian corporate law (i.e., control) with IFRS standards (i.e., consolidation).

- The **minimum participation** required is 25% (plus 1 share) in the capital of the perimeter company, which can also opt for the status of institutional BE-REIT. For the BE-REIT, those participations (in absence of exclusive or joint control) cannot exceed 50% of its consolidated assets.
- In a case of **exclusive control**, the total value of the minority interest cannot exceed 30% of the BE-REIT's consolidated net assets, it being understood that the controlled subsidiary for which the remaining capital is held by one or more EEA Member States are not considered to assess this threshold and (ii) the BE-REIT must hold directly or indirectly at least 50% of the share capital of the subsidiary concerned.
- In a case of **joint control**, the total value of the participations or of the assets (depending on the consolidation method applied) cannot represent more than 20% of the BE-REIT's consolidated assets it being understood that the controlled subsidiary for which the remaining capital is held by one or more EEA Member States are not considered to assess this threshold, and the BE-REIT must control, directly or indirectly (in this case, only one intermediary exclusively controlled holding is allowed), at least 50% of the issued capital of the subsidiary concerned.

- The articles of association (or other relevant document) of a jointly controlled subsidiary must provide for put and call options in favour of the public BE-REIT, allowing it either to sell its participation or to buy the other shareholder(s)'s participation in case of deadlock situation, with the sale/purchase price being determined by experts.
- Exit clauses (e.g. put and call options) provided in joint venture agreement are authorised and such sales are not subject anymore to the evaluation and limitations applicable to a sale of investment by a BE-REIT.

It is prohibited for a BE-REIT to enter into a shareholder's agreement which derogates to its vote cast according to its participation (being at least 25% plus 1 share) in a joint venture.

2.2 Legal form

A BE-REIT must be either a public limited liability company (*société anonyme, SA / naamloze vennootschap, NV*) or a Belgian limited partnership with shares (*société en commandite par actions, SCA / commanditaire vennootschap op aandelen, Comm VA*), incorporated for an unlimited period of time. The statutory seat and general management of the BE-REIT must be located in Belgium. The minimum share capital amounts to 1,200,000 EUR.

In principle, each shareholder has an equal right to participate in the profits of the BE-REIT. However, different categories of shares may be issued if allowed by the articles of association. The BE-REIT is allowed to issue securities other than shares (e.g. bonds, convertible bonds) to the exclusion of profit shares (*parts bénéficiaires / winstbewijzen*).

The status of BE-REIT is open to corporations only; a foreign entity that is similar to a BE-REIT cannot benefit from a passporting regime nor request the application of the BE-REIT (tax) regime to a branch it would have in Belgium and/or the real estate assets it directly owns in Belgium.

2.3 Leverage

Belgian legislation requires that the aggregate loans do not exceed 65% of the total fair value of the assets of the BE-REIT (at the time of entering into the loan). Furthermore, the annual interest costs may not exceed 80% of the total annual operational and financial income. If the BE-REIT holds shares in affiliated companies investing in real estate, the leverage restrictions will be applicable on a consolidated basis.

In order to guarantee a pro-active management, the BE-REIT must present a financial plan to the FSMA as soon as its consolidated debt-to-asset ratio exceeds 50%. In case the BE-REIT has obtained a derogation to the risk diversification rule, the debt-to-asset ratio may not exceed 33%.

A BE-REIT may only vest a mortgage (or other collateral) on real estate in relation to the financing of its “immovable property” activities or of the “immovable property” activities of the group. The total amount covered by a mortgage (or other collateral) may not exceed 50% of the total fair value of the “immovable property” held by the BE-REIT and its subsidiaries. Moreover, it is not allowed to vest a mortgage (or other collateral) on one immovable property for more than 75% of its fair value.

2.4 Profit distribution obligation

Subject to the provisions of the Belgian Company code on capital protection, Belgian legislation requires the BE-REIT to distribute on an annual basis the positive difference between (i) 80% of its net operational result (as determined by Royal Decree) and (ii) the net decrease of its indebtedness. No distribution is allowed if the (statutory or consolidated) indebtedness ratio exceeds 65% or will exceed this limit as a result of the distribution.

Capital gains are not included in the distribution obligation, provided the capital gains are reinvested within four years.

3 Institutional BE-REIT

The so-called “perimeter companies”, i.e. a company investing in “immovable property” as defined by the BE-REIT Law or participating in a public-private partnership, can opt for the institutional BE-REIT status provided that a BE-REIT holds at least 25% + 1 share of their share capital. The fact that the status of institutional BE-REIT is available only to subsidiaries of Belgian retail REITs might be considered to be contrary to EU law.

The capital of institutional BE-REIT is open to institutional investors, but also to retail investors, but their minimum investment value must still be determined by a Royal Decree.

Even though the institutional BE-REIT’s regulatory regime is less stringent, it is still subject to FSMA supervision. The key regulatory features are as follows:

- Given its capacity of subsidiary of a BE-REIT, certain requirements applicable to BE-REITs should also impact the institutional BE-REIT. The risk diversification requirement of the BE-REIT is assessed on a consolidated basis. As the real estate expert is appointed to appraise the BE-REIT's assets and those of its subsidiaries, it was not necessary to subject institutional BE-REITs to the same obligation. Financial reporting obligations apply only to BE-REIT but they concern consolidated information.
- Like BE-REITs, institutional BE-REITs can issue shares and bonds but with the exclusion of profit sharing certificates. In case of capital increase by contribution in kind, an institutional BE-REIT fully controlled by a BE-REIT or its subsidiaries is not subject to the requirement of a minimum subscription price. Specific requirements also apply to institutional BE-REITs jointly controlled by BE-REIT in case of capital increase by contribution in cash with a discount of more than 10%. Other capital transactions are subject to the common corporate law regime.
- The institutional BE-REIT is subject to the same distribution requirements.

4 Social BE-REIT

A new type of non-stock listed BE-REIT is created to finance and promote investments in "care", subject to their accreditation by the competent authority, and defined as infrastructures dedicated to

- the housing or care of disabled persons;
- the housing or care of elderly persons;
- the care or help of youth persons;
- the collective welcoming and care of children under the age of 3;
- the teaching and accommodation of students;
- the operation of a psychiatric institution;
- the operation of a revalidation centre.

Social BE-REITs are incorporated as cooperative companies with a social purpose, having a minimum fixed capital of 1,200,000 EUR. The variable capital can be subscribed by retail investors, in a proportion to be determined by Royal Decree. Due to their corporate form, they guarantee a dividend of maximum 6% (after deduction of the withholding tax) per year, but the exit is only structured as a buy-back of shares at nominal value. The social BE-REIT must

build-up a liquidity reserve to execute these buy-back orders, which can themselves be limited.

The social BE-REIT is only allowed to invest in “real estate assets” as defined by the Civil Code and in leasing. Its indebtedness level cannot exceed 33% of its asset value.

5 Specific tax regime

5.1 Exit tax

Upon conversion of a regular real estate company into a (institutional / social) BE-REIT or upon merger of such a company into a (institutional / social) BE-REIT, the latent gain on the Belgian real estate and the tax-free reserves are subject to the exit tax at a rate of 12.75%. The latent gain is computed on the basis of the appraised value of the real estate asset, excluding rights and taxes, and the tax losses of the Belgian company should be available for off-setting, subject to the minimum taxable base provided for by the tax legislation.

When a Belgian real estate asset is contributed to the (institutional / social) BE-REIT (as a single asset or as part of a contribution of a line of business or universality), the capital gain realised by the transferor is also subject to the exit tax in its hands, but the transferor cannot claim the roll-over regime.

The tax law specifies that, in case of conversion, there is no withholding tax on the deemed dividend (in order to avoid any discussion in this respect).

Note that merger, de-merger, or assimilated restructuring in case all participants to the operation are BE-REITs occur in tax neutrality. This type of restructuring between BE-REITs can therefore be performed without adverse tax consequences for the shareholders.

5.2 Corporate income tax and treaty protection

BE-REITs are **formally subject to corporate income tax** at the statutory rate of 29.58%, but on a reduced taxable base:

- the abnormal or benevolent advantages received;
- the disallowed expenses (other than capital loss and write-off on shares); in this respect, the tax and financial impact of certain regional taxes (e.g., office tax and COBRACE tax in Brussels) should not be underestimated and attention must be paid to transfer pricing and interest deductibility restrictions; and
- the special tax for secret commission (e.g., non-disclosed remuneration).

In other words, **investment income (rental income, capital gains, dividends and interest) is not subject to corporate income tax.**

This formal subjection to corporate income tax should allow the BE-REITs to claim **treaty benefits** from a Belgian standpoint.

5.3 Annual property tax

Belgian real estate assets held by the BE-REITs are subject to the annual property tax (*précompte immobilier / onroerende voorheffing*). This tax is usually recharged to the retail and office tenants, on the basis of the lease agreement provisions, but cannot be recharged to the residential tenants as a matter of law.

5.4 Subscription tax

BE-REITs are subject to a yearly 0.0925% subscription tax (*taxe d'abonnement / abonnementtaks*) on the net amounts invested in Belgium; this percentage is set at 0.01% for the institutional BE-REITs. There is no double counting of the parent and its subsidiaries.

5.5 Tax on stock exchange

Any transfer for consideration of shares of retail REITs are subject to a tax on stock exchange transaction of 1.20‰ and the share buy-back is subject to a tax on stock exchange transaction of 1.32% when it concerns capitalisation shares.

5.6 VAT

Management services invoiced to BE-REITs benefit from a VAT exemption.

6 Specific tax regime of the distributions

6.1 Investments in Belgian real estate

Dividends distributed to **Belgian individuals** shall be **taxed** in the hands of those shareholders at a flat rate of 30%, to be reduced to 15% provided that at least 60% of the real estate portfolio consists in properties dedicated to healthcare located in the EEA.

Dividends distributed to **Belgian corporate shareholders** shall be **taxed** in the hands of those shareholders in absence of participation exemption regime, subject as the case may be to the specific tax regime of the corporate shareholder concerned. A **withholding tax**

exemption shall apply to dividends distributed to Belgian corporations subject to a minimum participation of 10% in the BE-REIT and a minimum uninterrupted holding period of 1 year.

Dividends distributed to a **foreign pension fund** that (i) is not conducting a business or a lucrative activity, (ii) is totally tax exempt in its country of residence, and (iii) is not contractually obliged to redistribute these dividends to a beneficial owner that cannot qualify for this exemption, benefit from a **withholding tax exemption**.

Dividends distributed to **foreign investors** shall be subject to **30% withholding tax** subject to **exemption or reduction** by virtue of the applicable **tax treaty**.

6.2 Investments in foreign real estate

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Dividends distributed to **Belgian corporate shareholders** shall benefit from the **participation exemption** regime in the hands of those shareholders provided that:

- In case the BE-REIT holds directly the foreign real estate assets: the foreign real estate assets are located in the EEA or a treaty country (with exchange of information clause) and the income generated by these assets has been subject to regular income tax; or
- In case the BE-REIT holds indirectly the foreign real estate assets through foreign company(ies): the foreign company meets the ‘subject-to-tax’ requirement under the Belgian participation exemption regime.

A **withholding tax exemption** shall apply to dividends distributed to Belgian corporations subject to a minimum participation of 10% in the BE-REIT and a minimum uninterrupted holding period of 1 year.

Dividends distributed to **foreign investors** shall benefit from a **withholding tax exemption** without underlying condition of taxation in the source state.

6.3 Breakdown of the income

In order to apply the aforementioned tax regime, the BE-REIT must classify its income in accordance with a relevant breakdown.

For more information about this publication, please contact:

Ariane Brohez, Partner Real Estate & Real Estate Taxation

T: +32 2 743 43 21

E: ariane.brohez@loyensloeff.com

Christophe Laurent, Partner Real Estate & Real Estate Taxation

T: +32 2 743 43 05

E: christophe.laurent@loyensloeff.com

Antoine Béchaimont, Associate Real Estate Taxation

T: +32 2 700 10 39

E: antoine.bechaimont@loyensloeff.com

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