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Real estate tax update

What to expect in 2024 (and beyond) for the real estate sector

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Dear Friends,

This newsletter is aimed at informing you about the tax developments, relevant for your real estate business, in the Benelux and in Switzerland. In this edition, you will learn more on:

- Pillar Two and the real estate sector: real estate focussed summary of the key operative provisions and attention points in real estate transactions

- News from Europe

  - ESG and taxation
  - REITs and real estate funds: landmark decision of the European Court of Justice but beware of collateral effects
  - Update on unshell Directive, substance and beneficial ownership

- News from our home markets

  - Belgium
    - RETT: increased taxation on long-term leases and right to build
    - Specialised real estate investment funds: specific anti-abuse provision
    - VAT: notification obligations for mixed and partial VAT-payers
    - VAT: e-invoicing soon compulsory
  - The Netherlands
    - Entity classification rule
    - Limitation interest deduction (earnings stripping rule)
    - Real estate funds: abolishment of direct real estate as qualified investment for fiscal investment institution
    - RETT: cancellation of the RETT concurrence exemption for certain share deals
  - Luxembourg
    - Bill of law introducing a package of measures to stimulate the housing market
    - New double tax treaty between Luxembourg and the United Kingdom
  - Switzerland
    - Property Gains Tax
    - Real Estate Transfer Tax
    - Regulatory Update on Lex Koller

We wish you a pleasant reading and hope to see you soon.

Your L&L team

1. Pillar Two

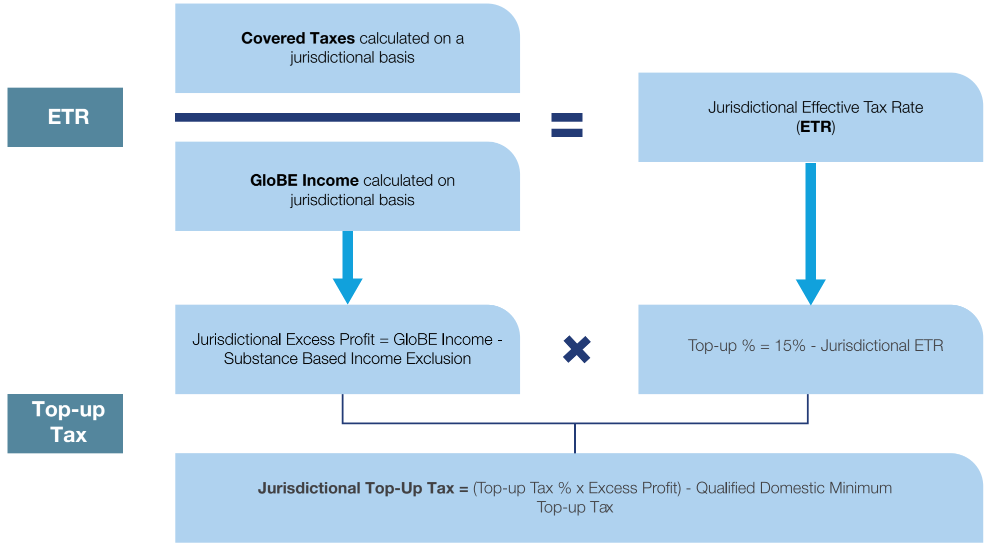
Real estate focussed summary of the key operative provisions and attention points in real estate

Does Pillar Two really matter for the real estate sector? The scope of application is broad, the real estate related exclusions are not straight-forward and the calculation of the effective tax rate deviates from the local tax calculations, meaning that being active in a country with a statutory rate higher than 15% does not mean being released from any Top-up Tax. In addition to their own tax position, real estate investors should consider the tax position in their counterparty in transactions, be it asset deals, share deals and, even more importantly, the entering into joint ventures. In absence of grandfathering clause, parties should also reconsider their position in existing joint ventures as Pillar Two applies to these joint ventures.

Pillar Two aims to ensure that Multinational Enterprises (MNE) groups[1] meeting the EUR 750,000,000 consolidated revenue threshold are subject to a minimum corporate taxation of 15%. On 15 December 2022 (Directive - 2022/2523 - EN - EUR-Lex (europa.eu)), the EU Member States formally approved the EU Directive setting out a harmonized implementation of the Pillar Two model rules in the EU. The Income Inclusion Rule (**IIR**), the Undertaxed Profits Rule (**UTPR**) and the Qualified Domestic Top-up Tax (**QDMTT**) seek to enforce a minimum effective tax rate (**ETR**) of 15% on a jurisdictional basis. The IIR, UTPR and QDMTT are referred to as the GloBE Rules.

A sequence of seven steps must be followed to determine whether an entity is in-scope of Pillar Two (and benefits, as the case maybe, from a safe harbour), and whether a Top-up Tax is to be assessed to reach the minimum ETR of 15%. These seven steps are summarised below with an emphasis put on items relevant for the real estate sector. We also highlight some attention points in real estate transactions. Note that further guidance from the OECD specific for the real estate sector is still expected. In terms of entry-into-force and compliance, the IIR and QDMTT rules entered into force on 31 December 2023 (at the earliest) in different jurisdictions both within and outside the EU, and the 2024 GloBE Information Return will have to be submitted by 30 June 2026.[2]

Formulas in a nutshell



1 In Europe, Pillar Two also applies to national groups meeting the turnover threshold.

2 The GloBE Information Return is to be filled in within 15 months from the closure of the relevant year. For the first return, this deadline is of 18 months.

The seven steps of Pillar Two with a focus on real estate specifics

1. Overview

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<td>1.</td>
<td>Constituent Entities within scope</td>
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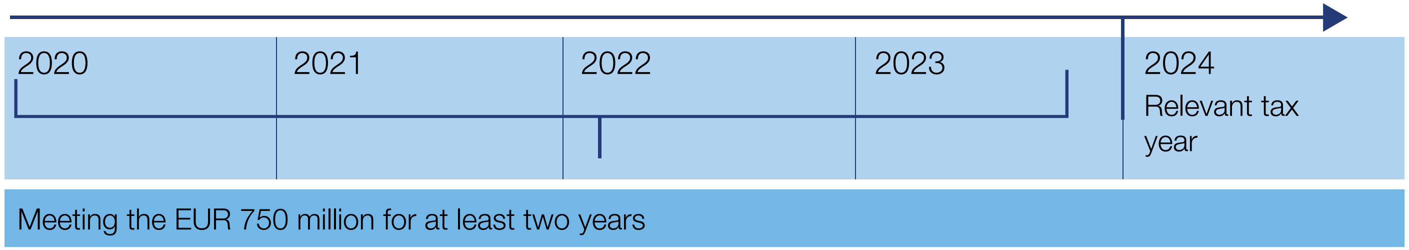
Identify groups within scope and the location of each Constituent Entity within the group
To be in-scope, the group must establish consolidated accounts where it appears that the group’s revenue[1] is at least EUR 750,000,000 for 2 (or more) tax years within the 4 tax years preceding the relevant tax year. Under the GloBE Rules, “revenue” is to be understood as the inflow of economic benefits arising from delivering or producing goods, rendering services, or other ordinary activities, in any event before deducting cost of sales and other operating expenses.


The entity that establishes the consolidated accounts is known as the Ultimate Parent Company (UPE). Subject to specific rules with respect to joint ventures in the sense of Pillar Two, the entities that are consolidated line-by-line are known as the Constituent Entities. Permanent establishments are treated as a separate Constituent Entities.
<u>Real estate specifics</u>

Investment funds and REITs, as well as their subsidiaries, are excluded entities, provided that they are the UPEs and the conditions set out in the definition of these concepts are met (see below).
The OECD has specified that net realised and unrealised gains from investments[2] must be taken into account to determine whether the threshold of EUR 750,000,000 is reached, even if presented separately as extraordinary or non-recurring items.
Constituent Entities include permanent establishments as defined by the GloBE Rules. The sole renting of real estate located in another country should not lead to a qualification of a PE within the scope of most treaties, even if the real estate income is taxable in the source state based on the treaties’ provision. In such a case, the provisions of the GloBE Rules related to ‘stateless PE’ should apply, which may lead to distortions in terms of allocable income.
Services charges and taxes reinvoiced to the tenants should be recognised as profits (no compensation between profits and charges) and therefore should be taken into account to determine whether the threshold of EUR 750,000,000 is reach.
For example, The qualification of a lease in accordance with IFRS 16 is crucial to determine the revenue of a Constituent Entity in the consolidated financial statements

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3 Including, as the case maybe, the turnover of excluded entities.

4 Under IFRS, Investment Properties must be appraised at their fair market value, which can lead to (upward or downward) fair value adjustments in the accounts. These fair value adjustments are therefore considered when determining whether a group meets the threshold.

2.	Safe Harbour	**Determine if the Transitional CbCR Safe Harbour or UTPR Safe Harbour is applicable for each jurisdiction** Under the CbCR Safe Harbour (Twogenerally available for financial years 2024 – 2026), the Top-up Tax due under the GloBE Rules in a jurisdiction is deemed to be zero in case one of the three tests is met: • De Minimis Test: In the CbCR, the total revenue in a jurisdiction is less than EUR 10,000,000 and the profit (loss) before income tax is less than EUR 1,000,000 • Simplified ETR test: the Simplified ETR is greater than or equal to the transition rate (15% for 2023 and 2024, 16% for 2025 and 17% for 2026) • Routine Profit Test: the profit (loss) before income tax is equal or less than the Substance Base Income Exclusion as calculated under the GloBE Rules Under the UTPR Safe Harbour (generally available for financial year 2025), the top-up tax under the UTPR for the jurisdiction of the UPE would be deemed to be zero provided that the UPE jurisdiction has a nominal corporate income tax rate of (at least) 20%. The availability of a safe harbour must be assessed for the first year of application of Pillar Two. A group that has not applied a safe harbour is this first year will not be allowed to apply it in the subsequent years. *Real estate specifics* • *As you will read below, the "Substance Base Income Exclusion" should rarely apply to the real estate sector, and therefore the Routine Profit Test should not be available*
3.	GloBE Income	**Determine income of each Constituent Entity** Starting from the consolidated financial statements of the UPE, the group should determine the income of each Constituent Entity as reported in these consolidated financial statements. The GloBE Income corresponds to the net result of the Constituent Entity in the consolidated financial statements of the UPE, before elimination of the intragroup transactions. It is further adjusted to take into account the differences between the accounting result and the taxable result (e.g., participation exemption regime as defined by the GloBE Rules). The GloBE Income might also be negative, and it is called an admissible loss. Once the income of each Constituent Entity has been determined, this income is aggregated (and the admissible loss is then deducted) for all Constituent Entities established in the same jurisdiction (jurisdictional blending[3]). *Real estate specifics* • *While included to determine whether the EUR 750,000,000 is reached, unrealised gains and losses (e.g., fair value adjustments on underlying real estate assets) are excluded for the determination of the GloBE Income. The ETR, as well as any Top-up Tax, is indeed determined by reference to the realised profits.* • *Important item that may lead to differences between some local GAAPs and the IFRS consolidated accounts, and hence to a (potential) low(er) ETR under the GloBE Rules: the depreciation taken on the real estate assets under local GAAP (awhile these assets are recorded as fair value in IFSR). Because of these depreciations, the ETR as calculated under the GloBE Rules might be (much) lower than the local statutory corporate income tax rate. This is to be verified on a case-by-case basis.*

5 Specific rules apply to minority shareholdings, partially owned companies and joint ventures.

4.	Covered taxes	**Determine taxes attributable to income of a Constituent Entity** Starting from the consolidated financial statements of the UPE, the group should determine the taxes attributable to the income of each Constituent Entity as reported in these consolidated financial statements. Only taxes on income are considered. It is mentioned that an income tax is generally levied on a flow of money or money's worth that accrues to a taxpayer during a period of time. The Covered Taxes definition is then further broadened by any tax on distributed profits (e.g., withholding tax on dividends that is a Covered Tax for the distributing company) and tax imposed 'in lieu of a generally applicable CIT'. The latter includes taxes that are not described in the main rule, but which operate as substitutes for such taxes, generally withholding taxes on interest, rents and royalties (that are Covered Taxes for the beneficiary of the income). The amount of taxes is further adjusted by the deferred taxes. For the purposes of the GloBE Rules and the calculation of the Covered Taxes, the deferred taxes are valued at the lower of the 15% minimum rate (which is the ETR to be reached) and the applicable tax rate. Deferred tax liabilities are tax expenses of the year they are recorded (or increased) while deferred tax assets are tax benefits; the total of both give the "Total Deferred Tax Adjustment Amount" (which can be negative) that is added to the amount of taxes. A deferred tax liability therefore increases the ETR in the year it is constituted (or increased) and decreases this ETR in the year it is reversed, while a deferred tax asset shall decrease the ETR in the year of constitution (or increase) and increase the ETR in the year of reversal. An option must be exercised as from the first submission of the GloBE Information Return for the recognition of a deferred tax asset related to the admissible loss of the year. Subject to specific rules, deferred tax liabilities should be used (reversed) within 5 years (this reversal will lead to a decrease of the Total Deferred Tax Adjustment Amount in the year concerned) to avoid a recapture, and thus a recalculation of the ETR and potentially a supplementary Top-up Tax, in the year during which they have been constituted (or increased). Deferred tax expenses (i.e., a deferred tax liability in the year of constitution (or increase) or a deferred tax asset in the year of reversal) with respect to items excluded from the GloBE Income (e.g., participation exemption) are excluded from the Total Deferred Tax Adjustment Amount. Once the Covered Taxes of each Constituent Entity have been determined, these taxes are aggregated for all Constituent Entities established in the same jurisdiction (jurisdictional blending[4]).

6 Specific rules apply to minority shareholdings, partially owned companies and joint ventures.

		Real estate specifics • *Deferred taxes are extremely frequent in the real estate sector. Two major items immediately come to mind: (i) the DTL corresponding to the income tax on the latent gain on a real estate asset and (ii) the DTA corresponding to the carried-forward tax losses. These deferred taxes recognised in the consolidated accounts should be carefully reviewed as they may be adjusted (or even be useless) for the purposes of Pillar Two. Indeed, a DTL recognised in the financial statements to match commercial negotiations in real estate share deals, may not be considered for Pillar Two in case the capital gain realised (even if a DTL was granted in the price formula) is an excluded income for the purposes of determining the GloBE Income based on the Pillar Two provisions on participation exemption. The DTA also raises questions, firstly on its origin (e.g., a DTA for carried-forward tax losses of a Constituent Entity stemming from the depreciation of the real estate asset, while this depreciation is not reflected in the consolidated financial statements and thus does not impact the GloBE Income). and secondly on its effective use in the future (which is also to be assessed prior to its recognition but may evolve over time).* • *Bear in mind that local dividend withholding tax is a Covered Tax for the distributing entity, and not its shareholder. This may have a positive impact for captive real estate funds, which should enjoy a (nearly) tax exempt regime subject to yearly dividend distribution. For such a real estate fund being a Constituent Entity in-scope, the withholding tax due is taken into account to ultimately determine the ETR of this Constituent Entity under the GloBE Rules. If we greatly simplify but depending on the size of the distribution compared to the GloBE income, a dividend withholding tax of 15% should be sufficient to avoid a Top-up Tax*
5.	Jurisdictional Excess Profit	**Determine Substance Base Income Exclusion for jurisdictional excess profit** This step aims at determining the taxable base for a Top-up Tax. The taxable base, as such, equals the GloBE Income. However, as a measure to promote employment and certain industries, Constituent Entities may deduct from this GloBE Income an amount called the 'Substance Based Income Exclusion' (SBIE), which is a carve-out for expenditure on tangible fixed assets and payroll costs. The tangible asset carve-out is equal to 5% of the carrying value of certain eligible tangible assets of a Constituent Entity located in a jurisdiction (subject to higher rates in a transitional period). *Real estate specifics* *Certain assets are however specifically excluded from the carve-out. This includes property held for investment, sale or lease. The reason for this is that the carve-out is intended to provide a measure of relief for MNEs that have genuine physical activities in a jurisdiction – not simply purchasing investment property. Therefore, although the SBIE seems to provide relief for real estate, companies investing in real estate will not benefit from the SBIE most of the time.* *This exclusion might influence the way the business is carried-out in a low-taxed jurisdiction. Take the example of an hotel in a tax haven. If both the operation and the real estate asset are located in the same Constituent Entity (e.g., via a franchise agreement or hotel management agreement), this entity will benefit from an SBIE on both the real estate asset and the payroll costs. On the contrary, when a Constituent Entity solely owns the real estate and leases it to the operator, this entity will not benefit from an SBIE, but the operator will. However only on payroll costs and not on the real estate.*

6.	ETR / QDMTT / Top-up Tax	**Calculate the ETR of all Constituent Entities located in the same jurisdiction and determine resulting Top-up Tax** The ETR is determined per jurisdiction by dividing the Covered Taxes by the GloBE Income. The Top-up Tax percentage is equal to 15% minus the jurisdictional ETR. Example: For a jurisdiction, the Covered Taxes amount to 10 while the GloBE Income amounts to 100. The jurisdictional ETR therefore amounts to 10%, and the Top-up Tax percentage amounts to 5%. In this example, for the jurisdictions having implemented a QDMTT, these jurisdictions will levy an additional 5% taxation calculated on the Jurisdictional Excess Profit (see step 5). It is noted that the basis and outcome of the preceding steps may deviate in case a jurisdiction applies a QDMTT. This is in particularly caused by the fact that jurisdictions are allowed to introduce a QDMTT that as a main rule starts from the local GAAP accounts instead of the UPE consolidated GAAP. In case a jurisdiction's QDMTT qualifies for the QDMTT Safe Harbour, the Top-up Tax under the IIR and UTPR will be deemed zero. In the absence of a QMDTT that qualifies for the QDMTT Safe Harbour, the QDMTT is only credited against the calculated Top-up Tax and Top-up Tax may still arise under the IIR and/or UTPR.
7.	IIR and UTPR	**Allocate Top-up Tax under IIR or UTPR** This last step is only relevant for the jurisdictions of Constituent Entities that either have not implemented a QDMTT have not implemented a QDMTT but such QDMTT does not qualify for the QDMTT safe harbour (or such QDMTT is subject to a switch-off for instance because it does not apply in all situations, e.g., joint ventures) and the QDMTT does not allow to reach an ETR of 15% based on the UPE consolidated accounts. Under the IIR, the UPE (or another intermediary as closest as possible of the UPE when the latter is not established in a country having implemented Pillar Two) shall bear the Top-up Tax that is attributable to it. The UTPR, which is a fallback position that should enter into force in 2025, shall shift the burden of the Top-up Tax to another Constituent Entity of the group in case no Top-up Tax is assessed under the IIR.

2. Excluded real estate investors

The GloBE rules will apply to MNEs[1] with a consolidated turnover of at least EUR 750,000,000. However, certain entities are excluded based on their particular purpose and status. In particular, "investment funds and real estate investment vehicles should also be excluded from the scope of this Directive when they are at the top of the ownership chain, since the income earned by those entities is taxed at the level of their owners." More specifically:

- **Investment funds** that are an ultimate parent entity are excluded from the scope of Pillar Two. To qualify as "investment fund" an entity or arrangement must meet a series of seven cumulative conditions. Some of them require a specific attention. The fund must be designed to pool assets from a number of investors, some of which are non-connected. Captive funds should therefore not be able to benefit from this exclusion; that being said, captive funds should also not qualify as "ultimate parent entity". The fund, or its management, should be subject to a regulatory regime which includes appropriate anti-money laundering and investor protection regulation. It remains to be seen what "appropriate" will mean; in any case it should be concluded that funds subject to the AIFMD and/or UCITs Directive should comply with this requirement. Other conditions relate to (i) the investment in compliance with a defined investment policy, (ii) the cost reduction or risk spreading achieved collectively by the investors, (iii) the goal of generating investment income or capital gain, or to protect investors against an event or outcome, (iv) the right to return for the investors based on the contribution made and (v) the management by professionals on behalf of the investors.
- **Real estate investment vehicles** that are an ultimate parent entity are excluded from the scope of Pillar Two. This exclusion benefits to REITs, defined as "*a widely held entity that holds predominantly immovable property and that is subject to a single level of taxation, either in its hands or in the hands of its interest holders, with at most one year of deferral*". This definition however raises certain questions for which clarification will be needed. What does "widely held" means, is there a minimum level of floating (which is usually the case in the local regulations of REITs)? Is the condition of single level of taxation still complied with if certain activities of the REIT are taxable? In certain REIT regimes, the single level of taxation is achieved in the hands of the shareholders via a compulsory dividend distribution, but what could be the consequences if the REIT chooses to reduce its indebtedness instead of distributing or decide to reinvest instead of distributing (knowing that in certain REIT regime the reinvestment period might exceed one year)?
- To benefit from this exclusion, the investment fund or the REIT must be the **ultimate parent entity (UPE)**. An UPE is an entity that owns, directly or indirectly, a controlling interest in any other entity (or the main entity of a permanent establishment in scope) and that is not owned, directly or indirectly, by another entity with a controlling interest in it. Based on the directive, "controlling interest" refers to an ownership interest whereby the owner is required (or would have been required) to consolidate all assets, liabilities, income, expenses and cash flows on a line-by-line basis in accordance with an acceptable financial accounting standard. In a European context, this refers to IFRS 10 (*Consolidated Financial Statements*) – which immediately raises the question of the exception to consolidation for investment entities who shall measure an investment in a subsidiary at fair value[2].
  This condition might lead to quite disturbing consequences, for example in case of a European REIT (entity A) controlled by another (European or not) REIT or by a governmental entity (entity B), or in case of an investment fund (entity A) controlled by a pension fund (entity B). The entity A should be excluded from the scope of Pillar Two, provided that entity B itself benefits from an exclusion and either entity B owns (directly

7 In Europe, Pillar Two also applies to national groups meeting the turnover threshold.

8 The OECD / IF provided helpful guidance in its February 2023 Guidance on the GloBE Rules for Investment Funds that clarified that the deemed consolidation test does not modify the rules to be applied under the accounting standard, therefore it should not modify the exception for investment entities into a deemed consolidation.

or through excluded entities) at least 95% of the value of entity A (which essentially invests funds for entity B) or entity B owns (directly or through excluded entities) at least 85% of the value of entity A and the latter derives substantially all of its income from dividends or equity gains (which shall not be the case in case of direct holding of real estate assets).

- Let's take a captive investment fund controlled by a pension fund or by a REIT (being itself the ultimate parent entity). The investment fund shall be excluded from Pillar Two because the controlling entity is an excluded entity as well.
- Let's take REIT A controlled by REIT B. REIT B might be excluded if it is the ultimate parent company. But REIT A shall not benefit from an exclusion since REIT A is not the ultimate parent company and, considering minimum floating requirements, REIT B is not owning 95% of the value of REIT A.

- **Platform companies** and **SPVs** held nearly fully by an exempt UPE and serving the investment purpose of that UPE should also qualify as excluded entities. **Importantly**, where the fund is excluded from consolidation obligations, it might be that in certain jurisdictions the consolidation obligation shifts to a holding entity below the fund. In such a situation, the group would not have an investment fund as UPE but that holding entity, which cannot benefit from the exclusion. If the revenue threshold is met, this holding entity will be treated as UPE for the purposes of Pillar Two. When assessing the form a fund should take, having a closer look to the accounting consolidation obligation might be a relevant point of comparison before making any decision.

Other usual suspects are pension funds and insurance companies.

- **Pension funds** also benefit from an exclusion for Pillar Two. This concept covers both regulated entities operating to the benefit of the public as pension funds of MNE group provided that the retirement benefits are secured or otherwise protected by national regulations and funded by a pool of assets held through a fiduciary arrangement or trustor.
- **Insurance companies** are large real estate investors. As a matter of principles, they are in scope of Pillar Two when meeting the turnover threshold.

Points of attention in real estate transactions

1. Deal structuring

Pillar Two considerations might also be relevant when comparing a share deal and an asset deal.

The consequences of an asset deal should be quite straight-forward: (i) the capital gain realised should be included in the GloBE Income, (ii) the DTL for latent gain previously recorded should be reversed (therefore reducing the ETR in the year of sale, but on the other hand such DTL has increased the ETR for the years preceding the sale), and (iii) any withholding tax upon distribution and/or liquidation of the company-owner shall be included in its Covered Taxes.

The consequences of a share deal might be more complicated.

- Firstly: the computation of the GloBE Income of the seller upon exit. The GloBE Rules provide for their own conditions for participation exemption: a capital gain benefits from participation exemption subject to a minimum participation of 10% in the benefits or voting rights of the subsidiary held for at least one year. Even if the capital gain realised upon exit is taxable in the hands of the seller (e.g., because of a "real estate rich" provision in domestic tax law), it is excluded from the GloBE Income with as a consequence the corresponding exclusion of the domestic tax from the Covered Taxes.
- Secondly: the reversal of the DTL in the hands of the seller. Even in absence of taxation of the capital gain, a seller might have recognised a 'commercial DTL' in line with market practices, i.e., a discount on the share price considering the latent taxable gain on the real estate. Contrary to an asset deal, the (accounting and GloBE) treatment of this DTL raises questions.

This DTL could be 'used' by the seller (as it has decreased the share price) but since it relates to an excluded income, it should not impact the calculation of the Covered Taxes. Since the reversal of this DTL is excluded from the calculation of the Covered Taxes, does it mean that a recapture, in the hands of the seller, of its initial constitution, must take place? Indeed, at the time of constitution of the DTL, the seller might not have decided yet whether it would dispose of the asset via a share deal.

One could also argue that this DTL still 'exists' in the sense that the transaction via a share deal has not resulted in a step-up in basis of the underlying real estate asset and therefore that a latent gain still exists (and have probably increased). Is the DTL then simply 'transferred' to the purchaser's group (whether or not in-scope of Pillar Two) without any recapture or reversal in the hands of the seller's group?

- Thirdly: the transfer of deferred taxes from one group to the other. Under the GloBE Rules,
    - the deferred taxes are transferred from one group to the other group, with the exception of deferred tax assets stemming from admissible losses, in the same way and to the same extent as if the group had acquired the target company when these deferred taxes were created; and
    - the deferred tax liability that has been taken into account to determine the Covered Taxed of the target are deemed annulled by the seller's group and are considered as coming from the purchaser's group in the year of acquisition.

The deferred tax asset related to carried-forward tax losses should not transferred. They should also not be maintained in the hands of the seller's group and their reversal should therefore be recorded as a tax expense and increase the ETR, to the extent they relate to an admissible loss in the sense of the GloBE Rules (which is doubtful in case their origin is found in the local depreciation of the real estate asset).

For the other deferred taxes, the transfer only applies between two groups in-scope of Pillar Two. In case the purchaser's group is not in-scope, then the sale of the target by the seller's group should lead to a reversal of the deferred taxes recorded in relation to this target (and its assets and liabilities) and therefore impacts its ETR in the year of sale. For the deferred tax liability recorded in relation to the target's asset, it should be annulled by the seller's group and be recognised by the purchaser's group, but the purchaser's group is then obliged to annul this DTL or pay the corresponding tax within the five subsequent tax years.

2. Share deals

In the framework of any real estate transactions, each party should take a view on whether its counterparty is in-scope of Pillar Two, as this may impact the pricing, the due diligence and the drafting of the transaction documents (incl. post-closing covenants). This section only deals with 'one-off' transactions; the formation of a joint venture is examined in the next section. It is assumed that the target company is a Constituent Entity of the seller's group and is not an excluded entity for the purposes of Pillar Two.

a. Buyer in-scope of Pillar Two

When a buyer is in-scope, the biggest impact could be on pricing based on the buyer's own tax position. For such a buyer, purchasing a target company in a given jurisdiction may lead to either an increase or a decrease of its ETR in this jurisdiction going-forward, as it will add a new Constituent Entity – and thus GloBE Income and Covered Taxes – in this jurisdiction.

On a more operational matter, the buyer in-scope will be careful to collect all the information required and to prepare the integration since the filing of the GloBE Information Return is due within 15 months from the end of the relevant year.

b. Seller in-scope of Pillar Two

The first relevant item is the pricing, which remains a commercial negotiation. As mentioned above, the acquisition of the target might be beneficial or detrimental to a buyer in-scope, and it is the same for a seller in-scope. Moreover, the change of control over the target should result in the reversal, in the hands of the seller, of the DTA recorded for the target's future tax benefits (e.g., losses admissible under Pillar Two). Such reversal of DTA increases the Covered Taxes and thus the ETR and should benefit to the seller.

The relevancy of Pillar Two in such a situation firstly depends on the location of each Constituent Entity of the seller's group.

- If all Constituent Entities are established in countries that have implemented Pillar Two and have included a QDMTT in their legislation, only the tax position of the seller's group in the jurisdiction of the target company will be relevant.
- On the contrary, in case some of the Constituent Entities are established in countries that have not implemented Pillar Two – especially in case the UPE of the seller's group is established in such a country – the tax position of the entire seller's group might be relevant. Indeed, the jurisdiction of the target company might be granted taxation rights under the IIR or UTPR, meaning that the target company might be liable for taxes computed on the income of other seller's group company(ies) that are not established in the same jurisdiction.

Secondly, the number of Constituent Entities of the seller's group in the jurisdiction of the target company is relevant. Indeed, because of the jurisdictional blending, the tax position of all Constituent Entities in this jurisdiction, including the target company, must be taken into account. The jurisdictional group may be subject to a QDMTT, with the target company being either the taxpayer or jointly liable for this QDMTT.

- The scope of the tax due diligence extends (theoretically) beyond the target company itself. Indeed, to determine whether a QDMTT will be due, the buyer should access full and detailed information about the seller's group (at least) in that jurisdiction. It is not certain that a seller will accept to disclose this type of information; moreover, and in the first years of Pillar Two, full and accurate information might not be available yet. [3]
- The scope of the tax due diligence might also influence the availability of a W&I insurance or a dedicated tax insurance. In most cases, the availability of such insurance shall depend on the robustness of the tax due diligence carried out; the absence of tax due diligence might render impossible the entering into such insurance. Until now, insurers are also keen to exclude Pillar Two exposures from the coverage, relying on standard exclusions for transfer pricing and secondary tax liabilities. However, in relation to other group tax provisions[4], we have seen insurers being willing to provide coverage under the general representations subject to specific conditions (e.g., confirmation of the seller that the rules have been complied with and commitment to assist in case of tax audit).

In this hypothesis of a seller in-scope, the transaction documents will also have to be adjusted. The most important topics to be negotiated include:

- Definition of "Taxes" should include any GloBE Rules as well as secondary tax liabilities under these rules.
- Representations & warranties, and as the case may be specific indemnities or tax covenant, should include secondary tax liabilities in case the target company would be liable for Top-up Tax of other companies.
- General exclusions, time limits and maximum liability should be carefully considered. Most of the time parties will refer to the applicable statute of limitation for claim under the tax representations, which should also cover the (longer) statute of limitation under Pillar Two. But the cap on liability might lead to negotiations or issues (e.g., if the value

11 The first GloBE Information Return is indeed due by 30 June 2026.

12 For example, the group tax provisions with respect to interest deduction limitation

of the target company's shares is imbalanced compared to a potential Pillar Two liability for the seller's group), and the UPE might be requested to act as guarantor.

- Post-closing covenants should detail Pillar Two responsibilities: who will prepare the GloBE Information Return for the years prior to closing and the year of closing, who will take the lead in case of Pillar Two (multi-jurisdictional) disputes, which access right (to the seller's information) should be granted to the buyer…

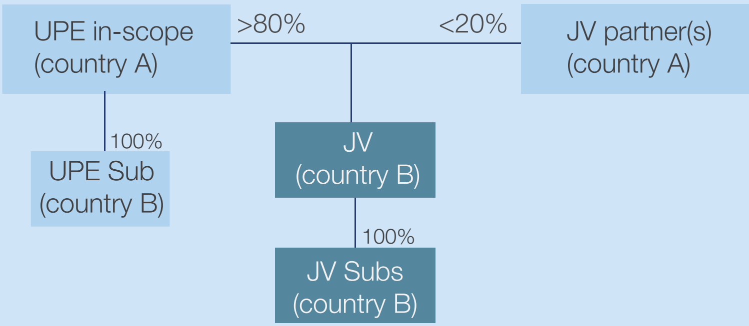
The purchase price formula and intragroup debt reimbursement on closing also require attention. The locked box system is not often used in real estate transactions but will surely require a specific protection for the period between the effective date and the closing. In a situation where the target company is not legally liable for the QDMTT but shares the cost with other group companies in the same jurisdiction, one should verify that the corresponding amount is recorded as debt – and that the corresponding amount is effectively paid (as the case maybe before refinancing of this intragroup debt by the buyer).

3. Joint Ventures

a. What's in a name

"Joint venture agreements" are frequent in the real estate sector. However, the treatment of these JVs under Pillar Two will differ drastically depending on the status of each shareholder and on their stake in the JV. In particular, an out-of-scope joint-venture partner might bear economically the burden of a Top-up Tax that is triggered by the other joint-venture partner being in-scope of Pillar Two. Several hypotheses are illustrated below .[5]

The UPE shareholder is in-scope and consolidates the JV (and its subsidiaries) line-by-line



The in-scope UPE holds an interest of at least 80% in the JV

- Country B has implemented a QDMTT

JV, JV Subs and UPE Sub are Constituent Entities in the sense of Pillar Two. To determine whether a Top-up Tax is due (to reach the 15% ETR threshold), the GloBE Income and the Covered Taxes of JV, JV Subs and UPE Sub are calculated and aggregated. In case the ETR is below 15%, a QDMTT is due in Country B.

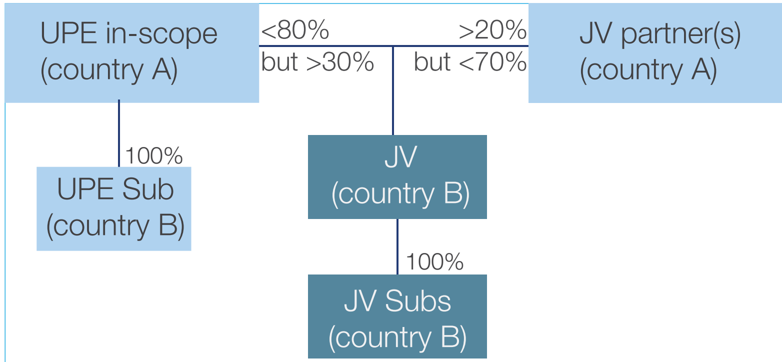
> *Tax position of JV and JV Subs is influenced (positively or negatively) by the existence of UPE Sub, and the JV partner(s) bears (economically) the burden of this QDMTT (proportionally to its share in JV)*

- Country B has not implemented a QDMTT

In absence of a QDMTT, the calculation of the Top-up Tax still follows the jurisdictional blending, but this Top-up is solely borne by UPE via the IIR, and for its share in the profits of JV, JV Subs and UPE Sub (i.e., the Jurisdiction Excess Profit of JV and JV Subs is subject to IIR up to the share of UPE in the JV; the balance of the Top-up Tax is uncollected).

> *Although the tax position of the JV and JV Subs is influenced by the existence of UPE Sub (i.e., determination of the ETR in country B), the consequences are solely borne by UPE, and not by the JV or the JV partners.*

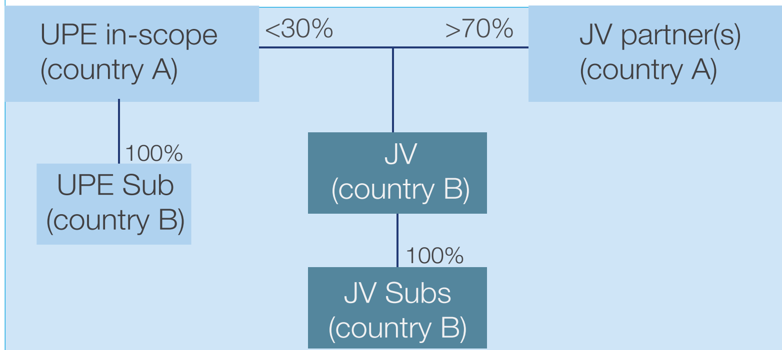
13 In these examples, the UPE can either be the direct shareholder of the JV or its indirect shareholder via subsidiaries.



The in-scope UPE holds an interest of less than 80% but more than 30% in the JV and the JV qualifies as partially owned parent entity (POPE) under Pillar Two.

- JV, JV Subs and UPE Sub are Constituent Entities in the sense of Pillar Two. To determine whether a Top-up Tax is due (to reach the 15% ETR threshold), the GloBE Income and the Covered Taxes of JV, JV Subs and UPE Sub are calculated and aggregated.
- The Top-up Tax, either via a QDMTT or an IIR, is assessed for the full amount in the hands of the JV.

> *Tax position of JV and JV Subs is influenced (positively or negatively) by the existence of UPE Sub, the Top-up tax (if any) is assessed in the hands of JV, and JV partner(s) bears (economically) the burden of the Top-up Tax (proportionally to its share in JV).*



The in-scope UPE holds an interest of 30% or less in the JV (but nevertheless consolidates it line-by-line), and the JV qualifies as minority-owned constituent entity (MOCE) under Pillar Two

- JV, JV Subs and UPE Sub are Constituent Entities in the sense of Pillar Two. However, JV and JV Subs are seen as one separate group for the purposes of Pillar Two. Their ETR in country B is thus assessed separately from the ETR of UPE Sub (limited jurisdictional blending).

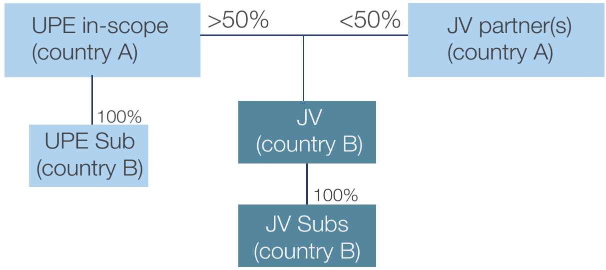
> *Tax position of JV and JV Subs is not influenced (positively or negatively) by the existence of UPE Sub.*

- In case Country B has implemented a QDMTT, the Top-up Tax is due by JV (and/or the JV Subs).

> The JV partner(s) bears (economically) the burden of this QDMTT (proportionally to its share in JV).

- In case Country B has not implemented a QDMTT, the Top-up Tax is due by UPE via the IIR, and for its share in the profits of JV and JV Subs (i.e., the Jurisdiction Excess Profit of JV and JV Subs is subject to IIR up to the share of UPE in the JV; the balance of the Top-up Tax is uncollected).

The UPE shareholder is in-scope and consolidates the JV (and its subsidiaries) based on the equity method



The in-scope UPE holds an interest of at least 50% in the JV. This is the 'joint venture" in the sense of Pillar Two.

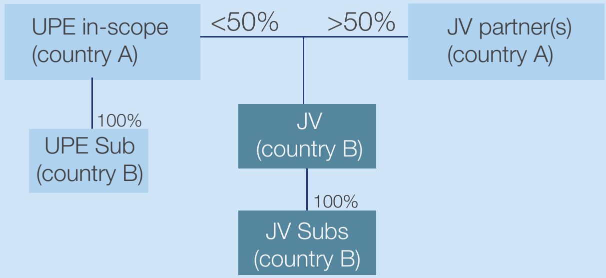
- The JV and the JV Subs are seen as one group for the purposes of Pillar Two. Their ETR in country B is thus assessed separately from the ETR of UPE Sub (limited jurisdictional blending).

> *Tax position of JV and JV Subs is not influenced by the existence of UPE Sub (same as for a MOCE).*

- In case Country B has implemented a QDMTT, the Top-up Tax is due by JV (and/or the JV Subs).

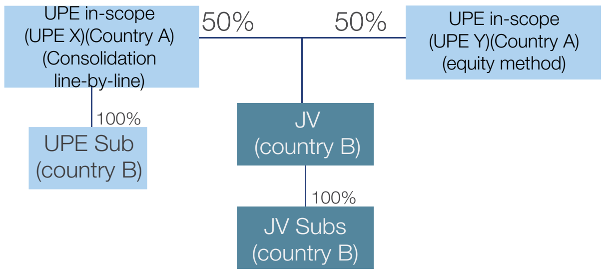
> *The JV partner(s) bears (economically) the burden of this QDMTT (proportionally to its share in JV).*

- In case Country B has not implemented a QDMTT, the Top-up Tax is due by UPE via the IIR, and for its share in the profits of JV and JV Subs (i.e., the Jurisdiction Excess Profit of JV and JV Subs is subject to IIR up to the share of UPE in the JV; the balance of the Top-up Tax is uncollected).



The in-scope UPE holds an interest of less than 50% in the JV

- The JV (and its subsidiaries) fall out-of-scope of Pillar Two, for their own tax position but also to determine the tax position of the UPE (no jurisdictional blending).
- Extreme example: a JV formed by three (or more) UPEs, each in-scope, and consolidated based on the equity method in all UPEs, will fall outside of Pillar Two



JV is a POPE for the UPE consolidating line-by-line (UPE X) and a JV in the sense of Pillar Two for UPE consolidating nder the equity method (UPE Y).

- From the perspective of UPE X, there is a jurisdictional blending (where the results of UPE Sub are aggregated with the results of JV). From the perspective of UPE Y, there should be no jurisdictional blending.
- From the perspective of both UPE X and UPE Y, any Top-up Tax might either be assessed in the hands of the JV via a QDMTT or in the hands of the UPE via an IIR (and for its allocable share in JV).

> *The potential issue is the QDMTT. In absence of such QDMTT, each group shall make its own calculation and shall bear its own Top-up Tax via the IIR. In case of QDMTT, UPE Y might bear indirectly a share in the Top-up Tax stemming from the jurisdictional blending. The worst-case scenario is having a QDMTT for POPE but not the JVs in the sense of Pillar Two, which might lead to a double taxation.*

The JV is held 50-50 by a UPE in-scope that consolidates line-by-line and an UPE in-scope that consolidates based on the equity method

Looking at these examples, it seems that the sole hypothesis where Pillar Two leads to a "logical conclusion" is the JV held 50-50 by two UPEs in-scope, each consolidating based on the equity method. In this hypothesis, each UPE shall bear directly (via the IIR) or indirectly (via the QDMTT), its share in the Top-up Tax, the latter not being influenced by other subsidiaries of any of the UPEs in the same jurisdiction. In all other cases, the difference in treatment, between the joint ventures and their partners, might be questioned as regard to the principle of freedom of establishment, free movement of capital and non-discrimination.

b. Existing joint ventures

The GloBE Rules do not provide for grandfathering clause according to which certain joint ventures established prior to their entry-into-force would fall outside of their scope. The GloBE Rules therefore have immediate effect (according to their implementation) and they will also apply to existing joint venture agreements. Parties should therefore consider their own position in such JVs and determine adjustments or re-negotiations are needed (or even possible).

c. Relevant provisions in joint venture agreements

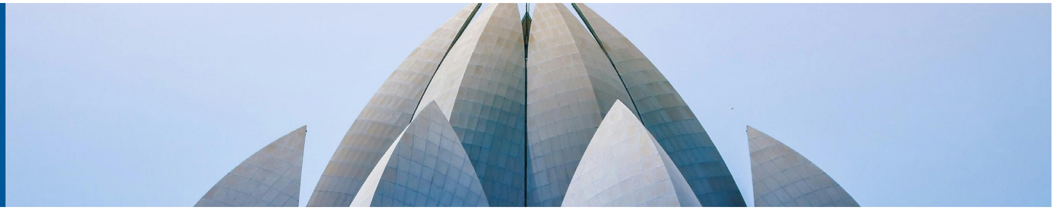
Negotiating joint venture agreements will be a complex exercise, as it will first require an assessment of the qualification of the joint venture itself, and thus also of each joint venture partner. More importantly, JVs are usually set-up for a long period of time (usually 5 to 10 years, with potential extension) and therefore the situation and qualification of all parties involved may evolve over time. At first sight, the parties will be attentive to the following provisions:

- Adequate "rendez-vous" clauses to renegotiate and adapt as the case maybe the economics of the deal in case the situation of (one of) the joint venture partners would change (e.g., in case one of the joint venture partners would fall in-scope of Pillar Two during the lifetime of the JV), or the qualification of the joint venture would change (e.g., in case of share transfers), or in case the composition of (one of) the partner's group in the jurisdiction of the joint venture (or the JV's subsidiaries) would change (e.g., purchase or sale of companies by in-scope partner in the same jurisdiction).
- The differences between control and appropriation of profits, where the recourse to non-voting shares might impact the question on whether the JV should be consolidated line-by-line or based on the equity method.
- Any form of neutralisation of the jurisdictional blending in order for the out-of-scope partner to not share (economically) a tax burden attributable to the in-scope partner.
- Any form of neutralisation of the QDMTT burden in the hands of the JV in order for the out-of-scope partner to not share (economically) a tax burden attributable to the in-scope partner.
- Exit provisions, especially in case the parties would not be (legally or commercially) able to deal with change in circumstances.

In addition, the QDMTT that would be assessed in the hands of the JV might raise the more concerns. Depending on local implementation of Pillar Two, this could become a point of comparison (or competition) concerning the country of incorporation of the JV (but beware of substance and beneficial ownership requirements). More sophisticated solutions, like transparent or hybrid entities, might also be envisaged (but beware of other tax aspects like ATAD 2).

2. News from Europe

ESG and Taxation



Today, ESG (short for: environmental, social, and governance) is more relevant for businesses than ever before. With the growing relevance of ESG in all sectors and all business departments, there is also an increased focus on ESG in taxation. Taxation can be related to each element of ESG.

Environmental

Tax related environmental aspects of ESG are seen in various laws and policies of governments or supranational bodies (like the EU Commission) to encourage, e.g., via subsidies or tax breaks, or discourage, e.g., via taxation or penalties, (so called 'sticks & carrots'), the behaviour of taxpayers. The Dutch energy investment allowance, 0% value added tax rate on solar panels, taxes on energy and the EU CBAM directive are examples thereof.

In the real estate sector, these policies should be taken into consideration and can influence the decisions of investors, developers and users of properties.

Social

The social aspects of ESG can be linked to taxpayers paying their 'fair share' and contributing to society directly and indirectly by paying taxes. Over the last years, this has become a more prominent topic as the public interest in the behaviour of taxpayers continues to increase. Naming and shaming appears to have become common place and therefore discussions about tax policy have made their way to the boardroom and into politics.

Governance

Governance can, together with the social aspect, be linked to more taxpayers developing tax governance and tax policy rules, which they also publish in order to show corporate social responsibility in relation to taxation. A comprehensive understanding and effective communication of tax governance strategies will become increasingly crucial, also in the real estate sector.

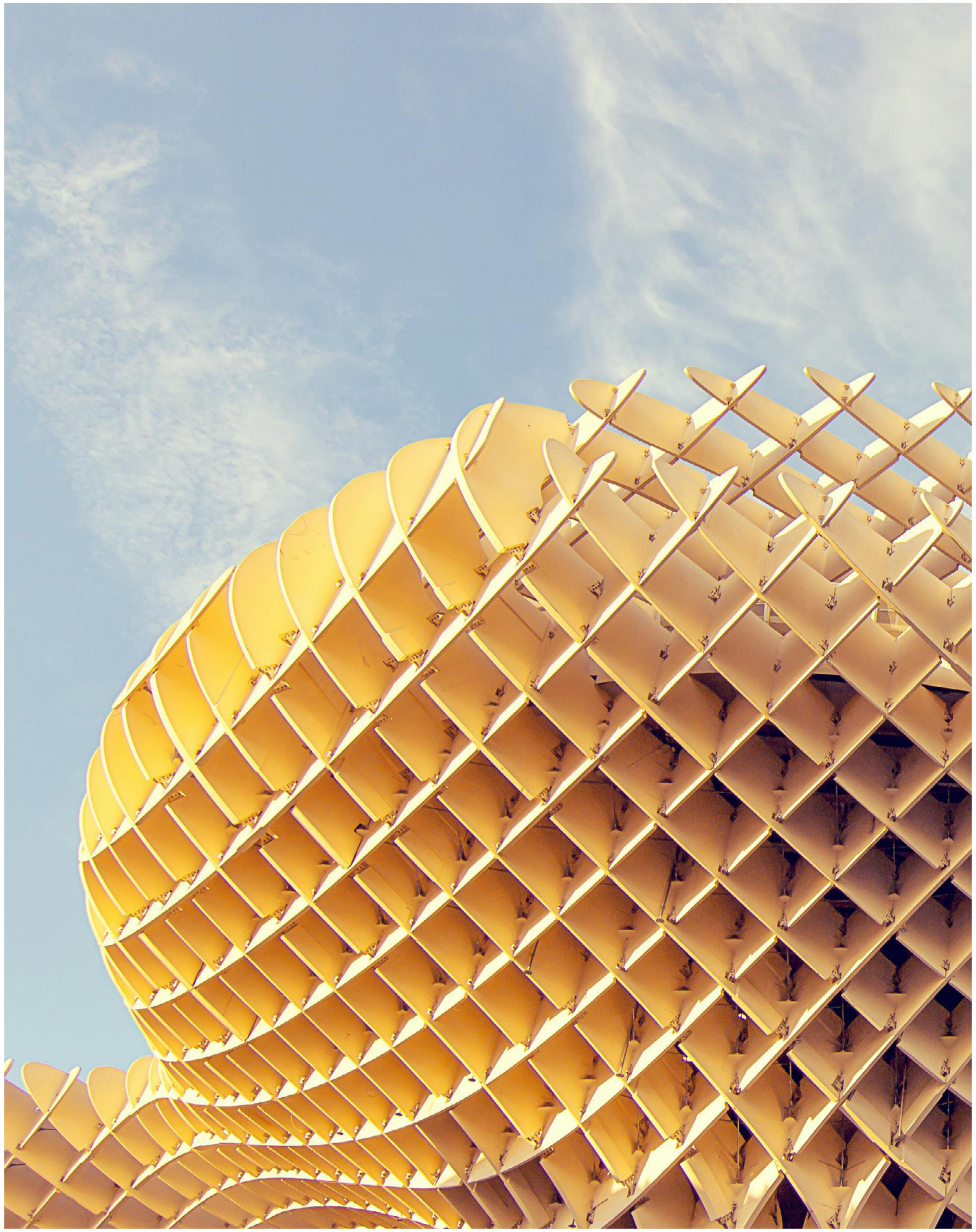
In addition, tax governance in ESG also includes mandatory or voluntary reporting on the tax and ESG obligations. The implementation of the EU directive on public Country-by-Country Reporting (**CbCR**) and the Corporate Sustainability Reporting Directive (**CSRD**) are examples of recent directives that may require additional disclosures. This will inevitably increase the importance of providing an explanation on tax governance, as these new regulations will demand greater transparency and accountability from corporations.

- Public CbCR: The European Directive 2021/2101 requires large multinational corporations to publicly disclose reports on corporate income tax paid per country. This public CbCR tax report will become a new mandatory and essential component of corporate communication and reporting to internal and external stakeholders. The aim is to provide comparable and transparent information to all stakeholders about the implemented tax policy, its impact, and related responsibilities or risks. The CbCR information must be provided by multinational groups, including unlisted ones, that meet a consolidated revenue threshold of EUR 750,000,000 and will apply to financial years starting on or after 22 June 2024.

- ESG reporting: The CSRD is a new EU directive that came into force from the fiscal year 2024 for the largest, listed companies. Thereafter the scope will be extended to smaller listed entities and large companies. The CSRD encompasses sustainability in a broad sense and includes disclosure requirements for a wide range of ESG aspects according to the European Sustainability Reporting Standards (**ESRS**). Initially, the CSRD requires limited external assurance. At a later stage, this is extended to reasonable assurance. It is expected that reporting about tax governance will be an important part of ESG reporting.

How can we help?

Our team of experts is well-equipped to provide you with practical support and tailored advice offering a range of tax related ESG services. This includes assisting with the integration of ESG considerations into tax policy and investment strategies and taking into account ESG considerations in day-to-day tax and transfer pricing advice.



REITS AND REAL ESTATE FUNDS: LANDMARK DECISION OF THE EUROPEAN COURT OF JUSTICE BUT BEWARE OF COLLATERAL EFFECTS

The European Court of Justice (ECJ) has ruled that the former German tax regime providing for an exemption from corporate income tax to a resident real estate fund while a non-resident real estate fund cannot benefit from the same exemption is contrary to EU free movement of capital (ECJ, Case C-537/20, CURIA - Documents (europa.eu)) (the ECJ Ruling). Would this mean that EU-based real estate funds and REITs can now operate in Member States via a branch benefitting from the same favourable tax regime as the funds established in this Member State? To answer this question, we summarise the ECJ Ruling to afterwards have a closer look to existing European case law on State Aid and REITs

The ECJ Ruling

The ECJ Ruling follows a request for a preliminary ruling by the German *Bundesfinanzhof* on the interpretation of the principle of free movement of capital as laid down in Article 63 TFEU. In the case at hand, a Luxembourg common fund (FCP) specialised in real estate investments, having two institutional investors, had disputed its subjection to German corporate income tax on German-source real estate income.

Non-resident real estate funds are indeed subject to income tax on their real estate income, while resident real estate funds are exempt, such exemption being available for resident funds only. It is however fair to add that distributions made by those resident funds to their (non-resident) investors are subject to withholding tax.
The *Bundesfinanzhof* questioned whether the exclusion of non-resident funds from the benefit of that exemption is compatible with EU law.

The ECJ recalls that the following elements must be examined to conclude that there has been a violation of EU law.

- The existence of a restriction of the free movement of capital. It is not disputed that resident real estate funds are exempt from corporate income tax, whereas non-resident real estate funds are not. The difference of treatment exists and is unfavourable to non-resident real estate funds. This difference is likely to dissuade non-resident real estate funds to invest in Germany but also German investors to invest through such non-resident real estate funds. The ECJ excludes the reasoning according to which the taxation applicable to the investors should be considered – indeed, resident real estate funds are exempt but their distributions to investors are subject to tax, while such taxation on distribution is not guaranteed in case of a non-resident real estate fund. For the ECJ, the existence of a difference in treatment cannot be called into question by this argument since the exemption of resident real estate funds is not subject to a condition of taxation of the real estate income in the hands of the investors. Same as for the deduction resident investors could benefit from in case of investment via a non-resident fund since it appears from the file in the main proceedings that this elimination of double taxation depends greatly on the individual situation of each investor and is therefore uncertain.
  Having disregarded the arguments in favour of the disputed tax regime – based on the

avoidance and elimination of double taxation considering the tax treatment of investors – the ECJ concludes to the existence of a restriction to the free movement of capital, in principle prohibited.

- The comparability of the situations. Although apparently contrary to EU law, it should still be verified whether the situations – resident real estate fund vs. non-resident real estate fund – can be considered comparable taking into account the objectives of the legislation at stake.
  It is apparent that the purpose of the German legislation at stake was to achieve transparency (the real estate income is taxed only once, at the level of the investors and via a withholding tax) and to ensure equal treatment between a direct investment in real estate and an investment made through a fund. Considering these goals, a non-resident fund should not be considering being in a comparable situation since Germany is precluded to tax the investors in those funds because of the territoriality principle (i.e., in the case at hand, Germany has no power to levy taxes on income attributed by a Luxembourg fund).

The ECJ is not convinced:

- Germany has the power to tax resident investors in a non-resident fund. From this perspective, both resident and non-resident funds are in an objectively comparable situation.
- Considering the objective - an equal treatment between a direct investment and an investment via a fund - both resident and non-resident funds are in an objectively comparable situation.
- The shifting of the taxation from the fund to its investors, to reach a single level of taxation, can also be implemented by making the exemption from income tax conditional on the taxation of the investors.

The ECJ therefore concludes that there is no objective difference in situation between a resident real estate fund and a non-resident real estate fund, and that these funds are in comparable situation considering the objectives of the legislation at stake.

- The existence of an overriding reason relating to the public interest. The ECJ recalls that a restriction on the free movement of capital may still be permitted provided it is justified by overriding reasons relating to the public interest, subject to a proportionality test.

  The ECJ rejects the arguments put forward by the German government in this respect.

  - The Government first pleaded for the coherence of the national tax system, arguing that the advantage of the exemption for resident funds was offset by the taxation via a withholding tax of their non-resident investors. For the ECJ, it is for the referring court to assess whether the taxation of the investors offset the exemption of the fund. But the ECJ immediately adds that the legislation at stake goes beyond what is necessary and therefore that the coherence of the national tax system cannot serve as a valid justification for a restriction to the free movement of capital. Indeed, it was demonstrated during the proceedings that the elimination of double taxation could not always be achieved, while it is precisely the objective of the legislation at stake. Moreover, the ECJ pointed out that there were other ways to meet this objective while guaranteeing the coherence of the national tax system (e.g., by granting the same exemption to non-resident funds provided their investors pay a tax equivalent to that to which investors in a resident fund are liable).
  - The ECJ then dismisses the second argument of the German government, being the need to preserve a balanced distribution of taxing power between the Member States. Such argument cannot serve as a justification for a legislation providing for a tax exemption.

The ruling of the ECJ is crystal clear: EU law prohibits a legislation that subjects non-resident real estate funds to corporate income tax while resident real estate funds are exempt.

REIT schemes and State aid

The Finnish government had notified a proposed act introducing a REIT regime in Finland and the government wanted to obtain the confirmation that the proposed REIT scheme could not be considered state aid (State Aid n° N131/2009, ec.europa.eu) (the **EC Decision**).

- Legal form, shareholder, asset test and leverage.
  - The REIT must be a public limited liability corporation with a tax residence in Finland. Its shares must be admitted to trading within 3 years from the beginning of the tax-exempt period.
  - No single shareholder may own directly or indirectly more than 9.99% of the REIT's shares.
  - The REIT should operate only in rental property activities, as the case maybe with necessary related auxiliary activities (e.g., maintenance of rental property), and cannot carry on a construction business unless it acts as developer for its own behalf.
  - The REIT must invest 80% of its assets in residential properties (incl. indirectly via interest in other mutual property companies) and at least 80% of its gross income (capital gain excluded) must come from rental income. Its liabilities cannot exceed 80% of the total asset value.
- Taxation
  - The entry into the REIT regime is subject to a taxation of the latent gain on the asset. Exiting the REIT regime also led to taxation of undistributed profits.
  - The REIT is fully exempt from the regular corporate income tax, but it must distribute at least 90% of its profits, via dividends, to its shareholders. These distributions are subject taxation in a domestic context and to withholding tax in an international context, at a rate of 28% subject to any applicable tax treaty.
  - The REIT is a long-term investor. As a consequence, minimum investment durations are applied, and non-compliance should result in taxation of the capital gain at 26%.

By reference to the ECJ Ruling, it is interesting to read the justification of the income tax exemption scheme proposed: "*The Finnish authorities claim that the tax exemption puts on par the investment of individuals in a REIT with a direct investment in real estate by an investor or through a 'tax transparent' entity, such as a collective real estate investment fund or a 'partnership'. This would compare advantageously with an investment in a corporation where the profits are subject to double taxation, first by means of the imposition of corporate income tax at the level of the corporation, and second, once the profits are distributed as dividends, by the imposition of income tax at the level of the shareholders.*"

The EC considers that the proposed scheme appears to be prima facie selective as it exempts from corporate income tax a certain type of corporation. For the Finnish authorities, this tax exemption is justified by the nature of the tax system, and therefore no aid is involved. The Finnish authorities refer to the Commission notice on the application of the State aid rules, and the example of the cooperative given in paragraph 25: "*Furthermore, it may also be justified by the nature of the tax system that cooperatives, which distribute all their profits to their members are not taxed at the level of the cooperative when tax is levied at the level of their members.*" The Finnish authorities therefore argued that "the fact that REITs will not be taxed at the corporate level, but at the level of the shareholders to whom at least 90 % of the profits should be distributed, is justified by the nature and overall structure of the Finnish tax system."

The EC had then confirmed that the exemption of REITs from corporate income tax is justified by the nature of the general scheme of the Finnish tax system, and that the proposed REIT scheme does not constitute aid.

Even in absence of harmonisation, it is fair to say that the description of the Finnish REIT regime broadly corresponds to REIT schemes in Europe, especially on that tax aspects. Institutional real estate funds also largely fit this (tax) profile (e.g., the Belgian specialised real estate investment fund (FIIS / GVBF) introduced in 2016 and for which a reference has been made to the EC Decision to defend the absence of state aid). A REIT regime or an institutional real estate fund regime providing for an exemption of the investment vehicle from income tax subject to a mandatory yearly dividend distribution of the largest part of the profits, such distribution being subject to withholding tax, should therefore not constitute State aid.

How to reconcile the ECJ Ruling and the EC Decision?

On the one hand, we have the EC Decision, on which many Member States rely to defend their REIT regime and other real estate fund regimes, according to which such exemption regime does not constitute State aid under the reasoning that the taxation is shifted from the vehicle to the investors (single level of taxation).

On the other, we have the ECJ Ruling, according to which the exemption granted to resident real estate fund should be extended to non-resident real estate fund, it being understood that the taxation of investors in these non-resident funds could be guarantee by other means than just denying an exemption to the non-resident fund itself.

Although challenging, let's try to reconcile both.

- The EC Decision and the ECJ Ruling are consistent on the treatment of resident real estate funds: the funds are tax exempt, and distributions made by these funds are subject to tax. In both, the principle of shifting taxation from the vehicle to the investors is confirmed and compliant with EU law.
- As such, the EC Decision does not deal with non-resident real estate funds, but only confirms the absence of State aid – in the sense that the exemption scheme, which is accompanied by an obligation to distribute dividends subject to withholding tax, is justified (single level of taxation).
- In both the EC Decision and the ECJ Ruling, the need for putting at par a direct investment and an indirect investment and to avoid a double taxation is mentioned. In fact, the only thing the ECJ Ruling adds is that introducing a difference of tax treatment between a resident and a non-resident real estate fund goes beyond this (legitimate) justification.

In our view, putting at par a direct and an indirect investment in real estate and avoiding double taxation (or a double layer of taxation) could be achieved by having the real estate investment being subject to tax in the Member State where the asset is located; this is also in line with international tax principles, and in particular the tax treaties for the avoidance of double taxation and their real estate income provision. But based on the EC Decision, there should be "a" layer of taxation to avoid a qualification of State aid. There are probably multiple options available to guarantee this result as pointed out by the ECJ. One could think about the French branch tax, which in our view should also allow limit the taxation to one layer in case of investment in local real estate by a resident investor but through a non-resident fund. It should therefore be concluded that the EC Decision and the recent ECJ Decision are compatible, but that the option of allowing non-resident funds to benefit from the same tax regime as resident fund, subject to taxation of the investors, might require fundamental changes in legislation in certain Member States. And this is maybe not the most pragmatic and efficient way to solve the issue.

Update on Unshell Directive, Substance and Beneficial Ownership

Unshell Proposal

The draft anti-shell EU Directive (**Unshell Proposal** or **Directive**) was published in 2021. The Directive aims to prevent the misuse of ‘shell entities’ (companies with no or very limited presence and economic activity) by introducing rules on reporting obligations, exchange of information between Member States and denial of tax benefits. Pursuant to the Directive, an entity is regarded a ‘shell entity’ if it cumulatively meets certain gateways, inter alia based on type of income and substance, with a reference period of the two preceding years.

Although no agreement could be reached to date, discussions to our understanding are still ongoing. It appears that reaching a compromise on the Unshell Proposal, notably on substance indicators and tax consequences, continues to be difficult. A two-step approach suggested by the EU Council’s Spanish presidency was discussed in 2023, but no longer appears to be on the table as preferred approach. Similarly, a suggested approach whereby the substance requirements would constitute a minimum standard does not seem to have much support.

Based on how discussions have progressed the last years, it is difficult to assess how the Unshell Proposal will evolve. Given the potentially far-reaching implications for investment structures, the absence of exceptions for real estate funds and the reference period effectively looking back two years, this development should be closely monitored.

The Netherlands has been a supporter of multilateral measures against the misuse of shell entities, however due to the difficult and long-running negotiations on the Directive the Netherlands recently mentioned that unilateral measures may be considered.

Anti-abuse case law

Following the landmark decisions of the European Court of Justice in the ‘Danish Cases’ in February 2019 (the **Danish Cases**), the Belgian and Dutch tax authorities increasingly scrutinize substance as well as beneficial ownership aspects in cases where a withholding tax exemption is claimed or a refund is requested, which has led to interesting decisions by national courts. Please find below some highlights in this respect.

The Netherlands

In the Netherlands, it is up to the Dutch Supreme Court to decide on a judgement of the Amsterdam Court of Appeal from June 2022 (**Amsterdam Case**). The Amsterdam Court of Appeal ruled on the application of the domestic dividend withholding tax exemption (**DWT Exemption**) to a profit distribution by a Dutch entity (**Dutch BV**) to a Belgian family holding company (**Belgian Holdco**) that availed of substance but that did not have any influence in the day-to-day management of the Dutch BV. The Court of Appeal ruled that the DWT exemption was not available, based on, in short, the following considerations:

- The Belgian Holdco should not be considered to be actively involved in the business of the Dutch BV. As such, the shares in the Dutch BV could not be attributed to the business enterprise of Belgian Holdco, even though the Belgian Holdco carries out an active business in relation to several of its other subsidiaries;
- Belgian Holdco did not avail of sufficient own substance;
- The decision-making is entirely in the hands of the ultimate shareholders of the Belgian Holdco and therefore the Belgian Holdco cannot independently dispose of the dividends and should therefore not be considered the beneficial owner of the dividends;
- The Belgian Holdco had no obligation to reinvest the dividends; and
- It is irrelevant that a structure was originally not set-up with tax motives.
- In July 2023, the Advocate General, in line with the Court of Appeal, ruled that the DWT Exemption should not apply in this case.

It is expected that the Dutch Supreme Court will issue its ruling in the course of 2024. Until then, it is strongly recommended to carefully consider the DWT Exemption position in case of dividend distributions by a Dutch entity.

Belgium

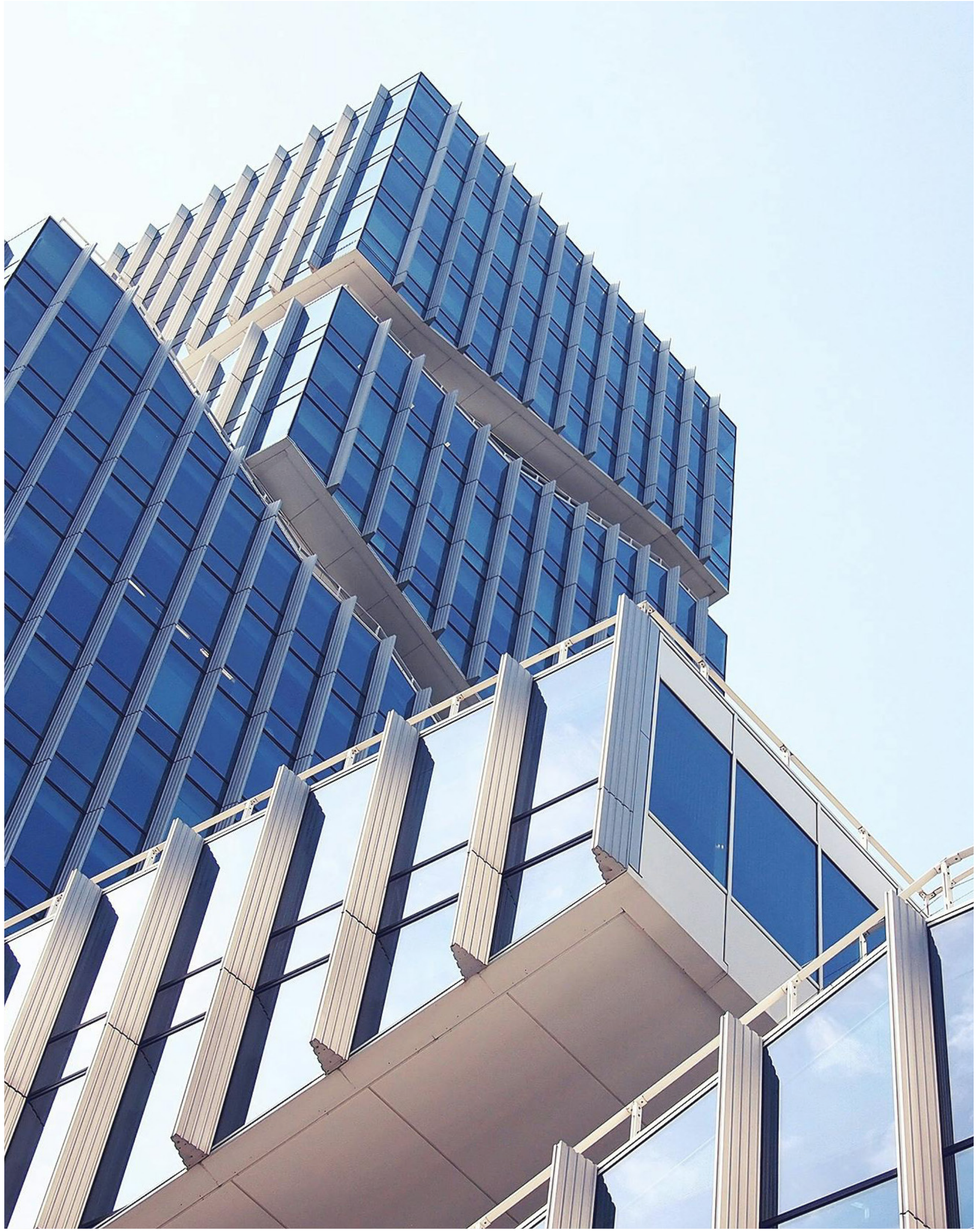
At the end of 2023, the Belgian Supreme Court ruled on the question whether the DWT exemption could be refused on the basis of abuse (**Belgian Case**). The Belgian Case is particularly relevant because it is the first time that the Belgian Supreme Court has taken the Danish Cases into consideration. The facts and circumstances of the Belgian Case are quite complex and a full analysis of the Belgian Case goes beyond the scope of this newsletter, but the following elements were key:

- in 2012 a restructuring took place within a US private equity structure whereby amongst others external financing was obtained in order to generate cash which was repatriated to the ultimate shareholders via a newly incorporated Luxembourg holding company;
- the Luxembourg holding company was interposed as a sub-holding which appeared to have limited substance while the group had no economic activity in Luxembourg; and
- the restructuring facilitated repatriation of cash to the shareholders without tax leakage.

According to the Supreme Court, no concrete economic reasons were given for the various transactions. The taxpayer only offered general justifications (e.g., cost savings, the structure is part of daily consultancy practice, it is normal market practice for international groups to be financed externally for a healthy “debt to equity ratio”). The Supreme Court concluded that there was no doubt that the Luxembourg holding company was used as a flow-through company with the intention to allow profit repatriation to the ultimate shareholders without tax leakage and that this should be considered abusive.

Conclusion

The above cases show that tax benefits granted to holding companies are increasingly scrutinized and that instruments such as the Danish Cases and cross-border exchange of information are becoming more and more effective. An increased focus on shell entities, substance, abuse and beneficial ownership can also be observed in other countries. In order to ensure that holding and finance structures are acceptable from a tax perspective, taxpayers will need to pay much attention to the proper documentation of the business reasons for the use and location of the holding/finance company and for the restructuring steps and financial transactions that are taken, and their actions should be consistent with those business reasons.



3. News from our Home markets

Belgium

RETT: increased taxation on long-term leases and right to build

As from 1 January 2024, the transfer tax applicable to long-term leases (*erfpachtrecht / droit d'emphytéose*) and right to build (*opstalrecht / droit de superficie*) is increased from 2% to 5%. Let's summarise the basics:

- The RETT applicable to the constitution and transfer of long-term leases and right to build is a federal taxation, while the RETT applicable to ownership transfer and usufruct is a regional taxation.
- The RETT applies to the constitution of such right and to its transfer provided that the transaction is carried-out for consideration.
- The taxable basis for the RETT is the total of this consideration, for the full duration of the right, usually composed of a first price or fee and a yearly fee, increased by the charges. Contrary to ownership transfer there is no minimum taxable base for RETT on long-term leases and right to build.
- Reduced rate (e.g., when the beneficiary is an NGO) or exemptions (e.g., in case of corporate restructuring) are available.

Specialised real estate investment funds: specific anti-abuse provision

Since 1 January 2024, an anti-abuse provision, in the form of a supplementary 10% taxation has been introduced, which aims at tackling short-term transactions where the latent gain on real estate asset would (only) be subject to the exit tax. This supplementary taxation, which first required that the exit tax was initially due[1], is triggered in three situations:

- the inscription of the SREIF list, which triggers the exit tax on the latent gain on the real estate asset owned by the SREIF: a supplementary tax of 10% shall be due in case the SREIF is omitted from the SREIF list within 5 years from its inscription[2];
- a corporate restructuring involving a SREIF (e.g., the merger of a regular company into a SREIF), which triggers the exit tax on the latent gain on the real estate asset transferred to the SREIF: a supplementary tax of 10% shall be due in case the SREIF is omitted from the SREIF list within 5 years from its inscription[3];
- the contribution of real estate asset to the capital of a SREIF, which triggers the application of the exit tax on the capital gain realised by the contributor: a supplementary tax of 10% shall be due in case the contributor does not hold the SREIF shares received in exchange for an uninterrupted period of 5 years from their acquisition.

14 In other words: not in case of sale of a real estate asset (or a property right) to a SREIF or not in case of a latent loss in the real estate.

15 Based on a strict reading of the law, this provision does not apply to a BE-REIT that is converted into a SREIF, following which the SREIF is omitted from the list.

16 Based on a strict reading of the law, this provision does not apply to a corporate restructuring involving only SREIFs.

In our view, the use of a specific anti-abuse provision to counter specific practices, without resorting to the general anti-abuse provisions, should be approved in principle. The specific anti-abuse provision chosen in this case is however somewhat questionable.

- **Justification of the retrospective effect?** The entry-into-force may be seen as granting a retrospective effect to this anti-abuse measure. Indeed, the condition of a minimum period of 5 years does not apply as from the inscription or contribution since 1 January 2024, but also to existing SREIFs: any SREIF inscribed on the list as from 1 January 2020 falls within the scope of application of this measure, which therefore can impact the investment objectives of the SREIF, or of a contributor of real estate into such SREIF.
- **Justification for exclusion of short-term sale?** The sale of a real estate asset within a short time after the entry into the SREIF regime is not targeted. The entry into the regime, via conversion of a regular company into a SREIF, the merger of a regular company into a SREIF or the contribution of the real estate asset into to SREIF, is subject to the exit tax. After that, the capital gain realised by the SREIF upon the sale is tax-exempt subject to dividend distribution. In other words, a SREIF that sells within a short period of time but remains inscribed on the SREIF list (e.g., in order to realise other investments in the future) is not targeted by this measure, even if the SREIF would be liquidated after more than 5 years (e.g., because of the absence of investment opportunities). Note that a specific, but limited, anti-abuse provision already applies in such a case: the SREIF must have, at the end of the second year of its inscription, assets for an investment value of at least EUR 10,000,000.
- **Justification of taxation in double SREIF structures?** When a SREIF (acquisition SREIF) purchases shares of a regular Belgian company (target company), it must either merger with this company or convert this company into a SREIF. The goal of the legislator when enacting the SREIF regulations was clearly to subject the latent gain on the underlying real estate asset to the exit tax. For timing and financing considerations, many purchasers in such situation have combined both measures, firstly by converting the target company into a SREIF (and paying the exit tax) and then merging it into the acquisition SREIF (such merger being tax neutral). Although the underlying real estate remains in the SREIF regime (after the merger of the target company into the acquisition SREIF), the supplementary tax is due since, after the merger, the target company will be omitted from the SREIF list.
- **Justification of over-taxation in the hands of the contributor?** From the perspective of the contributor, (i) the contribution of a real estate asset to the share capital of a SREIF or a BE-REIT is subject to corporate income tax at a rate of 15% instead of 25% but the roll-over regime is not available and (ii) the subsequent capital gain on the shares received in exchange cannot benefit from the participation exemption. With this new anti-abuse measure, and only for contribution to a SREIF, the contributor shall bear an additional 10% taxation in case of sale of the shares received in exchange within 5 years while still being excluded from the roll-over regime and from the participation exemption regime.

It is hard to find a justification to the treatments mentioned above. Countering specific structuring for which the SREIF legislation was not meant via a specific anti-abuse provision is legitimate, but the provision chosen in the case at hand could apply to situations that are outside the scope of any abuse.

VAT: notification obligations for mixed and partial VAT-payers

On 23 November 2023, the Belgian Parliament adopted a law reforming the Belgian value added tax code, imposing new notification requirements for mixed and partial VAT-taxable persons. It is supplemented by a Royal Decree of 17 December 2023. This gives us the opportunity to have a look at these different VAT-taxable persons and some of their administrative obligations.

Background

Value added tax (**VAT**) applies to most transactions invoiced by Belgian companies. For example, consultancy services provided to a Belgian company, property management services relating to buildings located in Belgium and certain re-invoicing of costs (e.g., administrative, energy, building charges) are subject to Belgian VAT at the rate of 21%. A company that carries out only transactions subject to VAT is classified as an "ordinary" taxable person and is entitled to deduct in full the VAT charged to it.

However, certain transactions carried out by companies active in the real estate sector are not subject to VAT because of a specific exemption (this is the case for most real estate letting in Belgium or fund management activities) or because they fall outside the scope of VAT (this is the case for holding companies whose sole activity consists of holding shares). Companies whose sole activity is this type of business cannot deduct the VAT charged to them because VAT does not apply to their own outgoing operations.

Of course, it is possible for the same company to carry out both, activities subject to VAT and activities exempted from VAT. Such a company is then referred to as a "mixed" VAT-taxable person. This will be the case, for instance, of companies that carry out both fund management and property management activities. There is also the case of a real estate company that leases buildings exempt from VAT and sells or establishes a right in rem subject to VAT on new buildings. Or companies benefitting from the "shopping centre" regime.

In principle, mixed taxable persons deduct the VAT charged to them on the basis of a general pro rata, i.e., a percentage corresponding to the proportion of their activities subject to VAT in relation to their exempt activities. For example, if 35% of the company's turnover is subject to VAT, the company is entitled to deduct 35% of the VAT charged on all its incoming transaction (expenditures).

However, mixed taxable persons may decide to opt to deduct VAT on the basis of the "actual allocation" or "real use method". In this case, the company is entitled to deduct all the VAT relating to goods and services acquired for its VAT-taxable activity but cannot deduct VAT relating to its VAT-exempt activity.

A company may also carry out activities that are subject to VAT and activities that out of scope of the VAT. This is the case with certain holding companies which, in addition to holding shares, actively provide services to their subsidiaries. Qualified as "partial" VAT-taxable persons, these companies necessarily deduct VAT on the basis of the actual allocation method. If the company receives services that are used for both its VAT-taxable and non VAT-taxable activities (e.g., energy costs relating to its head office), the company is required to determine a "special pro rata". Determined freely, but under the supervision of the tax authorities, this special pro rata may be calculated in the same way as the general pro rata (percentage of turnover from the VAT-taxable activity in relation to total turnover) or in another way (e.g., on the basis of FTEs assigned to the VAT-taxable activity).

Mandatory notification for mixed taxpayers with a general pro rata as at 31 December 2023

In 2023, the Belgian legislator had already required Belgian mixed VAT-taxable persons deducting VAT based on the actual allocation to inform the competent VAT authorities in advance, which was not the case prior to this reform. Since 1 January 2024, this obligation has also been extended to Belgian mixed VAT-taxable persons deducting VAT based on the general pro rata.

Mixed VAT-taxable persons who are already deducting VAT on the basis of the general pro rata as at 31 December 2023 must inform the competent VAT authorities before 1 July 2024. This notification is made by means of an e604B[4] form to be submitted via the e604 application and is valid for an indefinite period.

In addition, as the general pro rata is bound to vary from year to year due to fluctuations in exempt and taxed turnover, mixed VAT-taxable persons deduct VAT based on a provisional general pro rata. A definitive general pro rata (which then acts as a provisional general pro rata for the following calendar year) is then set by the taxable person at the beginning of the following year based on the actual outgoing transactions. For taxable persons starting their business, this provisional general pro rata is determined on the basis of projections. Previously, the general pro rata calculation was simply annexed to the periodic quarterly VAT-return of the first quarter of the year or to the periodic monthly VAT-return of one of three first months of the year.

From now on, mixed VAT-taxable persons with a general pro rata must electronically fill in the data relating to their definitive general pro rata for 2023 via INTERVAT when filing their periodic VAT-return for the first quarter of the year (in case of quarterly VAT-returns) or one of the first three months of the year (in case of monthly VAT-returns).

Mixed taxpayers and actual allocation method

In principle, mixed VAT-taxable persons making the deduction according to the actual allocation on 31 December 2022 had to notify their choice to the competent VAT authorities by 30 June 2023 using the same procedure.

Mixed VAT-taxable persons deducting VAT based on the general pro rata may switch to the actual allocation provided that they notify this choice in an e604B form to be submitted by the last day of their first reporting period of the year at the latest. This means that, for example, a mixed VAT-taxable person filing monthly VAT returns must make this choice by 31 January, while a quarterly filer must do so by 31 March.

Once the election for the actual allocation method has been made, this remains mandatory until 31 December of the third year following the effective date. For example, a change of deduction system made in January 2024 is valid until 31 December 2026.

A mixed VAT-taxable person wishing to switch back to the general pro rata method must notify its choice by submitting a form within this three-year period. In the example given above, if the taxable person files a form in January 2027, their deduction method will not be changed until 1 January 2028.

Here also, VAT-taxable persons must communicate their special pro rata (and, where applicable, the definitive general pro rata for the previous year in the event of a change of regime) by 20 April 2024 at the latest.

17 Declaration of change of activity form.

Partial taxpayers

From now on, partial taxable persons must communicate electronically via INTERVAT the data relating to their special pro rata (e.g., turnover subject to VAT, turnover outside the scope of VAT) as well as the methods used to calculate their special pro rata. This data must be completed when submitting their periodic return for the first quarter of the year (in case of quarterly VAT-returns) or one of the first three months of the year (in case of monthly VAT-returns).

VAT: e-invoicing soon compulsory

Belgium has implemented a mandatory structured electronic invoicing (e-invoicing) effective as from 1 January 2026 for B2B transactions located in Belgium for VAT purposes.

The **scope of this measure** is defined by the analysis of the following three criteria related to the (i) supplier, (ii) the recipient and (iii) the transaction:

- **Quality of the supplier** – the obligation to issue an e-invoice will apply to VAT-taxable persons established in Belgium, subject to certain exceptions. Amongst these exceptions, fully exempt VAT-taxable persons (as they perform VAT-exempt activities only without any right to deduct input VAT) will not be required to issue e-invoices. For the Real Estate sector, this exception is likely to apply to taxable persons whose the sole activity (outgoing transaction) is the lease of premises exempt from VAT pursuant to article 44, §3, 2° of the Belgian VAT Code. In addition, foreign entities having a Belgian VAT number required to be communicated when performing a transaction located in Belgium for VAT purposes will not be obliged to apply the e-invoicing.
- **Quality of the recipient** – the recipient must accept (and be able to receive) an e-invoice as soon as they are required to communicate their Belgian VAT number in the context of a Belgian transaction supplied by a Belgian established VAT taxable person. In such a case, foreign entities are therefore also in the scope of thus criterion.
- **Nature of the transaction performed** – the measure applies to pure domestic B2B transactions located in Belgium for VAT purposes. Therefore, the measure does not apply to B2C transactions or B2G transactions (although the latter is subject to another specific e-invoicing rule) are also excluded from this new measure.

Note that Belgium is still waiting on the permission from the European Commission to impose mandatory e-invoicing, and therefore derogate from the EU VAT Directive which only the feasibility to implement such e-invoicing in Member States. Such derogation has already been granted in, among other, France and Italy.

Establishment of structured electronic invoices. A structured electronic invoice contains data from the supplier in a machine-readable format, that can be automatically treated without requiring any manual intervention. Visual digital form of invoices as readable PDFs or word formats therefore does not meet the characteristics of an e-invoice. In this regard, Belgium intents to impose PEPPOL-BIS as format reference.

Tax incentives measures. In order to inhibit the financial impact, the necessary IT developments this new measure will entail, some supporting tax measures for SMEs are foreseen. In particular, the related costs supported to implement the e-invoicing (except depreciations) will benefit from a deduction of 120%.

Conclusion. Entities should keep in mind the date of entry into force of this new measure on the mandatory e-invoicing of 1 January 2026. Indeed, mandatory e-invoicing represents a new initiative for digitalization and automatization of systems to facilitate and optimize in the future the monitoring and control of the tax authorities. While the implementation of this law only encompasses the e-invoicing, the mandatory electronic reporting could therefore be the next step the Belgian authorities will likely tackle.

The Netherlands

Entity classification rule

The current Dutch tax classification rules for Dutch and foreign entities (such as partnerships) are quite unique and therefore deviate from international standards. In particular, this has caused 'hybrid entity mismatches' in an international context. For this reason, as per 2025 the Dutch tax classification rules will be amended. Below we set out the current Dutch tax classification rules and the Dutch tax classification rules per 2025.

Current Dutch tax classification rules

The Netherlands currently applies the 'similarity approach' to classify foreign legal forms. In short, this approach means that one looks at the most similar Dutch equivalent of the foreign entity ('corporate resemblance') to determine the Dutch tax position thereof.

The Dutch tax classification rules become unique when it comes to the classification of foreign limited partnerships for Dutch tax purposes. To determine the classification of a limited partnership, the decisive criterion is whether accession or substitution of a limited partner requires unanimous consent of all (general and limited) partners (the "consent requirement"). Only if such unanimous consent is required (and in practice obtained), a limited partnership is classified as transparent for Dutch tax purposes.

Background of the consent requirement lays within the Dutch *Commanditaire Vennootschap* ("**CV**"; the Dutch limited partnership). A Dutch CV is either transparent or non-transparent, based on the consent requirement.

In practice, this means that foreign limited partnerships are often treated as non-transparent from a Dutch tax perspective. Since foreign limited partnerships are considered transparent in many countries, but non-transparent from a Dutch tax perspective, this results in 'hybrid' entities.

Dutch tax classification rules per 2025

a. New rules for Dutch entities

As of 1 January 2025, it will be codified in Dutch tax law that all Dutch partnerships (**CV**) are transparent for Dutch tax purposes. Non-transparent Dutch CVs will cease to exist. In addition, the tax classification rules applicable to Dutch funds for joint account (**FGR**) will be amended as of 1 January 2025.

To date, an FGR can be classified as tax transparent or tax non-transparent. There are currently three types of FGRs, in short: (i) an FGR in which participations are only transferable to other participants with unanimous consent (transparent), (ii) an FGR in which the participations can only be repurchased by the FGR or transferred to certain close-related family members (transparent) and (iii) an FGR with transferable participations (non-transparent).

As of 1 January 2025, an FGR may only be non-transparent, if it is (i) regulated following the Dutch Financial Supervision Act (*Wet op het financieel toezicht*) and (ii) the participations in the FGR are tradeable. In case the participations in an FGR can solely be repurchased by the FGR, the participations would be deemed to be non-tradeable and thus such FGR will be classified tax transparent, even when it is regulated.

The aforementioned changes mean that non-transparent CVs and FGRs would be deemed to realise any capital gains in their assets (i.e., a tax triggering moment) when becoming transparent. Similarly, the partners/members in non-transparant CVs and FGRs are deemed to realise their investment. In practice, this could result in tax becoming due without cash being generated. Therefore, several facilities are proposed to apply as from 1 January 2024: (i) rollover facilities, (ii) a share-for-share merger facility (including a real estate transfer tax (RETT) exemption), or (iii) a deferred payment obligation (spread out over ten years). Any restructurings using those facilities can be carried out during the year 2024 to avoid the tax triggering moment on 1 January 2025. The RETT exemption however only applies in the case of CVs and FGRs that were already in existence on 19 September 2023 at 3:15pm.

b. New rules for the Dutch tax classification of foreign entities

Foreign entities in scope of the 'similarity approach'. The similarity approach will remain in force as primary classification rule. On 5 February 2024, the Ministry of Finance has launched a consultation on the draft Decree on Dutch tax classification rules for foreign entities (the Decree). The Decree addresses a legal framework for comparing foreign entities with Dutch legal forms. Based on the key characteristics of the Dutch entities set out in the Decree, the comparability should be assessed.

Due to the revised rules for the Dutch partnerships, which would become per se transparent (without consent requirement), many hybrid mismatches will disappear as the Netherlands (in line with most other jurisdictions) would then also regard a foreign partnership as transparent for tax purposes.

Foreign entities out scope of the 'similarity approach'. The draft Decree stipulates that in case a foreign entity has key characteristics of more than one type of Dutch entity or is not equivalent with any type of Dutch entity, a classification based on the similarity approach will not be possible. In that case, the foreign entity will be regarded as a non-equivalent entity and such foreign entity will be classified based on the symmetry approach or fixed approach:

- **Symmetry approach:** Pursuant to this approach the classification for foreign tax purposes will generally be followed. Limited guidance is available on how the symmetry approach should apply to e.g., translucent entities.
- **Fixed approach:** For foreign entities with no clear Dutch equivalent and which have their effective seat of management in the Netherlands, the 'fixed approach' would apply. This means that this foreign entity would always be classified as non-transparent entity for Dutch tax purposes, thus becoming a Dutch domestic taxpayer.

c. The classified foreign entities in the draft Decree

The draft Decree includes examples of foreign entities that have been classified. Taking the French example, the following entities are classified as follows (please keep in mind that the draft Decree is in draft and may be subject to change):

- Société Anonyme – comparable with a Dutch N.V. (opaque)
- Société à Responsabilité Limitée – comparable with a Dutch B.V. (opaque)
- Société Civile – comparable with a Dutch partnership (transparent)
- Société en Commandite Simple – comparable with a Dutch CV (transparent)

Limitation interest deduction (earnings stripping rule)

The deductibility of interest under the earnings stripping rule is proposed to be tightened by eliminating the EUR 1,000,000 threshold for companies owning real estate that is leased to third parties.

Current earning stripping rules

Currently, the earnings stripping rule limits the deductibility of net interest expenses (i.e., the balance of interest costs and interest income including foreign exchange results on the loans) for corporate income tax purposes to the highest of: (i) 20% of the fiscal EBITDA (formerly 30%), and (ii) a threshold of EUR 1,000,000. The ratio is applied at taxpayer level (in case of a fiscal unity: at fiscal unity level). No distinction is made between intra-group and third-party interest and costs.

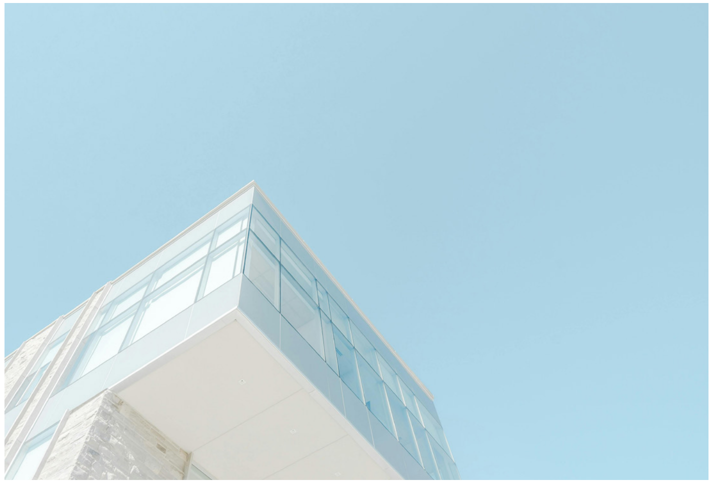
Upon introduction of the earnings stripping rule, the Dutch Ministry of Finance acknowledged that related entities could apply the EUR 1,000,000 threshold multiple times. However, the Dutch legislator had already announced that, should the splitting up of assets across multiple entities occur often in practice, anti-fragmentation rules may be introduced.

In April 2023, the Dutch Ministry of Finance announced an amendment of the earnings stripping rule, with a view to the EUR 1,000,000 threshold being disapplied to companies owning real estate leased to third parties. This means that such taxpayers can only rely on the 20% EBITDA threshold for deduction of interest expenses. This is a (further) tightening of the interest deductibility rules for taxpayers engaged in the leasing of real estate.

This measure is intended to apply as of 1 January 2025. A legislative proposal is expected to be published on Budget Day in September 2024.

Real estate funds: abolishment of direct real estate as qualified investment for fiscal investment institution

A company can, under conditions, qualify for the fiscal investment institution regime (*FBI-regime*) resulting in a 0% corporate income tax rate and a mandatory annual distribution of profits subject to generally 15% Dutch dividend withholding tax. **As of 1 January 2025**, a fiscal investment institution may no longer hold direct investments in Dutch real estate. Consequently, a direct investment in **Dutch** real estate would result in the loss of the fiscal investment institution status. A fiscal investment institution can still hold direct investments in non-Dutch real estate and indirect investments in (Dutch) real estate owned by a regular taxpayer. Under the proposed rules, an FBI is allowed to hold and manage a regularly taxed subsidiary company engaged in real estate development of non-Dutch real estate or Dutch real estate held by an affiliated entity that is a regular taxpayer (i.e., an indirect investment in Dutch real estate). A similar provision is proposed for ancillary services. The current 60% financing limit for (non-Dutch or indirect) real estate investments will remain in place. In order to enable FBIs to restructure in anticipation of the new rules, the proposed measures include a temporary real estate transfer tax exemption applicable in the year 2024 that can be applied to restructurings carried out in anticipation of the entry into force of the above measure.



RETT: cancellation of the RETT concurrence exemption for certain share deals

RETT exemption no longer applicable to share transactions with respect to real estate companies that own building land and newly constructed real estate used (in part) for VAT-exempt purposes

For envisaged share transactions with respect to shares in a real estate company that owns building land and newly constructed real estate used (in part) for VAT-exempt purposes, it is advisable that such share transactions take place before 1 January 2025.

Currently, newly constructed properties can be acquired without VAT or real estate transfer tax (RETT) if the shares in the real estate company are acquired.

The government wants to resolve the difference in taxation between asset deals and share deals by levying RETT on certain share transactions. To this end, the government proposes to abolish the RETT exemption for share transactions of real estate companies that own building land and newly constructed real estate, where more than 10% is used for VAT-exempt purposes. To avoid overkill, a new RETT rate of 4% is to be introduced for the acquisition of shares in real estate companies that can no longer benefit from the RETT exemption. We refer to our news flash for more information on this proposal.

The RETT exemption will not be abolished for share transactions in companies holding new real estate used for activities where at least 90% of the VAT is recoverable in the two years following the acquisition. Therefore, in most cases share transactions involving newly constructed logistics, office and retail properties should still qualify for the RETT exemption.

What for the shares already acquired in an ongoing development project where the company owns building land or newly constructed property? Transitional rules will be introduced for ongoing development projects. This means that an acquirer is eligible for the RETT exemption (i) if a letter of intent was signed with the intended acquirer before 19 September 2023 at 3:15 p.m., and (ii) provided that the acquisition of the shares takes place no later than 1 January 2030. To apply the transitional rules, acquirers must file a notification with the Dutch tax authorities between 1 January 2024 and 31 March 2024.

Luxembourg

Bill of law introducing a package of measures to stimulate the housing market

In his government statement to the Luxembourg parliament on 22 November 2023, the newly elected Prime Minister, Luc Frieden, emphasised the government's determination to launch a campaign for affordable housing, with a particular focus on first-time buyers.

On 1 February 2024 then, the Luxembourg government declared the country's construction sector to be in a state of crisis. This announcement followed the economic downturn that has been dominating the construction sector as well as the housing market for months, if not years. To avoid that an ever-growing demand for affordable housing is met by a complete standstill on the supply front, the Luxembourg government presented a number of tax measures, with the hope that these will give the sector the boost that it so desperately needs.

Formalized in a bill of law on 9 February 2024 (n° 8353), the government announced the following measures with a view to increase private property investment and to facilitate access to housing.

a. Temporary measures applicable for 2024

- The existing real estate transfer tax credit for individuals acquiring their main residence will be increased from EUR 30,000 to EUR 40,000 per person.
- A new real estate transfer tax credit for the acquisition of rental properties sold in state of future completion of EUR 20,000 per person will be introduced.
- The individual income tax rate applicable to capital gains in relation to real property realized in the context of their private wealth management and held for at least 2 years will be reduced to a quarter of the applicable global rate.
- Individuals realizing capital gains on real property at least 2 years after their acquisition will be granted a rollover relief if proceeds are reinvested in real estate rented out as social housing or in real estate meeting certain energy and environmental criteria.
- The flat rate for accelerated amortization applicable to newly constructed rental properties sold in state of future completion will be increased to 6% for six years, limited to a total tax benefit of EUR 250,000.

b. Permanent measures applicable beyond 2024

- The minimum holding period for capital gains realized by individuals in the context of their private wealth management to be subject to half their global tax rate will be extended from 2 to 5 years as from 1 January 2025.
- The exemption applicable to capital gains realized by individuals in the context of their private wealth management on real properties sold to the Luxembourg state or municipalities will be extended to disposals in favour of the Fonds de Logement.
- The portion of deductible interest on loans financing the acquisition of a main residence will increase by one third.
- The tax-exempt part of rental income derived by individuals from social rentals will be increased from 75% to 90% when derived through organisations operating in the field of social rental management.
- Subject to conditions, employers will be able to pay a monthly rent subsidy to their employees under the age of 30 at the beginning of the fiscal year which will benefit from a 25% tax exemption at the level of the latter.

The bill of law will need to go through the ordinary legislative process in Luxembourg but is expected to be fast-tracked, due to the temporary measures that will only be applicable during the year 2024.

New double tax treaty between Luxembourg and the United Kingdom

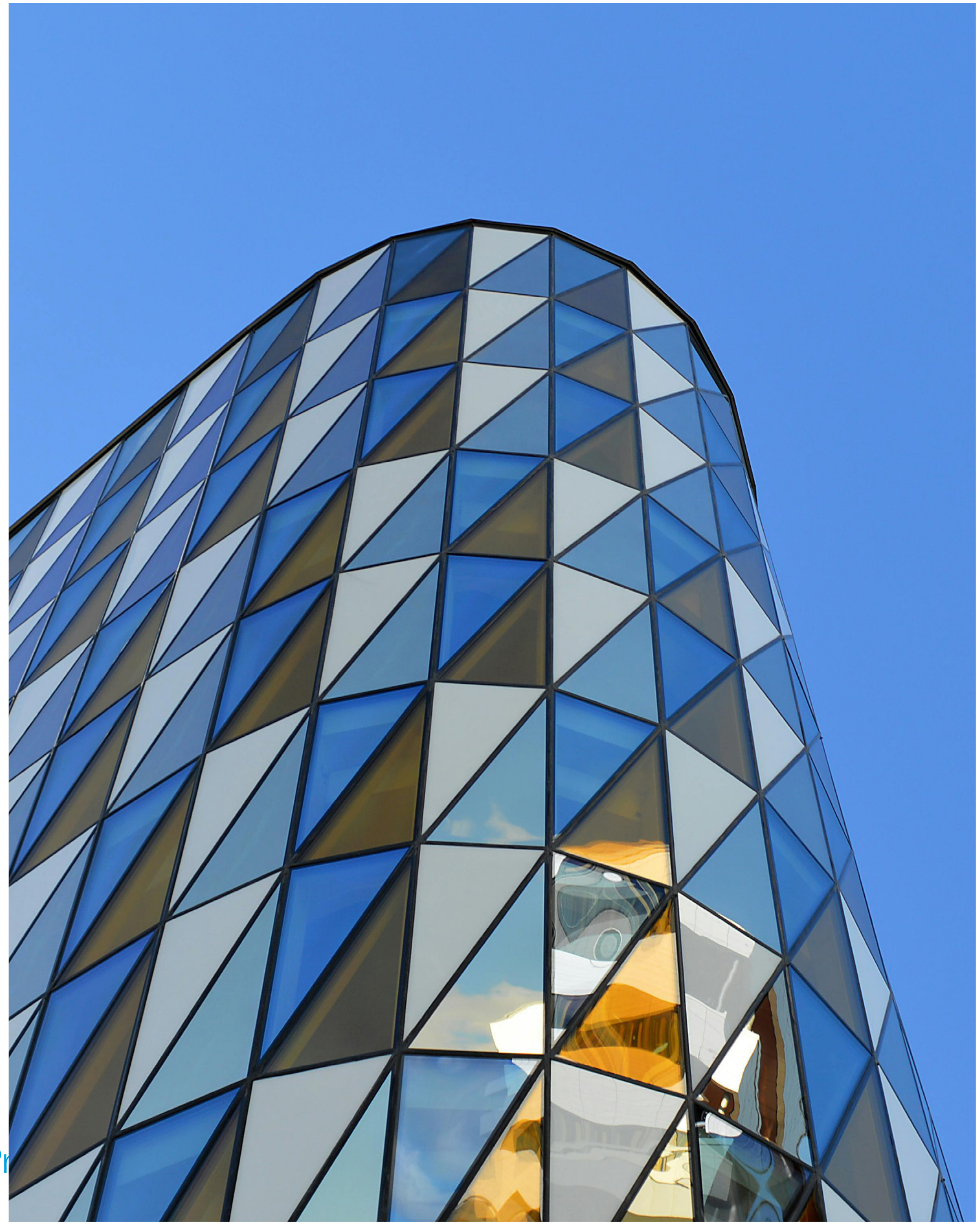
A new double tax treaty between Luxembourg and the United Kingdom (the **New Treaty**) has entered into force.

The New Treaty has become effective as from 1 January 2024 for Luxembourg taxes covered under the New Treaty and will apply as from 1 January 2024 for UK withholding tax purposes and as from 1 April 2024 for all other UK taxes.

The main change impacting the real estate sector is the introduction of a so-called ‘property-rich entity’ clause in the capital gains article of the New Treaty.

This clause grants taxing rights to both states in respect of a gain realised in the event of a sale of shares or corporate interests in an entity deriving more than 50% of its value directly or indirectly from immovable property situated in the other state (a property-rich entity).

This differs from the current situation where, in case of a share deal involving a Luxembourg property company owning UK real estate, the taxing rights on the capital gain realised with respect to these shares was exclusively allocable to Luxembourg.
Relief from double taxation will be granted by way of the ordinary credit method and not through the exemption method.



Switzerland

The following is a Swiss real estate tax update, outlining the relevant recent Federal Supreme Court decisions on property gains tax and real estate transfer tax, as well as a regulatory update on the so-called Lex Koller.

Property Gains Tax

In a recent decision, the Swiss Federal Supreme Court provided a definition for the term “business” in the context of property gains tax, particularly in relation to tax deferral for intra-group reorganizations involving partnerships transferring assets to legal entities. The competent Swiss tax authority challenged the tax neutrality of the transfer claiming that the requirement of a “business” had not been fulfilled due to lack of the involved companies employing relevant staff.

In its ruling, the Swiss Federal Supreme Court provided extensive guidance on the notion of a “business” in the context of real estate investments:

- The court stated that a business is an organisational and technical complex of assets that operates as a relatively independent unit capable of sustainable existence. Within a business, capital and labour are used for the purpose of generating profit, whereby the use of labour is not limited to the absorption of added value or the collection of revenue. It should be noted, however, that the definition of a business in the context of tax reorganisation law is broader than in the context of regular taxation, which places more stringent requirements on the existence of an enterprise.
- The management of own real estate may exceptionally constitute a business if it involves professional property management beyond mere asset oversight. It does not appear to be excluded that a property management company has the typical characteristics of a business for tax purposes, which goes beyond mere asset management and manages a large number of properties by providing its own services. However, it can only be considered a business if the management is not limited to what is already associated with the mere investment of a company in real estate. The holding and management of own real estate can constitute a business if the following criteria are cumulatively met: i) a market presence is established or operating properties are rented to group companies; ii) the company employs or commissions at least one person to manage the real estate (one full-time position for purely administrative work) and iii) the rental income is at least 20 times the normal market personnel expenses for real estate management.
- Professional property management is essential for business qualification, however, it remains independent of whether it is handled internally or outsourced. Unlike other sectors, labour is not the primary focus in property rental, as the main service is providing rental properties. Administrative tasks like rent collection are supportive rather than central. Outsourcing property management is common, especially with limited administrative burdens. However, the management must extend beyond typical investment activities to qualify. The court referenced guidelines requiring market presence, employment, or commissioning of personnel for real estate management, and substantial rental income relative to personnel expenses.

In its ruling, the court held that to assume professional property management and thus the basis for a “business” for tax purposes, it should not matter whether the company employs its own staff or outsources the activities to third parties. Outsourcing property management activities should thus not negate a company’s status as a business, as long as independence and operational continuity are maintained. The focus in real estate management is providing rental properties, with administrative tasks considered ancillary. Outsourcing such tasks to specialized companies is common and economically sensible. As such, the transfer was deemed to be tax neutral.

Real Estate Transfer Tax

There are two different Swiss Federal Supreme Court decisions on real estate transfer tax following a change of fund management company. The second decision confirms the previous one and complements it in some respects.

In the first Federal Supreme Court decision, the court addressed whether changing the management company of a Swiss real estate fund and transferring four plots of land in the canton of Fribourg from the previous management company to the new one triggers real estate transfer tax. The dispute focused on the extent of the fund management's authority to dispose of the properties under civil and economic law. The legal issue stemmed from the change in the real estate fund's management, with a contractual agreement transferring the properties to the new management company without charge, including mortgage debts, and maintaining the same beneficial owners. Following the transfer, the new management company was recorded as the owner in the land register, holding the properties in a fiduciary arrangement for the real estate fund or its unit holders. The Federal Supreme Court emphasised several points in its decision: the absence of explicit regulation under the Federal Act on Collective Investment Schemes (CISA), which results in the fund management company being recognized as the owner; the application of cantonal law deeming any legal transfer of ownership as taxable, irrespective of profit realization; the legality of the tax under a formal law specifying its parameters; maintaining competitive neutrality; the preservation of investor protection as outlined in the CISA; and the judiciary's reluctance to resolve conflicts between civil and cantonal tax law, leaving it to federal legislators.

In the second Federal Supreme Court decision, the court confirmed the levying of the property transfer tax and additional communal charges. The appellant argued that the levying of the transfer tax hindered the change of fund management company and thus investor protection in accordance with CISA and the Federal Act on Financial Institutions.

The Federal Supreme Court had already examined a similar complaint in an earlier judgment and found that a ban on the transfer tax in the case of changes of fund management company does not conflict with the principle of cantonal fiscal sovereignty. It is not up to the courts to impose such a ban. The appellant claimed that it would have to bear the transfer tax for 20 years before the associated costs would be covered by commissions. However, the Federal Supreme Court has ruled that such costs can be charged to the fund assets under certain conditions. The appellant argued that the transfer tax effectively makes it impossible to change the fund management company. However, the court states that it is not within its competence to remove such obstacles but rather it is the responsibility of the federal legislator.

Regulatory Update on Lex Koller

The acquisition of real estate in Switzerland by foreign nationals, companies domiciled abroad, or companies domiciled in Switzerland that are controlled by foreigners is restricted by the Federal Law on the Acquisition of Real Estate by Persons Abroad (also known as Lex Koller). Persons abroad generally require authorisation from the competent cantonal authority for the acquisition of real. Authorisation can only be granted on grounds provided for in the law and, where applicable, the cantonal introductory act. Whether a legal transaction requires authorisation depends on the circumstances of the individual case.

In a recent leading case, the Federal Supreme Court ruled that the acquisition of staff apartments without a permit can only take place if at the same time the purchaser also acquires a (permit-free) commercial property (i.e., including an operating business). This means that the acquisition of apartments for employed staff by persons abroad is subject to strict limitations. The decision is based on the understanding that apartments can only be acquired without a permit in connection with a business-related purpose or economic activity. However, it remains unclear whether the acquisition of the staff apartments in the present case was necessary for business purposes and whether the acquisition by a sister company would fall under the co-acquisition offence. The Federal Supreme Court emphasised the necessity of a simultaneous acquisition of business premises and staff apartments to benefit from the exemption provision. A change to this legal basis would require a corresponding amendment to the law.

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Real Estate at Loyens & Loeff

Our real estate team

Thanks to our dedicated team with many years of (multidisciplinary) real estate expertise we are always on top of market trends and new legislation. Whether it concerns construction, project development, real estate transactions, asset management or real estate funds and platforms; our advisers know what your business is dealing with and will assist you to achieve your goals and business objectives. As a real estate investor or project developer, you face many challenges. To address these challenges and match the requirements of your business - where tax and legal aspects are often intertwined and market knowledge is key - our Real Estate team combines our renowned tax, legal and industry expertise to deliver top quality integrated services.

Thanks to our many years of experience and expertise that covers the entire life cycle of real estate, we are ahead of the game. This enables us to identify business opportunities for our clients at an early stage and ensures a successful outcome of any type of real estate project.

Our added value

Efficient answers to industry challenges
Making well-informed strategic decisions about your real estate investments requires an understanding of the wider range of industry challenges. Questions arise, as to the effect of ever-changing national & international legislation on the structure and financing of your investment or the best way to manage your real estate assets. And what aspects of the relevant zoning and environment laws should you be conscious of? Legal certainty is of paramount importance. It is the cornerstone of our creative solutions which are drawn from our in-depth experience in handling challenging and complex transactions on a daily basis. Our specialised real estate advisers will answer these questions efficiently, allowing you to focus on the issues that are core to your business.

Experience that relates to all asset classes
Our multidisciplinary team combines global expertise with local market knowledge. Our legal and tax experts have extensive experience in various real estate asset areas, such as logistics, residential, offices, retail, hotels, and healthcare. We know and understand the challenges you face and are fully aware of economic trends influencing the investment apatite. So regardless of the type of real estate asset, you can count on us to be your trusted adviser.

Added value following our combined legal and tax offering

Structuring and taxation are our strengths. Our integrated legal and tax service offering truly sets us apart from other firms. This enables us to anticipate on legal and tax pitfalls at the same time, and integrate tax aspects at all stages of an investment. By integrating this knowledge at all stages of a transactions, even in the early stages, we can significantly impact the profitability of your investment.

Go-to firm reflected by our continuous Tier 1 Real Estate rankings

For many years, our Real Estate team has been a trusted partner in small to large scale real estate projects. Our premium knowledge, strong reputation and steady client base our reflected in our continuous Tier 1 Real Estate rankings by several independent legal guides (Chambers Europe, Legal 500). We thank our clients for their trust, and we will make sure we keep living up to their expectations.

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Combining global expertise with local knowledge is our commitment to our clients. We bring together our legal and tax expertise, and consider the requirements of local and international actors. The whole span of services needed by the real estate sector, is available in-house. We provide high-quality assistance and services in the following fields:

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- Real estate transactions
- Real estate developments
    - Forward-funding and forward-commitment
    - Construction-related agreements, acceptance process, decennial liability
- Real estate finance
    - Lenders' and sponsor's mandates
    - Transfer pricing for intragroup financing
- Real estate asset management
- Real estate regulatory
    - ESG
    - Public procurement and public real estate
    - Zoning, planning and permits, environmental responsibilities

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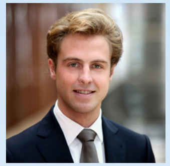

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