THE REAL ESTATE INVESTMENT STRUCTURE TAXATION REVIEW

FIFTH EDITION

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PREFACE

The real estate sector plays a crucial role in the global economy and social environment.

In particular, the commercial property sector offers the infrastructure needed for the growth and development of entrepreneurship and business, including offices, shops, industrial and logistics premises, and hotels. In Europe alone, commercial real estate represents a business of €8.5 trillion, which contributed €427 billion to the EU economy in 2021. It is also a fundamental source of employment. In 2021, the European real estate sector employed 4.2 million people – more than the car manufacturing and telecommunications sectors combined.[1]

Moreover, the sector also provides residential accommodation and is seen as a tool with which to meet social and public needs. New types of properties are emerging and have increasingly been included in investment portfolios, such as senior living, student accommodation and the life sciences market.[2] Since 2013, institutional investment in the residential sector has increased almost four times, to €606 billion in 2021. It has grown at a faster rate than commercial property and, over the same time line, its share of total institutionally invested property has doubled to 23 per cent.

The traditional retail and office sectors continue to represent a significant part of investors' portfolios, but their share has been declining over time in favour of residential property, particularly affordable and social housing. In responding to social and public needs, investors have increased the share of institutionally held residential investments, including student accommodation and senior housing, as well as holdings in 'alternative' property sectors (e.g., hotels, healthcare, car parks and mixed-use property).

In addition, urban regeneration has become a key element in many decisions taken at EU level and seeking to boost city renovation, decarbonisation and the green transition.

For the industry as a whole, the environmental, social and governance (ESG) agenda becomes clearly more pressing as each year goes by, and it is increasingly being recognised as more of an opportunity than an obligation. With the majority of stock (residential and non-residential buildings) built pre-2010 and almost a quarter pre-1945, Europe cannot achieve its emissions targets without retrofitting existing buildings to bring their energy efficiency levels into line with net zero goals.

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1 EPRA *Real Estate in the Real Economy* report 2022: https://www.epra.com/application/files/9516/6861/1334/EPRA-INREV-Real_Estate_Real_FINAL_Economy_2022_Report.pdf.

2 EPRA *Global Real Estate Total Markets Table* report: https://prodapp.epra.com/media/EPRA_Total_Markets_Table_-_Q1-2022_1649681531420.pdf.

Listed property companies and non-listed funds are constantly evaluating and improving their sustainability record through their participation in real estate sustainability benchmarks, such as GRESB and MSCI, in addition to reporting under relevant ESG frameworks such as EPRA sBPR, INREV and GRI.

In this context, attracting investment from institutional investors in highly regulated sectors such as pension funds, insurance companies and sovereign wealth funds is crucial for the growth of the real estate sector. In particular, it is desirable that those investors are involved in both financing large development projects and investing in properties held for rent.

Based on market practice, investments from foreign institutional investors are mainly carried out indirectly rather than through direct acquisitions, and particularly through specialised vehicles such as non-listed real estate funds, listed property companies and real estate investment trusts (namely REITs)

The pandemic emergency brought by covid-19 has affected the real estate sector just as it has so many other sectors. After a deep recession in most of the European economies in 2020 due to the pandemic, 2021 was characterised by an economic recovery that was forecast to continue, in principle, on a more moderate path.

However, in December 2022, annual inflation in the eurozone reached a record level of 9.2 per cent because of heightened uncertainty and geopolitical risks, as well as skyrocketing energy and raw materials prices caused by the war in Ukraine. Despite this uncertainty – and because the sector is underpinned by strong fundamentals – these conditions have not brought investments to a complete standstill. Nevertheless, we have certainly seen a slowdown. However, the underlying narrative around real estate in 2023 is one of cautious optimism, with renewed investment activity anticipated later in the year to counter the destabilising impact of high inflation and rising interest rates seen over the past 12 months.

In this regard, national legislators are bracing for a new risk phase and this will have an impact on new provisions aiming at stimulating or attracting selected investments in their countries. Parts of the NextGenerationEU recovery fund are likely to be subject to review in light of new 'what if' scenarios, as will tax credits and allowances given increased construction costs. Any review of national legislation shall also take into account international sanctions against Russia.

We are convinced that the role of the real estate sector as an economic, employment and social catalyst needs to be supported by a legislative framework that increases transparency and competitiveness, and simplifies as well as standardises bureaucratic processes.

However, the covid-19 pandemic, the war between Russia and Ukraine and the consequent inflation have all had different impacts within the European Union, depending on the country. This will, of course, further exacerbate differences between the interventions made by legislators in the individual jurisdictions, with allowances, tax credits and other tax provisions introduced and applied very differently from one Member State to another. Generally, these disparities reflect the level of impact of those elements on particular jurisdictions, the economic policies followed by their respective governments and the level of resources available to achieve those policy aims.

Correlatively, national legislators will need to adapt any new provisions to those pre-existing types of specialised real estate investment vehicles currently benefiting from tax exemptions or other advantageous allowances, for both direct and indirect tax purposes.

Given all of the above, the aim of this volume is to provide a useful guide to those international and institutional investors willing to invest in real estate properties located in Europe and elsewhere, and to illustrate in a comparative manner the possible alternatives

for establishing investment platforms in Europe and investment vehicles at a local level. In particular, each country-specific chapter provides insights from leading experts on key tax considerations and investment opportunities based on the relevant national legislation. Furthermore, in this edition, we have sought to provide indications of any allowances and facilitations introduced temporarily in response to current economic crises and that may also present investors with investment opportunities in specific countries.

We would like to thank the authors of this volume for their extensive expertise and their efforts to ensure the successful outcome of this work. We hope that the reader finds this volume useful and we welcome any comments and suggestions for its improvement.

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June 2023

Chapter 1

BELGIUM

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I OVERVIEW

i Investment vehicles in real estate

The most used unregulated corporate vehicles for real estate investments are the public limited liability company (SA/NV), the limited liability company (SRL/BV) and the limited partnership (SComm/CommV). The limited partnership is the most flexible vehicle from a corporate law standpoint and is not subject to capital protection rules. It also facilitates the setting up of the collateral in the context of acquisitions (share deals) financed by bank loans.

Regulated vehicles are the Belgian specialised real estate investment fund (SREIF),[2] which is an institutional fund, and the real estate investment trust (REIT) specific to Belgium, the BE-REIT,[3] which is a listed vehicle.

For an institutional investor, the choice between an unregulated vehicle or an SREIF depends on its own status and on the characteristics of the transaction.

ii Property taxes

Acquisition and disposal

Share deals are not subject to transfer tax, stamp duty or VAT, unless the tax administration demonstrates an abuse (to have the transaction subject to the same tax regime applicable for an asset deal).

Asset deals are subject to either transfer tax or VAT. When the real estate qualifies as a new building for VAT purposes, the transfer of a property right may (when the owner is not a professional developer and opts for a VAT taxable transaction) or must (when the owner is a professional developer) be subject to 21 per cent VAT. A building is deemed new for VAT purposes until 31 December of the second year following its first use or occupancy. Heavy refurbishment allows a building to be qualified as a new when either:

a a drastic modification of essential elements of the building is executed, affecting its nature, structure or purpose, whatever the costs of the works might be; or

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1 Ariane Brohez and Christophe Laurent are partners and Antoine Béchaimont is a senior associate at Loyens & Loeff.

2 In Belgium, this vehicle is known as the *Fonds d'investissement immobilier spécialisé/Gespecialiseerd Vastgoedbeleggingsfonds*, or FIIS/GVBF.

3 In Belgium this vehicle is known as the *Société immobilière réglementée/Gereglementeerde vastgoedvennootschap*, or SIR/GVV.

b modifications are executed for which the cost of the works (excluding VAT) is equal to at least 60 per cent of the market value of the building (excluding ground) at the end of the works.

When VAT does not apply, the purchase of an asset or the granting of usufruct is subject to 12 per cent (in Flanders) or 12.5 per cent (in Brussels and Wallonia) transfer tax computed on the higher of the agreed price or the market value. Long-term lease rights and rights to build are subject to 2 per cent transfer tax computed on the total of the fees paid to the owner over the full duration of the right increased by the charges contractually borne by the beneficiary.

Holding period

Unregulated vehicles, as well as Belgian establishments of foreign investors in the case of direct acquisition of real estate assets, are subject to corporate income tax (CIT). The net revenues, after depreciations and tax-deductible expenses, are subject to 25 per cent CIT. In the case of a direct holding by a foreign investor, no profit branch tax applies upon profit repatriation. Capital gains realised upon disposal are subject to 25 per cent CIT, subject to a rollover regime in the case of reinvestment of the price in qualifying assets.

The tax burden differs for regulated vehicles. Entering into such a vehicle (e.g., by conversion of a regulated vehicle) triggers exit tax – the taxation of the latent gain on the asset at a rate of 15 per cent. Going forward, investment proceeds will not be subject to CIT, but taxation will be shifted to the investors via a compulsory yearly dividend distribution, which will trigger withholding tax based on the applicable tax treaty.

II ASSET DEALS VERSUS SHARE DEALS

i Legal framework

Transactions are executed via acquisition of shares, acquisition of ownership or acquisition of a 99-year long-term lease right.

a Asset deal: an investor can acquire the full ownership, a long-term lease or usufruct over a real estate asset. Such acquisition must be performed by notarial deed and transcribed to the mortgage register to be made enforceable towards third parties.

b Share deal: in a share transaction, the purchaser acquires the shares of a special purpose vehicle and at the same time inherits all assets and liabilities of the company, including hidden liabilities. Extensive due diligence is therefore required upon acquisition. The share transaction takes the form of a private agreement and the inscription of the transfer in the share register. No notarial deed is required. Belgian law does not know the concept of a real estate company (a company whose main assets consist of real estate and that would be treated, mainly for tax purposes, differently from an ordinary company). Consequently, the tax regime applicable to share transactions is not subject to deviating rules.

Foreign investors can acquire real estate assets directly without being required to incorporate a local acquisition company.

These types of acquisition are common practice but their consequences from a taxation and accounting standpoint require case-by-case analysis.

ii Corporate forms and corporate tax framework

Corporate forms

It is common practice for investors to set up a company for each real estate investment. This allows them to ring-fence their investment and facilitates future exits.

The most used unregulated corporate forms for Belgian real estate companies are:

a the SA/NV (public limited liability company);

b the SRL/BV (limited liability company); and

c the SComm/CommV (limited partnership – this type of vehicle is not subject to capital protection rules, including the prohibition of financial assistance).

The most flexible vehicle is the SComm/CommV; however, it requires two types of shareholders: the general partner and the limited partners, with the general partner having unlimited liability for the debts of the SComm/CommV. The SA/NV and SRL/BV can have one shareholder whose liability is limited to its contribution to the company.

Belgian unregulated vehicles are subject to CIT; the same applies to Belgian establishments consisting of Belgian real estate owned directly by foreign companies. The main characteristics under the current state of the law are summarised below.

CIT rate

The statutory CIT rate for tax year (TY) 2024 (financial year 2023) is 25 per cent.

Taxable base

As a rule, accounting law (Belgian generally accepted accounting principles (GAAP)) governs corporate tax treatment, unless the tax law departs from it. Therefore, the taxable base consists primarily of the accounting results for the corresponding financial year, to which are added:

a the dividends distributed;

b the disallowed expenses (i.e., accounting expenses that are not deductible for tax purposes, fully or otherwise, as listed by tax law); and

c the transfer pricing adjustments.

In accordance with Belgian GAAP and confirmed by specific tax rules, a matching principle applies. Accordingly, costs related to, for example, a contract, such as a credit facility, are to be spread (and therefore deducted) over the duration of this contract.

The negative tax result shall be transferred to the company's carried-forward tax losses. These tax losses can be carried forward without any time limitation but are subject to a yearly limitation on use, as given below:

a no limitation up to €1 million of taxable income; and

b 40 per cent of taxable income above €1 million.

Depreciation

The acquisition price of a real estate asset, increased by the ancillary acquisition cost, is recorded as a fixed asset. This fixed asset, ground excluded, is depreciable over 20 to 33 years depending on the underlying type of asset (e.g., logistics, office or retail). Such

depreciation is a tax-deductible expense. The same applies to capital expenditure, on the understanding that the depreciation period could be shorter depending on the particular type of capital expenditure.

Most relevant tax-deductible costs

Apart from depreciation, the most relevant tax-deductible costs are:

a maintenance and repair costs to the extent that they qualify as operating expenses;

b only accruals and provisions corresponding to either a contractual obligation (agreed upon during the taxable period or a preceding period) or a legal or regulatory obligation (other than one deriving from accounting law);

c financing costs (e.g., arm's-length interest paid on loans, including mortgage loans);

d arm's-length fees stemming from the real estate, such as asset management fees and letting fees; and

e property taxes.

Most relevant disallowed expenses

The most relevant disallowed expenses are:

a the CIT due;

b the regional taxes (e.g., tax applying on non-residential surfaces located in the Brussels-Capital Region); and

c financing costs that are:
- not at arm's length; or
- above the 30 per cent earnings before interest, taxes, depreciation and amortisation (EBITDA) threshold.

Interest deduction

Interest borne to maintain or acquire taxable income is tax-deductible subject to the limitations set out below.

Intragroup loan interest is deductible for CIT purposes to the extent that the loan provides for market conditions. Belgian tax law does not provide for standard ratios (e.g., loan to value or interest service coverage ratio) to be complied with regarding the financial position of the debtor, nor does it provide for a standard arm's-length interest rate.

Net borrowing costs (i.e., financing expenses less financing income) of a taxpayer will be deductible only up to the highest of 30 per cent of the taxable EBITDA of the target company or €3 million, subject to group provisions.

The thin capitalisation rule providing for a 5:1 debt-to-equity ratio still applies:

a in respect of interest payments made to beneficial owners that are either not subject to income tax or subject to income tax on this interest income but significantly more advantageous than the Belgian common tax regime (i.e., tainted loans); and

b in respect of interest that benefits from the grandfathering clause under the above-mentioned EBITDA limitation.

Tax consolidation – intragroup transfer

Since TY 2020, Belgian parent and subsidiary companies or Belgian sister companies (i.e., qualifying taxpayers) are allowed to transfer tax losses of the year between them, allowing profit-making companies to offset their taxable base against the transferred tax losses, through an intragroup transfer agreement.

Qualifying taxpayers are Belgian companies and foreign companies established in the European Economic Area (EEA) that meet the requirement of a minimum 90 per cent capital affiliation, namely a direct participation of at least 90 per cent, or a common Belgian or EEA parent has a holding of at least 90 per cent in both companies. The companies concerned must have been affiliated during an uninterrupted period of five taxable periods, including the taxable period concerned, and have the same financial year starting date and either the same financial year end date as the Belgian taxpayer or an earlier end date because of liquidation.

Subject to the specific case of termination of activities, the intragroup transfer is also allowed only between Belgian taxpayers – namely, Belgian companies and Belgian establishments of foreign companies established in the EEA. In other words, when it is referred to a foreign company, the transfer occurs with its Belgian establishment.

Tax consolidation shall be achieved through the transfer of losses of the year between Belgian taxpayers of the same group in accordance with an agreement specifying the conditions for the intragroup transfer (e.g., the Belgian taxpayer must pay to the qualifying taxpayer compensation corresponding to the tax saving resulting from the intragroup transfer).

Transfer pricing adjustments

The Belgian tax authorities handle transfer pricing issues as abnormal or benevolent advantages.

When a company receives an abnormal or benevolent advantage from a related party at variance with the arm's-length principle, no loss or deduction can be offset against this advantage. This rule applies not only to payments received (e.g., excessive interest or fee received or part of the sale price received in excess of the arm's-length price) but also to savings (e.g., interest saved because of an interest-free loan). Abnormal or benevolent advantages received will, therefore, always constitute the minimum taxable base of the beneficiary. This minimum taxable base gives rise to an effective cash-out, which is equal to the amount of the advantage received multiplied by the applicable CIT rate. The received advantage, consisting of a saving, shall increase the carried-forward tax losses.

A company granting an abnormal or benevolent advantage in breach of the arm's-length principle must add this advantage (e.g., excessive interest or fee paid) to its taxable income but only to the extent that this advantage has not been taken into account in determining the Belgian recipient's taxable income.

Registration duties

Occupational agreements (e.g., commercial or office leases) are subject to a 0.2 per cent registration duty, calculated on the aggregate lease terms increased by the charges that are contractually borne by the lessee (these charges are generally estimated to be between 5 per cent and 10 per cent of the aggregate lease terms).

VAT

As a rule, the renting out of real estate, including commercial real estate, is not subject to VAT. Consequently, this implies the absence of the right to deduct the input VAT. However, exceptions or special regimes apply for:

a shopping centres;
b parking spaces;
c warehouses;
d VAT leases pertaining to new buildings;
e rights *in rem* on new buildings;
f provision of hotel accommodation; and
g granting of the right to perform a professional activity.

Since 1 January 2019, an optional regime to subject commercial leases to VAT has been available. Under a commercial lease, the letting of the premises is used exclusively by the tenant for its economic activity, granting the tenant the status of a VAT taxable person (even without the right to deduct input VAT). This option is subject to the following conditions:

a the letting must concern a new building (or part thereof), namely buildings for which VAT on construction or refurbishment cost has become chargeable for the first time on 1 October 2018 at the earliest;
b the option must be agreed upon by both landlord and tenant; and
c the option must be valid for the entire duration of the lease.

This option allows the landlord to deduct input VAT on the construction or refurbishment cost but, at the same time, extends the VAT clawback period to 25 years.

iii Direct investment in real estate

CIT in the hands of the seller

Capital gains realised on Belgian real estate are, as a rule, subject to CIT at a rate of 25 per cent in Belgium. This taxable capital gain can, however, be offset with tax-deductible costs or carry-forward losses.

Under certain conditions, however, the seller may benefit from a tax deferral regime. The following are the conditions for benefiting from this rollover relief:

a the asset on which the capital gain is realised must have been booked as a fixed asset for at least five years at the time the asset is sold;
b the taxpayer must reinvest the sale price in depreciable assets used in Belgium for business purposes; and
c the reinvestment must occur within a three-year period, which can be extended by two supplementary years if the reinvestment consists of a building, plane or boat.

In these cases, the taxation of the capital gain is spread out over the depreciation period of the newly acquired assets.

CIT in the hands of the purchaser

On acquisition, the assets will be booked in the hands of the purchaser for their acquisition value plus the acquisition costs. In other words, the purchaser will benefit from a stepped-up basis and will be able to depreciate these assets (excluding the land) from their market value.

Foreign companies investing directly in Belgian real estate

According to the Belgian Model Tax Treaty, which follows the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital (the OECD Model Tax Treaty) in this respect, the right to tax income from immovable property, or its transfer, belongs to the state in which the property producing the income is located. Non-resident entities are subject to non-resident income taxation, which is levied on their Belgian source income resulting from the transfer or the renting of a real estate asset located in Belgium.

No profit branch tax applies on the net repatriated income from the Belgian real estate.

Transfer taxes

The sale of real estate in full ownership (or the sale of residual property rights) and the granting of usufruct are subject to 12 per cent (Flemish Region) or 12.5 per cent (Brussels-Capital and Walloon Region) transfer taxes unless VAT applies. The taxable base equals the acquisition value of the real estate or its fair market value, whichever is higher.

Long-term lease rights are subject to 2 per cent registration duties computed on the aggregate of the lease terms for the entire duration of the right plus the costs to be borne by the long-term lessee, unless VAT applies. Transfers of such long-term lease rights are subject to the same registration duties computed on the lease terms and costs still due until termination of the right increased by the consideration paid to the transferor.

VAT

As a rule, the acquisition or granting of property rights over Belgian real estate is not subject to VAT but is subject to transfer taxes. This means that the seller will not have to charge any VAT to the purchaser, but nor will it be able to deduct the input VAT, if any, paid upon construction (or acquisition) of the real estate. However, the acquisition or granting of property rights over Belgian real estate qualifying as a new building for VAT purposes may or must be subject to VAT instead of transfer taxes, as follows:

a New building: only the purchase of (or granting of a property right over) a building (including with adjacent land) that qualifies as new for VAT purposes can be subject to VAT. A building will be deemed new for Belgian VAT purposes until 31 December of the second year following that of its first occupancy or appropriation. Heavy refurbishment allows a building to be qualified as new for VAT purposes if the refurbishment affects the essential elements of the building (its nature, structure or purpose). If there is doubt regarding such essential elements, the VAT authorities accept that the refurbished building is considered new for VAT purposes whenever the cost price of the refurbishment (not counting VAT) amounts to at least 60 per cent of the sale value of the building (not counting land) after refurbishment.

b Status of the supplier: in the case of a new building, whether the transfer can be performed under VAT depends on the status of the supplier. If the supplier is a professional constructor, the transfer must be subject to VAT. A professional constructor is a person who regularly transfers, for a price, new buildings or rights *in rem* on new buildings that they have built or acquired subject to VAT, before expiry of the period during which the building is considered new. In other cases, the transferor can opt to subject the transfer to VAT.

Security package

The registration of a mortgage as well as the transfer of a mortgage, further to the transfer for consideration of the mortgage-backed receivable or loan, is subject to a 1 per cent registration duty and 0.3 per cent mortgage fee. Certain transfers are exempt. Other securities, such as mortgage mandate, pledge of receivables and bank account, are not subject to those taxes, except for a documentary tax of €0.15. The registration of a pledge of movable assets triggers a registration fee of €500.

A pledge of shares can have adverse tax consequences. This is because pledged shares are, as a rule, not considered when determining the thresholds to be met in respect of dividend and interest withholding tax exemptions. However, the Belgian Ruling Commission has confirmed that this rule does not apply to pledges that exclude the transfer of ownership rights (e.g., voting rights).

iv Acquisition of shares in a real estate company

CIT in the hands of the seller

When selling shares in a Belgian company whose main assets are in real estate, the realised capital gain on shares should benefit from an exemption from CIT in Belgium. This tax advantage for the seller often leads to the granting of a discount for deferred tax liability when computing the share price in accordance with the market standard formula net equity of the company minus the net book value of the real estate asset plus the agreed value of the real estate asset minus the discount for deferred tax liability, which usually corresponds to 12.5 per cent (50 per cent of the currently applicable CIT rate) of the positive difference between the agreed value of the real estate asset and its net book value.

CIT in the hands of the purchaser

Upon the acquisition, the share deal does not have tax consequences as such in the hands of the purchaser.

CIT in the hands of the target company

Article 207 of the Income Tax Code (ITC) must be kept in mind; this Article provides that tax deductions carried forward are unavailable in the case of a change of control of a Belgian company. There are no fixed guidelines in respect of real estate acquisitions in the form of a share deal. Therefore, the further availability of tax deductions must be assessed on a case-by-case basis and it should be understood that in most cases the transfer occurs on a going-concern basis and, thus, does not trigger Article 207.

Indirect taxes

A share deal is not subject to transfer taxes or stamp duty, even if the sole or main asset of the target company whose shares are sold consists of real estate. A share deal is not subject to VAT.

Belgian general anti-abuse rules

Unlike numerous countries, Belgium does not assimilate the sale of shares in companies whose main assets consist of real estate with the sale of real estate for both CIT and transfer tax purposes. Consequently, a share deal on an unregulated real estate company will not trigger any adverse tax consequences: no transfer tax, no VAT, no stamp duty and no taxation of the latent capital gain on the real estate asset.

This raises the question whether the general anti-abuse rules (GAAR) would allow the recharacterisation of a share deal as an asset deal, consequently leading to CIT being due on the latent capital gains and to registration duties being due on the real estate asset value.

In accordance with European case law, the preparatory parliamentary text of the Belgian GAAR and the administrative guidelines provide that tax abuse includes two components:

a an objective component: a disjunction between the aims of a legal provision and the intention of the legislature. The taxpayer chooses a particular, perfectly legal, structuring, although the aims of the tax law and the intention of the legislature were not to promote this type of structuring. In short, the taxpayer uses a structure that allows it to fall either outside the scope of a legal tax provision or within the scope of a legal exemption provision, although those legal provisions were not made for this purpose; and

b a subjective component: the essential goal of the taxpayer in choosing this structuring is to obtain a tax advantage.

Accordingly, this GAAR requires that the Belgian tax administration demonstrates a tax abuse, the first component of which is an objective element – namely, the contravention of the aim or objectives of the legislature. In this regard, the Belgian legislature has always, repeatedly and without any doubt, expressed its will (1) not to assimilate shares of a real estate company to the real estate asset, and (2) to exempt share deals from both CIT and transfer taxes. On this basis, share deals should generally not be in contravention of the aim or objectives of the legislature and, therefore, the objective element of tax abuse is not present.

III REGULATED REAL ESTATE INVESTMENT VEHICLES

i Regulatory framework

SREIFs are subject to the Law of 19 April 2014 relating to alternative investment funds and their managers (the AIFM Law), the Programme Law II of 3 August 2016 (the SREIF Law) and the Royal Decree of 9 November 2016 relating to specialised real estate investment funds (the SREIF Decree).

SREIFs are aimed at providing asset managers and institutional investors with a flexible and efficient fund vehicle for their real estate investments in Belgium and abroad.

Overview of available legal forms

An SREIF is a closed-end fund with fixed capital and must be structured as a corporation (the available corporate forms are the SA/NV and the SComm/CommV).

AIFM Law and AIF qualification

An SREIF is an alternative investment fund (AIF) that falls under one of the following categories.

a First category: the fund raises capital from a certain number of investors, without public issue, with a view to investing in real estate in accordance with an investment policy in the interest of the investors. The fund is an AIF in the sense of the Alternative Investment Fund Managers Directive (the AIFM Directive) and has opted for investment in real estate. In this case, the AIFM Law applies fully to the fund and its managers, and a light regulatory regime is available for a small AIF when the assets under management do not exceed €100 million (with leverage) or €500 million (without leverage and without right to reimbursement within five years of the initial investment).

b Second category: the fund is not an AIF in the sense of the AIFM Directive because either (1) it does not fall within its scope of application or benefits from an exemption, or (2) it is owned by a single investor or constitutes a joint venture. In this case, the fund opts for AIF status within the meaning of the AIFM Law and limits its investments to real estate. This option is required to benefit from the specific tax status. This means that the manager of the fund shall not be subject to other obligations, without prejudice to its obligations under the AIFM Law (or equivalent in another Member State), if it manages other AIFs in the sense of the AIFM Directive.

Eligible investors

Shares or partnership interests in an SREIF can be subscribed or offered to corporate institutional investors only as further listed by Royal Decree and by the Markets in Financial Instruments Directive. In addition, all corporations can opt to be treated as institutional investors via specific request to the Belgian supervisory authority the Financial Service and Markets Authority (FSMA).

Eligible investments

An SREIF can invest only in real estate, defined as follows:

a Belgian and foreign real estate assets, as well as rights *in rem* on these assets;
b all the shares in Belgian companies owning real estate, provided that these companies either are merged into the SREIF or have opted for the SREIF regime within 24 months of the acquisition;
c shares in foreign real estate companies holding foreign real estate assets;
d shares in institutional BE-REITs;
e shares in Belgian SREIFs;
f shares in Belgian or foreign AIFs investing in real estate;
g shares in EEA REITs (as further defined by the SREIF Decree);
h options on real estate assets;
i real estate certificates;
j rights under real estate leasing; however, the activity of a lessor under a leasing with a purchase option can be only ancillary (with an exception for real estate assets dedicated to a public interest, including social housing and teaching);
k concession rights granted by a public body; and
l loans to subsidiaries and guarantees or security to the benefit of subsidiaries.

An SREIF is subject to a minimum investment volume of at least €10 million at the end of the second financial year following its inscription on the SREIF list.

Real estate development, understood as a main or ancillary activity implying a forward sale or a sale within five years of construction, is strictly prohibited.

No compulsory diversification requirement or leverage limits apply to SREIFs, but an SREIF may freely decide to apply these types of limitations as part of its investment policy.

Financial statements and control

An SREIF must draw up its consolidated financial statements in accordance with International Financial Reporting Standards (IFRS) and is subject to a yearly audit by an auditor recognised by the FSMA. The approval or direct supervision of the FSMA applies to the manager of the first category of SREIF and to the managers of the second category to the extent that they

manage other AIFs in the sense of the AIFM Directive. The tax authorities are competent to monitor the compliance of the SREIF with the provisions of the AIFM Law and the SREIF Decree.

Distribution obligation

The SREIF is subject to a yearly distribution obligation amounting to at least the positive difference between (1) 80 per cent of its net profit (computed in accordance with the rules set out in Annex A to the SREIF Decree) and (2) the net reduction of the SREIF indebtedness in the course of a financial year. Provided that they are reinvested within four years, realised capital gains are exempted from this distribution obligation.

Duration

The duration of the SREIF is limited to a maximum of 10 years, although this term can be extended periodically for five years at a time, subject to a decision taken by the unanimity of the votes at the general assembly of the investors.

ii Overview of the different regulated investment vehicles

In addition to the SREIF, the status of European long-term investment fund (ELTIF) is available for long-term infrastructure and real estate projects (transport, environmental and social infrastructure, public-private partnerships, care and social housing, schools and hospitals), to the extent that such long-term projects fit into a strategy of 'smart, sustainable and inclusive growth', as described by Regulation (EU) 2015/760. The ELTIF status, deriving from the Regulation, was implemented into the AIFM Law in the course of 2021.

ELTIFs can be listed or raise funds from institutional investors. An ELTIF is subject to the supervision of the FSMA, falls within the scope of the AIFM Directive and, therefore, qualifies as an AIF.

Because of a strict regulatory framework and, until recently, an inadequate tax regime, no Belgian company has yet adopted ELTIF status. However, EU institutions opened discussions in 2021 to revise the applicable regulatory framework, following which the ELTIF-amending Regulation (EU) 2023/606[4] was published on 21 March 2023. In short, Regulation (EU) 2023/606 develops the scope of eligible investment assets (with an amended definition of a real estate asset), revises diversification and leverage thresholds, adapts minimum investment requirements and distribution rules to improve accessibility for retail investors while aligning with MiFID II as regards their protection, and offers additional structuring options (e.g., open-ended ELTIFs through limited redemption rights).

In the interim, the ELTIFs tax regime has been aligned with those of SREIFs and BE-REITs from a Belgian domestic perspective. In this respect, investment income (rental income, capital gains, dividends and interest) is not subject to CIT, although dividends are, in

4 Regulation (EU) 2023/606 of the European Parliament and of the Council of 15 March 2023 amending Regulation (EU) 2015/760 as regards the requirements pertaining to the investment policies and operating conditions of European long-term investment funds and the scope of eligible investment assets, the portfolio composition and diversification requirements and the borrowing of cash and other fund rules.

principle, subject to 30 per cent withholding tax, which can be reduced by virtue of relevant provisions of domestic law or tax treaty. However, unlike the SREIF and the BE-REIT, the ELTIF is not subject to any distribution obligation.

iii Tax payable on acquisition of real estate assets

Acquisition in asset deal

The net capital gain realised by the seller shall be subject to CIT at a rate of 25 per cent. The sale or the granting of a property right shall be subject either to transfer taxes or to VAT.

Exit tax

Upon an unregulated vehicle opting by for the SREIF regime, or upon the merger of an unregulated vehicle into an SREIF, the latent gain on the Belgian real estate and the tax-free reserves are subject to the exit tax at a rate of 15 per cent. The same applies to the contribution of real estate to an SREIF by a Belgian corporation.

The latent gain is computed based on the appraised value of the real estate asset, excluding transfer taxes. The tax losses of the Belgian company should be available for offsetting, subject to the limitation in use provided for by the tax legislation.

Indirect taxes

The option for the SREIF regime or the merger of an unregulated vehicle into an SREIF does not trigger transfer taxes or VAT.

iv Tax regime for the investment vehicle

CIT and treaty protection

An SREIF is formally subject to CIT at the statutory rate of 25 per cent but on a reduced taxable base taking into account:

a the abnormal or benevolent advantages received;

b the disallowed expenses (other than (1) capital loss and write-off on shares, and (2) excessive borrowing costs in accordance with the EU Anti-Tax Avoidance Directive provisions on interest deduction restriction). In this respect, the tax and financial impact of certain regional taxes (e.g., tax on office surfaces) should not be underestimated, and attention must be paid to transfer pricing; and

c the special tax for secret commission (e.g., non-disclosed remuneration).

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

This formal subjection to CIT should allow the SREIF to claim treaty benefits from a Belgian standpoint.

Subscription tax

An SREIF is subject to a yearly 0.01 per cent subscription tax on the net amounts invested in Belgium (i.e., to the extent that the SREIF's shares are held by Belgian residents).

VAT

Management services invoiced to an SREIF benefit from a VAT exemption.

v Tax regime for investors

Investments in Belgian real estate

Taxation of dividends

Dividends distributed to Belgian corporate shareholders do not benefit from the participation exemption regime and shall, therefore, be taxable in the hands of those shareholders, subject to the specific tax regime of the corporate shareholder concerned.

Withholding tax

Dividends distributed by an SREIF are, as a rule, subject to 30 per cent withholding tax, which can, however, be reduced by virtue of relevant provisions of domestic law or tax treaty as follows:

a a withholding tax exemption shall apply to dividends distributed to Belgian corporations subject to a minimum participation of 10 per cent in the SREIF and a minimum uninterrupted holding period of one year; and

b dividends distributed to a foreign pension fund that (1) is not conducting a business or a lucrative activity, (2) is totally tax exempt in its country of residence and (3) is not contractually obliged to redistribute these dividends to a beneficial owner that cannot qualify for this exemption benefit from a withholding tax exemption.

Investments in foreign real estate

Taxation of the dividends

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

a the SREIF directly holds the foreign real estate assets: the foreign real estate assets are located in the EEA or a treaty country (with an exchange of information clause) and the income generated by these assets has been subject to regular income tax; or

b the SREIF indirectly holds the foreign real estate assets through a foreign company or companies: the foreign company meets the subject-to-tax requirement under the Belgian participation exemption regime.

Withholding tax

A withholding tax exemption applies to dividends distributed to Belgian corporations subject to a minimum participation of 10 per cent in the SREIF and a minimum uninterrupted holding period of one year, and dividends distributed to foreign investors shall benefit from a withholding tax exemption without an underlying condition of taxation in the source state (the look-through approach).

IV REAL ESTATE INVESTMENT TRUSTS AND SIMILAR STRUCTURES

i Legal framework

The regulated real estate company (REC) was introduced by the Law of 12 May 2014 (the BE-REIT Law) and the Royal Decree of 13 July 2014 (the BE-REIT Decree) as an alternative to maintain the attractiveness and competitiveness of Belgium. The status of institutional REC has been implemented as well.

The main goal of a BE-REIT is the long-term holding and letting of real estate, including the active management of the real estate. Public BE-REITs and institutional BE-REITs are subject to FSMA supervision but fall outside the scope of the AIFM Directive.

A BE-REIT carries out commercial activity in the development and management of a real estate portfolio in its own corporate interest. This commercial activity is carried out by the BE-REIT itself or by a subsidiary and, therefore, the BE-REIT must have an operational team constituting a substantial part of its employees and must have direct relationships with clients and service providers.

ii Requirements to access the regime

Regulatory status

A BE-REIT is subject to the supervision of the FSMA but falls outside the scope of the AIFM Directive and does not qualify as an AIF.

A BE-REIT must obtain a licence as a collective investment undertaking from the FSMA to be registered on the BE-REIT list. In this respect, the registration process comprises a request for information to allow the FSMA to assess the BE-REIT's compliance with the BE-REIT Law and the BE-REIT Decree.

Legal form

The BE-REIT must be structured as a non-tax-transparent fund vehicle – namely, a public limited liability company – with a minimum share capital of €1.2 million.

Eligible investors and listing

The subscription and transfer of securities issued by BE-REITs are open to every investor, to the extent that at least 30 per cent of the issued share capital is publicly traded and that the BE-REIT is listed on a regulated market.

Listing can occur only after registration on the BE-REIT list and after the publication of a prospectus, subject to specific requirements.

The BE-REIT Law expressly provides the possibility for a BE-REIT to issue securities other than shares (e.g., bonds or convertible bonds) to the exclusion of profit shares.

Eligible investments

The principal activity of a BE-REIT consists of the active management of real estate assets. In this respect, BE-REITs are allowed to invest only in real estate, whether located in Belgium or not, which includes the following categories of assets:

a real estate and rights *in rem* on real estate;

b shares with voting rights in real estate companies (including intermediary holdings), whose share capital is held (directly or indirectly) for more than 25 per cent by the BE-REIT;

c option rights on real estate;

d shares in BE-REITs and in institutional BE-REITs, whose share capital is held (directly or indirectly) for more than 25 per cent by the BE-REIT;

e units of a foreign collective investment undertaking investing in real estate and registered on the Belgian FSMA list of foreign collective investment undertakings;

f units of a collective investment undertaking investing in real estate, established in the EEA and subject to an equivalent control;

g real estate certificates;
h shares in EEA REITs;
i shares in real estate investment companies;
j shares in SREIFs; and
k subject to limitations, rights resulting from financial leases as defined by the IFRS and analogous rights of use.

Real estate development, understood as a main or ancillary activity implying a forward sale or a sale within five years of construction, is strictly prohibited.

As an exception, ancillary or temporary investments in transferable securities are allowed, to the extent that the articles of association authorise such investments. A BE-REIT may hold hedging instruments covering its financial risk to the extent that its articles of association authorise transactions of this kind. Speculative transactions are not allowed. The hedging strategy must be disclosed in the BE-REIT's financial reports.

The list of authorised activities of a BE-REIT includes the execution, indirectly or in a joint venture, with a public partner, of design build finance agreements, design build finance maintain agreements, design build finance maintain operate agreements or agreements for the concession of public works (i.e., participation in public-private partnerships).

The minimum participation required for investment in a joint venture is 25 per cent, plus one share, in the capital of the perimeter company, which can also opt for the status of institutional BE-REIT. For a BE-REIT, in the absence of exclusive or joint control, those participations cannot exceed 50 per cent of its consolidated assets.

It is prohibited for a BE-REIT to enter into a shareholders' agreement that derogates from the vote cast according to its participation in a joint venture (at least 25 per cent plus one share).

Financial statements and control

A BE-REIT must draw up its consolidated financial statements in accordance with IFRS and is subject to a yearly audit by an auditor recognised by the FSMA.

Risk diversification

A BE-REIT cannot invest more than 20 per cent of its consolidated assets into a single real estate project. A real estate project is defined as one or more real estate objects subject to the same investment risk (e.g., the same tenant). Under certain specific conditions, a BE-REIT can obtain a derogation of this rule from the FSMA, provided that the leverage limit does not exceed 33 per cent of its consolidated assets.

This risk diversification requirement does not apply when an EEA Member State is the tenant, user or beneficiary of an infrastructure in the framework of a public-private partnership.

The risk diversification is assessed on an IFRS consolidated basis.

Leverage

BE-REITs are subject to a double leverage limit:

a a debt-to-asset ratio of 65 per cent at both statutory and IFRS consolidated level; and
b an interest ratio of 80 per cent at both statutory and IFRS consolidated level; in other words, the interest expenses of the BE-REIT and its subsidiaries cannot represent more than 80 per cent of their annual operational and financial income.

The BE-REIT and its subsidiaries are prohibited from mortgaging (or otherwise encumbering) a real estate asset for more than 75 per cent of its value. In an intragroup relationship, no mortgage or other collateral can be granted except for financing the real estate activities, and the total amount covered by such mortgages or collateral cannot exceed 50 per cent of the global fair value of the real estate assets held by the BE-REIT and its subsidiaries.

The BE-REIT and its subsidiaries are prohibited from granting credit facilities and collateral to third parties.

These thresholds are calculated on an IFRS consolidated basis as well.

Distribution obligation

A BE-REIT is subject to a yearly distribution obligation amounting to at least the positive difference between (1) 80 per cent of its net profit (computed in accordance with the BE-REIT Decree) and (2) the net reduction of the BE-REIT indebtedness in the course of a financial year. No distribution is allowed if the statutory or consolidated indebtedness ratio already exceeds 65 per cent or will exceed this threshold because of the distribution.

Provided that they are reinvested within four years, realised capital gains are exempted from this distribution obligation.

Institutional BE-REIT

The institutional BE-REIT status is available to companies investing in immovable property, as defined above, or participating in public-private partnerships, provided that 25 per cent of their share capital, plus one share, is owned, directly or indirectly, by a BE-REIT. The capital of institutional BE-REITs is open to not only institutional or professional investors but also retail investors, subject to a minimum investment value of €100,000.

The status of an institutional BE-REIT is not optional and, therefore, the BE-REIT must choose between having all its subsidiaries subject to this status or not. Once a retail REIT holds an institutional REIT and acquires or incorporates another company, this company has 24 months to apply for institutional REIT status.

Social BE-REIT

The social BE-REIT is a type of non-stock-listed BE-REIT available to finance and promote investments in care, subject to their accreditation by the competent authority, and it is defined as investing in infrastructures dedicated to:

a the housing or care of disabled persons;
b the housing or care of elderly persons;
c the care or help of young persons;
d the collective welcoming and care of children under the age of three;
e the teaching and accommodation of students;
f the operation of a psychiatric institution; or
g the operation of a revalidation centre.

Social BE-REITs are incorporated as cooperative companies with a social purpose, having a minimum fixed capital of €1.2 million. The variable capital can be subscribed by retail investors in a proportion to be determined by Royal Decree. Because of their corporate form, they guarantee a dividend of maximum 6 per cent (after deduction of the withholding

tax) per year, but the exit is structured as a buy-back of shares at nominal value. The social BE-REIT must build up a liquidity reserve to execute these buy-back orders, which can themselves be limited.

A social BE-REIT is allowed to invest only in real estate and rights *in rem* on real estate and in leasing. A debt-to-asset ratio of 33 per cent is applicable as leverage limit.

iii Tax regime

Exit tax

Upon conversion of an unregulated vehicle into a BE-REIT, or upon the merger of an unregulated company into a BE-REIT, the latent gain on the Belgian real estate and the tax-free reserves are subject to the exit tax at a rate of 15 per cent, as for the SREIF.

Indirect taxes

The acquisition of a right *in rem* by a BE-REIT is subject to the same real estate transfer tax as that applicable in cases of a direct acquisition by an unregulated company.

CIT and treaty protection

A BE-REIT is subject to the same CIT regime as that applicable to the SREIF.

Subscription tax

A BE-REIT is subject to a yearly 0.0925 per cent subscription tax on the net amounts invested in Belgium (i.e., to the extent that the BE-REIT's shares are held by Belgian residents). Institutional BE-REITs are subject to a yearly 0.01 per cent subscription tax.

Tax on stock exchange

Any transfer for consideration of shares of BE-REITs is subject to a tax on stock exchange transaction of 0.12 per cent and the share buy-back is subject to a tax on stock exchange transaction of 1.32 per cent when it concerns capitalisation shares. Institutional BE-REITs are exempted from this tax.

VAT

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

iv Tax regime for investors

The tax regime of a BE-REIT's investors is the same as that applicable to SREIFs' investors. However, dividends distributed by the BE-REIT to its shareholders are subject to 15 per cent withholding tax (instead of a 30 per cent withholding tax) if the BE-REIT invests at least 80 per cent of its assets in real estate used for healthcare in the EEA.

v Forfeiture of REIT status

BE-REIT status can be forfeited (1) if the FSMA omits the BE-REIT from the BE-REIT list as a sanction (because the BE-REIT does not observe the laws, regulations or its articles of association on an ongoing basis, after recommendations to remedy to the situation) or (2) by request of the BE-REIT to be removed from the BE-REIT list.

The forfeiture of BE-REIT status has the following tax consequences:

a the results of the year concerned remain subject (1) to the BE-REIT tax regime until the forfeiture of the regime and (2) to the ordinary CIT regime as from this date;

b the share capital of the BE-REIT, in the sense of the corporate law legislation, shall be considered fiscal capital for the purposes of CIT and withholding tax;

c the retained earnings, not yet distributed, of the BE-REIT, built up under the BE-REIT status, shall be considered taxed reserves for the purposes of CIT and withholding tax, these retained earnings having been subject to their own tax regime; and

d the revaluation surplus corresponding to the latent gain that has been subject to the exit tax should be considered a taxed reserve for the purposes of CIT and withholding tax, as this revaluation surplus has been subject to its own tax regime – the exit tax.

V INTERNATIONAL AND CROSS-BORDER TAX ASPECTS

i Tax treaties

Permanent establishment and Belgian establishment

Based on domestic law, foreign investors are subject to non-resident income taxation on their Belgian source income, if the income can be allocated to a Belgian establishment. This non-resident taxation in the case of a Belgian establishment shall, however, be subject to the presence of a permanent establishment pursuant to the applicable double tax treaty.

The Belgian Model Tax Treaty follows the OECD Model Tax Treaty in respect of the definition of 'permanent establishment', without any reservation. Whether Belgian real estate constitutes a permanent establishment for the purposes of the application of tax treaties must be analysed based on factual elements.

The absence of a permanent establishment in Belgium for the purposes of the application of tax treaties does not necessarily result in the absence of a Belgian establishment, the existence of which creates tax obligations in Belgium.

Although similar to the definition of 'permanent establishment' that appears in the OECD Model Tax Treaty, the term 'Belgian establishment' is somewhat broader than the OECD terminology. In this respect, old case law states that even the merely passive renting of Belgian real estate investments by a foreign entity constitutes a Belgian establishment when the articles of association of the foreign entity mention the exploitation of real estate in their corporate purpose.

The determination of a permanent establishment or a Belgian establishment will, however, not be pertinent in ascertaining which state has the right to tax income from immovable property, or from its transfer. Rather, the establishment will only be of relevance in determining the source of movable income; for example, in the context of interest payments. As Article 6 of the OECD Model Tax Treaty takes precedence over Article 7 (business profits), income from Belgian real estate is always taxable in Belgium, even if it does not constitute a permanent establishment.

Income from immovable property

According to the Belgian Model Tax Treaty, which follows Article 6 of the OECD Model Tax Treaty in this respect, the right to tax income from immovable property, or from its transfer, belongs to the state in which the property producing the income is located.

Non-resident entities are subject to non-resident income taxation, which is levied on their Belgian source income resulting from the transfer or the renting of a real estate asset located in Belgium, whether or not they are connected with a permanent establishment or a Belgian establishment.

Taxation of capital gains

As noted earlier, unlike numerous other countries, Belgium does not assimilate the sale of shares in companies whose main assets consist of real estate with the sale of real estate for CIT purposes.

In this respect, Belgium reserved the right not to include Paragraph 4 of Article 13 of the OECD Model Tax Treaty in its conventions. Subsequently, most of the tax treaties concluded by Belgium allocate the right to tax capital gains to the state of which the alienator is a resident, even in the case of a share deal on a company whose main assets consist of real estate.

Notably, however, Paragraph 4 of Article 13 of the OECD Model Tax Treaty is being implemented more and more often in the case of renegotiation of older treaties concluded by Belgium. However, this provision does not apply to stock listed companies.

OECD Multilateral Instrument

Belgium signed the OECD Multilateral Instrument (MLI)[5] on 7 June 2017. The MLI entered into force for Belgium on 1 October 2019. For CIT, the MLI provisions affect taxable periods that began on or after 1 April 2020.

In line with its treaty policy, Belgium has chosen not to include Article 13(4) of the OECD Model Tax Treaty in all its covered tax treaties and has entered a reservation in respect of Paragraph 1(a) of Article 9 of the MLI, which introduces a 365-day reference period for determining whether the value threshold that triggers the application of the analogous provisions of Article 13(4) of the OECD Model Tax Treaty has been reached.

On the other hand, Belgium has not entered a reservation with regard to Paragraph 1(b) of Article 9 of the MLI, which extends the scope of the existing provisions to holdings in entities such as partnerships and trusts. Subsequently, the scope of application of the provisions contained in the 10 tax treaties concluded by Belgium should be extended to cover transfers of interests in entities other than companies.

ii Cross-border considerations

Under Belgian law, there are no restrictions on foreign investment in real estate, nor do specific incentives for foreign investment apply.

One should, however, pay attention to EU rules on money laundering and on sanctions, as economic operators and service providers (e.g., lawyers and notaries) might be prevented from doing business with certain parties that are subject to restrictive measures or for which know-your-customer and client due diligence is not conclusive. However, this is not specific to real estate and applies to any type of business.

5 The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

iii Locally domiciled vehicles investing abroad

Belgium as place of establishment of funds or platforms

Belgium may offer the following advantages for establishing a real estate fund or an investment platform.

a An extensive tax treaty network that, in most cases, currently does not assimilate the sale of shares in companies whose main assets consist of real estate with the sale of real estate for CIT purposes: accordingly, most of these treaties allocate the power to tax capital realised on shares to the state of residence of the seller (Belgium), where it should be tax exempt provided that the underlying company complies with the subject-to-tax requirements.

b Withholding tax exemptions for dividends distributions to foreign pension funds: dividends distributed to a foreign pension fund that (1) is not conducting a business or a lucrative activity; (2) is totally tax exempt in its country of residence; and (3) is not contractually obliged to redistribute these dividends to a beneficial owner that cannot qualify for this exemption benefit from a withholding tax exemption.

c Withholding tax exemption for dividends distributions to corporate shareholders: dividends distributed to corporates established in a treaty country should benefit from a withholding tax exemption subject to the same conditions provided for in the EU Parent–Subsidiary Directive as follows:

- the parent company holds at least 10 per cent of the share capital of the Belgian distributing company and that participation has been (or will be) held in full ownership for an uninterrupted period of at least one year. Even if this one-year holding period requirement is not fulfilled at the time of the dividend distribution, the parent company can benefit from the exemption if it commits to hold this participation;
- the Belgian distributing company and its parent company are incorporated under one of the legal forms listed in the appendix to the EU Parent–Subsidiary Directive or under an analogous legal form;
- the parent company must be established in a country with which Belgium has entered into a tax treaty and be deemed to have its tax domicile in that country (no dual residence) under the laws of that country and in accordance with the tax treaties concluded by that country with third countries; and
- the Belgian distributing company and its parent company must be subject to CIT or to a tax analogous to CIT, without enjoying a tax regime that deviates from the common tax system.

d Withholding tax exemptions for redistribution of foreign source real estate by SREIFs: dividends stemming from foreign source real estate income distributed by an SREIF to foreign investors are exempt from withholding tax (the look-through approach).

Business reasons, substance and beneficial ownership

According to recent case law from the European Court of Justice (i.e., the 'Danish cases'),[6] EU law such as the Parent–Subsidiary Directive or the Interest and Royalty Directive cannot be relied on for abusive or fraudulent ends. Following that principle, a Member State must

6 The Danish cases consisted of six cases decided by the European Court of Justice in 2019, on the interpretation of the beneficial owner concept under the EU Parent–Subsidiary Directive.

refuse to grant the benefit of provisions of EU law where they are relied upon with the aim not of achieving the objectives of those provisions but, instead, of benefiting from an advantage in EU law, although the conditions for it are fulfilled only formally.

In short, conduit companies that are artificially interposed as beneficiaries of interests or dividends to benefit from exemptions provided by EU directives should be disregarded.

VI YEAR IN REVIEW

As in the previous year, from a tax standpoint, the year in review has been characterised by an increase in scrutiny and tax audits of (1) dividend and interest withholding tax exemptions linked to the concept of the beneficial owner, and (2) transfer pricing.

The first topic is not new but continues to draw attention, and it is a source of much litigation. In fact, a special task force is focusing on conducting audits of withholding tax exemptions and reductions applied by Belgian taxpayers, to verify whether the recipients were effectively allowed to benefit from the exemption or reduction claimed, in view of the Danish cases, and whether the compliance formalities have been strictly observed. The Belgian tax administration is also relying on exchanges of information, mainly with Luxembourg, to conduct these audits.

The following key tax aspects are currently coming under scrutiny to determine whether an intermediary holding has 'enough' substance and can be considered the beneficial owner of interest or dividends: the composition of the board, and control of the funds (e.g., do the amounts of interest received correspond to subsequent payments, made within a short period, to another group company lender, and are dividends received then immediately redistributed). Where the beneficial ownership of an intermediary holding has not been demonstrated, the Belgian tax administration might be willing to apply a tax treaty by treating the intermediary as a fiscally transparent entity, taking into account the state of residence and tax status of the beneficial owner.

Transfer pricing audits continue to focus on remuneration of intragroup loans and, as for interest and dividends, a dedicated unit also conducts transfer pricing audits of financing of this kind to assess the arm's-length character of the interest applied. Benchmark analysis, documented and performed well in advance, is a real asset for taxpayers in their defence during such audits. A new type of payment also seems to be attracting the attention of the Belgian tax administration: asset management fees. Although the reality of these fees is often not disputed, the tax administration has proved keen to review their arm's-length character. Although the question may not seem relevant since this type of fee is often subject to negotiations between third parties, asset managers should be prepared to defend their position.

VII OUTLOOK

It is difficult to predict how current practice will evolve given that much legislation has been announced (even if clear proposals regarding its implementation are lacking): a new tax reform in Belgium aimed at promoting, via tax deductions, the renovation of buildings; the implementation of the EU Minimum Tax Directive (Pillar 2); and the approval (or not) of the third European Anti-Tax Avoidance Directive, ATAD 3, and the proposal for a debt-equity bias reduction allowance, or DEBRA.

In terms of market trends, it is fair to say that the focus is currently totally on environmental, social and governance issues. A proposal for tax reform includes the introduction of an enhanced investment deduction and double depreciation for qualified investments: investment in efficient use of energy, renewable energy and zero-emission transport, environmentally friendly investment and digital support investment. For those investments, the taxpayer shall benefit from a 30 per cent investment deduction from its yearly profits, with an option to carry forward in the absence of sufficient profits. In addition, the depreciation time frames for those investments shall be halved (e.g., five years instead of 10 years). Two conditions apply: the investment must stay on balance (i.e., the taxpayer cannot grant a right of use to a third party that would result in the investment appearing on the balance sheet of this third party) and no right of use (e.g., a lease agreement) can be granted to a third party that could not benefit from the same deduction. It remains to be seen, however, whether this proposal will enter into force on 1 January 2024 or whether it will be postponed.