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Choosing an investment vehicle
European Real Estate Fund Regimes

This booklet seeks to compare more than 30 different types of fund vehicles in a summary form, by looking at a consistent set of key topics, and noting major pros and cons

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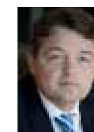
Introduction

The AIFM Directive entered into force on 22 July 2013, and has been implemented by European legislators. Legislators had to consider regulatory matters, as well as changes to fund and investor taxation. This has resulted in significant changes in the European real estate fund landscape.

This booklet aims to give an overview of the most common European Collective Investment Vehicles (CIVs) suitable for investment in real estate, including their legal form, as well as their regulatory and tax position. AIFMD has forced Fund Managers and Investors to change their approach and look not only at national rules, but also at EU rules and guidelines. At the same time, the new passports for professional investor funds provide new options. Managers must consider the place where they apply for authorisation to obtain the license, paying close attention to legal aspects, tax aspects, as well as available business infrastructure and personal resources. While AIFMD clearly seeks to pave the way for a single market for real estate CIVs, differences and imperfections in tax regimes form a barrier for real estate funds investing on a pan-European basis. Many countries offer attractive tax facilities, including tax exemptions, to their local real estate CIVs. In many countries these tax facilities are not available to real estate CIVs investing out of a different jurisdiction. The case law of national courts and of the ECJ is developing rapidly and may push for further harmonisation of tax regimes for real estate CIVs in Europe. This development will certainly result in significant changes of the various tax regimes described in this publication. The portfolio of CIV regimes in Europe is still expanding, providing new structuring alternatives. Our country specialists mentioned in the booklet will be very happy to help you, by providing further information on any of the fund vehicles described.

Uwe Stoschek
Partner,
Global Real Estate Tax Leader,
Real Estate Industry Leader EMEA
PwC Germany
+49 30 2636-5286
+49 160 5820641
uwe.stoschek@de.pwc.com

Lise-Meitner-Str. 1,
D-10589 Berlin, Germany



Jeroen Elink Schuurman
Partner,
EMEA Real Estate Tax Leader
PwC Netherlands
+31 88 792 6428
+31 653984810
jeroen.elink.schuurman@nl.pwc.com

Thomas R. Malthusstraat 5,
Amsterdam, The Netherlands

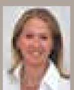
Austria

- GmbH & Co. KG
- Immobilien-Sondervermögen
- Immobilien-Spezialsondervermögen
- Alternative Investment Fund Manager Directive

Contacts

Rudolf Krickl
+43 1 501 88 34 20
rudolf.krickl@at.pwc.com

Franz Rittsteuer
+43 1 501 88 34 33
franz.rittsteuer@at.pwc.com



Petra Holzer
+43 1 501 88 30 43
petra.holzer@at.pwc.com

Austria
GmbH & Co. KG

Background

Austrian closed-end real estate funds are typically set up as an Austrian limited partnership (KG). Such vehicles are so far, generally, not subject to regulatory requirements, and usually represent long-term investments with less risk diversification.

Legal form

Under Austrian commercial law, the GmbH & Co. KG is a special form of limited partnership (KG). The general partner (unlimited liability) is a limited liability company. Investors are typically limited partners. The liability of the limited partners for the vehicle's obligations is limited to their contributions.

Tax status

The fund vehicle is transparent for Austrian income tax purposes.

Tax treatment at entity level

Received dividends, capital gains and other received incomes are not subject to income tax at the level of the fund.

Treatment of investors

For tax purposes, investors are basically deemed to receive their income from the KG pro rata to their participation, regardless of its actual distribution policy. As a result, the taxation of the fund's income will be triggered at the level of each investor, depending on the tax status of the investor and the nature of the received income.

However, the GmbH & Co KG could qualify as an Alternative Investment Fund (AIF; please see page 5). In such a case, the tax regulations for real estate investment funds are applicable (please see our comments on the following pages).

Withholding tax

No withholding tax is levied on income distributed by the KG (due to the tax-transparent status).

Treaty status

The KG itself doesn't generally have access to treaty benefits; from an Austrian perspective the investors can benefit from double tax treaties as the beneficial owners of the fund's income.

Filing obligations

The KG has to file an annual income tax return, whereby the profit will be determined at the level of the KG at a first stage, and will then be allocated to the investors on the basis of their participation. Resident investors are required to file an Austrian tax return and so might be non-resident investors.

Regulation

The KG is not subject to regulatory investment supervision (non-regulated fund).

Requirements for authorisation

None.

Investment restrictions

None.

Minimum level of investment

None.

Pros

- Austrian closed-end funds in the form of a KG are well accepted among Austrian investors, especially for long-term investments, focusing on only one or a few assets.
- The fund vehicle is tax-transparent and there are no withholding taxes on income distributions.
- An increase of value in the property is only taxed in case of the actual disposal of the asset.
- More possibilities for investors to have some influence on the investment.

Cons

- The fund vehicle is not very flexible regarding the holding period of the investment.
- There's generally no direct access to double tax treaties.

Austria
Immobilien-Sondervermögen

Background

The legislation regarding the Austrian *Immobilien-Sondervermögen* (Real Estate Investment Fund) was published in 2003, introducing a legal framework for real estate investment funds. It has been a long-lasting call of investors to introduce a regulated open-end real estate investment vehicle in Austria.

Legal form

An Austrian *Immobilien-Sondervermögen* is an open-end fund, primarily invested in real estate assets. The fund has no legal personality and is managed by an Austrian management company (*Kapitalanlagegesellschaft*, KAG), which is either an Austrian limited liability company (GmbH) or a stock corporation (AG). Further, a depository bank usually governs the issuance and redemption of shares in the fund. An *Immobilien-Sondervermögen* is a real estate retail fund, accessible to all kinds of investors.

Tax status

The fund is transparent for Austrian income tax purposes.

Tax treatment at entity level

There is no income taxation at the level of the fund.

Treatment of investors

Investors are deemed to receive the fund income pro rata to their fund shares. From an Austrian tax perspective, the income will be taxed at the level of each investor, depending on the tax status of the investor and the nature of the received income. In case of non-resident investors, special provisions might apply. Furthermore, the respective double tax treaties should be considered.

Withholding tax

Principally, withholding tax is levied on both distributed and accumulated income. The income is determined at the level of the fund and comprises income from the rent and lease of the real estate, the revaluation gains as well as domestic and foreign dividends, interest and other specified capital income sources. Further, foreign investors as the beneficial owners of the fund income might have access to a double tax treaty and reduce the rate of withholding tax levied in Austria. Profits from foreign real estate held by the fund are exempt from Austrian taxation under those treaties, for which the method of exemption is applicable.

Treaty status

Regarding treaty access for open-end investment funds, Austria has, in principle, adopted the “proportional approach”, as mentioned in the OECD report on “The Granting of Treaty Benefits with Respect to Income of Collective Investment Vehicles”. Whether this approach shall also apply to real estate funds is currently subject to ongoing discussion and, therefore, unclear. However, Austria issues certificates of residence to Austrian publicly offered real estate funds for the purpose of pursuing treaty entitlements and should, in principle, also recognise the treaty access of foreign publicly offered real estate funds. Nevertheless, the view of the respective treaty partner might be different, whether treaty access should be granted to the fund itself, the KAG, or the investors in the fund as the beneficial owners of the fund’s income. There is no access to EU Parent-Subsidiary Directive for the fund.

Filing obligations

Depending on the nature of the investors, there might be an obligation to file tax returns with the local authorities. In the annual report of the *Immobilien-Sondervermögen*, the tax treatment for different investor types has to be published (i.e. so-called “*Steuerseite*”).

Regulation

The *Finanzmarktaufsicht* (FMA) is responsible for the regulatory supervision of the KAG, managing the fund.

Requirements for authorisation

The KAG needs a banking licence in order to set up the fund and is therefore subject to the respective capital market regulations. Before the units of the *Immobilien-Sondervermögen* are offered to the public, a prospectus and a simplified prospectus have to be published and provided to the FMA.

Investment restrictions

The fund is restricted to invest in certain eligible real estate assets, e.g. real estate properties or property rights. The acquisitions of other real estate funds, of shares in other than property companies, or other investments in securities are excluded. Specific quotas regarding the gearing and investment of the fund apply.

Minimum level of investment

The fund has to invest consistently, according to the principle of risk spreading, as detailed in legislation (at least ten property investments within four years).

Pros

- The *Immobilien-Sondervermögen* is an investment vehicle for all types of investors.
- The fund itself is not subject to tax.
- The *Immobilien-Sondervermögen* represents a comparably safe vehicle, due to capital market regulation.
- The fund must redeem the shares upon request of the investors.

Cons

- Austrian open-end funds may be unknown to some international investors.
- The flexibility for Austrian and international investments and the range of eligible assets is limited.
- Moreover, there are gearing restrictions for real estate assets held by the fund.
- The access to double tax treaties in some jurisdictions is not clear.
- An increase of value in the property will principally be taxed, regardless of the actual disposal of the asset.

Austria
Immobilien-Spezialsondervermögen

Background

The Austrian *Immobilien-Spezialsondervermögen* is also governed by the regulations that apply to the Immobilien- Sondervermögen. However, it creates a regime for institutional investors and provides a more flexible investment environment.

Legal form

The Austrian *Immobilien-Spezialsondervermögen* is a closed-end fund with no legal personality, and is managed by an Austrian management company (*Kapitalanlagegesellschaft*, KAG), which is either an Austrian limited liability company (GmbH) or a stock corporation (AG). The number of institutional investors investing in the fund is limited.

Tax status

The fund is transparent for Austrian income tax purposes.

Tax treatment at entity level

There is no income taxation at the level of the fund.

Treatment of investors

Investors are deemed to receive the fund income pro rata to their fund shares. From an Austrian tax perspective, the income will be taxed at the level of each investor, depending on the tax status of the investor and the nature of the received income. However, individuals cannot invest in *Immobilien-Spezialsondervermögen* and the number of institutional investors is limited. In case of non-resident investors, special provisions might apply. Furthermore, the respective double tax treaties have to be regarded.

Withholding tax

Principally, withholding tax is levied on both distributed and accumulated income. The income is determined at the level of the fund and basically comprises income from the rent and lease of the real estate, the revaluation gains as well as domestic and foreign dividends, interest and other specified capital income sources. Moreover, foreign investors who are the beneficial owners of the fund income might have access to a double tax treaty reducing the rate of withholding tax levied in Austria. Profits from foreign real estate held by the fund are exempt from Austrian taxation under those treaties, for which the method of exemption is applicable.

Treaty status

Regarding treaty access for closed-end investment funds, Austria has, in principle, adopted the “proportional approach” as contained in the OECD report on “The Granting of Treaty Benefits with Respect to Income of Collective Investment Vehicles”. Whether this approach shall also apply to real estate funds is currently subject to ongoing discussion and, therefore, unclear. However, Austria issues certificates of residence to Austrian publicly offered real estate funds to pursue treaty entitlements and should, in principle, also recognise the treaty access of foreign publicly offered real estate funds. Nevertheless, the view of the respective treaty partner might be different, whether treaty access should be granted to the fund itself, the KAG, or the investors in the fund as the beneficial owners of the fund’s income. There’s no access to EU Parent-Subsidiary Directive for the fund.

Filing obligations

Unlike the *Immobilien-Sondervermögen*, resident investors are generally required to file tax returns for income derived from the fund.

Regulation

The *Immobilien-Spezialsondervermögen* is not subject to direct supervision from the FMA.

Requirements for authorisation

The KAG needs a banking licence in order to set up the fund and is therefore subject to the respective capital market regulations. The *Immobilien-Spezialsondervermögen* is not required to publish and provide FMA with a prospectus, or simplified prospectus.

Investment restrictions

The investment-vehicle targets institutional investors. Generally speaking, restrictions regarding the nature of investments (e.g. eligible assets, quotas) apply, as with the *Immobilien-Sondervermögen*. The investment vehicle is also restricted to invest in certain eligible real estate assets. Specific quotas regarding the gearing and investment of the fund apply. However, the investment restrictions are more flexible compared to *Immobilien-Sondervermögen*.

Minimum level of investment

The fund has to invest according to the principle of risk spreading, as detailed in legislation (at least five property investments within four years).

Pros

- The *Immobilien-Spezialsondervermögen* is not subject to direct supervision from the FMA.
- The fund does not have to issue a prospectus.
- The *Immobilien-Spezialsondervermögen* offers a flexible investment vehicle to institutional investors.

Cons

- Individuals are not eligible investors.
- The *Immobilien-Spezialsondervermögen* generally represents a long-term investment.
- The access to double tax treaties in some jurisdictions is not clear.
- An increase of value in the property will principally be taxed, regardless of the actual disposal of the asset.

Austria
Alternative Investment Fund Manager Directive

The European Union passed a directive concerning EU fund managers who manage alternative investment funds. This directive was implemented by the Austrian government in the Alternative Investment Fund Manager Act (AIFMA), passed in July 2013 by the Austrian Parliament. AIFMA covers alternative investment structures that are not regulated by the UCITS Directive (Undertakings for collective Investment in Transferable Securities).

The Austrian AIFMA stipulates that investment structures which:

(i) collect money from investors;

(ii) invest the fund according to a defined investment strategy;

(iii) are not used to generate active income; and

(iv) do not require an approval according to the UCITS Directive

qualify as Alternative Investment Fund (AIF).

Under this qualification, an AIF would comprise:

- *Immobilien-Sondervermögen* (Real Estate Investment Fund) and *Immobilien-Spezialsondervermögen*;
- Alternative Investment Fund in Real Estate;
- Real Estate stock companies (AG), limited companies (GmbH) and closed-end real estate funds (GmbH & Co KG).

Tax wise, these investments are treated as Real Estate Investment Funds. As a result of this new regulation, an investment in e.g. an Austrian closed-end real estate fund might be treated as a Real Estate Investment Fund for tax purposes under the Real Estate Investment Funds Act. One of the consequences of this treatment would be a special determination of income including a taxation of unrealised revaluation gains.

The Real Estate Investment Funds Act however foresees certain exemptions for the application of the taxation as a Real Estate Investment Fund.

A national investment vehicle should not be taxed as a Real Estate Investment Fund if:

- the capital invested is used to generate active income (this structure would generally not be seen as an AIF); or
- the AIF meets the criteria under § 48 (5) AIFMA to be seen as an AIF in Real Estate ("*AIF in Immobilien*") and then the investment entity is subject to taxation according to § 7 (3) Austrian Corporate Income Tax Act (CITA).

An international investment vehicle should not be taxed as a Real Estate Investment Fund if:

- the capital invested is used to generate active income, then this structure would generally not be seen as an AIF; or
- the AIF meets the criteria under § 48 (5) AIFMA to be seen as AIF in Real Estate and the investment entity is comparable with an Austrian entity which would be subject to taxation according to § 7 (3) CITA; or
- the real estate investment is not qualified as an AIF and has no risk spreading (e.g. less than 10 properties); or
- the real estate investment fund is not qualified as an AIF, has however sufficient risk spreading but the investment entity is subject to taxation comparable to the Austrian CIT in the foreign country.

Belgium

▶ REIF – Real Estate Investment Fund

Contacts

Grégory Jurion
+32 2 710 93 55
gregory.jurion@be.pwc.com

Evelyne Paquet
+32 2 710 43 54
evelyne.paquet@be.pwc.com

Belgium
REIF – Real Estate Investment Fund

Background

The Programme Act of 3 August 2016 introduced the new Belgian Real Estate Investment Fund (REIF or FIIS) and created an attractive platform for real estate funds from a regulatory and tax perspective. The Royal Decree implementing the REIF regime is yet to be introduced by the Belgian government.

Tax treatment at entity level

Investment in Belgian assets

Latent capital gains of Belgian assets entering into a REIF are taxed at the favorable entry tax rate of 16.995%.

For income relating to Belgian real estate, no taxation occurs (i.e. the taxable basis of the REIF is limited to the disallowed expenses and the abnormal or gratuitous advantages received).

Investment in non-Belgian assets

No entry tax is applicable for non-Belgian assets entering into a REIF and no taxation occurs on foreign rental income, capital gains on assets and on shares, dividends and interest income.

In case of investment in foreign as well as in Belgian real estate, a breakdown of the income (and tax treatment) would be applicable.

Treatment of investors

Belgian investors

Dividends received from a REIF by shareholders subject to Belgian corporate income tax are taxable as profit at the normal tax rate of 33.99%, except in case the dividends stem from income qualifying for the Belgian dividends received deduction (DRD) regime (i.e. foreign taxed income and DRD dividends), in which case 95% of the dividends received can be deducted from the taxable basis. Furthermore, there will be no withholding tax to the extent the Belgian investor has a participation of at least 10% in the REIF for a period of at least one year (and if not, mere pre-financing of withholding tax).

Non-Belgian investors

For dividends distributed by the fund of which the income stems from Belgian real estate, a dividend withholding tax of 27% applies. This rate can however be decreased or exempt based on a double tax treaty.

For income stemming from foreign real estate, no withholding tax is applicable on dividends distributed by the REIF.

Finally, a withholding tax exemption is available for dividends distributed by the REIF to foreign pension funds.

Other taxes

The REIF is subject to the Belgian annual tax of 0.01% on its net asset value.

Treaty status

The REIF is subject to corporate income tax and should therefore in principle be entitled to have access to the double tax treaties concluded by Belgium.

Belgium
REIF – Real Estate Investment Fund

Regulation

The REIF disposes of a flexible regulatory regime, which can be summarised as follows:

- available only for institutional and corporate investors;
- no need of plurality of investors;
- no risk diversification;
- no limitation on leverage;
- distribution obligation of 80%;
- minimum capital of EUR 1.2m;
- limited lifetime of maximum 10 years (with possibility to extend by periods of maximum 5 years each);
- minimum assets required EUR 10m to be reached 2 years after the acquisition.

The REIF will in most cases be regulated under the European AIFM Directive and will benefit from the corresponding European passport, but will not be supervised by the Belgian financial regulator (FSMA). In case a sole investor holds all the shares of the REIF, its manager will fall outside the scope of the AIMFD.

The REIF is not subject to a prior approval procedure or ongoing supervision of the FSMA. Only a registration with the Ministry of Finance is required, which means the REIF can be established and operational in a time of approximately 15 days, without high constitution costs.

Investment restrictions

In general, a REIF can invest in real estate. For the purposes of the REIF, the scope of real estate is however broad: the definition of real estate includes amongst others real estate assets, shares in real estate companies or Belgian or foreign REITs, real estate certificates, rights under real estate leasing, shares in other REIF or in foreign real estate investment funds concessions.

The REIF may not hold Belgian real estate indirectly. Indirect investments through subsidiaries are allowed only temporarily as the REIF acquiring Belgian real estate indirectly will benefit from a 24-month period to proceed to a restructuring.

It is prohibited for a REIF to build a real estate asset and sell it within 5 years after construction.

Filing obligations

The REIF is in principle subject to the same filing obligations as a normally taxed Belgian company (i.e. yearly filing of a Belgian corporate income tax return, filing of withholding tax returns upon interest payments and dividend distributions, etc.)

Please note however that in case the REIF invests in Belgian and foreign real estate, it should add to its yearly report a breakdown of its income according to its nature/source, as a different tax treatment is applicable in this respect.

Furthermore, as the REIF is subject to the IFRS accounting regulations, a yearly valuation of the real estate assets should be included in the yearly report.

Pros

- Real estate income (including leasing income, capital gains and dividends from real estate companies) is not subject to Belgian corporate tax at fund level.
- Double Tax treaty Access.
- Limited regulatory restrictions.
- No withholding tax on dividend stemming from foreign real estate and paid to international investors.
- Withholding tax exemption for dividends distributed to pension funds.
- IFRS accounting (fair value) – no depreciation.

Cons

- Distribution obligation of 80%.

Czech Republic

- ***Collective Investment Fund investing in Real Estate***
- ***Fond Kvalifikovanych Investorů (Fund of Qualified Investors)***

Contacts

Jan Fischer
+420 251 152 539
ja.fischer@cz.pwc.com

Lucia Čechová
+420 251 152 535
lucia.cechova@cz.pwc.com

Matej Chrz
+420 251 152 576
matej.chrz@cz.pwc.com

Czech Republic
Collective Investment Fund investing in Real Estate

Background

With the Law on Investment Companies and Investment Funds ("ICIF") (Act No. 240/2013 Coll.) which is effective from 19 August 2013 the AIFM Directive has been implemented into the Czech legislation.

This new Act specifies a special kind of investment fund defined as Collective Investment Fund investing in Real Estate ("Real Estate CIF").

Following to the changes of Investment Funds' treatment under the ICIF and re-codification of the Civil Law, there is a matching amendment to the Czech Income Taxes Act effective as of 1 January 2015.

According to this amendment of the Czech Income Taxes Act the decreased 5% corporate income tax rate (in comparison with standard corporate income tax rate of 19%) may only apply for funds that qualify as a so-called "Basic Investment Fund" for tax purposes.

Under Czech tax law, a Basic Investment Fund is:

a) an investment fund under the ICIF whose shares or participation certificates are accepted for trading on the European regulated market,

b) an open-ended mutual fund under the ICIF,

c) an investment fund and sub-fund of a joint stock company with variable registered capital under ICIF investing in accordance with their statutes more than 90% of the value of their property in certain specific financial assets, not including real estate. Therefore, this category c is not applicable to a Real Estate CIF.

d) a foreign investment fund comparable to a fund stated in a) through c) if

1. its home State under ICIF is an EU Member State or a State of the European Economic Area,
2. it proves that it is managed under a license comparable to a license to manage an investment fund that is issued by the Czech National Bank, and the manager is subject to supervision comparable to the supervision by the Czech National Bank,
3. it has statutes or a document comparable to statutes from which it can be ascertained that it is a foreign fund comparable to a fund stated in a) through c), and
4. it proves that under the law of its home State its income is not attributed to other persons even in part.

The amendment further extends the holding period for the individual's tax exemption of the sale/redemption of units in Real Estate CIF to 3 years (see Treatment of Investors).

Legal form

The Real Estate CIF may be established as (i) joint-stock company with variable registered capital (SICAV) or (ii) as an open-end unit fund.

Tax status

The Real Estate CIF (either established in the form of SICAV or as an open-end unit fund) is considered to be a taxpayer liable to corporate income tax and needs to be registered with its respective Tax Authority.

The corporate income tax rate applicable for the Real Estate CIF is generally 19%. If the Real Estate CIF qualifies as a Basic Investment Fund (see conditions above in Background), the decreased 5% corporate income tax rate will apply.

The tax is calculated from the Czech accounting profit amended for the tax purposes.

Collection of corporate income tax is similar to other corporate entities, i.e. the Real Estate CIF will file a corporate income tax return in which the tax liability is declared.

Tax treatment at entity level

There is no special tax levied on capital gains in the Czech Republic.

Rental income and any capital gain from the sale of real estate are reflected in the income of the Real Estate CIF and taxed through the corporate tax return against a 19%/5% corporate income tax rate (see Tax status above).

Generally, tax losses realised by the Real Estate CIF in previous taxable periods can reduce the corporate income tax base in the subsequent five taxable periods.

Starting 2014, losses realised from the sale of plots of land may be tax-deductible.

Dividends received from abroad are included in a separate corporate income tax base of the Real Estate CIF, which is subject to a 15% corporate income tax rate. Tax paid abroad may be credited against the Czech corporate income tax liability in compliance with the relevant Double Taxation Treaty.

Dividends received from the Czech Republic are generally subject to a 15% final withholding tax and are not included in the separate tax base.

Benefits of EU Parent-Subsidiary Directive

(i) Real Estate CIF in the legal form SICAV
Real Estate CIF established in a legal form of SICAV (legal form of Joint Stock Company) shall be eligible to benefits of the EU Parent-Subsidiary Directive concerning dividends and same exemption is applicable in case of capital gains.

(ii) Real Estate CIF in the legal form of open-ended fund
Real Estate CIF established in a legal form of open-ended funds are not eligible to benefits of the EU Parent-Subsidiary Directive.

Czech Republic
Collective Investment Fund investing in Real Estate

Treatment of investors

Investor as a legal entity

Income from redemption/sale of units in the Real Estate CIF is taxed via the corporate income tax return as a part of the profit of the particular entity (19% corporate tax rate, unless applicable double tax treaty states otherwise).

Dividends received from the Real Estate CIF are generally subject to 35%/15% final withholding tax (see Withholding tax section below).

In case of corporate investors of the Real Estate CIF in a form of SICAV, income from redemption/sale of units in Real Estate CIF and dividend income may be tax exempt under the conditions of the EU Parent-Subsidiary Directive.

Investor as an individual

No special tax on capital gains is levied.

For Czech tax purposes the redemption of units (buy-backs of units) in Real Estate CIF is treated as a sale of units (sale of securities). If sold in the period:

(a) More than 3 years after acquisition it is generally exempt from income taxation. Starting 2015 tax period, there is an obligation to notify the tax authorities if such a tax exempted income exceeds CZK 5 million.

(b) Within 3 years from acquisition, the total capital gain is included in the general tax base of the taxpayer and is taxed by 15% Personal Income Tax rate. Loss from the sale of one unit can be compensated with profit from the sale of another unit up to the total amount of profits from sales of securities in a given tax year.

Withholding tax

15% withholding tax applies for tax residents of EU or EEA member states, or residents of states with which the Czech Republic has an enforceable double tax treaty or tax information agreement unless reduced by the applicable double tax treaty.

A Real Estate CIF established in a legal form of a SICAV shall qualify for the EU Parent-Subsidiary directive. Thus, dividends received by a corporate parent company shall be exempt from Czech withholding tax under the condition that the parent company holds at least 10% shares for at least 12 months.

Treaty status

(i) Real Estate CIF in the legal form of a SICAV
A Real Estate CIF in the legal form of a SICAV is treated as a tax resident and should be able to access treaty benefits,

(ii) Real Estate CIF in the legal form of an open-ended fund
A Real I Estate CIF in the legal form of an open-ended fund is considered as a tax resident for Czech tax purposes, however the access to treaty benefits must be confirmed in the particular double tax treaty.

Filing obligations

(i) Real Estate CIF in the legal form of a SICAV
A Real Estate CIF in the form of a SICAV files a corporate income tax return for each taxable period itself.

(ii) Real Estate CIF in the legal form of an open-ended fund
With effect from 2011, each open-ended fund became itself liable to file corporate income tax returns. This reflected the change that open-ended funds became Czech taxpayers as of 2011. The asset management company of the Real Estate CIF is obliged to file tax returns on behalf of the Real Estate CIF .

Regulation

The regulatory body is the Czech National Bank (CNB). Regulation is rather extensive since the fund is designed for investments from the general public.

Requirements for authorisation

The Real Estate CIF is required to have an authorised depository. The authorised depository could be a bank with its seat in the Czech Republic, or a foreign bank with a branch in the Czech Republic, or a stock-exchange broker with custody permission.

Further, a board of experts has to be established. The board of experts, among others, sets the value of real estate property in the possession of the Real Estate CIF and its stakes in real estate companies.

Investment restrictions

The Real Estate CIF should invest mainly in real estate that it acquires, operates, or sells in order to realise a profit, and under certain conditions in shares in specific real estate companies. The Real Estate CIF must invest at least 20% and at most, 49%, of its value into supplementary liquid assets, state treasury bills issued by the State or CNB, securities of mutual funds, or specific bonds. In the first three years of the functioning of the Real Estate CIF, the value invested into one real estate asset should not exceed 60% of the value of the fund; in further years it cannot exceed 20% of the value of the fund.

Minimum level of investment

No legal requirements. The Real Estate CIF (or the asset management company) can set the minimum level of investment for a particular Real Estate CIF.

Pros

- No investor restrictions (intended for investment by the general public).
- If meets the conditions for Basic Investment Fund, it may benefit from the lower corporate income tax rate than standard corporate entities (5% corporate income tax comparing to standard 19% corporate income tax).
- Access to the EU Parent-Subsidiary Directive for Real Estate CIF established in a legal form of SICAV.
- Sale/redemption of units in Real Estate CIF is tax free for individual investors after 3 years holding period.
- Access to Double Tax Treaty benefits (with some limitations for Real Estate CIF established an open-ended fund).

Cons

- Rather intense regulation (investment policy is regulated by CNB, minimum investment requirements).
- Emission of bonds is permitted only under some specific conditions.

Czech Republic
Fond Kvalifikovanych Investorů (Fund of Qualified Investors)

Background

A *Fond Kvalifikovanych Investoru* (FKI) is a fund of qualified investors which is not covered by the UCITS.

Following to the changes of Investment Funds' treatment under the Investment Companies and Investment Funds (ICIF) and re-codification of the Civil Law, there is a matching amendment to the Czech Income Taxes Act effective as of 1 January 2015.

According to this new amendment the decreased 5% corporate income tax rate (in comparison with standard corporate income tax rate of 19%) may only apply for so-called Basic Investment Fund.

For the tax purposes, the Basic Investment Fund is

a) an investment fund under the ICIF whose shares or participation certificates are accepted for trading on the European regulated market,

b) an open-ended mutual fund under ICIF,

c) an investment fund and sub-fund of a joint stock company with variable registered capital under ICIF investing in accordance with their statutes more than 90% of the value of their property in certain specific financial assets, not including real estate. Therefore, this category c is not applicable to a FKI which invests into the real estates.

d) a foreign investment fund comparable to a fund stated in a) through c) if

1. its home State under ICIF is an EU Member State or a State of the European Economic Area,

2. it proves that it is managed under a license comparable to a license to manage an investment fund that is issued by the Czech National Bank, and the manager is subject to supervision comparable to the supervision by the Czech National Bank,

3. it has statutes or a document comparable to statutes from which it can be ascertained that it is a foreign fund comparable to a fund stated in a) through c), and

4. it proves that under the law of its home State its income is not attributed to other persons even in part.

The amendment further extends the holding period for the individual's tax exemption of the sale/redemption of units in FKI to 3 years (see further).

Legal form

The FKI may be established in the following legal forms:

(i) a limited partnership,

(ii) a limited liability company,

(iii) a joint-stock company or a joint-stock company with variable registered capital (SICAV),

(iv) cooperative,

(v) a societas europae (SE),

(vi) an open-end or closed-end unit fund,

(vii) a trust.

If established an open-end or closed-end unit fund or trust, it is not a legal entity per se; it is a pool of assets with its own tax identification number that has to be managed by an investment company (asset management company).

Tax status

The FKI nevertheless its legal form is considered to be taxpayer liable to corporate income tax and needs to be registered by its respective Tax Authority.

The corporate income tax rate applicable for an FKI is generally 19%. If FKI qualifies for the Basic Investment Fund (see conditions above in Background), the decreased 5% corporate income tax rate will apply.

The tax is calculated from the Czech accounting profit amended for the tax purposes.

Collection of corporate income tax is similar to other corporate entities, i.e. FKI itself files a corporate income tax return in which the tax liability is declared.

Tax treatment at entity level

There is no special tax levied on capital gains in the Czech Republic.

Any capital gain/loss or revaluation differences are reflected in the income of the FKI and taxed through the corporate tax return by 19%/5% corporate income tax rate (see Tax status above).

Generally, tax losses realised by the FKI in previous taxable periods can reduce the corporate income tax base in the subsequent five taxable periods.

Dividends received from abroad are included in a separate corporate income tax base of the FKI, which is subject to a 15% flat corporate income tax rate. Tax paid abroad may be credited against the Czech corporate income tax liability in compliance with the relevant Double Taxation Treaty.

Dividends received from the Czech Republic are generally subject to 15% final withholding tax and are not included in the separate tax base.

Benefits of EU Parent-Subsidiary Directive

(i) FKI in the legal form of a limited liability company, joint-stock company, SICAV, cooperative and SE

If the FKI is established in those legal forms, it shall be eligible to benefits of the EU Parent-Subsidiary Directive concerning dividends and same exemption is applicable in case of capital gains.

(ii) FKI in the legal form of a limited partnership, open-ended or close-ended fund or trust

If the FKI is established in those legal forms it is not eligible to benefits of the EU Parent-Subsidiary Directive.

Czech Republic
Fond Kvalifikovanych Investorů (Fund of Qualified Investors)

Treatment of investors

Investor as a legal entity

Income from redemption/sale of units in the KFI is taxed via the corporate income tax return as a part of the profit of the particular entity.

Dividends received from an FKI are generally subject to 35%/15% final withholding tax (see Withholding tax section below).

The tax-exemption based on the EU Parent-Subsidiary Directive is applicable for the dividends and capital gains paid by KFI in the legal form of a limited liability company, joint-stock company, SICAV, cooperative and SE.

In case the corporate investors of an KFI are in the legal form of a limited liability company, joint-stock company, SICAV, cooperative and SE, income from redemption/sale of units in Real Estate CIF and dividend income may be tax exempt under the conditions of the EU Parent-Subsidiary Directive.

Investor as an individual

No special tax on capital gains is levied.

For Czech tax purposes the redemption of units (buy-backs of units) in an FKI is treated as a sale of units (sale of securities). If sold in the period:

(a) More than 3 years after acquisition it is generally exempt from income taxation unless FKIs has the legal form of cooperation, limited liability companies and partnerships where the holding period is prolonged to 5 years. Starting 2015 tax period, there is an obligation to notify the tax authorities if such a tax exempted income exceeds CZK 5 million.

(b) Within 3 years (5 years) from acquisition, the total capital gain is included in the general tax base of the taxpayer and is taxed by 15% personal income tax rate. Loss from the sale of one unit can be compensated with profit from the sale of another unit up to the total amount of profits from sales of securities in a given tax year.

Withholding tax

Standard withholding tax rate for dividends is 35%. 15% withholding tax applies for tax residents of EU or EEA member states, or residents of states with which the Czech Republic has an enforceable double tax treaty or tax information agreement unless reduced further by the applicable double tax treaty.

An FKI established in a legal form of a limited liability company, joint-stock company, SICAV, cooperative and SE may qualify for the EU Parent-Subsidiary directive. Thus, dividends received by a corporate parent company shall be exempt from Czech withholding tax under the condition that the parent company holds at least 10% shares for at least 12 months.

Treaty status

An FKI should generally have access to treaty benefits regardless of its legal form as it is treated as a tax resident.

However, access of FKIs in the legal form of open-ended or closed-ended fund or trusts, must be confirmed in the particular double tax treaty.

Filing obligations

(i) FKI in the legal form of a limited liability company, joint-stock company, SICAV, cooperative and SE and a limited partnership,
An FKI in the above mentioned legal form files a corporate income tax return for each taxable period itself (with specific regime for limited partnership).

(i) FKI in the legal form of open-ended or close-ended fund or trust
The asset management company of the FKI in this legal form is obliged to file tax returns on behalf of the FKI.

Regulation

The regulatory body is the Czech National Bank (CNB). The regulation is not that extensive as in the case of a Real Estate CIF. The function of the CNB is rather to supervise, since the FKI does not have a large-scale reporting requirements.

Requirements for authorisation

The FKI is required to have an authorised depository, which controls whether the FKI manages its assets in compliance with the legal regulations and statute of the FKI.

Investment restrictions

Investors into FKIs should be special institutions such as banks, investment companies, pension funds, insurance companies, central bank, etc., or other qualified investors (such legal entity or individual has to confirm in writing that it has experience with securities trading). The minimum number of investors in an FKI is two and the maximum number is 100; however, the CNB could approve an increase of this limit. Further restrictions and limitations (types of investment etc.) are set by the fund itself in the statute of the FKI. Currently many FKIs invest in real estate.

The value invested into one real estate asset should not exceed 35% of the value of the fund. This limit does not apply in the first 3 years after the set-up of the FKI, for FKIs that invest more than 49% of its funds into real estate. The limit can be entirely removed in case sufficient funds are contributed to the FKI in proportion to the number of investors.

Minimum level of investment

The minimum investment is EUR 125,000.

Pros

- If it meets the conditions for Basic Investment Fund, the FKI might benefit from a lower corporate income tax rate than standard corporate entities (5% corporate income tax comparing to standard 19% corporate income tax).
- Not very extensive regulation.
- Possibility of in kind contribution.
- Possibility to change the FKI in the form of the investment fund to a joint stock company after 6 years of activity.
- Access to the EU Parent-Subsidiary Directive for KFI established in the specific legal form.

Access to Double Tax Treaty benefits (with some limitations for KFI established as an open-ended fund/close-ended funds or trust).

- Sale/redemption of units /shares is tax free for individual investors after 3 years holding period.
- Emission of bonds by FKI is not prohibited.

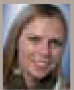
Cons

- No access to UCITs Directives.
- Investor restrictions – “well informed investors” (not primarily intended for general public).

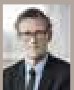
Denmark

▶ Kommanditselskab (Limited Partnership)

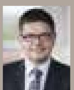
Contacts



Karina Hejlesen Jensen
+45 3945 3276
khe@pwc.dk



Henrik Stig Lauritsen
+45 3945 3656
hla@pwc.dk



Søren Thorvaldsen Keller
+45 3945 9010
svl@pwc.dk

Denmark
Kommanditselskab (Limited Partnership)

Background

The Danish Limited Partnerships (LP) are not typically used for direct collective investments (>10 investors) in Danish real estate. Due to tax transparency, the Danish partnership has some disadvantages when there is a significant number of investors buying and selling their partnership interest on an ongoing basis.

Instead, a Luxembourg HoldCo or similar is often used as the investment vehicle, investing 100% directly into the Danish LP. The LP is attractive due to the tax transparency, as no withholding tax should be levied on income distributions.

Legal form

The legal form of the Danish LP is, in most cases, a Danish *Kommanditselskab* (K/S). The general partner (unlimited liability) is typically a limited liability company and investors are typically limited partners.

Tax status

The Danish K/S is considered transparent for Danish tax purposes. Note that there is an anti-avoidance rule in Denmark stating that if shareholders with more than 50% of the capital or of the voting rights are resident in a state that considers the K/S as separate taxable entity, the K/S would also be considered a separate taxable entity for Danish tax purposes. This also applies if shareholders with more than 50% of the capital or the voting rights are resident in a state that has not concluded a double tax treaty with Denmark, in which withholding tax on dividends should be reduced or eliminated, and if the state is not a member of the EU.

Tax treatment at entity level

Dividends received, interest, rental income, capital gains etc. are not subject to Danish income tax at the level of the K/S.

Treatment of investors

For Danish tax purposes, the investors are, as a general rule, deemed to receive their income from the K/S pro rata to their participation, regardless of actual distribution policy. The income allocation to each investor can (to some extent) be agreed otherwise, i.e. freedom of contract.

As a result, the taxation of the K/S' income should be triggered at the level of each investor, depending on the tax status of the investor and the nature of the income received.

An investment in Danish real estate implies limited tax liability to Denmark, which means that each investor must file a Danish tax return based on their share of the result from the real estate investment in Denmark. If the K/S receives a capital gain from selling real estate, the investor will be taxed on the gain in Denmark (consequence of the limited tax liability).

Interest expenses allocated to the Danish real estate are, as a main rule, fully deductible, but Danish tax legislation includes up to three rules on limitation of interest deductibility.

Foreign investors investing in a Danish K/S may be considered having a permanent establishment in Denmark. This depends on a case-by-case analysis.

Withholding tax

No withholding tax should be levied on income distributed by the K/S due to the tax transparent status.

Treaty status

The K/S itself does generally not have access to treaty benefits, however the investors may be eligible to treaty status from a Danish tax perspective.

Filing obligations

No corporate tax or withholding tax filing obligations for the K/S. Danish and non-Danish investors must file a Danish tax return.

Regulation

A Danish K/S can be a regulated AIF entity but this is established on a case-by-case basis. Typically, if the K/S' main objectives are investment, financing, development, selling and buying of real estate, the K/S should be considered an AIF. The main legislation governing AIFs in Denmark is the Danish Alternative Investment Fund Managers Act. The Act regulates AIF Managers.

Requirements for authorisation

Regulatory

A K/S described above is required to be registered with the Danish Business Authority. Also, the K/S must file annual financial statements with the Danish Business Authority.

In addition, if the K/S is an AIF, the K/S must be either managed by an AIF Manager or be a self-managing AIF.

The AIF Manager or the self-managing AIF is required to be licensed or registered with the Danish Financial Supervisory Authority. As regards Danish AIF Managers, depending on the volume of assets under management, licensing or registration is a prerequisite for managing AIFs.

For EU-AIF Managers licensed by competent authorities within EU/EEA that intend to manage Danish AIFs in Denmark, no licensing or registration is required with the Danish Financial Supervisory Authority, provided that the AIF Managers are authorised to manage the particular type of AIFs. If this is the case, the EU-AIFMs can start managing the AIFs as soon as they receive a notification from their competent authorities stating that information has been forwarded to the Danish Financial Supervisory Authority for either direct managing or managing through a branch.

Tax

No corporate income tax return requirements apply for the K/S but such requirements apply for the investors. Potentially, VAT registration and payroll tax registrations may be applicable for the K/S but it should be evaluated on a case-by-case basis.

Denmark
Kommanditselskab (Limited Partnership)

Pros

- The K/S vehicle is tax transparent and there are no withholding taxes on income distributions. The investors may be able to depreciate on the assets for Danish tax purposes.
- An increase in the value of the property will in principle only be taxed in case of an actual disposal of the asset.
- For civil law purposes, the K/S exists as a separate entity, but the Danish Corporate Act does not apply for a Danish K/S (it is possible, though, to form a Danish partnership as a P/S (partnerselskab) which is regulated by the Danish Corporate Act). This means that for instance the regulations on dividends and extraordinary dividends in the Corporate Act do not apply. Instead, there should be "room" for freedom of contract in the articles of association on how the distributions to the investors should be regulated.

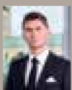
Cons

- A K/S with multiple investors is not very flexible during the holding period if investors want to buy or sell shares in the K/S. When an investor acquires an ideal share of the K/S, the fair market value of each underlying investment should be computed as the fair market value should be considered the acquisition price of the K/S share for this investor. When new investors are entering, the existing investors would, as a starting point, be considered having partly realised (i.e. partly sold) their K/S shares.
- In addition, the investors should be taxed on each individual investment under the K/S, since it is a limited partnership (look through entity). This could be burdensome. The investor should be considered to hold an ideal share of each underlying investment in the K/S based on the investor's ownership of the K/S. In order to file the Danish tax returns, the K/S reports information to its shareholders about: (1) the income that has been received; (2) expenses incurred; (3) the amount of withholding tax that has been suffered; and (4) whether any real estate has been acquired or disposed of.

Estonia

- ***Contractual Fund***
- ***Public Liability Company***

Contacts



Viljar Kähari
+372 6141 941
viljar.kahari@ee.pwclegal.com

Estonia
Contractual Fund

Background

Currently Estonian real estate investment funds may be set up as contractual funds or limited liability companies. Both of these can be open-end and closed-end investment funds but their tax statuses do not have a significant difference.

In Estonian legislation, contractual funds are referred as common funds. This fund is allowed to invest in real estate as well as real estate companies and securities related to real estate. The fund manager also has to diversify the assets of the fund on the principle of risk-spreading and diversification.

However, adoption of a new extensive regulation governing investment funds can be expected in the beginning of 2017. The new legislation will among other things allow new fund structures.

Legal form

The Estonian common fund REIF-s are not legal persons per se but a pool of assets established for collective investment, is managed by a regulated management company. More specifically, the common fund is the money collected through the issue of units and other assets acquired through the investment of such money, which is owned jointly by the unit holders. The assets of a common fund include securities, other assets and rights, including for the account of the fund, if immovable property has been purchased in the name of the fund.

Only a management company has the right to dispose of and possess the assets of a fund. A management company shall conclude transactions with the assets of a common fund in its own name and for the account of all the unit-holders collectively.

Tax status

An Estonian resident contractual fund is deemed to be taxpayer for Estonian real estate related income.

Tax treatment at entity level

An Estonian resident contractual fund is liable to pay 20% Estonian corporate income tax in respect of following types of income:

- capital gains from sale of Estonian real estate or real right or claim which is related to Estonian real estate, capital gains from sale of shares in an Estonian real estate rich company or investment fund or pool of assets in which the Fund holds at least 10% shares;
- rental income; and
- interest which is derived in relation to at least 10% shareholding in a real estate rich company, investment fund or pool of assets.

Treatment of investors

As a general rule investors (both resident and non-resident) should not be liable to taxation in respect of income derived from the fund which has been subject to tax at fund level.

Capital gains from sale or redemption of share in a real estate rich fund are subject to 20% Estonian corporate income tax.

Investor Compensation Scheme Directive is implemented into Estonian law, and therefore investments are protected up to EUR 20,000 per investor.

Rights and obligations of the investors are regulated by the fund rules and to some extent by the Estonian Investment Fund Act.

Withholding tax

An Estonian resident contractual fund is not a withholding tax agent.

Treaty status

As a general rule, contractual funds would not have access to Treaty benefits.

Filing obligations

In respect of taxable income on which tax has not been withheld, the Fund Manager is required to submit tax return within one month from receipt of such income.

Regulation

The regulatory authority for Estonian contractual funds and the fund managers is the Financial Supervision Authority (FSA). The fund is subject to its regulatory supervision.

Requirement for authorisation

If the fund is established based on the Estonian Investment Fund Act, then the approval of the Financial Supervision Authority is needed prior to setting up a contractual investment fund. Before registering the units of the contractual fund, the required documents (e.g. the conditions of the fund, the depositary contract, the approval of the contract conditions of the depository, etc.) must be submitted to the FSA and their compliance with applicable legislation is verified prior to registering a contractual investment fund and its units.

Foreign entities are able to apply the regime and are subject to the same conditions as a local entity.

Estonia
Contractual Fund (continued)

Investment restrictions

At least 60% of a real estate investment fund's assets must consist of immovables. Alternatively, it is possible for a fund to have less assets in immovables but in that case a fund has to have a combined 80% in immovables and securities relating to immovables. The securities could be the units or shares of a real estate fund, the units or shares of a real estate undertaking whose main activity is investment in immovables or derivative instruments the underlying assets of which are securities specified previously.

Minimum level of investment

Estonian legislation doesn't set a provision for minimum level of investment in a real estate investment fund. However, some investment funds have set a minimum level of investment in their founding charter.

Pros

- Contractual investment funds are fairly widespread and common in Estonia.
- Common investment funds are easily accessible for Estonian and foreign investors.
- There is no minimum level of investment set in the current legislation.
- The regulations regarding Estonian and foreign investors do not differ from each other as of 1 January 2015, thus improving the condition of foreign investors.

Cons

- The establishment of the fund is generally a slow and difficult process.
- Unless the fund is open-end, the fund has no obligation to redeem any shares at the demand of the investor. The shares are generally repossessed at the time the fund is dissolved.

Estonia
Public Liability Company

Legal form

REIFs founded as public liability companies (PLC) are legal persons according to investment fund regulations. PLC-s can only act (i.e. broker any deals regarding investments) through a management company. Beforehand, a management contract between the regulated management company and PLC needs to be concluded.

In order to start its activities, a fund shall enter into a management contract with a management company whereby the fund undertakes to transfer its assets to the disposal of the management company and the management company undertakes to invest the assets of the fund through a depositary according to the fund rules in order to generate income.

Tax status

REIFS founded as public limited liability companies are deemed to be regular corporate taxpayers without any special rules. This means the general principles of Estonian corporate income tax system apply according to which all earned income is tax exempt until distributed to shareholders.

PLC real estate funds do not pay any corporate tax on accrued profits. Formal and deemed profit distributions are subject to 20% Estonian corporate income tax.

Tax treatment at entity level

PLC real estate funds are subject to the same tax regulations as other public or limited liability companies.

Treatment of investors

The Investor Compensation Scheme Directive is implemented into Estonian law, and therefore investments are protected up to EUR 20,000 per investor.

Rights and obligations of the investors are regulated by the fund rules.

Investors are not the shareholders of the management company, so they have no voting rights over the leadership of the fund. Such right comes only if, within two years, dividends from the fund are not paid to the investors.

There is no withholding tax on dividends paid to non-residents.

Capital gains from sale of shares in Estonian real estate PLC are subject to 20% Estonian tax if the shareholder holds more than 10% shares in the PLC.

In the same manner liquidation proceeds or proceeds from redemption of shares are subject to tax to the extent they exceed the acquisition cost for the underlying share.

Withholding tax

REIFS founded as public limited liability companies are in principle withholding tax agents. However, dividends and arm´s length interest payable to non-residents are not subject to Estonian withholding tax under domestic legislation.

Treaty status

REIFS founded as public limited liability companies have access to Treaty benefits.

Filing obligations

The fund manager has to submit a quarterly report that shows the profits gained from the given time period.

Regulation

The fund is subject to the supervision of Estonian Financial Supervision Authority (FSA).

Requirement for authorisation

If the fund is established based on the Estonian Investment Fund Act, the fund established as a limited liability company must be approved by the FSA before it can be enrolled to the Commercial Register. The necessary documents include, but are not limited to: the founding application, contract of establishment, founding charter, depositary contract and business plan.

Foreign entities are able to apply the regime and are subject to the same conditions as a local entity.

Existing LLC-s can be remodelled to be an investment fund if all shareholders are in favour of amending the founding charter. However, existing REIF-s founded as such cannot be remodelled to a regular LLC the main activity of which is not investing in real estate or securities.

Investment restrictions

At least 60% of a real estate investment fund's assets must consist of real estate. Alternatively, it is possible for a fund to have less assets in real estate but in that case a fund has to have a combined 80% in real estate and securities relating to real estate. The securities could be the units or shares of a real estate fund, the units or shares of a real estate undertaking whose main activity is investment in real estate or derivative instruments the underlying assets of which are securities specified previously.

Minimum level of investment

Estonian legislation does not set a provision for minimum level of investment in a REIF founded as a limited liability company. However, some investment funds have set a minimum level of investment in their founding charter which should be considered prior to investing.

Pros

- The most successful PLC REIF-s in Estonia are obtaining their investments through individual retirement account payments, thus creating a stable income to the investment vehicle.
- PLC REIF-s are easily accessible for Estonian and foreign investors.
- There is no minimum level of investment set in the current legislation.

Cons

- The PLC regime is not widespread in Estonia. Generally REIF's are registered as contractual funds.
- The establishment of the fund is time consuming and costly.
- The profit yielded from investing must be declared to the FSA.
- Unless the fund is open-end, the fund has no obligation to redeem any shares at the demand of the investor. The shares are generally repossessed at the time the fund is dissolved.

Finland

- Limited Partnership
- Special Investment Fund

Contacts

Mikko Reinikainen
+358 20 787 7463
mikko.reinikainen@fi.pwc.com

Karin Svennas
+358 20 787 7801
karin.svennas@fi.pwc.com

Finland
Limited Partnership

Background

Finnish close-ended real estate funds are typically set up as Finnish Limited Partnerships (*kommandiittiyhtiö*).

Legal form

The Finnish limited partnership is established with the registration to the Finnish Trade Register. A partnership agreement in written has to be made prior to registration within the Finnish Trade Register. The limited partnership has separate legal personality. The limited partnership must have at least one general partner with unlimited liability and at least one limited partner with limited liability up to the amount of commitment. The general partner is usually set up as a Finnish limited liability company (*osakeyhtiö*).

Tax status

A limited partnership is tax transparent for the purposes of Finnish law and is, therefore, not subject to tax in Finland.

Tax treatment at entity level

The partnership's net income is not subject to tax at the level of the partnership. Instead, its net income (after deduction of carry-forward losses) is allocated to be taxed as the income of its partners.

Treatment of investors

The limited partnership's net income for Finnish tax purposes will be determined in accordance with Finnish tax laws, and the income will be allocated to the partners in proportion to their shares in the limited partnership's income. The net income allocated to a particular partner ("Allocated Income") is considered taxable income for Finnish tax purposes for the partner in that fiscal year regardless of whether funds have been actually distributed or not. Actual distributions of funds are therefore not subject to an additional tax. Losses are not allocated to the partners but instead carried forward at the level of the limited partnership.

Allocated Income is fully taxable income for Finnish resident partners. Subject to certain exceptions, if the allocable share of income includes dividends, the partners are entitled to deduct an amount from their pro rata share of the taxable net income, which corresponds to the tax exempt part of the dividend calculated as if the partner had received the dividend directly instead of via the limited partnership. However, the tax treatment depends on the tax status on the partner.

An investment in a Finnish limited partnership should as such create a permanent establishment for the non-resident partner in Finland which would mean that the partner would be basically taxed in Finland as to its pro rata share of income (the corporate income tax rate is currently 20%). However, subject to certain preconditions, a non-Finnish limited partner should not be taxed in Finland other than on income, which would have been taxed in Finland if received directly (and not via the partnership) by the non-resident limited partner.

Withholding tax

No withholding tax is levied on income distributed to a Finnish resident partner, and may not be levied on distribution of income to non-resident partners. The partner is liable to file an annual income tax return in Finland including the Allocated Income and pay Finnish tax on the Allocated Income.

However, provided that certain preconditions are met, the limited partnership is obliged to withhold Finnish tax on certain types of income distributed to a non-resident partner, which include, *inter alia*, dividends, in case such income is included in the Allocated Income of the non-resident partner.

Treaty status

For the Finnish limited partnership there is generally no access to treaty benefits. However, from Finnish tax perspective the limited partners can benefit from double tax treaties. The Finnish limited partnership does not have access to the EU Directives.

Filing obligations

A Finnish limited partnership is required to submit a tax return annually. The limited partnership is also liable to file periodic and annual withholding tax returns on amounts withheld from its partners, if applicable.

Resident partners are, and non-resident partners may be (if the above mentioned preconditions are not met) required to file a Finnish tax return including the Allocated Income (see above).

Regulation

Limited Partnerships investing in real estates are most likely categorised as Alternative Investments Funds under the AIFM Act. The Real Estate Fund Act (*kiinteistörahastolaki*) may also be applicable in certain special cases. Furthermore, such partnerships are subject to the Partnerships Act.

Requirement for authorisation

If Limited Partnerships are categorised as AIFs they must be managed by an AIFM. AIFMs require either registration or authorisation, depending on the AUM, from the Finnish FSA.

Investment restrictions

Limited Partnerships may in principal invest in any kind of assets, as stipulated in the fund documentation/rules.

Minimum level of investment

None.

However, if the AIFM Act is applicable, the assets of an AIF (minimum capital) shall in general be EUR 125,000 (externally managed) or EUR 300,000 (internally managed).

Pros

- Finnish Limited Partnerships are widespread and well accepted among Finnish investors.
- A recent amendment to the Partnerships Act enables the possibility to agree in the partnership agreement that the duration of the partnership may be longer than ten years, provided that the general partner is not a natural person.
- The vehicle is tax transparent.
- Contractual freedom on most elements of the limited partnership, including profit share allocation between partners and flexible fund structure. However, if the AIF is offered to retail clients, the profit distribution must be restricted in the Partnership Agreement.

Cons

- Finnish limited partnership may be unknown to some international investors.
- Not suitable for certain non-resident investors.
- There is generally no access for the limited partnership to double tax treaties and EU Directives.

Finland
Special Investment Fund

Background

The significance of the special investment fund (*erikoissijoitusrahasto*, "Fund") regime has increased significantly as of late even though the special investment fund is a more unusual type of real estate investment vehicle. There are currently close to ten operational Funds dedicated to real estate investments. One difficulty related thereto is their mandatory nature as open-ended investment vehicles.

Legal form

A Fund is not a separate legal entity but a pool of assets, which is owned by the parties that have invested in the Fund, i.e. the unitholders of the Fund.

As a Fund is not a separate legal entity, it needs a separate management company to act on its behalf. The Fund's management company must be established as a limited liability company or a European Company (*eurooppayhtiö*) and it is also subject to the supervision of the FSA. The assets of the Fund shall be entrusted to a depositary (*säilytysyhteisö*).

Tax status

From Finnish tax perspective, Funds are considered as separate tax subjects that are entirely exempted from income taxation based on a special provision.

Tax treatment at entity level

There is no Finnish corporate income taxation at the level of the Funds. However, Funds are liable to pay real estate tax and transfer tax.

Treatment of investors

Generally profit distributions received from a Fund and capital gains arising from the redemption of units by a resident unitholder are fully taxable income. Tax treatment of a unitholder depends on its tax status.

As a starting point, non-resident unitholders are subject to Finnish tax on profit distributions but are not subject to tax on capital gains. However, tax treaties often provide protection against Finnish tax on profit distributions to unitholders.

Withholding tax

A management company is under an obligation to withhold tax prepayment (*ennakonpidätys*) on profit distributions paid to resident individual unitholders. No tax prepayment is withheld on profit distributions paid to resident corporate unitholders.

As a starting point, the management company is under an obligation to withhold tax at source on profit distributions made to non-resident unitholders. However, tax treaties often provide protection against Finnish tax on profit distributions.

Treaty status

According to domestic interpretation, the Funds have treaty access. The Fund is not covered by the relevant EU directives.

Filing obligations

The management company of a Fund is responsible for reporting client holdings to Finnish tax authorities and withholding tax prepayment (*ennakonpidätys*) on distributions, if applicable (management companies shall submit e.g. periodic tax returns and annual tax returns on the tax withheld).

Regulation

Funds investing in real estates are categorised as Alternative Investments Funds under the AIFM Act. Furthermore, such Funds are also subject to the Act on Investment Funds (*sijoitusrahastolaki*) and might also partially be subject to the Real Estate Fund Act (*kiinteistörahastolaki*). Management companies of Funds are supervised by the Finnish FSA.

Requirement for authorisation

Management companies of Funds require an authorisation or registration, depending on the AuM, from the Finnish FSA. The rules of a Fund must be drafted in accordance with the Act on Investment Funds and the AIFM Act, and they must be submitted to the Finnish FSA for information purposes.

Investment restrictions

The management company shall diversify the risks related to the investment activity of a Fund if the Fund is offered to retail clients. Such Funds may deviate from investment restrictions laid out in the Act on Investment Funds but its rules must contain information to what extent it derogates from the restrictions. A Fund might also, to a certain extent, be obligated to follow the investment restrictions laid out in the Real Estate Fund Act according to which it is required to e.g. invest in real estates situated in the EEA-area as well as in certain financial assets. Debt financing is in principle limited to maximum 50% of the value of the Fund, but the Fund may take additional debt in certain special cases.

Minimum level of investment

In general, the assets of an investment fund (minimum capital) shall be not less than two million euros and an investment fund must have at least 50 unitholders. However, a Fund investing mainly in real estate and real-estate securities needs only ten unitholders if, in accordance with its rules, each unitholder subscribes to units in an amount of at least one million euros.

Pros

- The Fund is exempt from income tax.
- Suitable also for many non-resident investors.

Cons

- Mandatory nature as open-ended investment vehicle.
- 75% of the profits of a given financial year (less unrealised capital gains and losses) must be distributed.
- Less room for contractual freedom in comparison to the Finnish limited partnership.

France

- *Fonds de Placement Immobilier (FPI)*
- *Société de Placement à Prépondérance Immobilière (SPPICAV)*

Contacts

Bruno Lunghi
+ 33 1 56 57 82 79
bruno.lunghi@pwcavocats.com

Philippe Emiel
+ 33 1 56 57 41 66
philippe.emiel@pwcavocats.com

France
Fonds de Placement Immobilier (FPI)

Background

The *Fonds de Placement Immobilier* (FPI) is one of the two categories of *Organisme de Placement Collectif Immobilier* (OPCI). Its main purpose is the acquisition or construction of properties (directly or through entities that are not subject to corporate tax) for renting.

An FPI is a regulated investment vehicle and its implementation requires the prior approval of the French Financial Market Authority.

Legal form

An FPI is a pool of assets with no separate legal personality. It is subject to distribution requirements: at least 85% of rental income and of capital gains must be distributed to investors.

An FPI is managed by a French or an EU (under certain conditions) regulated Management Company.

Tax status

There is no French corporate income taxation at the fund vehicle level.

Tax treatment at entity level

Rental income, capital gains on the disposal of properties, dividends and interest received are exempt from French corporate income tax at the level of the FPI.

Treatment of investors

Unitholders are subject to income tax only when the income recognised by the FPI is distributed.

Income distributed by the FPI keeps its own qualification (rental income, capital gains upon disposal of real estate, interest, dividends) and source (French or non-French) for the assessment of income tax payable by unitholders.

Withholding tax

Given the investment constraints imposed on FPIs, most of the income recognised by FPIs consists of rental income and capital gains on the disposal of properties, or of shares in pass-through entities holding properties.

Unitholders who are French and non-French tax resident individuals are subject to French personal income tax (at progressive rates from 0% up to 45% and increased, in certain cases, by an additional 3 to 4% surcharge) and 15.5% social surcharges when they receive distributions of French source rental income from FPIs.

Capital gains (reduced by an allowance for each year of holding after the fifth year) on the disposal of French properties (or shares in French pass-through entities) realised by FPIs are subject to a 19% withholding tax and 15.5% social surcharges when they are distributed to unitholders who are French and non-French tax resident individuals. By application of the allowance for holding, the capital gains realised are fully exempt from the 19% withholding tax after 22 years of holding and from the 15.5% social surcharges after 30 years of holding. The same tax regime as described above applies for the disposal of units in FPIs by individuals.

Non-French corporate unit holders are subject to French corporate income tax at the rate of 33.33% when they receive distributions from FPIs corresponding to French source rental income and capital gains, or when they realise capital gains on the disposal of units in FPIs.

Treaty status

FPIs have no access to double tax treaties or EU Directive benefits.

Regulation

An FPI is a regulated entity.

Requirement for authorisation

Both the FPI and the management company require the prior approval from the French Financial Market Authority and are under the supervision of that authority.

Investment restrictions

At least 60% of the assets must consist of real estate assets. The indirect holding of properties is possible, but only through entities that are not subject to corporate tax.

Depending on the nature of the FPI (public or limited to qualified investors), prudential investment ratios and at least a 10% liquid assets ratio may apply.

Minimum level of investment

There are no minimum capital requirement when the FPI is set up. A minimum EUR 500,000 net equity requirement must be fulfilled three years after the setting-up of the FPI.

Pros

- No taxation at the FPI level.
- Possible automatic French 3% tax exemption (for public funds only).

Cons

- No access to double tax treaties and subsequently no mitigation of French withholding tax.
- Fund vehicle with little flexibility.
- Need for a French or an EU regulated Management Company.
- To date very few FPIs have been set up.

France
Société de Placement à Prépondérance Immobilière (SPPICAV)

Background

The *Société de Placement à Prépondérance Immobilière* (SPPICAV) is the other category of *Organisme de Placement Collectif Immobilier* (OPCI). Its main purpose is the acquisition or the construction of properties (directly or indirectly, i.e. through interposed companies) for renting.

A SPPICAV is a regulated investment vehicle and its implementation requires the prior approval of the French Financial Market Authority.

Legal form

A SPPICAV is a corporate vehicle that enjoys a separate legal personality.

It is subject to distribution requirements: at least 85% of rental income, 50% of capital gains and 100% of dividends received from subsidiaries, which benefit from the SIIC corporate income tax exemption regime must be distributed.

The SPPICAV is managed by a French or an EU (under certain conditions) regulated Management Company.

Tax status

The SPPICAV is fully exempt from French corporate income tax.

Tax treatment at entity level

A SPPICAV is a company within the scope of French corporate income tax but which is fully exempt from the payment of that tax provided that it complies, among others, with its distribution requirements. Technically speaking, an EU regulated vehicle (with the legal personality) that is governed by regulatory rules (including dividend distribution requirements) similar to those applicable to SPPICAVs should be in a position to benefit from the French corporate income tax exemption with regards to the French properties it holds either directly or through French pass-through entities. This has never being tested. In any case, the position should be secured by a prior tax ruling obtained from the French tax authorities.

Treatment of investors

For French resident individual investors, dividends received from SPPICAVs are, in principle, subject to a 21% withholding tax, levied at the time of payment. They are then subject to personal income tax at progressive rates of 0%, escalating to 45% (increased, in certain cases, by an additional 3 to 4% surcharge), increased by 15.5% social taxes (out of which 5.1% is deductible for the personal income tax computation). The 21% withholding tax can be used against the personal income tax liability.

Capital gains realised by French resident individual investors on the disposal of SPPICAV shares are subject to personal income tax at progressive rates of 0%, escalating to 45% (increased, in certain cases, by an additional 3 to 4% surcharge), increased by 15.5% social taxes (out of which 5.1% is deductible for the personal income tax computation). A tax allowance is available on the capital gain realised if the shares have been held for a certain period of time.

Dividends received from SPPICAVs by French corporate resident investors are, in principle, subject to corporate income tax at the standard rate of 33.33% (or 34.43% if the 3.3% social surcharge applies, or 36.9% if the exceptional 10.7% surcharge applies or 38% if both surcharges apply).

Capital gains realised by French corporate resident investors on the disposal of SPPICAV shares are subject to corporate income tax at the standard rate of 33.33% (or 34.43% if the 3.3% social surcharge applies, or 36.9% if the exceptional 10.7% surcharge applies or 38% if both surcharges apply).

Withholding tax

Distributions of dividends by a SPPICAV are subject to a withholding tax at the rate of:

(a) 15% if the shareholder is a non-profit organisation established in an EU country, in Norway or Iceland or if the shareholder is a regulated UCIT (fulfilling certain conditions) established in the EU or in a country that has signed a double tax treaty with France containing an administrative clause;

(b) 30% if paid to a non-French tax resident individual or company;

(c) 75% if the dividend is paid in a non-tax cooperative country.

Capital gains recognised on the disposal of shares in a SPPICAV by a non-French corporate tax resident are subject to the 33.33% French withholding tax only if the seller owns, directly or indirectly, 10% or more of the SPPICAV shares. It is debatable whether or not capital gains recognised on the disposal of shares in a SPPICAV should be subject to corporate income tax at the standard rate of 33.33% (or 34.43% if the 3.3% social surcharge applies) when the non-French corporate tax resident owns, directly or indirectly, less than 10% of the SPPICAV shares.

Treaty status

Application of double tax treaty benefits needs to be reviewed on a case-by-case basis. Recent double tax treaties concluded by France (for instance, with the US and the UK) provide specific rates of withholding tax on dividends paid by SPPICAVs. These recent double tax treaties provide a 15% withholding tax on dividends when the foreign shareholder holds directly or indirectly less than 10% of the SPPICAV shares and a 30% withholding tax if this ownership threshold is exceeded. However, there is no access to EU Directives.

Filing obligations

A SPPICAV must file an annual tax return.

Regulation

A SPPICAV is a regulated entity.

France
Société de Placement à Prépondérance Immobilière (SPPICAV)

Requirement for authorisation

Both the SPPICAV and the management company require prior approval and supervision by the French Financial Market Authority.

Investment restrictions

At least 60% of the assets must consist of real estate assets. The direct or indirect holding of properties via interposed tiers is possible. Depending on the nature of the SPPICAV (public or limited to qualified investors), prudential investment ratios and at least 10% of liquid assets ratio may apply.

Minimum level of investment

There are no minimum capital requirement when the SPPICAV is set up. A minimum EUR 500,000 net equity requirement must be fulfilled three years after the setting-up of the SPPICAV.

Pros

- Dividend nature of income distributed by SPPICAVs.
- No taxation at the SPPICAV level.
- Possible automatic French 3% tax exemption (for public funds only).

Cons

- Limited access to double tax treaties.
- Need for a regulated French or EU management company.

Germany

- **_Immobilien-Sondervermögen (Open-End Retail Fund)_**
- **_Spezial-Sondervermögen (Open-End Specialised Fund)_**
- **_Investment-KG (Closed-End Retail Fund)_**
- **_Spezial-Investment-KG (Closed-End Specialised Fund)_**

Contacts

Uwe Stoschek
+49 30 2636 5286
uwe.stoschek@de.pwc.com

Sven Behrends
+49 89 5790 5887
sven.behrends@de.pwc.com

Antje Schumacher
+49 30 2636 5427
antje.schumacher@de.pwc.com

Germany
Immobilien-Sondervermögen (Open-End Retail Fund)

Background

Due to the implementation of the EU Directive on Alternative Investment Fund Managers (AIFM Directive), the German Capital Investment Act, the *Kapitalanlagegesetzbuch* (KAGB), replaced the former German Investment Act. It is applicable to UCITS as well as alternative investment funds (AIFs). The implementation of the AIFM-Directive led to the subsequent amendment of the German Investment Tax Act (*Investmentsteuergesetz* – InvStG). The amended Investment Tax Act was adopted into German law on 24 December 2013.

Vehicles that qualify either as AIFs or as UCITS are now in principle within the scope of the German Investment Tax Act.

Legal form

German open-end funds investing in real estate may only be set up as a so-called *Sondervermögen*. Such a contractual form of fund has no legal personality and has to be managed by a German management company (*Kapitalverwaltungsgesellschaft*, or KVG), which is either a stock corporation (AG), a German limited liability company (GmbH) or a German limited partnership (GmbH & Co. KG). One KVG may manage several funds. An *Immobilien-Sondervermögen* set up as a retail fund is accessible to all types of investors.

Tax status

A German open-end fund is treated as a corporate entity for German tax purposes and is in principle subject to German corporate income tax and trade tax, at a combined rate of approx. 30% (depending on the municipality). In case the German open-end fund fulfils the requirements to qualify as a so-called investment fund pursuant to German Investment Tax Act, it is exempt from German corporate income tax and German trade tax.

Tax treatment at entity level

There is no income taxation at the level of the fund on dividends received, capital gains realised and other income received provided the investment entity qualifies as investment fund within the meaning of the German Investment Tax Act.

Treatment of investors

In case the German open-end fund qualifies as investment fund, investors are deemed to receive the fund income pro rata to their fund shares. The income is subject to taxation at the level of the investors in accordance with the investors' personal tax status and the nature of the income. Income determination at fund level must comply with German tax provisions.

In case the German open-end fund does not qualify as investment fund pursuant to German Investment Tax Act distributions made will be treated as dividend income for German tax purposes. Investors might benefit from participation exemption.

Withholding tax

If the German open-end fund qualifies as investment fund pursuant to German Investment Tax Act, withholding tax is in principle levied on both distributed and retained fund income. Income derived from domestic and foreign dividends, interest and other capital income sources is subject to withholding tax at a rate of 26.375% (including 5.5% solidarity surcharge) at fund level. Distributed income derived from domestic rental income and capital gains, realised on the disposal of German properties, is subject to withholding tax at a rate of 26.375% (including 5.5% solidarity surcharge). Withholding tax rate may be reduced, due to national rules for certain investor types, or due to individual rules in relation to double tax treaties for international investors.

Withholding tax is levied on distributed income only in case the German open-end fund does not qualify as investment fund.

Treaty status

From both an OECD Model and German tax perspective, treaty access should be granted to the fund. From the point of view of the treaty partner, there may be access either for the fund itself, the KVG, or the investors as the beneficial owners of the fund's income. The fund has no access to EU Directives developed for corporations.

Filing obligations

If the German open-end fund qualifies as investment fund according to the German Investment Tax Act, special tax reporting (indicating e.g. the taxable income per fund unit) has to be published on the website of the German Federal Gazette in order to ensure the tax-transparent status of the fund. Deadlines apply. In case of a retail fund there are no tax filing requirements for non-resident investors in Germany, and there should be no tax filing requirements for investors in target countries of the fund.

Regulation

The regulatory authority for German open-end retail funds and the fund managers (KVG) is the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin). The fund is subject to its regulatory supervision.

Requirements for authorisation

Prior written regulatory approval is necessary for the KVG in order to manage the fund. For the fund itself, approval of the investment conditions by BaFin is required.

Investment restrictions

The fund is restricted to investments in eligible assets, e.g. real estate properties (rental, commercial, or mixed use), building land, property rights over real estate, shareholding in real estate companies, cash, securities and REIT interests. Quotas apply. Debt financing is generally limited to 30% of the fair market value of the properties held by the fund. Further restrictions apply for German open-end funds, which qualify as investment, fund pursuant German Investment Tax Act.

Germany
Immobilien-Sondervermögen (Open-End Retail Fund)

Minimum level of investment

The fund has to invest, consistent with the principle of risk spreading, as detailed in legislation.

Pros

- *Immobilien-Sondervermögen* is a widespread and highly trusted investment vehicle in Germany.
- They offer regular (at least once in a 12 months period) redemptions at NAV.
- The fund is tax-exempt if certain requirements of the German Investment Tax Act are fulfilled.
- There are no tax filing requirements for non-resident investors in Germany.

Cons

- *Immobilien-Sondervermögen* may be unknown to some international investors.
- The flexibility for German and international investments and the range of eligible assets is limited.
- Moreover, there are gearing restrictions for real estate companies held by the fund.
- The access to double tax treaties in some jurisdictions is not clear. The fund has no access to EU Directives.
- Redemption requests have to satisfy a 24-month minimum holding period as well as a 12-month notice period.

Germany
Spezial-Sondervermögen (Open-End Specialised Fund)

Background

Due to the implementation of the EU Directive on Alternative Investment Fund Managers (AIFM Directive), the German Capital Investment Act, the Kapitalanlagegesetzbuch (KAGB), replaced the former German Investment Act. It is applicable to UCITS as well as to alternative investment funds (AIFs). The implementation of the AIFM-Directive led to the requirement to amend the German Investment Tax Act (Investmentsteuergesetz – InvStG). The amended Investment Tax Act was adopted into German law on 24 December 2013.

Vehicles that qualify either as AIFs or as UCITS, are now in principle within the scope of the German Investment Tax Act.

Legal form

German open-end funds investing in real estate may only be set up as a so-called *Sondervermögen*. Such contractual form of fund has no legal personality and has to be managed by a German management company (*Kapitalverwaltungsgesellschaft*, or KVG), which is either a stock corporation (AG), a German limited liability company (GmbH) or a German limited partnership (GmbH & Co. KG). One KVG may manage several funds. An *Immobilien-Sondervermögen* set up as a specialised fund is accessible to professional and semi-professional investors only.

Tax status

A German open-end fund is treated as a corporate entity for German tax purposes and is in principle subject to German corporate income tax and trade tax, at a combined rate of approx. 30% (depending on the municipality). In case the German open-end fund fulfils the requirements to qualify as so-called investment fund pursuant to German Investment Tax Act, it is exempt from German corporate income tax and from German trade tax.

Tax treatment at entity level

There is no income taxation at the level of the fund on dividends received, capital gains realised and other income received, provided the fund qualifies as investment fund within the meaning of the InvStG.

Treatment of investors

If the German open-end fund qualifies as investment fund, investors are deemed to receive the fund's income pro rata to their fund shares. The income is subject to taxation at the level of the investors in accordance with the investors' personal tax status. Income determination at fund level must comply with German tax provisions.

If the German open-end fund does not qualify as investment fund pursuant to German Investment Tax Act, distributions made will be treated as dividend income for German tax purposes. Investors might benefit from participation exemption.

Withholding tax

In case the German open-end fund qualifies as investment fund pursuant to German Investment Tax Act withholding tax is levied on both distributed and retained fund income. Income derived from domestic and foreign dividends, interest and other non-dividend sources is subject to withholding tax at a rate of 26.375% (including 5.5% solidarity surcharge) at fund level. Distributed income derived from domestic rental income and capital gains realised on the disposal of German properties is subject to withholding tax, at a rate of 26.375% (including 5.5% solidarity surcharge). Withholding tax rate may be reduced, due to national rules for certain investor types, or due to individual rules in relation to double tax treaties for international investors.

Withholding tax is levied on distributed income only in case the German open-end fund does not qualify as investment fund.

Treaty status

From both an OECD Model and German tax perspective, treaty access should be granted to the fund. From the treaty partner's point of view, there may be access either for the fund itself, the KVG, or the investors as the beneficial owners of the fund's income. The fund has no access to EU Directives.

Filing obligations

If the German open-end fund qualifies as German Investment Tax Act there is in principle no obligation to publish special fund reporting, provided, however, that German tax bases necessary for the investors' income determination in accordance with the German Investment Tax Act, is made available to investors and the Federal Central Tax Office. Non-resident investors are required to file tax returns for German-sourced real estate income derived from the fund.

Regulation

The fund is subject to BaFin regulatory supervision.

Requirements for authorisation

Prior written regulatory approval is necessary for the KVG in order to manage the fund. For setting up the fund itself, however, no approval is required. The investment conditions and material changes thereto have to be submitted to the BaFin.

Investment restrictions

With the consent of investors, the specialised fund can deviate from most restrictions as long as certain requirements regarding eligible assets and investment quotas are observed, including a debt financing not exceeding 50% of the fair market value of the properties held by the fund. Further restrictions apply for German open-end funds, which qualify as investment funds pursuant German Investment Tax Act.

Minimum level of investment

The fund has to invest according to the principle of risk spreading, as detailed in legislation.

Pros

- The *Spezial-Sondervermögen* is well known to German institutional investors.
- The fund is tax-exempt.
- There are no tax filing requirements for non-resident investors in Germany apart from tax returns for German-sourced real estate income.

Cons

- Despite the option to deviate from investment restrictions, regulatory constraints have to be observed.
- Investors are required to file tax returns for German-sourced real estate income.
- Moreover, there are gearing restrictions for real estate companies held by the fund.
- The access to double tax treaties in some jurisdictions is not clear. There is no access to EU Directives.

Germany
Investment-KG (Closed-End Retail Fund)

Background

German closed-end real estate funds are most commonly set up as a German limited liability partnership (KG). In the past, these were largely non-regulated vehicles. Due to the implementation of the EU Directive on Alternative Investment Fund Managers (AIFM Directive) such vehicles, as well as the managers of German closed-end funds, are now subject to regulation under the German Capital Investment Act (*Kapitalanlagegesetzbuch* - KAGB). Due to the change of the German Investment Tax Act, the *Investment-KG* falls within the scope of the German Investment Tax Act.

Legal form

The KAGB provides for closed-end funds inter alia to be set up as the commonly used *geschlossene Investmentkommanditgesellschaft* (limited partnership – *Investment-KG*). Under German commercial law, the GmbH & Co. KG is a special form of limited partnership. The general partner is not a natural person but usually a limited liability company (GmbH). Investors may only participate in the fund as limited partners. The liability for the fund's obligations is therefore limited to the investors' capital contributions. An *Investment-KG* set up as a retail fund is accessible to all types of investors.

Tax status

The tax treatment for German income tax purposes depends on the legal form of the investment vehicle and the general tax rules. The *Investment-KG* as a partnership is transparent for German income tax purposes, i.e. income has to be determined separately and uniformly at the partnership level and is allocated to the partners being subject to tax depending on their individual tax status. German trade tax at a rate of 7% to 17.15% (depending on the municipality) may be due at the level of the fund vehicle, notably where there are commercial activities, where there is evidence of a business imprint, or participation in other business partnerships.

Tax treatment at entity level

Dividends received, capital gains realised and other income received is not taxed at the level of the KG. For trade tax purposes, an exemption for participations of at least 10% in EU companies and 15% in non-EU and domestic companies (active income required for non-EU companies) is generally available for dividends received. Other trade tax exemptions may be available.

Treatment of investors

For tax purposes, investors are deemed to receive their income from the KG pro rata to their participation, regardless of its actual distribution policy. The income is subject to tax, according to the individual circumstances of the investor. Resident investors are, and non-resident investors may be (depending on the type of income), subject to German taxation on their income deriving from the KG.

Withholding tax

No withholding tax is levied on income distributed by the KG.

Treaty status

For the KG itself there is generally no access to treaty benefits; instead – from a German tax point of view – its partners and the investors can benefit from double tax treaties as the beneficial owners of KG's income. The KG itself has no access to the EU Directives developed for corporations.

Filing obligations

The *Investment-KG* has to submit an annual income tax return, a so-called separate and uniform determination of profits. Resident investors are, and non-resident investors may be (depending on the type of income), required to file a German tax return, including their income deriving from the *Investment-KG* (determined based on the Investment-KG's tax return).

Regulation

The *Investment-KG,* as well as the managers of such German closed-end fund, fall within the scope of regulation by KAGB. The purpose of the *Investment-KG* has to be set forth in the partnership agreement and must be limited to collective investment and management of capital in accordance with a previously defined investment conditions for the benefit of the investors.

Requirements for authorisation

The fund's investment conditions as well as any changes thereto are subject to BaFin's prior approval, which shall usually be given within four weeks provided the documents meet the legal requirements.

Investment restrictions

A retail Investment-KG may invest in property (e.g. real estate including farmland and forests/woodland), financial assets as well as participations in other funds and companies whether or not traded on a stock exchange. Debt Financing is limited to 150% of the committed capital and only if so set forth in the investment conditions.

Minimum level of investment

The fund has to invest according to the principle of risk spreading, as detailed in legislation.

Pros

- German closed-end funds are widespread and well accepted among German investors.
- The legal form of a GmbH & Co. KG provides for a fast establishment procedure, low cost and easy handling.
- The vehicle is tax-transparent (except for trade tax) and there are no withholding taxes on income distributions.
- Under certain conditions, possibility of long-term investments with the focus only on one or a few assets.

Cons

- German closed-end funds may be unknown to some international investors.
- German trade tax could apply at KG level. Furthermore, investors could be subject to tax in the target countries (tax-transparent entity).
- There is generally no access for the KG to double tax treaties and EU Directives.

Germany
Spezial-Investment-KG (Closed-End Specialised Fund)

Background

German closed-end real estate funds are most commonly set up as a German limited liability partnership (KG). In the past, these were largely non-regulated vehicles. Due to the implementation of the EU Directive on Alternative Investment Fund Managers (AIFM Directive), such vehicles, as well as the managers of German closed-end funds, are now subject to regulation under the German Capital Investment Act (*Kapitalanlagegesetzbuch* - KAGB).

Legal form

The KAGB provides for closed-end funds to be set up as *Investmentaktiengesellschaft* (investment stock corporation with fixed capital – Investment AG), as well as the more commonly used *geschlossene Investmentkommanditgesellschaft* (limited partnership – *Investment-KG*). Under German commercial law, the GmbH & Co. KG is a special form of limited partnership. The general partner is not a natural person but usually a limited liability company (GmbH). Investors may only participate in the fund as limited partners. The liability for the fund's obligations is therefore limited to the investors' capital contributions. A *Spezial-Investment-KG* is accessible to professional and semi-professional investors only.

Tax status

The tax treatment for German income tax purposes depends on the legal form of the investment vehicle and the general tax rules. The *Spezial-Investment-KG* as a partnership is transparent for German income tax purposes, i.e. income has to be determined separately and uniformly at the partnership level and is allocated to the partners being subject to tax depending on their individual tax status. German trade tax may be due at the level of the fund vehicle, notably where there are commercial activities, where there is evidence that there is a business imprint, or participation in other business partnerships.

Tax treatment at entity level

Dividends received, capital gains realised and other income received is not taxed at the level of the KG. For trade tax purposes, an exemption for participations of at least 10% in EU companies and 15% in non-EU and domestic companies (active income required for non-EU companies) is generally available for dividends received. Other trade tax exemptions may be available.

Treatment of investors

For tax purposes, investors are deemed to receive their income from the KG pro rata to their participation, regardless of its actual distribution policy. The income is subject to tax, according to the individual circumstances of the investor. Resident investors are, and non-resident investors may be (depending on the type of income), subject to German taxation on their income deriving from the KG.

Withholding tax

No withholding tax is levied on income distributed by the KG.

Treaty status

For the KG itself there is generally no access to treaty benefits; instead – from a German tax point of view – its partners and the investors can benefit from double tax treaties as the beneficial owners of KG's income. The KG has no access to the EU Directives developed for corporations.

Filing obligations

The KG has to submit an annual income tax return, a so-called separate and uniform determination of profits. Resident investors are, and non-resident investors may be (depending on the type of income), required to file a German tax return, including their income deriving from the KG (determined based on the KG's tax return).

Regulation

The *Spezial-Investment-KG* as well as the managers of such German closed-end fund fall within the scope of regulation by KAGB. The purpose of the *Spezial-Investment-KG* has to be set forth in the partnership agreement and must be limited to collective investment and management of capital in accordance with a previously defined investment conditions for the benefit of the investors.

Requirements for authorisation

Prior to a placement the fund's investment conditions have to be submitted to the German BaFin as well as any material changes thereto.

Investment restrictions

A *Spezial-Investment-KG* may invest in property (e.g. real estate including farmland and forests/woodland), financial assets as well as participations in other funds and companies whether or not traded on a stock exchange. In general debt financing is not restricted, however upon request of BaFin the level of leverage has to be evidenced prudent on a case by case basis.

Minimum level of investment

The fund may invest in any kind of assets as long as its market value can be determined. The fund may invest in a single asset only.

Pros

- German closed-end funds are widespread and well accepted among German investors.
- The legal form of a GmbH & Co. KG provides for a fast establishment procedure, low cost and easy handling.
- The vehicle is tax-transparent (except for trade tax) and there are no withholding taxes on income distributions.
- Possibility of long-term investments with the focus only on one or a few assets.
- A *Spezial-Investment-KG* provides for very flexible fund structures including single asset funds.

Cons

- German closed-end funds may be unknown to some international investors.
- German trade tax could apply at KG level. Furthermore, investors could be subject to tax in the target countries (tax-transparent entity).
- There is generally no access for the KG to double tax treaties and EU Directives.

Germany
Reform of the German Investment Tax Act (Investmentsteuerreformgesetz)

Background

On 8 July 2016 the German Federal Council (Bundesrat) granted consent regarding the German Investment Tax Reform Act (Investmentsteuerreformgesetz), which had been passed by the German parliament (Bundestag) on 9 June 2016.

The new law set a complete change regarding the taxation of income derived from investment funds is set. The new regulations will be put into action from 31 December 2017 onwards.

AIFs, which qualified as investment funds under the Investment Tax Act before it was amended in accordance with the AIFM-Directive on 24 December 2013, will maintain their status as investment funds until 1 January 2018 (so called "grandfathering").

In order to simplify the present complex taxation system and to prevent abusive tax planning, the German Investment Tax Reform Act includes two independent taxation systems. Which taxation system is applicable, depends on whether the fund is categorised as an open-ended retail fund or a specialised investment fund.

Whereas the current semitransparent taxation system will still be applicable regarding specialised investment funds, the taxation of open-ended retail funds will differ fundamentally.

Open-ended retail fund

When categorised as an open-ended retail fund, the transparent taxation system will not be applicable, i.e. the fund as well as the investors will be taxed in a separate manner. The opaque taxation system is inspired by the predominant German taxation system of corporations. A lump-sum taxation system shall apply to investors. Without distinction, domestic and foreign investment funds will be subject to German corporate income tax on the fund's German sourced income.

The investment fund can achieve exemption of corporate tax if certain investors, e.g. churches which are tax-exempt themselves, participate in the investment fund. Trade tax exemption can be achieved, if income from entrepreneurial management would not exceed five percent of the fund's gross income (unwesentliche aktive unternehmerische Bewirtschaftung).

In the first instance, every collective investment undertaking within the meaning of the German Capital Investment Act, the Kapitalanlagegesetzbuch (KAGB), will be subject to the new Investment Tax Act. Every collective investment undertaking, especially open-ended retail funds, irrespective of whether it is domiciled in Germany or not, will be governed by the principle of non-transparent taxation if not qualifying as a specialised investment fund.

Partnerships will only be included within the new regulations if the partnership's investment purpose solely serves pension-asset-pooling.

Collective investment undertaking vehicles will only be subject to Corporate Income Tax at a rate of currently 15,825%, including solidarity surcharge, with their income derived from

- domestic dividends,
- domestic rental income and
- other domestic income.

Trade tax at a rate of currently 7-17.5%, depending on the municipality, may be applied under certain circumstances.

Distributions and gains considering the return, sale or withdrawal of a fund share are burdened with the German withholding tax or in case of operating revenue with the tax rate applicable for the investor. Distributions are subject to the regular withholding tax regime.

Investor level

The investors will be subject to tax – dependent on their individual tax status – with regard to dividends received from the collective investment undertaking, retained profits, which are partly deemed to be dividends and capital gains derived from the disposal of shares.

German individual investors holding the units as private assets are subject to so called flat tax, i.e. 25%, whilst individual investors that hold the units as business assets are subject to income tax with their individual tax rate. Corporate investors are subject to corporate income tax and trade tax.

Partial exemption regulations apply for certain income on the level of the investors.

If the investment fund invests at least 51 percent of its value in equity participations, 30 percent tax exemption can be achieved if the fund share is part of the investor's non-business assets. 60 percent tax exemption can be achieved if the fund share is part of the investor's business assets. Corporate investors are able to achieve an 80 percent tax exemption.

If the investment fund invests at least 51 percent of its value in real estates or real estate companies, the partial exemption amounts to 60 percent irrespective of the type of investor. If the investment fund invests at least 51 percent of its value in non-German real estate or non-German real estate companies, the partial exemption will increase to 80 percent.

Specialised investment funds

In order to qualify as a specialised investment fund, a collective investment undertaking has to fulfill inter alia the following requirements (amongst others):

- it must be a regulated entity, e.g. by an AIFM,
- the investor has to have the right to redeem its share at least once in a year,
- only certain investments are eligible,
- the number of investors is limited to 100, whereas every partner in a partnership which is invested in a fund will count as one investor and
- investors are only professional or semi-professional investors (e.g. no individual person).

The specialised investment funds can opt for the semitransparent taxation system, thus the specialised investment fund will not be subject to Corporate Income Tax or Trade Tax. The taxation will take place on the level of the investor.

Dependent on whether withholding tax were levied at source, withholding tax has to be levied on fund level.

Ireland

- ▶ Common Contractual Fund (CCF)
- ▶ Variable Capital Investment Company (VCC)
- ▶ Unit Trust
- ▶ Irish Limited Partnership
- ▶ ICAV

Contacts

Enda Faughnan
+353 1 792 6359
enda.faughnan@ie.pwc.com

Ilona McElroy
+353 1 792 8768
ilona.mcelroy@ie.pwc.com

Ireland
Common Contractual Fund (CCF)

Background

The Common Contractual Fund (CCF) legislation was originally introduced as a pension pooling vehicle with tax transparency. Subsequent amendments allow other categories of institutional investors, without any impact on its tax transparency. The funds can be formed as open-end or closed-end. It requires the appointment of a management company to carry out the day-to-day activities of the fund. CCFs are a useful structure for non-taxable investors who wish to pool their investments in a tax efficient manner. The investors participate as co-owners of the assets under a contractual deed. CCFs are only available to institutional investors.

Legal form

A CCF is a collective investment vehicle without a legal personality, established and managed by a management company.

Tax status

The CCF is transparent for income tax purposes.

Tax treatment at entity level

Dividends received, capital gains realised and other income received are exempt from income taxation at the level of the fund (tax-transparent).

Treatment of investors

The fund's income is directly allocated to the investors so that the tax (if any) is borne by the ultimate investor (who may benefit from double taxation treaties). However, non-resident investors are not subject to any Irish tax on income received from the fund.

Withholding tax

No Irish withholding tax is levied on fund distributions, or on capital gains realised on fund investments provided the investors are non-Irish resident.

Other taxes

Stamp duty is not chargeable on the issue, transfer, or switching of fund units. No capital duty arises on the issue of units by the fund.

Treaty status

There is no access to treaty benefits by the fund itself, but an investor should be able to access the relevant tax treaties between the investor's country of residence and the countries where the fund's investments are located. A ruling from the relevant tax authority, or an opinion from an appropriate tax adviser may be required in certain cases. More recent enacted treaties contain a protocol stating that the CCF will not be regarded as a resident of Ireland and shall be treated as fiscally transparent for the purposes of granting tax treaty benefits (e.g. Switzerland and Germany). This is in addition to the long-standing competent authority agreement that currently prevails with the United States.

Filing obligations

The fund must submit an annual tax return in respect of the calendar year by the following 28 February, detailing the total profits of the fund, together with details relating to the investors in the fund.

Regulation

The vehicle is subject to the regulatory supervision of the Central Bank of Ireland (CBI). As it is not a legal entity in its own right, the CCF must appoint an Irish management company to carry on its day-to-day activities. The Irish management company must appoint at least two Irish directors.

Requirements for authorisation

The Alternative Investment Fund Managers Directive has been transposed into Irish law and any Non-UCITS funds, including property funds, must be set up as an Alternative Investment Fund (AIF) under the Directive. Approval is a two-stage process involving the authorisation of the alternative investment fund manager (AIFM) and the completion of the relevant fund application. The fund manager must complete an "Application for Authorisation of an Alternative Investment Fund Manager" to the CBI, comprising various information and documentation. While the appropriate application for the fund (as a Retail Investor Alternative Investment Fund (RIAIF) or a Qualifying Investor Alternative Investment Fund (QIAIF) must also be completed, there are transitional arrangements with regard to the authorisation of AIFs for both EU and non-EU AIFMs.

Investment restrictions

A QIAIF is dedicated to institutional investors and has a minimum initial subscription requirement per investor of EUR 100,000. Investment restrictions and borrowing restrictions that generally apply in relation to regulated funds can be disapplied in the case of a QIAIF. A 24-hour authorisation process applies for QIAIFs.

Minimum level of investment

See above.

Pros

- The set-up, taking into account the appointment of service providers and the approval process of the fund vehicle, may take from six to eight weeks.
- The fund can be formed as a single fund, or as an umbrella fund with segregation of liability between sub-funds.
- Moreover, for reporting purposes, the fund has the option of reporting under various GAAPs, including IFRS, US GAAP, or local GAAP. The fund can also be listed on the Irish Stock Exchange.

Cons

- No treaty access under Ireland's treaties (although treaty access may be granted to investors on the basis that the CCF is regarded as tax transparent).

Ireland
Variable Capital Investment Company (VCC)

Background

The Investment Company is a corporate investment fund subject to Irish company law, the most common of which is the Variable Capital Investment Company (VCC), similar to the SICAV. It can operate with or without a management company (i.e., being self-managed). The main aim of funds set up as investment companies is the collective investment of its funds and property with the aim of spreading investment risk. A company is managed for the benefit of its shareholders.

Legal form

A VCC is an open- or closed-end company limited by shares, which is marketed to the public, or sold by private placement.

Tax status

Tax-exempt on income, capital gains and on their net asset value.

Treatment of investors

The income of the fund is normally paid to investors by means of dividends, or alternatively, paid out on the realisation of the investment by the investor on redemption.

Withholding tax

In the case of Irish resident investors withholding tax is levied on both distributions, at a rate of 41% for individuals and 25% for companies, and on gains from encashment, redemption, or transfer of shares, also at 41% for individuals and 25% for companies. No tax is applied on income distribution, or redemption payments made to non-residents, provided that the non-resident has signed the necessary non-resident declaration. A VCC that does not actively market to Irish investors may be allowed to operate without the need for non-resident declarations on meeting certain conditions. Similar exemptions apply to certain categories of Irish investors, including pension funds and charities.

Other taxes

Shares in the VCC are not liable to stamp duty or capital duty.

Treaty status

The VCC may be able to access treaty benefits in certain cases. This would need to be considered on a case-by-case basis.

Filing obligations

The fund must submit two six-monthly tax returns a year, due on 30 January and 30 July, respectively.

Regulation

The VCC is subject to the regulatory supervision of the CBI. The promoter of the fund is also subject to approval by the CBI. The board of directors of the fund must include at least two Irish residents.

Requirements for authorisation

The Alternative Investment Fund Managers Directive has been transposed into Irish law and any Non-UCITS funds, including property funds, must be set up as an Alternative Investment Fund (AIF) under the Directive. Approval is a two-stage process involving the authorisation of the alternative investment fund manager (AIFM) and the completion of the relevant fund application. The fund manager must complete an “Application for Authorisation of an Alternative Investment Fund Manager” to the CBI, comprising various information and documentation. While the appropriate application for the fund (as a Retail Investor Alternative Investment Fund (RIAIF) or a Qualifying Investor Alternative Investment Fund (QIAIF) must also be completed, there are transitional arrangements with regard to the authorisation of AIFs for both EU and non-EU AIFMs.

Investment restrictions

A Qualifying Investor Alternative Investment Fund (QIAIF) is dedicated to institutional investors and has a minimum initial subscription requirement per investor of EUR 100,000. Investment restrictions and borrowing restrictions that generally apply in relation to regulated funds can be disapplied in the case of a QIF. A 24-hour authorisation process applies for QIFs.

Minimum level of investment

See above.

Pros

- The set-up, taking into account the appointment of service providers and the approval process of the fund vehicle, may take from six to eight weeks.
- The fund can be formed as a single fund, or as an umbrella fund with segregation of liability between sub-funds.
- Moreover, for reporting purposes, the fund has the option of reporting under various GAAPs, including IFRS, US GAAP, or local GAAP. The fund can also be listed on the Irish Stock Exchange.

Cons

Restricted treaty access may apply. Positive developments have been made by the OECD to remove the uncertainty present on treaty access for widely held collective investment vehicles (CIVs). On 31 May 2010, the OECD Committee on Fiscal Affairs released a report that concluded and recommended that collective investment vehicles should be able to claim treaty access on behalf of investors. In addition, on 22 July 2010, the commentary to the OECD Model Tax Treaty was amended to include references to CIVs.

Ireland
Unit Trust

Background

The Unit Trust is an investment fund formed under trust law. They are a contractual fund structure between the management company and a trustee that is appointed under a trust deed. A management company must be appointed to carry out the day-to-day activities of the fund. As the Unit Trust is not a separate legal entity, the trustee acts as the owner of the assets on the investors' behalf.

Legal form

A Unit Trust can be formed as an open- or closed-end fund, which may be marketed to the public, or sold by private placement.

Tax status

The Unit Trust is exempt from Irish taxation in respect of its income and gains.

Treatment of investors

The income of the fund is normally paid to investors by means of an income distribution, or alternatively, paid out on the realisation of the investment by the investor on redemption.

Withholding tax

In the case of Irish resident investors withholding tax is levied on both distributions, at a rate of 41% for individuals and 25% for companies, and on gains from encashment, redemption, or transfer of shares, also at 41% for individuals and 25% for companies. No tax is applied on income distribution, or redemption payments made to non-residents, provided that the non-resident has signed the necessary non-resident declaration. A Unit Trust that does not actively market to Irish investors may be allowed to operate without the need for non-resident declarations, on meeting certain conditions.

Other taxes

Neither stamp duty nor capital duty is chargeable on the issue, transfer, or switching of fund units.

Treaty status

The Unit Trust may be able to access treaty benefits in certain cases. This would need to be considered on a case-by-case basis.

Filing obligations

Similar to the VCC, the fund must submit two six-monthly tax returns a year, due on 30 January and 30 July, respectively.

Regulation

The Unit Trust is subject to the regulatory supervision of the CBI. As it is not a legal personality in its own right, the Unit Trust must appoint trustees and a management company to carry on its day-to-day activities. The management company must appoint at least two Irish directors.

Requirements for authorisation

The Alternative Investment Fund Managers Directive has been transposed into Irish law and any Non-UCITS funds, including property funds, must be set up as an Alternative Investment Fund (AIF) under the Directive. Approval is a two-stage process involving the authorisation of the alternative investment fund manager (AIFM) and the completion of the relevant fund application. The fund manager must complete an "Application for Authorisation of an Alternative Investment Fund Manager" to the CBI, comprising various information and documentation. While the appropriate application for the fund (as a Retail Investor Alternative Investment Fund (RIAIF) or a Qualifying Investor Alternative Investment Fund (QIAIF) must also be completed. There are transitional arrangements with regard to the authorisation of AIFs for both EU and non-EU AIFMs.

Investment restrictions

A Qualifying Investor Alternative Investment Fund (QIAIF) is dedicated to institutional investors and has a minimum initial subscription requirement per investor of EUR 100,000. Investment restrictions and borrowing restrictions that generally apply in relation to regulated funds can be disapplied in the case of a QIAIF. A 24-hour authorisation process applies for QIAIFs.

Minimum level of investment

See above.

Pros

- The set-up, taking into account the appointment of service providers and the approval process of the fund vehicle, may take from six to eight weeks.
- The fund can be formed as a single fund, or as an umbrella fund with segregation of liability between sub-funds.
- Moreover for reporting purposes, the fund has the option of reporting under various GAAPs, including IFRS, US GAAP, or local GAAP. The Fund can also be listed on the Irish Stock Exchange.

Cons

Restricted treaty access may apply. Positive developments have been made by the OECD to remove the uncertainty present on treaty access for widely held collective investment vehicles (CIVs). On 31 May 2010, the OECD Committee on Fiscal Affairs released a report that concluded and recommended that collective investment vehicles should be able to claim treaty access on behalf of investors. In addition, on 22 July 2010, the commentary to the OECD Model Tax Treaty was amended to include references to CIV.

Ireland
Irish Limited Partnership

Background

The Investment Limited Partnership (ILP) is a regulated fund, structured as a limited partnership. It requires the appointment of a general partner to carry out the day-to-day functions of the ILP. A key feature of the limited partnership is that it does not have an independent legal existence. Accordingly, all assets and liabilities as well as the partnership's profits and losses belong to the partners.

Legal form

An ILP can be formed as an open- or closed-end fund, which may be marketed to the public, or sold by private placement.

Tax status

Since the Finance Act, 2013 the ILP is transparent for income tax purposes. Dividends received, capital gains realised and other income received are exempt from income taxation at the level of the fund (tax-transparent). Since the Finance Act, 2013 the ILP is transparent for income tax purposes. Dividends received, capital gains realised and other income received are exempt from income taxation at the level of the fund (tax-transparent).

Treatment of investors

The fund's income is directly allocated to the investors. However, non-resident investors are not subject to any Irish tax on income received from the fund.

Withholding tax

No Irish withholding tax is levied on fund distributions, or on capital gains realised on fund investments.

Other taxes

Neither stamp duty nor capital duty is chargeable on the issue, transfer, or switching of partnership interests.

Treaty status

The ILP is not able to access to treaty benefits under Ireland's tax treaties because of its tax transparency, although it may be regarded as tax-transparent in other jurisdictions, in which case the investors may be able to access treaty rates under their own tax treaties.

Filing obligations

Similar to the CCF, the fund must submit an annual tax return in respect of the calendar year by the following 28 February, detailing the total profits of the fund, together with details relating to the investors in the fund.

Regulation

The ILP is subject to the regulatory supervision of the CBI. As it does not have legal personality in its own right, the partnership agreement must provide for a general partner to carry on its day-to-day activities.

Requirements for authorisation

The Alternative Investment Fund Managers Directive has been transposed into Irish law and any Non-UCITS funds, including property funds, must be set up as an Alternative Investment Fund (AIF) under the Directive. Approval is a two-stage process involving the authorisation of the alternative investment fund manager (AIFM) and the completion of the relevant fund application. The fund manager must complete an "Application for Authorisation of an Alternative Investment Fund Manager" to the CBI, comprising various information and documentation. While the appropriate application for the fund (as a Retail Investor Alternative Investment Fund (RIAIF) or a Qualifying Investor Alternative Investment Fund (QIAIF) must also be completed. There are transitional arrangements with regard to the authorisation of AIFs for both EU and non-EU AIFMs.

Investment restrictions

A Qualifying Investor Alternative Investment Fund (QIAIF) is dedicated to institutional investors and has a minimum initial subscription requirement per investor of EUR 100,000. Investment restrictions and borrowing restrictions that generally apply in relation to regulated funds can be disapplied in the case of a QIAIF. A 24-hour authorisation process applies for QIAIFs.

Pros

- The set-up, taking into account the appointment of service providers and the approval process of the fund vehicle, may take from six to eight weeks.
- The fund can be formed as a single fund, or as an umbrella fund with segregation of liability between sub-funds.
- Moreover, for reporting purposes, the fund has the option of reporting under various GAAPs, including IFRS, US GAAP, or local GAAP. The fund can also be listed on the Irish Stock Exchange.

Cons

- No treaty access under Ireland's treaties (although treaty access may be granted to investors on the basis that the ILP is regarded as tax transparent).

Ireland
ICAV

Background

The ICAV is a new corporate vehicle designed specifically as an Irish investment fund. It sits alongside the Public Limited Company ("PLC"), which has been the most successful and popular of the existing Irish collective investment fund vehicles to date. An ICAV can be incorporated with the Central Bank of Ireland and provides a tailor-made corporate fund vehicle for both UCITS and alternative investment funds. Notably, the legal framework applicable to the ICAV isolates it from potential changes in Irish and EU company law and allows the ICAV to achieve tax transparency in the US as it may "check-the-box" (unlike a plc, the ICAV is not considered a "per se corporation" from a US tax law perspective).

Legal form

The ICAV is not a company under the Irish Companies Act (ICA), but rather a corporate entity with its own facilitative legislation that has been drafted specifically with the needs of collective investment schemes in mind. The ICAV is as flexible as a plc and can be open-ended, closed-ended or a limited liquidity fund AIF. It can be established as an umbrella with sub-funds and various share classes. The Central Bank of Ireland is the registration and supervisory authority for the ICAV.

Tax status

The ICAV is subject to the existing Irish tax regime for regulated investment funds. It is exempt from Irish income and corporation tax as well as from stamp duty on a transfer of shares in the fund.

Treatment of investors

The income of the fund is normally paid to investors by means of dividends, or alternatively, paid out as the realisation of the investment by the investor on redemption.

Withholding tax

In the case of Irish resident investors withholding tax is levied on both distributions, at a rate of 41% for individuals and 25% for companies, and on gains from encashment, redemption, or transfer of shares also at 41% for individuals and 25% for companies. No tax is applied on income distributions, or redemption payments made to non-residents, provided that the non-resident has signed the necessary non-resident declaration.

Other taxes

Exemption from stamp duty on a transfer of shares in the fund, VAT exemption for fund management services and an exemption from exit tax for foreign investors, exempt Irish investors (e.g. pension funds) and shares held in a recognised clearing system.

Treaty status

The ICAV may be able to access treaty benefits. This would need to be analysed on a case by case basis.

Filing obligations

The fund must submit two six-monthly tax returns a year, due on 30 January and 30 July respectively.

Regulation

The ICAV can be regulated either as a UCITS or as an AIF (an alternative investment fund). The ICAV is both authorised and regulated by the Central Bank of Ireland. Like an investment company, an ICAV is a corporate entity that is governed by a board of directors and owned by shareholders. The board of directors must include at least two Irish resident directors.

Requirements for authorisation

The Alternative Investment Fund Managers Directive has been transposed into Irish law and any Non-UCITS funds, including property funds, must be set up as an Alternative Investment Fund (AIF) under the Directive. Approval is a two-stage process involving the authorisation of the alternative investment fund manager (AIFM) and the completion of the relevant fund application. The fund manager must complete an "Application for Authorisation of an Alternative Investment Fund Manager" to the CBI, comprising various information and documentation. While the appropriate application for the fund (as a Retail Investor Alternative Investment Fund (RIAIF) or a Qualifying Investor Alternative Investment Fund (QIAIF) must also be completed, there are transitional arrangements with regard to the authorisation of AIFs for both EU and non-EU AIFMs.

Investment restrictions

A Qualifying Investor Alternative Investment Fund (QIAIF) is dedicated to institutional investors and has a minimum initial subscription requirement per investor of EUR 100,000. Investment restrictions and borrowing restrictions that generally apply in relation to regulated funds can be disapplied in the case of a QIAIF. A 24-hour authorisation process applies for QIAIFs.

Pros

- Ability to "check-the box" for US taxation purposes.
- May dispense with requirement to hold annual general meetings.
- Accounts can be drawn up at sub-fund level.
- Requirement to have minimum of 2 directors.
- Ability to have Umbrella structure and/or Stand-alone structure.
- UCITS/AIF compliant structure.

Cons

Restricted treaty access may apply. Positive developments have been made by the OECD to remove the uncertainty present on treaty access for widely held collective investment vehicles (CIVs). On 31 May 2010, the OECD Committee on Fiscal Affairs released a report that concluded and recommended that collective investment vehicles should be able to claim treaty access on behalf of investors. In addition, on 22 July 2010, the commentary to the OECD Model Tax Treaty was amended to include references to CIVs.

Italy

- Real Estate Investment Fund
- Real Estate SICAF

Contacts

Fabrizio Acerbis
+39 2 91605 001
fabrizio.acerbis@it.pwc.com

Daniele Di Michele
+39 2 91605 002
daniele.di.michele@it.pwc.com

Giovanni Stefanin
+39 2 91605 222
giovanni.stefanin@it.pwc.com

Italy
Real Estate Investment Fund

Background

The Real Estate Investment Fund (REIF) is one of the most appealing forms to direct the collective savings towards real estate in Italy. The REIF was first introduced in 1994 and, since then, continuous improvements in its regulation and tax regime have been made.

The current tax regime is provided by Law Decree no. 351 of 25 September 2001 (converted by Law no. 410 of 23 November 2001), as lastly amended and integrated by Law Decree no. 70 of 13 May 2011 (converted by Law no. 106 of 12 July 2011), and it is based on income tax exemption, with taxation in the hands of the investors, and tax benefits for certain investors and real estate operations.

Legal form

The Italian REIF is a regulated collective investment vehicle entitled to invest in real estate. It is a closed-end contractual "investment fund" without legal personality, established and managed by a management company: the *Società di Gestione del Risparmio* (SGR). The SGR is an Italian regulated joint-stock company, which can manage one or more investment funds.

Further to implementation in Italy of the Alternative Investment Fund Managers Directive (in March 2014), the "investment fund" is defined as an "OICR" (i.e. undertaking for the collective investment of savings) which, in its turn, is defined as "an undertaking established to provide the financial service of 'investment and management of savings on a collective basis', whose assets are raised among a plurality of investors by means of issuing or offering of shares and units, managed on a collective basis in the interests of the investors and autonomously from the same, and invested in financial instruments, receivables, interest and other transferable and immovable assets, in accordance with a predetermined investment strategy". The investment fund's assets are separated from those of the SGR, of the other funds managed by the same and of each unitholder. The investment fund is solely liable, with its own assets, for the obligations incurred on its behalf by the SGR.

Tax status

Since 2012, REIF has been included among subjects liable to income tax, although exempt from the Italian corporate income tax (IRES – ordinary rate: 27.5%) and regional tax on production (IRAP – ordinary rate: 3.9%). REIF's profits are conversely taxable in the hands of the unitholders, pursuant to different methods and/or limits in consideration of the unitholders' nature/tax status. As a result of the introduction of the new tax rules in 2010 and 2011, the 1% net worth tax (*imposta patrimoniale*) introduced in 2008 for "low participated" and "family-owned" REIFs has been repealed (but replaced by other deterrent provisions).

Tax treatment at entity level

Dividends received, capital gains realised and other incomes earned by the REIF are exempt from corporate income taxation at the level of the REIF. For income normally subject to withholding tax at source, the withholding tax (generally at a rate of 26%) applies as a final payment, unless its application is excluded for REIFs by the law (e.g., interest from bank deposits and income from certain foreign funds). REIF units are not subject to registration tax.

For real estate properties held by the REIF, local property taxes (particularly: IMU, the municipal tax on properties which replaced ICI from 2012, and TASI, the recent municipal tax on indivisible services) apply according to ordinary rules.

As far as VAT and other indirect taxes are concerned, REIF follows the ordinary rules. However, it can benefit from some tax reliefs with regard to indirect/transfer taxes.

Treatment of investors

In the current framework, two categories of REIFs are identified, according to the nature of the unitholders:

- institutional funds: REIFs entirely owned by "institutional" investors;
- non-institutional funds: REIFs owned also by investors different from "institutional" ones.

For this purpose, "institutional" investors are deemed to be the following:

a) States or public entities/bodies;

b) undertakings for collective investment of savings;

c) pension funds;

d) insurance companies (limited to investments related to "technical reserves" coverage);

e) banking and financial intermediaries that are subject to prudential surveillance;

f) entities indicated in previous letters from a) to e), established in countries included in the White List (this list includes the countries that have specific agreements for the exchange of tax information with Italy) and that allow the identification of beneficial owner of income;

g) non-profits/charities resident in Italy;

h) SPVs owned for more than 50% by any of the entities listed under previous letters from a) to g).

Foreign institutional investors under letter f) include: foreign States and foreign public bodies, and foreign subjects corresponding to the other listed Italian entities which are subject to "prudential supervision". This last requirement is met if the execution of the foreign subject's activity requires prior authorisation and is subject to compulsory continuous controls according to the laws in force in the foreign State of residence. The execution of this prudential supervision must be certified by the home country's competent authority.

Italy
Real Estate Investment Fund (continued)

The SPVs under letter h) can be established in Italy or abroad, but limited to countries included in the White List. The control on such SPV can also be indirect (in this case, the percentage of interest must be properly adjusted - e.g., an indirect control on 60% of a Luxembourg SPV through 90% of a US corporation, equates to 54% actual control on the SPV).

With reference to "institutional funds", REIF's profit distributions are generally subject to a 26% withholding tax at source (certain reductions/ exemptions are provided); for investors which are subject to corporate/ business income tax, REIF's profits collected are taxed accordingly and the withholding tax is credited against the income tax due. In the other cases the withholding tax, unless excluded by the law, is a definitive taxation.

Regarding "non-institutional funds", the following rules apply:

- for institutional investors (regardless the amount of their interest in the REIF) and non-institutional investors owning (directly or indirectly) up to 5% of the REIF, REIF's profit distributions are subject to the 26% withholding tax at source according to the ordinary rules (with reductions/exemptions, where applicable); for investors which are subject to corporate/business income tax, REIF's profits collected are taxed accordingly and the withholding tax is credited against the income tax due. In the other cases the withholding tax, unless excluded by the law, is a definitive taxation;
- for resident non-institutional investors that own (directly or indirectly) more than 5% of the REIF, the annual REIF's profit is attributed to them proportionally with their interest in the REIF (which, as a result, acts as a tax-transparent entity/partnership), regardless of its actual distribution, and is taxed in their hands according to their tax regime/ status (consequently, withholding tax at source does not apply);
- for non-resident investors, REIF's profit distributions are in any case taxable according to the ordinary rules, thus upon distribution through the 26% final withholding tax at source (with reductions/ exemptions stated below).

For non-institutional funds a one-off substitute tax was also provided. This substitute tax only applied to non-institutional investors which held (directly or indirectly) more than 5% of the REIF as of 31 December 2010. This substitute tax amounted to 5% of the average value of the pertaining REIF units held during the REIF's management period 2010. The tax could have been paid either by (i) the investors or (ii) the SGR (or the custodian bank, when provided); if the investor did not provide sufficient funds, the SGR could dispose of the REIF units to pay the tax. In addition, the underwriting or purchase cost of the REIF units is only recognised for tax purposes within the limit of the amount that constituted the taxable base for the substitute tax. Losses incurred upon disposal are irrelevant for tax purposes.

As an alternative to the application of the tax-transparent regime for non-institutional investors with "relevant" interest in the REIF (as defined), upon investors' decision, the REIF could be put into liquidation, benefiting from some tax reliefs (in terms of indirect/transfer taxes) if the liquidation was resolved by 31 December 2011. In this case, the SGR had to account for a 7% substitute tax on the REIF's NAV as of 31 December 2010 (payable in three years, by annual instalments, from 2012 to 2014). Liquidation had to be completed within a maximum of five years. On annual profits accrued from 1 January 2011 to the end of the liquidation, the SGR must account for a further substitute tax of 7%. As a result, REIF's profit distributions are not subject to withholding tax and are not taxable up to the amount that was subject to the 7% substitute tax.

Withholding tax

Withholding tax is levied on the REIF's profit distributions, even on redemption, at a rate of 26% (in case of REIF units' reimbursement, distributions of REIF's profits earned before 1 July 2014 benefit from the previous lower withholding tax rates).

However, in the following cases the withholding tax is not applicable:

- non-institutional relevant unitholder subject to transparency taxation;
- REIF in liquidation (under special procedure) with liquidation profits already subject to the 7% substitute tax;
- Italian pension funds and Italian undertakings for the collective investment of savings (OICRs);
- foreign pension funds and foreign undertakings for the collective investment of savings (OICRs) established in countries that have an adequate exchange of tax information with Italy (i.e., countries included in the White List), at the conditions stated below;
- international bodies established on the basis of international agreements that are valid in Italy, as well as central banks, or entities that manage the official reserves of a State.

Foreign pension funds and foreign OICRs are identified making reference to the home country legislation. In particular, the exemption applies to entities that pursue the same purposes of, respectively, Italian pension funds and OICRs, regardless of their legal form. Conversely, formal and not substantial similarity is not sufficient for entitlement to the exemption. The foreign fund, or the competent management entity, must be subject to supervision. In principle, the exemption does not apply in case of indirect investment; however, entitlement to exemption is recognised for investment through a fully owned SPV located in a White List country.

REIF's profits distributed to investors, resident in countries for which a treaty against double taxation exists may benefit from the more favourable tax regime set out in the treaty (reference can be made to provisions concerning "interest", unless the relevant treaty expressly regulates the income from real estate funds). For this purpose, subjective, objective and documentary requirements have to be fulfilled (e.g., beneficial owner status; tax certificate issued by the tax authority of the country of residence of the beneficial owner, which is valid until 31 March of the following year). However, distributions of profits referring to management periods up to 31 December 2009 are still tax-exempt (as before the 2010 changes), provided that the collectors are resident in a country included in the White List, they are the beneficial owners of the income, and the stated documentary requirements are fulfilled and they held the REIF units at the end of 2009.

In principle, capital gains derived from the disposal of REIF units are subject to 26% substitute tax, with the following exceptions:

(i) gains realised in the context of a business activity, thus subject to business income taxation rules;

(ii) gains realised by resident entities subject to special tax regimes (e.g., mutual and pension funds);

(iii) gains realised by non-institutional investors with respect to "relevant" interest (as defined) into non-institutional REIFs, which are exempt at 50.28% while the rest is included in the global taxable income and taxed ordinarily.

Italy
Real Estate Investment Fund (continued)

Non-residents, under the following circumstances, may benefit from tax exemption:

- REIF units listed in a regulated market;
- for unlisted REIF units, if the recipient is the beneficial owner of the capital gain (or, being a fund or a transparent entity, it qualifies as institutional investor), does not have a permanent establishment in Italy to which the income is referable and its residence country allows an effective exchange of tax information with Italy (i.e. White List country).

For other cases, the application of treaties against double taxation may be claimed.

Treaty and EU Tax Directive status

As it's included among subjects liable to income tax (since 2012), although tax-exempt, from the Italian perspective REIF should benefit from Treaties application (reciprocity condition with the relevant foreign Country may be required).

The lack of subjective and objective requirements does not give access to the EU Tax Directives.

Filing obligations

Withholding tax agent reporting obligations are generally fulfilled on behalf of the REIF by the management company (SGR).

Regulation

The REIF and the SGR are subject to the supervision of the Italian regulatory authority, the Bank of Italy.

The rules enforced in July 2010 provide a form of deregulation for certain investment funds. In particular, for investment funds that are not subject to the rules established to mitigate and diversify risks (i.e., investment funds "reserved" to institutional/professional investors), the adoption and amendment of the fund's rules no longer require prior approval by the regulatory authority. In addition, mergers of these funds no longer have to meet the regulatory provisions established for mergers between regulated funds.

Requirements for authorisation

For the SGR, the following requirements apply:

- The registered office and the head office must be located in Italy.
- The paid-up share capital, complying with the minimum amount established by the Bank of Italy, is 1 million euros.
- The persons in charge of performing administrative, managerial and control functions must fulfil professional and independence legal requirements.
- Shareholders are also required to fulfil honourableness requirements.
- Activities are limited to those allowed by law.

Reserved funds that are only accessible to professional investors have fewer restrictions than ordinary funds. Moreover, reserved funds require a minimum investment of EUR 500,000 for retail investors, apart from being accessible to professional investors.

Investment restrictions

REIF invests mainly or exclusively in real estate assets, property rights over real estate and shareholdings of real estate companies, for at least two-thirds of its value (some exceptions are provided).

Investment diversification requirements have to be observed. In particular, direct investment (or indirect, through controlled companies) into a single property, with single urban and functional characteristics, cannot exceed 20% of the REIF's assets value. This limit is increased to 33% for properties leased out, provided the annual rentals from the main tenant (and from subjects of the same group) do not overcome 20% of annual aggregated rentals. Investments in companies allowed to carry on the building development business are limited to 10% of the total REIF's assets value. Reserved funds are not subject to these limitations, although their regulations have to provide minimal assets and risk diversifications rules to comply with.

Direct building development business is forbidden.

Minimum level of investment

The REIF does not require a minimum level of investment, unless established as reserved fund, for which the minimum level is EUR 500,000 for retail investors, apart from being accessible to professional investors.

Pros

- REIF is not subject to income taxes: limitations provided in the corporate income taxation system do not apply (e.g., thin capitalisation rules/interest deductibility limitations).
- REIF's profits are taxed only upon distribution and/or reimbursement of the units, with the exception of unit-holdings exceeding 5% held by resident non-institutional investors.
- Tax exemption for certain foreign qualifying institutional investors is available. Other foreign investors can benefit from DTTs reduction/exemption.
- Facilitated liquidation until the end of 2011 of non-institutional REIFs that didn't intend to apply the new tax transparency taxation method to unitholders, with a one-off 7% substitute tax on the REIF's NAV as of 31 December 2010 and a further 7% on the annual REIF's liquidation profits, if any.
- REIF benefits from several tax reliefs in terms of indirect taxes.

Cons

- REIF's profits in favour of resident non-institutional investors holding more than 5% are taxed on an accrual basis (tax transparency taxation method).
- A one-off substitute tax equal to 5% of the investment value as of 31 December 2010 was due by non-institutional investors holding more than 5% at the same date (also foreigners).
- Unitholders cannot manage the REIF: this role is executed by the management company (SGR), which is (and has to be), independent from the investors.
- Due to the fact that the REIF is a regulated entity, it is subject to supervision by regulatory authorities (this implies higher operating costs).
- Real estate properties have to be evaluated twice each year on the basis of external appraisals.
- From 31 May 2010, less favourable tax treatment for REIF's profit distributions to foreign unit-holders different from certain institutional investors.

Italy
Real Estate SICAF (continued)

Background

Within the implementation of AIFMD (the Alternative Investment Funds Managers Directive), the Legislative Decree 4 March 2014, no. 44, has introduced in Italy a new investment vehicle: the "SICAF" ("*Società di Investimento a CApitale Fisso*"), an investment company with fixed capital.

In a nutshell, the SICAF is a regulated closed-end fund with corporate form. If it invests prevalently in real estate (as stated for Italian Real Estate Investment Funds, REIFs), it qualifies as "Real Estate SICAF" and is thus entitled to take advantage of the same tax regime and benefits provided for the Italian REIF (with just one specific exception).

Thanks to its corporate form and to the fact that investors are the SICAF's shareholders, with the rights and powers peculiar of this role, investors should be able to influence to a certain extent (i.e. within the limits of the shareholders' powers) the SICAF's real estate assets management, by-passing some of the governance constraints of the investment through contractual real estate funds.

Legal form

The SICAF is an "OICR" (i.e., undertaking for the collective investment of savings – for definition, please refer to the section concerning the Italian REIF) with closed-end form, incorporated as limited company by shares (and so with legal personality), with fixed capital, registered office and general management in Italy and whose sole purpose is the collective investment of savings raised through the issuing of its shares and other equity instruments.

The SICAF is a regulated investment vehicle and is subject to regulatory authorities' authorisation and supervision (this requires the fulfilment of several requirements).

The SICAF shares/equity instruments may be listed.

Tax status

The SICAF is liable to income tax. However, as OICR, it is exempt from the Italian corporate income tax (IRES – applicable rate: 27.5%) and regional tax on production (IRAP – applicable rate: 5.57%), but with just an exception (see below).

Real estate SICAF's profits are conversely taxable in the hands of the shareholders-investors, pursuant to different methods and/or limits in consideration of their nature/tax status.

Tax treatment at entity level

As a closed-end (corporate) fund, the SICAF is allowed to invest in real estate. When the investment in real estate is prevalent (as stated for Italian REIFs, this condition is met if investments in real estate, rights on real estate - including those from financial leasing contracts -, real estate companies and REIF units are at least two-thirds of the SICAF's value, with some exceptions), the SICAF qualifies as "real estate SICAF" and is subject to the same tax regime of Italian REIFs (with a little difference with respect to IRAP).

Consequently, for a real estate SICAF, dividends received, capital gains realised and other incomes earned are exempt from corporate income taxation. For income normally subject to withholding tax at source, the withholding tax (generally with rate of 26%, with a few exceptions) applies as a final payment, apart cases where its application is expressly excluded by the law (e.g. interest from bank deposits and income from certain foreign funds).

As far as IRAP is concerned, the SICAF is subject to tax, but only with regard to its net commissions income (i.e., underwriting commissions collected, net of commissions eventually paid to distributors).

As stated for Italian REIFs, local property taxes (namely IMU and TASI) and VAT apply according to ordinary rules. With regard to VAT and other indirect taxes, the tax reliefs stated for REIFs are applicable also to the real estate SICAF.

Treatment of investors

The shares of the SICAF can be subscribed or purchased by either institutional investors or any other investors, even retail, in compliance with the provisions of the SICAF's by-laws.

As for REIFs, according to the nature of the shareholders, two categories of real estate SICAFs can be identified:

- institutional real estate SICAF: SICAF entirely owned by institutional investors (for definition, please refer to the section concerning the Italian REIF);
- non-institutional real estate SICAF: SICAF owned also by investors different from the institutional ones.

With reference to the institutional real estate SICAF, SICAF's profit distributions are generally subject to a 26% withholding tax at source (certain reductions/exemptions are provided); for investors which are subject to corporate/business income tax, SICAF's profits collected are taxed accordingly and the withholding tax is credited against the income tax due. In the other cases the withholding tax, unless its application is expressly excluded by the law, is a definitive taxation.

Regarding the non-institutional real estate SICAF, the following rules apply:

- for institutional investors (regardless the amount of their interest in the SICAF) and non-institutional investors owning (directly or indirectly) up to 5% of the SICAF, SICAF's profit distributions are subject to the 26% withholding tax at source, according to the ordinary rules (with reductions/exemptions, where applicable); for investors which are subject to corporate/business income tax, SICAF's profits collected are taxed accordingly and the withholding tax is credited against the income tax due. In the other cases the withholding tax, unless excluded by the law, is a definitive taxation;
- for resident non-institutional investors that own (directly or indirectly) more than 5% of the SICAF, the annual SICAF's profit is attributed to such investors in proportion to their interest in the SICAF (which, as a result, acts as a tax-transparent entity/partnership), regardless of its actual distribution, and is taxed in their hands according to their tax regime/status (consequently, withholding tax at source does not apply);
- for non-resident investors, SICAF's profit distributions are in any case taxable according to the ordinary rules, thus upon distribution through the 26% final withholding tax at source (with reductions/exemptions stated below).

Italy
Real Estate SICAF (continued)

Withholding tax

Withholding tax is levied on the real estate SICAF's profit distributions, even on redemption, at a rate of 26%.

However, in the following cases the withholding tax is not applicable:

- non-institutional "relevant" shareholders subject to transparency taxation (see above);
- Italian pension funds and Italian undertakings for the collective investment of savings (OICRs);
- foreign pension funds and foreign undertakings for the collective investment of savings (OICRs) established in countries that have an adequate exchange of tax information with Italy (i.e., countries included in the White List), at the conditions stated below;
- international bodies established on the basis of international agreements that are valid in Italy, as well as central banks or entities that manage the official reserves of a State.

Foreign pension funds and foreign OICRs are identified making reference to the home country legislation. In particular, the exemption applies to entities, regardless of their legal form, which pursue the same purposes of, respectively, Italian pension funds and OICRs. Conversely, formal and not substantial similarity is not sufficient for entitlement to the exemption. The foreign fund, or the competent management entity, must be subject to supervision. In principle, the exemption does not apply in case of indirect investment; however, entitlement to exemption is recognised for investment through a fully owned SPV located in a White List country.

SICAF's profits distributed to investors, resident in countries for which a treaty against double taxation exists, may benefit from the more favourable tax regime set out in the treaty (reference can be made to provisions concerning "interest", unless the relevant treaty expressly regulates the income from real estate funds). For this purpose, subjective, objective and documentary requirements have to be fulfilled (e.g., beneficial owner status; tax certificate issued by the tax authority of the country of residence of the beneficial owner, which is valid until 31 March of the following year).

In principle, capital gains derived from the disposal of real estate SICAF shares are subject to 26% substitute tax, with the following exceptions:

(i) gains realised in the context of a business activity, thus subject to business income taxation rules;

(ii) gains realised by entities subject to special tax regimes (e.g., mutual and pension funds);

(iii) gains realised by "non-institutional" investors with respect to "relevant" interest (as defined) into non institutional SICAFs, which are exempt at 50.28% while the rest is included in the global taxable income and taxed ordinarily.

Non-residents, under the following circumstances, may benefit from tax exemption:

- real estate SICAF shares listed in a regulated market;
- for unlisted SICAF shares, if the recipient is the beneficial owner of the capital gain (or, being a fund or a transparent entity, it qualifies as institutional investor), does not have a permanent establishment in Italy to which the income is referable and its residence country allows an effective exchange of tax information with Italy (i.e., White List).

For other cases, the application of treaties against double taxation may be claimed.

Treaty and EU Tax Directive status

Because the SICAF has corporate form and is included among subjects liable to income tax, although tax-exempt, from the Italian perspective it should benefit from Treaties application (reciprocity condition with the relevant foreign Country may be required).

Conversely, its exemption from Italian corporate income tax should prevent access to the EU Tax Directives.

Filing obligations

Generally, the SICAF has to fulfil withholding tax agent reporting obligations.

Regulation

SICAFs are subject to the supervision of the Italian regulatory authorities, the Bank of Italy and Consob (i.e., the regulatory body for the Italian Stock Exchange).

In principle, the SICAF is managed internally (as such, it qualifies as "AIFM"). However, the management can be also entrusted to an external AIFM (i.e., a SGR – for definition, please refer to the section concerning the Italian REIF).

Requirements for authorisation

The Bank of Italy authorises a company to undertake the status of SICAF if the following main requirements are fulfilled:

- it is set up as limited company by shares;
- it has registered office and general management in Italy;
- its share capital amounts to at least EUR 1 million (or to at least EUR 500,000 for SICAF reserved to professional investors);
- people who carry on administrative, management and control functions fulfil honourableness, professional and independence requirements;
- shareholders also fulfil honourableness requirements.
- its by-laws contemplate, as exclusive purpose, the collective investment and management of savings raised by the issuing of its shares and of the equity instruments provided therein;
- submission of suitable initial activity program and organisational structure report.

Italy
Real Estate SICAF (continued)

Investment restrictions

Investment diversification requirements have to be observed. In particular, direct investment (or indirect, through controlled companies) into a single property, with single urban and functional characteristics, cannot exceed 20% of the real estate SICAF's assets value. This limit is increased to 33% for properties leased out, provided the annual rentals from the main tenant (and from subjects of the same group) do not overcome 20% of annual aggregated rentals.

Investments in companies allowed to carry on the building development business are limited to 10% of the total SICAF's assets value.

Reserved SICAFs are not subject to these limitations, although their regulations have to provide minimal assets and risk diversifications rules to comply with.

Direct building development business is forbidden.

Minimum level of investment

The SICAF does not require a minimum level of investment, with the exception of the reserved SICAF for which there is a minimum level of investment of EUR 500,000 for retail investors.

Pros

- As real estate corporate fund, SICAF is not subject to income taxes (with the exception of the net commissions income, which generally pays IRAP).
- Real estate SICAF's profits are taxed only upon distribution and/or reimbursement of the shares, with the exception of holdings exceeding 5% held by resident non-institutional investors.
- Tax exemption for certain foreign qualifying institutional investors is available; other foreign investors can benefit from DTTs reduction/exemption.
- Real estate SICAF (corporate fund) benefits from the several indirect tax reliefs provided for the REIF (contractual fund).
- Investors, as SICAF's shareholders, by way of SICAF's directors' appointment, can influence, to a certain extent, the real estate assets management, more than in the REIF.

Cons

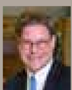
- Real estate SICAF's profits in favour of resident non-institutional investors holding more than 5% are taxed on an accrual basis (tax transparency taxation method).
- SICAF is subject to authorisation and supervision by regulatory authorities (this implies higher operating costs).
- Real estate properties need to be evaluated twice each year on the basis of external appraisals.
- SICAF can't issue corporate bonds.

Luxembourg

- Part II UCIs – FCP, SICAV, SICAF
- SIF Regime – FCP, SICAV, SICAF
- SICAR
- Securitisation Vehicle

Contacts

Alexandre Jaumotte
+352 49 48 48 5380
alexandre.jaumotte@lu.pwc.com



Max Von Frantzius
+ 352 49 48 48 4478
max.von.frantzius@lu.pwc.com

Luxembourg
Part II UCIs – FCP, SICAV, SICAF

Background

Real estate Undertakings for Collective Investments (Part II UCIs), under the so-called "Part II" of the law of 17 December 2010 offer a wide range of investment possibilities, such as direct and indirect investments in real estate properties. They can be considered as the classic type of regulated real estate fund vehicles publicly distributed, in Luxembourg.

Legal form

The legal forms publicly distributed UCIs may take are:

- A *Fonds Commun de Placement* (FCP) is a contractual form (i.e. a separate pool of assets), equivalent to the concept of UK "unit trust" or German "*Sondervermögen*". Having no separate legal status, it must be managed by a Luxembourg Alternative Investment Fund Manager (AIFM), according to the Luxembourg AIFM Law of 12 July 2013 (AIFM Law), or by a management company that appoints an AIFM.
- A *Société d'Investissement à Capital Variable* (SICAV) is an investment company with a variable share capital, which equals the net asset value of the fund at all times. It may operate either as an open-end or closed-end fund, but can only be set up as a public limited company (*Société Anonyme*). The SICAV has to be managed by an AIFM, according to the AIFM Law, or be registered/authorised as an AIFM itself.
- A *Société d'Investissement à Capital Fixe* (SICAF) is an investment company with fixed capital, which may operate either as an open-end or closed-end fund. A SICAF can be set up in the different legal forms available (e.g. *Société Anonyme* - SA, *Société en Commandite par Actions* - SCA, *Société en Commandite Simple* - SCS or *Société en Commandite Spéciale* - SCSp). Similar to the SICAV, the SICAF has to be managed by an AIFM, according to the AIFM Law, or be registered/authorised as an AIFM itself.

Tax treatment at entity level

The Part II UCI vehicle is exempt from corporate and municipal business tax, as well as from net wealth tax. Dividends received, capital gains realised and other income received are outside the scope of taxation.

Treatment of investors

The tax treatment of investors depends on the rules applicable in their country of residence. Some jurisdictions may treat the FCP form as tax-transparent.

Withholding tax

Distributions by a Luxembourg Part II UCI, whether paid to resident or non-resident investors, are not subject to any Luxembourg withholding tax.

Other taxes

A subscription tax (*taxe d'abonnement*) at a rate of 0.01% or 0.05% per annum is levied, depending on the investments made and the investor base, on the net asset value at the end of each quarter. UCIs whose securities are reserved for institutions, for occupational retirement pension, or investment vehicles dedicated to fund employment retirement benefits are in principle exempt from subscription tax.

There is no net wealth tax. Part II UCIs are regarded as VAT taxable persons performing VAT-exempt activities and are in principle not entitled to recover the input VAT incurred on their costs, except in specific cases. The management of Part II UCIs is VAT-exempt. The exemption covers the main functions such as strategic management of portfolio, fund accounting and administrative management of the assets of the Part II UCI, where the place of taxation of these services is Luxembourg. Distribution of Part II UCIs' units/shares is generally VAT-exempt. Services that can't benefit from a VAT exemption are generally subject to 17% VAT, the lowest rate within the EU.

Supervision functions of the depositary bank are subject to 14% VAT. Part II UCIs are not required to register for VAT in Luxembourg unless they receive taxable services from abroad, for which they have to self-account for Luxembourg VAT under the reverse-charge mechanism, and/or if they carry out intra-Community acquisitions of goods in Luxembourg under certain conditions.

Treaty status

For the FCP form there is no access to the double tax treaty network. Corporate-type SICAVs and SICAFs should have access to Luxembourg double tax treaties with more than 40 countries, as defined in a Circular issued by the Luxembourg tax authorities in February 2015. For all of the legal forms, there is no access to the EU Parent-Subsidiary Directive.

Regulation

All Part II UCIs are categorised as Alternative Investment Funds under the AIFM Law and therefore need to be managed by an AIFM.

Furthermore, UCIs fall under the supervision of the Luxembourg financial sector regulator, the *Commission de Surveillance du Secteur Financier* (CSSF), which plays a key role by (i) authorising the vehicle and by (ii) supervising the ongoing operations of the structure.

This type of fund vehicle is highly regulated and offers the broadest investor protection, due to the possibility to be distributed to retail clients. Therefore, there is a more extensive CSSF approval process.

Requirements for authorisation

All Part II UCIs must be previously authorised by the CSSF before carrying out any activities. A Part II UCI is authorised if the CSSF has reviewed and approved the constituting documents (i.e., the articles of incorporation or the management regulations and the prospectus), the choice of depositary and the other intervening parties in the fund, such as the central administration, the investment manager (if any) and the approved statutory auditors.

Luxembourg
Part II UCIs – FCP, SICAV, SICAF (continued)

In addition, Part II UCIs set up in contractual form (FCP) are only authorised if the CSSF has approved the application of the Management Company or AIFM to manage the respective Part II UCI. Part II UCIs set up in corporate form (SICAV or SICAF) appointing a management company or an AIFM are authorised only if the CSSF has approved the application of that Management Company or AIFM to manage the respective Part II UCI.

Part II UCIs have to disclose in their prospectuses their investment strategies, the policy on leverage, their risk profile and other characteristics of the fund, including any other information that has to be disclosed to the investors in accordance to the AIFM Law.

The directors of a Part II UCI must be of sufficiently good reputation and have enough experience in relation to the type of UCI concerned.

The investment manager must be regulated and subject to prudential supervision, or, if established in a third country, cooperation between the CSSF and the supervisory authorities of the respective country must be ensured. The investment management function shall not be delegated to the depositary.

A depositary and a central administrator located in Luxembourg and supervised by the CSSF, are required.

For a real estate UCI, the net asset value on which the issue and redemption prices of securities are based must be determined at least once a year, as well as on each day on which shares or units are issued or redeemed. Part II UCIs must compute their net asset value at least monthly. The valuation of assets is subject to specific requirements, such as the appointment of one or more independent property valuers to value the underlying real properties. An approved statutory auditor (*réviseur d'entreprise agréé*) must audit the annual accounts of the fund.

The authorisation process with the CSSF to set up a new Part II UCI can be summarised in the following steps:

1. Submission of the request for authorisation

   The application file is constituted of the duly completed application questionnaires (available on the CSSF website) and of the appended documents.

Applicants are advised to file an application only once all elements of the project are fully agreed upon and stable. The transmission of an incomplete application may prevent either the start or the swift progress of the approval process and cause unexpected delays.

Once the application file is complete, it is submitted to the CSSF, generally via e-mail.

The CSSF acknowledges receipt of the application file within a few working days and provide the name of the responsible officer in charge of the examination of the application file.

2. Examination of the request for authorisation

After receiving the application file, the CSSF will contact the applicant or the contact person indicated in the application questionnaire for an initial feedback. The applicant may be asked to provide further information and/or supportive documents to complete the file or explain specific considerations of the application.

This step may be subject to reiteration until satisfactory completion of the examination phase.

The CSSF will inform the applicant when the examination phase is completed and invite the applicant to submit final and signed-off versions of all compulsory documents.

At this point, the CSSF no longer allows changes in the scope or alterations in the last draft versions of the constitutive documents on the basis of which the examination has been terminated.

3. Entry of the Part II UCI on the official list

The CSSF keeps official lists of the UCIs authorised in Luxembourg and subject to its supervision. Upon satisfactory receipt of all prospectuses and compulsory documents as requested, the CSSF will proceed to the registration of the Part II UCI on the official list.

In parallel, the CSSF will issue the official accreditation letters and the CSSF identification codes. The CSSF will register the documentation and return an electronic visa-stamped version of the prospectus.

The replacement of the management company, the AIFM, investment manager or depositary, as well as any amendment to the articles of incorporation or management regulations, prospectus or offering document of the Part II UCI are subject to prior approval by the CSSF.

Investment restrictions

The investment restrictions are not onerous. Some risk diversification is required; consequently a maximum of 20% of the assets can be invested in a single investment. However, all types of investors are allowed to participate. In principle, there is certain flexibility as regards risk diversification rules concerning the CSSF's administrative practice.

Minimum capital requirements

The minimum net asset value of a UCI must be EUR 1.25 million. This amount has to be reached within six months of authorisation by the CSSF. Debt financing of up to 50% (or more in some cases; there is certain flexibility) of the real estate value is possible. Part II UCIs may have various sub-funds and can issue different classes of shares.

Luxembourg
Part II UCIs – FCP, SICAV, SICAF (continued)

Pros

- A fund in one of the legal forms noted above is highly flexible, subject to expert and flexible supervision, and is well known by international investors.
- Low tax leakage and scope for optimisation of carried interests.

Cons

- Requirement to use a depositary bank.
- An AIFM license is needed to manage Part II UCIs.
- Since Part II UCIs are distributed to retail investors they face a stricter regulatory regime than SIFs (see below).

Luxembourg
SIF Regime – FCP, SICAV, SICAF

Background

In February 2007, the Luxembourg parliament adopted a law (the "SIF Law"), to replace the 1991 Law on UCIs dedicated to institutional investors, so formalising the concept of Specialised Investment Funds (SIFs). The main change compared to previous regulation concerns the scope of eligible investors, which has been broadened to include not only institutional investors, but also professional and sophisticated investors. The SIF Law has been amended by the Law of 26 March 2012.

Legal form

A SIF is in essence a special regulatory regime for non-retail funds. The SIF regime is available for FCPs (*Fonds Commun de Placement*) with a management company; for SICAVs (*Société d'Investissement à Capital Variable*) and for SICAFs (*Société d'Investissement à Capital Fixe*). Both the SICAV and the SICAF may choose from a number of legal forms – the limited liability company (*Société à responsabilité limitée* - Sàrl), the public limited company (SA), the (commonly used) partnership limited by shares (SCA), or simple partnership with legal personality (*Société en Commandite Simple* – SCS) or special limited partnership without legal personality (*Société en Commandite Spéciale* - SCSp), or the cooperative in a form of a public limited company (*Société coopérative organisée sous forme de société anonyme* – SCSA).

Tax treatment at entity level

The SIF vehicle is exempt from corporate and municipal business tax, as well as from net wealth tax, irrespective of its legal form. Dividends received, capital gains realised and other income received are outside the scope of taxation.

Treatment of investors

The tax treatment of investors depends on the rules applicable in their country of residence. Some jurisdictions may treat the FCP form as tax-transparent.

Withholding tax

Distributions by a Luxembourg SIF, whether paid to resident or non-resident investors, are not subject to any Luxembourg withholding tax.

Other taxes

Subscription tax (*taxe d'abonnement*) at a rate of 0.01% yearly is levied on the net asset value at the end of each quarter. SIFs whose securities are reserved for institutions for occupational retirement pension or investment vehicles dedicated to fund employment retirement benefits are in principle exempt from subscription tax. There is no net wealth tax.

SIFs are regarded as VAT taxable persons performing VAT-exempt activities and are in principle not entitled to recover the input VAT incurred on their costs, except in specific cases. Management of SIFs is VAT-exempt. The exemption covers main functions such as strategic management of portfolio, investment advice, fund accounting and administrative management of the assets of the SIF, where the place of taxation of these services is Luxembourg. Placement of SIFs' units/share is generally VAT-exempt. Services that cannot benefit from a VAT exemption are generally subject to 17% VAT, the lowest rate within the EU. Supervision functions of the depositary bank are subject to 14% VAT. SIFs are not required to register for VAT in Luxembourg, unless they receive taxable services from abroad, for which they have to self-account for Luxembourg VAT under the reverse-charge mechanism, and/or if they carry out intra-Community acquisitions of goods in Luxembourg under certain conditions.

Treaty status

For the FCP form, there is no access to the double tax treaty network. SICAVs and SICAFs should have access to Luxembourg double tax treaties with more than 40 countries, as defined in a Circular issued by the Luxembourg tax authorities in February 2015. For all of the legal forms, there is no access to the EU Parent-Subsidiary Directive.

Regulation

The regulatory authority is the CSSF.

Requirements for authorisation

- Prior CSSF approval is required since the entry into force of the Law of 26 March 2012 amending the SIF Law.
- SIFs governed by Part II of the SIF Law are qualified as AIFs under the AIFM law and must be managed by an authorised AIFM, either internally managed or by an externally appointed manager.
- SIFs that do not qualify as AIFs are not impacted by the AIFM Law and will remain subject, to a large extent, to requirements similar to those under the SIF regime before the AIFM Law.

A SIF is authorised if the CSSF has reviewed and approved the constituting documents (i.e., the articles of incorporation or the management regulations and the offering document), the choice of depositary and the other intervening parties in the fund, such as the central administrator, the investment manager (if any) and the approved statutory auditors.

In addition, SIFs set up in contractual form (FCP) are only authorised if the CSSF has approved the application of the management company or AIFM (if applicable) to manage the respective SIF. SIFs set up in corporate form (SICAV or SICAF) appointing a management company or an AIFM (if applicable) are authorised only if the CSSF has approved the application of that Management Company or AIFM to manage the respective SIF.

SIFs have to disclose in their offering document their investment strategies, the policy on leverage, their risk profile and other characteristics of the fund, including any other information that has to be disclosed to the investors in accordance with the AIFM Law, if applicable.

The directors of a SIF must be of sufficiently good reputation and have sufficient experience in relation to the type of SIF concerned.

The investment manager must be regulated and subject to prudential supervision, or, if established in a third country, cooperation between the CSSF and the supervisory authorities of the respective country must be ensured. The investment management function shall not be delegated to the depositary.

A depositary and a central administrator located in Luxembourg and supervised by the CSSF, are required.

For SIFs qualifying as AIFs whose investors have no redemption rights for five years from the date of their initial investment and which

Luxembourg
SIF Regime – FCP, SICAV, SICAF (continued)

generally do not invest in assets that must be held in custody, the depositary may also be an entity which:

- carries out depositary functions as part of professional or business activities,
- is subject to mandatory professional registration recognised by law, to legal or regulatory provisions or to rules of professional conduct, or
- can furnish sufficient financial and professional guarantees.

An approved statutory auditor (*réviseur d'entreprise agréé*) must audit the annual accounts of the SIF.

Moreover, a SIF is required to implement an appropriate risk management system and an effective conflicts of interest policy.

A SIF is only required to produce an annual audited report. However, SIFs qualifying as AIFs under the AIFM Law will be required to report in accordance with the provisions of the AIFM Law.

The authorisation process with the CSSF to set up a new SIF can be summarised in the following steps:

1. Submission of the request for authorisation

The application file is constituted of the duly completed application questionnaires (available on the CSSF website) and of the appended documents.

Applicants are advised to file an application only once all elements of the project are fully agreed upon and stable. The transmission of an incomplete application may prevent either the start or the swift progress of the approval process and cause unexpected delays.

Once the application file is complete, it is submitted to the CSSF generally via e-mail.

The CSSF will acknowledge receipt of the application file within a few working days and provide the name of the responsible officer in charge of the examination of the application file.

2. Examination of the request for authorisation

After receiving the application file, the CSSF will contact the applicant or the contact person indicated in the application questionnaire for an initial feedback. The applicant may be asked to provide further information and/or supportive documents to complete the file or explain specific considerations of the application.

This step may be subject to reiteration until satisfactory completion of the examination phase.

The CSSF will inform the applicant when the examination phase is completed and invite the applicant to submit final and signed-off versions of all compulsory documents.

At this point, the CSSF no longer allows changes in the scope or alterations in the last draft versions of the constitutive documents on the basis of which the examination has been terminated.

3. Entry of the SIF on the official list

The CSSF keeps official lists of the SIFs authorised in Luxembourg and subject to its supervision. Upon satisfactory receipt of all prospectuses and compulsory documents as requested, the CSSF will proceed to the registration of the SIF on the official list.

In parallel, the CSSF will issue the official accreditation letters and the CSSF identification codes. The CSSF will register the documentation and return an electronic visa-stamped version of the offering document.

The replacement of the management company, the AIFM (if applicable), investment manager or depositary, as well as any amendment to the articles of incorporation or management regulations or offering document of the SIF are subject to prior approval by the CSSF.

Investment restrictions

The investment restrictions are not onerous. Some risk diversification is required, and consequently a maximum of "in principle" 30% of the assets (there is some flexibility) can be invested in a single investment. Participation in a SIF is only open to "well-informed investors", i.e. institutional, professional investors or high-net-worth individual investors who are investing at least EUR 125,000 or who can provide a bank confirmation of suitable experience, and confirmed in writing that he/she adheres to the status of well-informed investor.

Minimum capital requirements

The minimum asset base of a SIF is EUR 1.25 million. This amount has to be reached within the 12 months following SIF authorisation. Debt financing of the real estate is not restricted. SIFs can have various sub-funds, and can issue different classes of shares. Units or shares issued by each of the sub-funds may have different values, representing specific pools of assets and liabilities.

Pros

- The SIF is the most flexible fund vehicle and uses the well-known Luxembourg fund types (FCP, SICAV).
- Use of the SCA legal form allows fund managers to exercise strong influence.
- Low tax leakage and scope for optimisation of carried interest.

Cons

- Requirement to use a depositary, although the duties of the depositary in case of non-AIF SIFs are less severe than for SIF-AIFs.
- Subscription tax expense.
- An AIFM license may be required to manage the SIF.

Luxembourg
SICAR

Background

The SICAR law of 15 June 2004 introduced the SICAR (*Société d'Investissement en Capital à Risque*) form of investment vehicle, which has enjoyed some popularity as a vehicle exclusively dedicated to investments in risk capital, and only available to well-informed investors.

Legal form

A SICAR is an investment company in risk capital for private equity and venture capital funds. A SICAR can be set up under the legal form of a partnership, or of a corporation. Various legal forms are available:

- a public limited company (SA);
- a limited liability company (Sàrl);
- a cooperative in the form of a public limited company (SCSA) (rarely used);
- partnership limited by shares (SCA);
- a limited partnership (*Société en Commandite Simple* - SCS) (rarely used);
- a special limited partnership (*Société en Commandite Spéciale* - SCSp) (newly created).

Tax status

The limited partnership and special limited partnership are transparent for tax purposes; consequently, there is no taxation at the level of the fund. The other legal forms are fully taxable, although the income (including interest), which is connected with investments in risk bearing capital, is tax-exempt. All other income is subject to corporate income tax and municipal tax at an aggregate effective tax rate (in Luxembourg City) of 29.22% for 2016. The aggregate effective tax rate (in Luxembourg City) is planned to be reduced to 27.08% for fiscal year 2017 and to 26.01% in 2018.

Treatment of investors

Investors in both SCS and SCSp type SICAR are deemed to receive their income pro rata to their participations in the fund. For investors investing in SICARs in other legal forms, the tax treatment depends on the rules applicable in the country of their residence.

Withholding tax

Distributions by a SICAR, whether paid to resident or non-resident investors, are not subject to any Luxembourg withholding tax.

Other taxes

A SICAR is not subject to annual subscription tax. As from 2016, SICARs are subject to minimum net wealth tax amounting to EUR 3,210 in and as from fiscal year 2017, EUR 4,815.

SICARs are regarded as VAT taxable persons performing VAT-exempt activities and are in principle not entitled to recover the input VAT incurred on their costs, except in specific cases. Management of SICARs is VAT-exempt. The exemption covers main functions such as strategic management of portfolio fund accounting and administrative management of the assets of the SICAR, where the place of taxation of these services is Luxembourg. Placement of SICARs' units/share is generally VAT-exempt. Services that cannot benefit from a VAT exemption are generally subject to 17% VAT, the lowest rate within the EU. Supervision functions of the depositary bank are subject to 14% VAT. SICARs are not required to register for VAT in Luxembourg unless they receive taxable services from abroad, for which they have to self-account for Luxembourg VAT under the reverse-charge mechanism and/or if they carry out intra-Community acquisitions of goods in Luxembourg under certain conditions.

Treaty status

SICARs having the form of SA, Sàrl, SCA, or SCSA, should generally be entitled to tax treaty benefits; however, this has to be reviewed on a case-by-case basis as some countries may challenge treaty access. There is no access to most tax treaties for partnerships, and SCS/SCSp-type SICARs are not differentiated.

Regulation

A SICAR is subject to regulation by the CSSF.

Requirements for authorisation

For a SICAR to carry out its activities in Luxembourg, it has to be authorised by the CSSF. The CSSF will ensure that the SICAR meets the requirements of the SICAR law. In particular, the investment strategy will be a central element of the CSSF review in order to analyse its qualification as investment in risk capital, defined as the investment of assets to entities in view of their launch, development or listing on a stock exchange.

SICARs governed by Part II of the SICAR Law qualify as AIFs under the AIFM Law and must be managed by an authorised AIFM, either externally or internally.

SICARs that do not qualify as AIFs under the AIFM Law are not impacted by the AIFM Law and will remain subject, to a large extent, to requirements similar to those under the SICAR regime prior to the AIFM Law.

The directors of a SICAR must be of sufficiently good reputation and have enough experience in consideration of the investment policy of the SICAR concerned.

A depositary and a central administrator located in Luxembourg and supervised by the CSSF, are required.

Luxembourg
SICAR (continued)

For SICARs that qualify as AIFs whose investors have no redemption rights for five years from the date of their initial investment, and which generally do not invest in assets that must be held in custody, the depositary may also be an entity which:

- carries out depositary functions as part of professional or business activities,
- is subject to mandatory professional registration recognised by law, to legal or regulatory provisions or to rules of professional conduct, or
- can furnish sufficient financial and professional guarantees.

An approved statutory auditor must audit the annual accounts of the fund.

The authorisation process with the CSSF to set up a new SICAR follows the same steps as for a SIF.

The replacement of any agent (depositary, central administration, approved statutory auditor, AIFM), as well as any amendment to the instruments of incorporation of the SICAR are subject to approval by the CSSF.

Investment restrictions

SICARs are, by definition, exclusively dedicated to investments in risk capital. As a result, a SICAR does not have to comply with any kind of risk diversification requirement. A SICAR may, in principle, invest 100% of its assets in only one target investment. The CSSF accepts that real estate investments are “risk” assets for SICAR purposes so long as they are held via property-owning companies and have the potential to generate significant development or exit gains (i.e. are “opportunistic” profile investments).

Minimum capital requirements

The subscribed share capital must be not less than EUR 1 million, and must be reached within the 12 months following CSSF authorisation. The share capital must then be fully subscribed, but only 5% needs to be paid-up. There are no requirements for legal reserves.

Pros

- No investment restrictions, only one investment allowed.
- The SICAR is a flexible, tax-neutral and tailored lightly regulated fund.
- Compared to publicly distributed UCIs, SICARs are subject to “lighter” regulation by the CSSF.

Cons

- Some countries challenge treaty access, or withholding tax reductions under local law (although Luxembourg accepts that these apply to Luxembourg participations held by a SICAR).
- Only available for “opportunistic” real estate funds.
- The SICAR may fall under the AIFM Law and therefore may need an AIFM.

Luxembourg
RAIF – FCP, SICAV, SICAF

Background

On 18 July 2016, the Luxembourg parliament adopted a law (the "RAIF Law"), creating a new investment structure, under the name Reserve Alternative Investment Fund ("RAIF"). The RAIF is similar to a SIF from an investment policy and tax perspective but is exempt from the CSSF's authorisation and supervision requirements.

Legal form

The RAIF regime is available for FCPs (Fonds Commun de Placement) with a management company; for SICAVs (Société d'Investissement à Capital Variable) and for SICAFs (Société d'Investissement à Capital Fixe). Both the SICAV and the SICAF may choose from a number of legal forms – the limited liability company (Société à responsabilité limitée - Sàrl), the public limited company (SA) or the newly introduced simplified public limited company (Société anonyme simplifiée - SAS), the (commonly used) partnership limited by shares (SCA), or simple partnership with legal personality (Société en Commandite Simple – SCS) or special limited partnership without legal personality (Société en Commandite Spéciale - SCSp), or the cooperative in a form of a public limited company (Société coopérative organisée sous forme de société anonyme – SCSA).

Tax treatment at entity level

The RAIF vehicle is exempt from corporate and municipal business tax, as well as from net wealth tax, irrespective of its legal form. Dividends received, capital gains realised and other income received are outside the scope of taxation.

Treatment of investors

The tax treatment of investors depends on the rules applicable in their country of residence. Some jurisdictions may treat the FCP form as tax-transparent.

Withholding tax

Distributions by a Luxembourg RAIF, whether paid to resident or non-resident investors, are not subject to any Luxembourg withholding tax.

Other taxes

RAIFs are normally subject to 0,01% subscription tax (levied on the Net Asset Value of the fund – with some exemptions available) and are not subject to any other Luxembourg taxes (e.g. Corporate Income and Municipal Business taxes as well as Net Wealth Tax). Exemptions from subscription tax apply to RAIFs, whose securities are reserved for institutions for occupational retirement pension or investment vehicles dedicated to fund employment retirement benefits.

By exception, RAIFs that invest exclusively into risk capital related securities may opt for a tax regime similar to the tax regime of a SICAR (i.e. taxable for Corporate Income and Municipal Business taxes, but with an exemption for income related to risk capital securities). Under this regime, RAIFs are subject to the minimum Net Wealth Tax. The combination of these two different tax regimes should not be possible within a same legal entity having different compartments.

Management of RAIFs is VAT-exempt. The exemption covers main functions such as strategic management of portfolio, fund accounting and administrative management of the assets of the RAIF, where the place of taxation of these services is Luxembourg. Placement of RAIFs' units/share is generally VAT-exempt. Services that cannot benefit from a VAT exemption are generally subject to 17% VAT. The RAIFs are generally regarded as VAT taxable persons performing VAT-exempt activities and will therefore in principle not be entitled to recover the input VAT incurred on their costs. In that case, RAIFs are not required to register for VAT in Luxembourg, unless they receive taxable services from abroad, for which they have to self-account for Luxembourg VAT under the reverse-charge mechanism and/or if they carry out intra-Community acquisitions of goods under certain conditions.

Treaty status

For the FCP form, there is no access to the double tax treaty network. SICAVs and SICAFs should have access to Luxembourg double tax treaties with more than 40 countries, as defined in a Circular issued by the Luxembourg tax authorities in February 2015. For all of the legal forms, there is no access to the EU Parent-Subsidiary Directive.

Regulation

The RAIF itself is not subject to any regulation, but must appoint a fully licenced AIFM, which itself is fully subject to the regulations of its country of domiciliation (EU).

Requirements for authorisation

RAIFs are not subject to either CSSF authorisation or supervision.

A RAIF generally needs to appoint the following service providers:

1. AIFM authorised in any EU jurisdiction
2. Luxembourg based depositary, which also needs to be AIFMD compliant
3. Luxembourg based Central Administrator
4. Luxembourg based external auditor (*Réviseur d'entreprises*)

The AIFM may delegate portfolio management to an entity duly licensed for portfolio management in its country of residence. The portfolio manager must be regulated and subject to prudential supervision, or, if established in a third country, cooperation between the CSSF and the supervisory authorities of the respective country must be ensured. The investment management function shall not be delegated to the depositary.

Investment restrictions

The investment restrictions depend on whether the RAIF has been established with a SIF-type or a SICAR-type corporate purpose.

1. For SIF-type RAIFs, the investment restrictions are identical to those applicable to SIFs. This means that there is no restrictions on the type of assets, however investments are "in principle" subject to a 30% diversification requirement (there is some flexibility).
2. For SICAR-type RAIFs, the restrictions applicable to SICARs will find also application. This means there is no diversification requirement and that the company may in principle invest 100% of its capital in a single asset.

Luxembourg
RAIF – FCP, SICAV, SICAF (continued)

Eligible investors

Participation in either SIF-type or SICAR-type RAIFs is only open to "well-informed investors", i.e. institutional, professional investors or high-net-worth individual investors who are investing at least EUR 125,000 or who can provide a bank confirmation of suitable experience, and confirmed in writing that he/she adheres to the status of well-informed investor.

Minimum capital requirements

The minimum asset base of a RAIF is EUR 1.25 million. This amount has to be reached within the 12 months following the RAIF establishment. RAIFs can have various sub-funds, and can issue different classes of shares. Units or shares issued by each of the sub-funds may have different values, representing specific pools of assets and liabilities.

Pros

- Fund establishment and prospectus amendments require no CSSF approval and can, therefore, be carried out in a very short time frame.
- Since it is managed by an authorised AIFM, the RAIF benefits from the marketing passport (applies only to SIF-type RAIFs).

Cons

- Appointment of a fully authorised AIFM can be costly, especially for a fund that falls under the "de minimis threshold", according to article 3.2 of the AIFMD

Luxembourg
Securitisation Vehicle

Background

The Luxembourg Securitisation law of 22 March 2004 provides a flexible legal framework for workable structures at reasonable cost. Securitisation works by grouping together assets with predictable cash flows, or rights to future income streams (such as mortgages, loans), and turning them into bond-style securities that are then sold to investors.

Legal form

Securitisation is a type of structured financing in which a pool of financial assets is transferred from an originating company to a special purpose vehicle (SPV).

A Securitisation vehicle can be organised in corporate forms, such as a public limited company (SA), a limited liability company (Sàrl), a cooperative in the form of a public company (SCSA), or a partnership limited by shares (SCA), as well as in a purely contractual form as a securitisation fund (FCP co-ownership).

Tax status

Securitisation vehicles organised as corporate entities are fully liable to corporate income tax and municipal business tax at the effective rate (in Luxembourg City) of 29.22% for 2015. The aggregate effective tax rate (in Luxembourg City) is planned to be reduced to 27.08% for fiscal year 2017 and to 26.01% in 2018.

Tax treatment at entity level

Dividends received, capital gains realised and other income received is taxable. However, under the Securitisation law, all commitments of a Securitisation company to remunerate investors (as well as other creditors) in respect of bonds or shares, qualify as interest on debts, even if paid as return on equity. Hence, all such outgoings are fully tax-deductible. The resulting tax neutrality is one of the key success factors of Luxembourg securitisation structures.

Treatment of investors

The tax treatment of investors depends on the rules applicable in their country of residence.

Withholding tax

Distributions made by a Securitisation vehicle, whether paid to resident or non-resident investors are not subject to any Luxembourg withholding tax.

Other taxes

No annual subscription tax, and only minimum net wealth tax are levied on a Securitisation vehicle. Securitisation vehicles are regarded as VAT taxable persons performing VAT-exempt activities and are in principle not entitled to recover the input VAT incurred on their costs, except in specific cases. Management of securitisation vehicles is VAT-exempt. The exemption covers main functions such as strategic management of portfolio, fund accounting and administrative management of the assets of the securitisation vehicle, where the place of taxation of these services is Luxembourg. Placement of Securitisation vehicles' units/share is generally VAT-exempt. Services that cannot benefit from a VAT exemption are generally subject to 17% VAT, the lowest rate within the EU. Securitisation vehicles are not required to register for VAT in Luxembourg unless they receive taxable services from abroad, for which they have to self-account for Luxembourg VAT under the reverse-charge mechanism and/or if they carry out intra-Community acquisitions of goods in Luxembourg under certain conditions.

Treaty status

Generally the Securitisation vehicle having corporate forms should be entitled to double tax treaty benefits and access to EU Directives; however, this has to be reviewed on a case-by-case basis as some countries may challenge this.

Regulation

Securitisation vehicles are, in principle, unregulated. Only Securitisation vehicles that issue securities to the public on a continuous basis (usually interpreted as being more than three times per year) fall under the supervision and regulation of the CSSF. Offers to institutional investors and private placements do not constitute a "public offer".

Requirements for authorisation

Where required, the CSSF has to approve the articles of incorporation or management regulations (subject to the provisions of the Securitisation law) of the Securitisation vehicle and, if necessary, authorise the management company.

Securitisation companies and management companies of Securitisation funds must have an adequate organisation and adequate resources to exercise their activities. The directors of the Securitisation vehicle must be of good repute and have adequate experience.

Authorised Securitisation vehicles need to entrust the custody of their liquid assets and securities with a credit institution established or having its registered office in Luxembourg and an approved statutory auditor must audit their annual accounts.

Investment restrictions

Investment in the SPV is possible for all types of investors. There are no investment restrictions or risk diversification requirements for the vehicle.

Minimum capital requirements

The minimum amount of investment is the fixed capital, which, depending on the legal form, is EUR 12,000 or EUR 30,000. Securitisation vehicles offer the possibility of creating several compartments/classes of shares within one legal entity.

Pros

- The SPV is a tax-efficient and highly flexible fund vehicle.

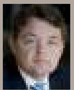
Cons

- Not suitable for direct investments in real estate.

The Netherlands

- *Transparent Funds (CV/FGR)*
- *Fiscal Investment Institutions (FBI)*

Contacts



Jeroen Elink Schuurman
+31 88 792 64 28
jeroen.elink.schuurman@nl.pwc.com

Serge de Lange
+31 88 792 63 90
serge.de.lange@nl.pwc.com

The Netherlands
Transparent Funds (CV/FGR)

Background

The Netherlands has two forms of tax transparent investment fund vehicles that are used for real estate investments. These are the limited partnership (*Commanditaire Vennootschap* or CV) and the mutual fund (*Fonds voor Gemene Rekening* or FGR). The CV and FGR may be closed or open-end funds and, as such, are not necessarily meant to be used as widely held funds.

Legal form

The CV and FGR are contractual arrangements without legal personality, that are based on a contract between the General and Limited Partners (in the case of a CV) or between the Manager and investors (in the case of the FGR). Legal title to the fund's assets is typically held by a separate custodian.

Tax status

If constituted properly, an FGR or CV is not recognised as a taxable person for Dutch corporate income tax purposes.

Tax treatment at entity level

A transparent FGR or CV is not subject to corporate income tax.

Treatment of investors

The FGR or CV are ignored for Dutch corporate income tax purposes, consequently all assets and liabilities, as well as profits and losses are directly allocated to the investors. The income retains its underlying qualification for Dutch tax purposes (for instance as rental income, capital gains, dividends or interest).

Withholding tax

No withholding tax is levied on distributions and interest payments made by the tax-transparent fund.

Treaty status

Transparent funds have no treaty access and are not eligible for EU Directives.

Treaty benefits may apply to investors in the fund in relation to investments held by the fund (i.e. look-through approach). Some Competent Authority Agreements have been concluded with, for instance, Canada, the UK, Denmark, Norway, Spain and the US, which make this approach explicit.

Filing obligations

No income tax filing obligations apply at fund level.

Regulation

Managers of Dutch fund vehicles are in principle subject to regulation based on the Dutch investment supervision law *(Wet op het financieel toezicht)* in which the AIFMD has been implemented. The regulatory authority is the *Autoriteit Financiële Markten.*

Requirements for authorisation

In order to qualify as tax transparent for Dutch tax purposes, certain conditions must be met.

An FGR is considered transparent in case the participation rights in the fund are not freely transferrable. The participation rights are not freely transferable when:

1. the disposal of participation rights can only take place with the prior consent of all participants ("unanimous consent model"); or
2. the participation rights in the fund can only be disposed of to the fund itself by means of redemption or to relatives connected by blood or affinity in the direct line of the investor/participant in the fund ("redemption model").

A CV is transparent when the prior consent of all partners is required for the admission or replacement of limited partners.

The requirements for admission of partners and transfer of participations rights should be clearly adopted in the fund agreement. The fund agreement may provide that unanimous consent is deemed to be given: when unanimous consent is requested to the partners or participants of the fund; and within four weeks after such request was made to all partners or participants and none of them has objected to the proposed admission or transfer.

Investment restrictions

None.

Minimum level of investment

None.

Pros

- A transparent fund is not subject to tax at the fund level.
- There is no dividend withholding tax on distributions made by the fund.
- No specific requirements with respect to investors in the fund.
- The fund itself has low costs of establishment, and can be implemented relatively quickly.

Cons

- The fund vehicle has no access to treaty benefits and EU Directives, although some Competent Authority Agreements have been concluded to confirm the look-through treatment for tax treaty purposes.
- The fact that participation rights cannot be freely traded restricts the liquidity of the investment in the fund.

The Netherlands
Fiscal Investment Institutions (FBI)

Background

Fiscal Investment Institutions (*Fiscale beleggingsinstellingen* or FBIs) are open or closed-end funds, used for passive investments. The purpose of the FBI regime is to create tax neutrality for investors that prefer to (collectively) invest.

Legal form

The regime for FBIs is available to Dutch resident Public Limited Liability Companies (NV), Private Limited Liability Companies (BV) and non-transparent mutual funds (FGR). An FGR must qualify as a taxable entity for Dutch corporate income tax purposes, i.e. not treated as a tax transparent FGR. In addition, similar entities established under the laws of Aruba, the BES Islands (Bonaire, St. Eustatius and Saba), Curaçao, St. Maarten, EU Member States or states with which The Netherlands has concluded a double tax treaty that contains a non-discrimination provision for companies may also qualify for the FBI regime provided certain conditions are met.

Tax status

Entities eligible for the FBI regime are taxable persons for Dutch corporate income tax purposes. The FBI is therefore not treated as tax transparent. Income from investment is perceived as income of the FBI itself.

Tax treatment at entity level

The FBI is subject to corporate income tax at a rate of 0%.

Treatment of investors

Dutch entities and individuals are subject to (corporate) income tax on dividends and capital gains derived from the shares held in the FBI.

Non-resident corporate investors with an interest of at least 5% in the FBI (so-called substantial interest holders) may be subject to Dutch corporate income tax on dividends, capital gains and interest derived from that FBI. This should only be the case if the investment in the FBI is held with the purpose or one of the main purposes to avoid dividend withholding tax or income tax. In practice, this rule should not often apply to investors in an FBI.

Non-resident private individuals with an interest of at least 5% are subject to Dutch income tax on dividends, capital gains and interest derived from the FBI. Tax treaties may limit The Netherlands' right to tax non-resident shareholders of an FBI.

Withholding tax

The FBI is obliged to withhold dividend withholding tax at a rate of 15%, unless a double tax treaty applies that provides for a reduced tax rate. The exemption of dividend withholding tax pursuant to the EU Parent-Subsidiary Directive is not applicable to the FBI. If Dutch or foreign withholding tax was due on income derived by the FBI, this withholding tax may under circumstances be credited against the withholding tax liability on dividends distributed by the FBI.

Capital gains can be allocated to a special reinvestment reserve. Distributions out of the reinvestment reserve are exempt from dividend withholding tax.

Treaty status

Generally speaking, the FBI is eligible to the benefits of double treaties. The EU Parent-Subsidiary Directive is not applicable to an FBI.

Filing obligations

The FBI is obliged to file a corporate income tax return.

Regulation

If the FBI is an AIF, its manager may be required to obtain an AIFMD license from the *Autoriteit Financiële Markten*.

Requirements for authorisation

For tax purposes, the following general conditions are relevant.

Shareholder/investor restrictions

For the purpose of the shareholder/investor restrictions, a distinction is made between listed or licensed FBIs (regulated FBI) and other FBIs (private FBI). A licensed FBI is an FBI managed by a manager under an AIFMD license.

Regulated FBI

- No single entity that is subject to tax on its profits (or the profits of which are subject to tax at the level of the shareholders/participants of such entity) may, together with related entities, own 45% or more of the shares in the FBI.
- A director or more than half of the members of the supervisory board may not be a, director or member of the supervisory board or employee of an entity which holds (alone or together with related parties) 25% or more of the shares in the FBI unless such entity is a regulated FBI.
- A single individual may not hold an interest of 25% or more.
- Only up to 25% of the shares may be held by Dutch corporate entities through the interposition of foreign entities.

Private FBIs

- At least 75% of the shares need to be held by

  - private individuals; and/or

  - entities that are not subject to a taxation on their profits or are exempt from tax and the profits of which entities are not subject to tax at the level of the shareholders/participants of such entities; and/or

  - regulated FBIs.
- No individual may hold a substantial interest (which broadly means a direct or indirect interest of 5% or more) in the FBI.

The Netherlands
Fiscal Investment Institutions (FBI) (continued)

Investment restrictions

- The statutory purpose, as well as the actual activities of the FBI must consist solely of passive investment activities.
- Investment activities may include any type of investment including real estate or investments of a financial nature (such as loan notes, shares or other securities).
- Activities such as trading in real estate or real estate development are generally not allowed.
- The FBI is allowed to manage and hold shares in an entity carrying out real estate development activities for this entity itself, for the FBI, or for certain related entities. This development subsidiary is taxed at the regular corporate income tax rate (maximum rate 25%).
- Furthermore, the FBI is allowed to manage and hold shares in a subsidiary providing auxiliary services. As a precondition, the activities of this subsidiary must consist of auxiliary services in connection to the real estate held by the FBI. Examples of such services are conference facilities or promotion services. This services subsidiary is taxed at the regular corporate income tax rate (maximum rate 25%).
- The improvement or expansion, including maintenance of real estate is considered a passive investment activity if the investment in an asset is less than 30% of the community assessment value (*WOZ-waarde*) of such asset.
- Guarantees towards third parties in relation to obligations of subsidiaries and the on-lending of third-party financing to subsidiaries are considered passive investments activities

Distribution requirements

- An FBI is required to distribute its entire taxable profit within eight months following the financial year-end.
- Capital gains do not have to be distributed if they are contributed to a reinvestment reserve.

Minimum level of investment

Not applicable

Pros

- 0% CIT rate.
- Freely transferable shares.
- Can be used as holding and financing vehicle of (foreign) real estate entities.

Cons

- Strict shareholder requirements, unless AIFMD licensed FBI.
- Relatively strict investment restriction.
- Leverage restrictions.

Poland

▶ ***Closed-end investment fund of non-public assets (FIZ)***

Contacts

Sławomir Krempa
+48 519 50 6874
slawomir.krempa@pl.pwc.com

Marta Pabiańska
+48 502 18 4688
marta.pabianska@pl.pwc.com

Poland
Closed-end investment fund of non-public assets (FIZ)

Background

Real estate investments on the Polish market are frequently performed within investment structures comprising Polish closed-end investment fund of non-public assets (FIZ).

Under a FIZ typical structure, FIZ holds shares in a Luxembourg special limited partnership (SCSp) that acts as a limited partner in a tax transparent Polish limited partnership holding the Polish real property.

Alternatively, real estate may be held directly by a FIZ. However, due to certain regulatory restrictions applicable to such investments (in particular, restrictions on acquisition by the FIZ of encumbered real estate or further encumbering the real estate with mortgage), such structures are not very popular. Nevertheless, there has been a growing interest for such structure in recent months, which could be associated, to a certain extent, with the introduction of General Anti Abuse Regulations (GAAR) legislation in Poland in July 2016.

Based on recent announcements, a draft bill aimed at implementing a concept of Real Estate Investment Trust (REIT) in the Polish real estate market is being prepared by the Ministry of Finance. In line with initial guidelines, Polish REITs will be listed public companies meeting certain criteria (including a requirement to distribute a significant percentage of their profits to the investors via dividends). If the above requirements are met, lease rental income and profits from the disposal of the real properties (as well as revenues generated by REITs from the sale of shares in subsidiaries and from dividends obtained by REITs from such subsidiaries) should be CIT exempt in Poland. Progress of the legislation should be closely monitored (draft bill is expected to be provided for consultations shortly).

Legal form

A FIZ has legal personality separate from its participants (investors) and investment fund management company (TFI).

A TFI is a licensed specialised entity being FIZ's statutory governing body. It manages the FIZ's affairs, including representation of the FIZ towards third parties as well as taking care of administration and compliance activities.

The FIZ's assets remain the separate property of the FIZ, separate from the TFI. Within the typical structure, investors are holding the economic interest in the FIZ's investments through investment certificates issued by the FIZ. Technically, investors are no legal owners of the FIZ.

The investors may keep control over the FIZ's activities and investments under the mechanisms stipulated in the Articles of Association of the FIZ and in the cooperation agreement executed between the investors and TFI.

Tax status

A FIZ benefits from full corporate income tax exemption in Poland.

Tax treatment at entity level

Under the FIZ structure, income generated from the Polish real properties (including rental income) is effectively "flowing" through tax transparent vehicles (Polish limited partnership and Luxembourg ScSp) to the FIZ, which is corporate income tax exempt. As a result rental income and capital gains are effectively exempt from Polish corporate income tax.

The only effective corporate income tax leakage in Poland would be a 19% corporate income tax on the income allocated to the general partner of the Polish limited partnership, as well as to the general partner of the Luxembourg ScSp (1% or less).

Treatment of investors

There is no direct allocation of FIZ income to investors. At the same time, investors are not liable for obligations of FIZ.

Profits from the investment may be repatriated to investors through: (i) buy-back of investment certificates, (ii) sale of investment certificates to third parties or (iii) dividend-like distributions of the FIZ's income.

As a rule, distributions from FIZ to the investors are treated as business income/capital gains under domestic Polish law and should be subject to 19% corporate income tax in Poland. However, under the double tax treaties concluded by Poland, investors may benefit from treaty protection, as a result of which they should be subject to taxation in their respective states of residence. Note that treaty protection may not be available in case of the treaties covering a broad "real estate clause" that allows treating FIZ as a real estate rich company. Also, it should be observed that investors in FIZ should not have a permanent establishment in Poland for tax purposes.

FIZ structures are typically implemented with investors having their seat in Luxembourg or in The Netherlands. Such structures are well-tested in the market practice and their tax efficiency has been confirmed by the Polish tax authorities.

Potential impact of new GAAR legislation on the commonly applied FIZ structures is unknown yet, as there were no binding decisions issued by the tax authorities with this respect so far. As such, the risk of applicability of GAAR to FIZ structures should be considered on a case-by-case basis.

Withholding tax

Distributions from FIZ should not fall into the category of dividend-like income either on the grounds of Polish corporate income tax Law or on the grounds of the respective double tax treaty (taking into account their legal and economical nature). As such, they should not be subject to withholding tax in Poland. This aspect requires tax ruling clearance.

Treaty status

A FIZ has access to double tax treaties, but it does not have access to EU directives. Due to its tax exempt status this might be challenged by foreign tax authorities.

Filing obligations

A FIZ is a tax exempt entity and, therefore, should not be subject to any specific tax reporting obligations.

Regulation

Both the FIZ and the TFI are subject to supervision of Polish Financial Supervisory Authority (PFSA). In 2016 AIFMD regulations were implemented into Polish law. Impact of new legislation on existing or new FIZ structures is fairly limited although certain new compliance obligations were introduced (e.g. notification of employees of entities in which the FIZ invests). The new law introduced alternative investment funds legislation as well as regulations on cross border offering of investment certificates in the FIZ.

Poland
Closed-end investment fund of non-public assets (FIZ)

Requirements for authorisation

A FIZ is established by a TFI.

A FIZ needs to appoint an authorised Depositary. Generally a bank subject to supervision of PFSA. The role of the Depositary is, in particular, to maintain the asset register of the FIZ and to supervise flow of funds of the FIZ through its bank accounts. The Depositary should act independently from the TFI in the interest of the investors.

Investment restrictions

The sole business of a FIZ consists of investing funds in assets defined in the Polish Investment Funds Law. In particular, a FIZ may invest in securities (including shares in a Luxembourg SCSp), shares in Polish limited liability companies or foreign currencies.

As regards real estate assets, a FIZ may invest in ownership or co-ownership of land, buildings and premises representing separate real estate or a perpetual usufruct right. FIZ can only acquire real estate that does not serve as collateral and/or is not subject to enforcement. A FIZ can acquire real estate encumbered with third party rights only if the exercise of such rights does not create the risk of a loss of the ownership of such real estate. A FIZ shall not allocate more than 25% of the value of its assets in one real estate asset.

The real estate portfolio held directly by a FIZ may be subject to mortgage only up to 50% of FIZ's net assets. A FIZ may contract loans exclusively from domestic banks, credit institutions and/or foreign banks, provided that their aggregate value doesn't exceed 75% of the fund's net asset value upon conclusion of the loan or credit agreement.

Minimum level of investment

N/A (subject to provisions of the FIZ's Articles of Association).

Pros

- The structure is well known to investors on the Polish real estate market.
- A FIZ may be held by a single investor.
- Due to its regulation, the FIZ is perceived by banks and investors as a safe and reliable platform for investment operations.
- Almost full exemption of Polish corporate income tax on rental income and capital gains.
- Tax free distribution of profits by FIZ to investors resident in selected treaty protected jurisdictions (most typically Luxembourg, The Netherlands or Cyprus).
- The structure allows for high flexibility and tax efficiency on the portfolio disposal (at various levels of the structure) as well as for high flexibility of portfolio shaping (including efficient transfer of assets within the portfolio).

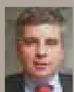
Cons

- Relatively high annual maintenance costs.
- Tax efficiency depending of investor jurisdiction.
- In case of direct real estate investment by a FIZ there are regulatory restrictions on encumbering the property with mortgage.
- Potential applicability of GAAR should be considered on a case-by-case basis.

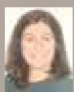
Portugal

- *Fundo de Investimento Imobiliário (FII)*
- *Sociedades de Investimento Imobiliário (SIIMOs)*

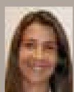
Contacts



Jorge Figueiredo
+351 213 599 618
jorge.figueiredo@pt.pwc.com



Elsa Martins
+351 213 599 627
elsa.silva.martins@pt.pwc.com



Anabela Mendes
+351 213 599 625
anabela.mendes@pt.pwc.com

Portugal
Fundo de Investimento Imobiliário (FII)

Background

In 2015, with the approval of the Law no. 16/2015 of 24 February, several changes in the Collective Investment Vehicles (CIV) regime were made. The law results from the partial transposition of EU Directives 2011/61/UE and 2013/14/UE and is applicable to all CIVs, irrespective of their legal form.

Additionally several substantial changes were introduced on the CIV's tax regime through the Decree-Law no. 7/2015 of 13 January, effective since 1 July 2015. These changes aim to modernise the CIV's tax regime in Portugal, aligning it to its European peers and promoting its international competitiveness. The Decree-Law also foresees a transitional regime applicable to income obtained by the CIV between 1 January and 30 June 2015 and also to capital gains arising from CIV assets acquired before 30 June 2015.

The new CIV's tax regime impacts the *Fundo de Investimento Imobiliário* (FII), which is a common real estate investment vehicle in Portugal. It has been used by both the banking industry and by investors.

Legal form

A FII is a separate and autonomous pool of assets that is jointly owned by its unitholders.

A FII can be an open-end or closed-end. It is established and managed by a management company having as its primary object the managing of one or more CIVs. FIIs securities are entrusted to a depositary that has to be established in Portugal. Among others, the depositary guarantees to investors the fulfilment of the CIV rules, the execution of the instructions given by the management company and pays them the income arising from the securities.

Tax status

In general, income derived from real estate assets held by the FII is not taxed, unless is derived from "offshore" entities. Other income obtained by the FII is taxed at Corporate Income Tax (CIT) level.

Tax treatment at entity level

FII is subject to CIT at the main rate (currently 21%). It is exempt from municipal and state surtaxes, being however subject to autonomous taxation foreseen in the CIT code.

The taxable profit of the FII corresponds to the net income of the period, computed in accordance with the applicable accounting standards. However, for the assessment of taxable profit, the following income/expenses, among others, are disregarded:

- investment income, rental income and capital gains (unless derived from "offshore" entities);
- expenses related to the income referred above;
- income and expenses related to management services, as well as, other commissions reverting to the FII.

FII is also subject to stamp duty, levied on its Net Asset Value (NAV) at 0.0125%, and paid quarterly to the Revenue.

Treatment of investors

The taxation "at exit" rule applies to investors.

Income obtained by resident investors or non-resident with permanent establishments in Portugal is taxed as follows:

- for individuals, income is subject to taxation at Personal Income Tax (PIT) level (generally, at the rate of 28%);
- for entities, income is subject to CIT (being considered in the taxable profit of the investors, taxed at the rate of 21%, plus municipal and state surtaxes, if applicable).

Income obtained by non-resident investors without permanent establishment is taxed at a 10% rate. This regime does not apply – being instead applicable the PIT and CIT rates of 28% and 25% respectively, whenever the investors are tax residents in "offshore" jurisdictions or, as a general rule, are held in more than 25% by tax residents in Portugal.

Withholding tax

The withholding tax treatment of investors depends on the tax status of the investors (i.e. non-resident investors or resident investors, individuals or other entities).

- In case of resident individuals, income distributed by the FII are subject to definitive withholding tax at the rate of 28%. Resident individuals may opt to add that income to the remaining income and subject it to taxation at the progressive rates.
- In case of resident entities, income distributed by the FII is subject to withholding tax at the rate of 25% (this withholding tax works as a payment on account) and should be included in the taxable profit of the year.
- Income obtained by non-resident investors without permanent establishment, as a general rule is subject to a WTH rate of 10%.

Other taxes

general Property Transfer Tax (IMT) rate levied on offices, retail and other commercial property, is 6.5%.

Annual Property Tax (IMI) rates vary, depending on the municipality where the property is located. For urban property the rate varies from 0.3% to 0.45%.

An annual stamp duty at a rate of 1% applies for the ownership of residential property and land for construction intended for residential purposes, with a tax registration value of at least EUR 1,000,000 million.

Treaty status

In principle, a FII has access to treaty benefits.

Filing obligations

CIT due by the FII is assessed in the CIT return (Form Modelo 22), to be filed before the end of May of the following tax year (or of the 5th month following the end of the tax year, if different from the calendar year) and payment should be made until the last day of the deadline foreseen for the submission of the tax return.

Portugal
Fundo de Investimento Imobiliário (FII) (continued)

Stamp duty on the NAV is self-assessed quarterly, in March, June, September and December of each year and is due by the FII before the end of the month following the taxable event.

Periodical financial reports are sent by the management company to the CMVM (*Comissão do Mercado de Valores Mobiliários*), the Portuguese Securities Market Commission.

Regulation

The regulatory authority, the CMVM, supervises the FII. The management company is governed by the banking law, being supervised by the Bank of Portugal and CMVM and is only allowed to manage regulated funds.

Requirements for authorisation

Authorisation for setting up a FII is granted by the CMVM, upon the request of the Management Company.

Investment restrictions

There are several investment restrictions for FIIs, imposed by risk diversification rules. Eligible assets are urban real estate, real estate rights in rem, and shares in real estate companies (subject to further restrictions), investment units in real estate funds, and cash and other instruments. Also, the composition of the portfolio is subject to certain restrictions.

Restrictions for open-ended funds, among others:

(i) eligible real estate assets have to represent at least two thirds of the total assets;

(ii) one single real estate asset can't represent more than 20% of the total assets; and

(iii) the fund leverage can't exceed a maximum of 25% of the total assets.

Conversely, the requirements are not so strict for close-ended funds. For instance, for privately placed close-ended funds with no more than five investors who are not exclusively institutional investors, or with more than five institutional investors, from the restrictions listed above only restriction (i) applies.

Minimum level of investment

Upon 12 months of activity, the NAV of the FII should amount to EUR 5,000,000.

Pros

- A relevant part of FII's income is not actually taxed.
- Non-resident investors benefit from a favorable tax regime.
- Privately placed closed-end FIIs have a more flexible portfolio composition and leveraging rules.

Cons

- FII are fully subject to property taxes (IMT and IMI).

Portugal
Sociedades de Investimento Imobiliário (SIIMOs)

Background

The *Sociedades de Investimento Imobiliário* (SIIMOs) were introduced in June 2010. They are regulated real estate investment vehicles for real estate. Although the regime has been in place for more than six years, Portuguese SIIMOs haven't been used very much by investors in Portugal, meaning there's little practical experience with them.

Both FIIs and SIIMOs follow the same tax regime.

Legal form

SIIMOs are Collective Investment Vehicles (CIV) adopting the legal form of a joint stock company (*sociedade anónima*), which can either be a fixed capital company (SICAFI), or a variable capital company (SICAVI). They can be self-managed, or managed by an independent management company. SIIMOs shares are entrusted to a depositary which has to be established in Portugal. Among others, the depositary guarantees to investors the fulfilment of the CIV rules, the execution of the instructions given by the management company and the payment of the income arising from the securities to the investors.

Tax status

In general terms, income derived from assets held by SIIMOs is not taxed, unless is derived from "offshore" entities. The income obtained by SIIMOs is taxed at Corporate Income Tax (CIT) level.

Tax treatment at entity level

SIIMOs are subject to CIT at the main rate (currently 21%). They're exempt from municipal and state surtax, but subject to autonomous taxation foreseen in the CIT code.

The taxable profit of SIIMOs corresponds to the net income of the period, computed in accordance with the applicable accounting standards. However, for the purposes of assessment of taxable profit, the following income/expenses, among others, are disregarded:

- investment income, rental income and capital gains (unless derived from "offshore" entities);
- expenses related to the income referred above;
- income and expenses related to management fees and other commissions reverting to the SIIMO.

SIIMOs are also subject to stamp duty levied on its Net Asset Value (NAV) at 0.0125% and paid on a quarterly basis.

Treatment of investors

The taxation "at exit" rule applies to investors.

Income obtained by resident investors or non-resident with permanent establishments in Portugal is taxed as follows:

- for individuals, income is subject to taxation at Personal Income Tax (PIT) level (generally, at the rate of 28%);
- for entities, income is subject to CIT (being considered in the taxable profit of the investors, taxed at the rate of 21%, plus municipal and state surtaxes, if applicable).

Income obtained by non-resident investors without permanent establishment is taxed at a 10% rate. This regime does not apply - and instead the PIT and CIT rates of 28% and 25% respectively apply, whenever the investors are tax residents in "offshore" jurisdictions or, as a general rule, are held in more than 25% by tax residents in Portugal.

Other taxes

The general Property Transfer Tax (IMT) rate levied on offices, retail and other commercial real estate is 6.5%.

Annual Property Tax (IMI) rates vary depending on the municipality where the real estate is located. For urban property, the rate varies from 0.3% to 0.45%.

SIIMOs are subject to annual stamp duty at a rate of 1% in the ownership of residential property and land for construction intended for residential purposes, with a tax registration value of at least EUR 1,000,000.

Withholding tax

The withholding tax (withholding tax) treatment of investors depends on the tax status of the investors (i.e. non-resident investors or resident investors, individuals or other entities).

- In case of resident individuals, income distributed by the SIIMO are subject to definitive withholding tax at the rate of 28%. Resident individuals may opt to add that income to the remaining income and subject it to taxation at the progressive rates.
- In case resident entities, income distributed by the SIIMO is subject to withholding tax at the rate of 25% (this withholding tax works as a payment on account) and should be included in the taxable profit of the year.
- Income obtained by non-resident investors without permanent establishment, as a general rule is subject to a WTH rate of 10%.

Treaty status

In principle, SIIMOs have access to treaty benefits.

Filing obligations

CIT due by the SIIMOs is assessed in the CIT return (Form *Modelo 22*), to be filed before the end of May of the following tax year (or of the 5th month following the end of the tax year, if different from the calendar year) and payment should be made until the last day of the deadline foreseen for the submission of the tax return.

Stamp duty on the NAV is self-assessed quarterly, in March, June, September and December of each year and is due by the SIIMO before the end of the month following the taxable event.

Periodical financial reports are sent by the management company to the CMVM (*Comissão do Mercado de Valores Mobiliários*), the Portuguese Securities Market Commission.

Regulation

The regulatory authority, CMVM, supervises the SIIMOs. The management company, if any, is governed by the banking law, being supervised by the Bank of Portugal and CMVM and only allowed to manage regulated funds.

Requirements for authorisation

Authorisation for setting up a SIIMO is granted by the CMVM.

Investment restrictions

These matters fall under the same rules that apply for FIIs. In principle, SIIMOs in the form of SICAVI follow the same regime of the open-ended FIIs, and the form of SICAFIs, follow that of the closed–end, unless otherwise ruled.

Portugal
Sociedades de Investimento Imobiliário (SIIMOs) (continued)

Minimum level of investment

At incorporation, the minimum capital required for SIIMOs self-managed managed is EUR 300,000. Upon 12 months of activity, the NAV of the SIIMOs should amount to EUR 5,000,000.

Pros

- A relevant part of SIIMOs' income is not actually taxed.
- Non-resident investors benefit from a favorable tax regime.
- SIIMOs can be self-managed (not requiring a management company), which can be an advantage in certain situations.
- SICAFI may have a flexible portfolio composition and leveraging rules.

Cons

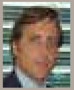
- SIIMOs are subject to property taxes (IMT and IMI).

Spain

▶ ***Fondo de Inversión Inmobiliaria (FII)***

▶ ***Sociedad de Inversión Inmobiliaria (SII)***

Contacts



Antonio Sánchez
+34 91 568 56 15
antonio.sanchez.recio@es.pwc.com

José L. Lucas
+34 91 568 56 07
jose_luis.lucas.chinchilla@es.pwc.com

Spain
Fondo de Inversión Inmobiliaria (FII)

Background

The *Fondo de Inversión Inmobiliaria* (FII) is one of the two categories of Real Estate Collective Investment Institutions (non-financial nature) available in Spain. Its exclusive purpose is the acquisition of properties for renting. An FII is a regulated investment vehicle and its implementation requires the prior approval of the CNMV (*Comisión Nacional del Mercado de Valores*)

Legal form

A Spanish Real Estate Investment Fund is a collective investment institution with no legal personality. The fund is managed by a management company known as SGIIC. The SGIIC is a regulated Spanish public limited company (S.A.) with effective head office in Spain. Assets are entrusted to a depository bank.

Tax status

The fund is considered a taxpayer for corporate income tax purposes.

Tax treatment at entity level

Income is taxed at 1%, subject to several requirements. Excess of withholding tax borne is refundable.

Capital gains are taxed at 1% provided that the asset is held for a period of at least three years.

Other tax benefits may be applicable.

Treatment of investors

Capital gains are taxable upon transfer or redemption of units. Taxation at the level of investors shall be in accordance with their personal tax status.

Withholding tax

Capital gains are subject to 19.5% (19% from 2016 onwards) withholding tax but this may be reduced by double tax treaties.

Treaty status

From a Spanish tax perspective, treaty access should be granted to the fund.

Filing obligations

The FII is required to file an annual corporate income tax return, as well as withholding tax returns.

Regulation

The fund is subject to CNMV (*Comisión Nacional del Mercado de Valores*) regulatory supervision.

Requirements for authorisation

SGIIC needs prior regulatory approval by the CNMV in order to set up the fund.

Investment restrictions

The fund has to invest in accordance with the principles of risk spreading as detailed in legislation. At least 80% of the assets must comprise of eligible real estate for lease, and 10% must be liquid assets. Shareholdings in real estate entities are limited to maximum 15% of total assets. Real estate assets require a minimum holding period of three years.

Minimum level of investment

Minimum investment of EUR 9 million. There is no minimum legal requirement on the investment amount for the investors, unless otherwise provided in the prospectus.

Pros

- Income taxable at 1% at fund level vs. 25% standard corporate income tax rate.
- The fund should be entitled to double tax treaties.

Cons

- Subject to supervision authorities as a regulated collective investment institution.
- Need for a regulated Spanish management company.
- Minimum of 100 investors.

Spain
Sociedad de Inversión Inmobiliaria (SII)

Legal form

A Spanish Real Estate Investment Company (SII) is a collective investment institution with legal personality. The SII is a regulated public limited company (S.A.) with effective head office in Spain.

Tax status

The SII is considered a taxpayer for corporate income tax purposes.

Tax treatment at entity level

Income is taxed at 1%, subject to several requirements. Excess of withholding tax borne is refundable.

Capital gains are taxed at 1% provided that the asset is held for a period of at least three years.

Other tax benefits may be applicable.

Treatment of investors

Dividends and capital gains are taxable at the level of investors, depending on their tax status.

Withholding tax

Dividends and capital gains are subject to 19.5% (19% from 2016 onwards) withholding tax, but this may be reduced by double tax treaties and EU Directives.

Treaty status

The vehicle is entitled to double tax treaty benefits and has access to EU Directives.

Filing obligations

The SII is required to file an annual corporate income tax return as well as withholding tax returns.

Regulation

The SII is subject to CNMV (*Comisión Nacional del Mercado de Valores*) regulatory supervision.

Requirements for authorisation

Prior regulatory approval by the CNMV is necessary.

Investment restrictions

The SII has to invest in accordance with the principles of risk spreading as detailed in legislation. At least 80% of the assets must comprise eligible real estate for lease, and 10% must be liquid assets. Shareholdings in real estate entities are limited to a maximum 15% of total assets. Real estate assets require a minimum holding period of three years.

Minimum level of investment

Minimum share capital of EUR 9 million. There is no minimum legal requirement on the investment amount for the investors, unless otherwise provided in the prospectus.

Pros

- Income taxable at 1% at SII level vs. 25% standard corporate income tax rate.
- There is access to double tax treaties and EU Directives.

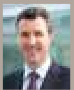
Cons

- Subject to supervision authorities as a regulated collective investment institution.
- Minimum of 100 shareholders.

Switzerland

▶ **Swiss Collective Investment Schemes**

Contacts



Victor Meyer
+41 58 792 43 40
victor.meyer@ch.pwc.com

Switzerland
Swiss Collective Investment Schemes

Background

The legislation regarding collective investments (Collective Investment Schemes Act, "*Bundesgesetz über die kollektiven Kapitalanlagen*") came into force on 1 January 2007. There have been several amendments that came into force on 1 March 2013. In addition, the Swiss Federal Tax Administration published Circular Letters No. 24 and 25 (issued in January and March 2009), providing additional information on its tax practice regarding collective investment schemes.

Legal form

A real estate fund is a "collective investment scheme" and can appear in different forms. Real estate can be held directly or indirectly by a SICAV (investment companies with variable capital), a SICAF (investment companies with fixed capital), a contractual collective investment fund (FCP or "*vertraglicher Anlagefonds*") and a KGK (limited partnership for collective capital investments).

The subsequent comments are mainly based on the legal forms of SICAV and FCP. Switzerland does not have a REIT regime and KGKs holding real estate are not yet very common.

Tax status

Collective investment schemes are generally considered transparent for tax purposes. The only exemptions are the SICAF (which is regarded as a taxable entity) and the collective investment schemes (such as SICAV and FCP) holding direct real estate investments.

Tax treatment at entity level

Generally, FCPs and SICAVs are considered as transparent for tax purposes. An exception to this rule occurs where a generally transparent collective investment scheme directly holds real estate. In such a case, income derived from Swiss real estate is subject to a preferential statutory income rate for direct federal taxes of 4.25% (profit after tax), and in most cantons to a preferential statutory income rate for cantonal and communal taxes (e.g. City of Zurich 9.16% (profit after tax)). Both taxes are levied at the level of the collective investment scheme. Dividends, capital gains and interest income generated by the collective investment scheme not related to Swiss real estate are disregarded at the level of the collective investment scheme, but are taxed at the level of the investor. Furthermore, collective investment schemes that hold Swiss real estate directly are subject to annual capital taxes on cantonal level on the net taxable capital (e.g. City of Zurich 0.1718%).

In case of indirect Swiss real estate investment held by a special purpose vehicle (SPV) income is subject to ordinary statutory income taxation (8.5% direct federal taxes and cantonal and communal taxes, e.g. City of Zurich 18.32% profit after tax) at the level of the SPV. Furthermore, the SPV is subject to annual capital taxes on cantonal level (e.g. City of Zurich 0.1718%).

Depending on the canton where the real estate is located, capital gains realised by the sale of a real estate held by the fund directly or indirectly might be taxed differently on cantonal and communal level. This means that, in certain cantons, capital gains realised on immovable property are subject to a special real estate gains tax regime instead of ordinary income tax. In general, the tax rate is higher than the ordinary income tax rate however a deduction for long-term ownership is available which can reduce the tax to quite a low level. Where ownership has only been short-term, there is usually a speculation surcharge. The definition of short-term and long-term ownership varies from canton to canton. At federal level, capital gains realised upon the sale of a real estate are subject to income tax.

Should the fund sell the majority of the ownership rights held in a real estate company owning Swiss real estate, this sale usually qualifies as an economic change of ownership. At cantonal level, such economic change of ownership may be subject to real estate gains tax. However, in case of real estate gains tax, the Swiss tax authorities may be restricted in levying real estate gains tax under certain double tax treaties. At federal level, an economic change of ownership does not trigger income tax but the buyer inherits a latent tax burden.

Treatment of investors

If a FCP or a SICAV has direct real estate investment the income derived from real estate is attributable to the collective investment scheme for tax purposes. Hence there is no taxation of real estate income at the level of the Swiss resident investor.

In case of indirect holdings of real estate investments and/or other income other than real estate, Swiss resident individual investors are subject to income taxes on the ordinary income (dividend/interest) generated by the investment scheme. Capital gains are tax-exempt for individual investors with the exception of individual investors who hold shares of a collective investment scheme in their business assets. Swiss resident corporate investors are subject to income taxes on both the ordinary income and the capital gains generated by the investment vehicles. A participation exemption is not available for income derived from a FCP or a SICAV.

Withholding tax

The profit and capital gains of direct real estate investments of the SICAV and FCP are tax-exempt from Swiss withholding tax purposes at the level of the fund.

In case of income from indirect real estate investments and/or other income, distributions (dividend income and/or interest) are subject to a 35% withholding tax. Distributions of capital gains are not subject to withholding tax as long as the capital gains are distributed by a separate coupon or are separately disclosed.

With regard to the timing of this withholding tax obligation, a distinction must be made between accumulating and distributing collective investment schemes. Distributing funds must declare and pay the withholding tax due upon distributions to investors within 30 days from the due date of the distribution.

Accumulating funds must declare and pay the withholding tax due on accumulated income within 30 days from the time of its credit (accumulation) which basically happens at the financial year end.

Exceptions to the above filing requirements for withholding taxes purposes can apply to funds when following the Affidavit procedure (a requirement is that the overall income of the Swiss fund is at least 80% foreign sourced).

Other taxes

The issuance and redemption of shares of Swiss collective investment funds with direct or indirect real estate investments is exempt from securities transfer tax respectively Swiss issuance stamp tax.

Switzerland
Swiss Collective Investment Schemes (continued)

In the case of a purchase, sale or transfer of shares in a funds with direct or indirect real estate investments (secondary market transactions) through a Swiss securities dealer (e.g. Swiss bank), a security transfer tax will be levied, which in general has to be borne equally by the seller and purchaser. The securities transfer tax is usually levied on the consideration and amounts to 0.15 bp for securities issued by a Swiss resident and 0.3 bp for securities issued by a foreign resident.

Most cantons levy a real estate transfer tax on the transfer of ownership in a property. A transfer of ownership is also given in the case of a purely economic transfer of immovable property such as the transfer of all or the majority of the shares in a Swiss real estate company. The real estate transfer tax is calculated on the purchase price and the rates vary between 0.5% and 3.5% depending on the canton where the real estate is located. Generally, the tax is borne by the buyer. In some cantons the tax is divided between the seller and the buyer.

Treaty status

Usually, the fund vehicle has no access to treaty benefits. Exceptionally, a collective investment scheme may have access to treaty benefits on behalf of its Swiss investors and for the amount relating to the Swiss investors. Switzerland has entered into several mutual agreements with its treaty partners which allow the fund reclaim foreign withholding tax for their Swiss investors. Fund vehicles have no access to EU Directive benefits.

Filing obligations

Funds are subject to withholding tax filing obligations. Additionally, collective investment schemes with direct holdings of Swiss real estate are subject to filing obligations with regard to income realised from the real estate.

Regulation

The regulatory authority for regulated collective investment schemes and its management company or its asset manager is the Swiss financial market authority (FINMA). In addition, various other rules, set by self-regulation bodies as e.g. the Swiss Funds & Asset Management Association (SFAMA) may apply. Contrary to other fund types, real estate funds have to issue a simplified prospectus and not a Key Investor Information Document (KIID).

Requirements for authorisation

The authorisation of the fund vehicle is granted by FINMA, based on the fulfilment of the various conditions of Swiss Collective Investment Scheme Act (CISA) and related ordinances, as stipulated in the fund prospectus or fund contract.

Investment restrictions

Investment restrictions are stipulated in the CISA, the related ordinances and the fund prospectus. Especially, neither the fund management company nor the custodian bank or its agents, nor closely connected natural and legal persons may acquire real estate assets from real estate funds or assign any such assets to them.

Minimum level of investment

CISA and/or regulatory authorities may require a diversification of risk, restrictions for certain types of real estate investments, etc.

Pros

- No withholding tax on distributions or accumulated income consisting of profits and capital gains of direct real estate investments.
- No withholding tax on distributions of capital gains if distributed by a separate coupon or separately disclosed.
- Preferential tax rate on income derived from directly held real estate investments on fund level which results in a lower taxation for taxable individual investor.

Cons

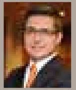
- 35% withholding tax on distributions or accumulated interest and dividend income (if no exemption applies).

Turkey

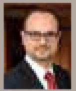
▶ ***Gayrimenkul Yatırım Fonları (GYF) – Real Estate Investment Funds (REIFs)***

Contacts

Ersun Bayraktaroğlu
+90 (212) 326 6098
ersun.bayraktaroglu@tr.pwc.com



Emre Haykir
+90 (212) 326 6813
emre.haykir@tr.pwc.com



Umurcan Gago
+90 (212) 326 6472
umurcan.gago@tr.pwc.com

Turkey
Gayrimenkul Yatırım Fonları (GYF) – Real Estate Investment Funds (REIFs)

Background

Real Estate Investment Funds (REIFs) have been introduced into Turkish law with the Capital Markets Board of Turkey (“CMB”) Communiqué on “Principles Regarding Real Estate Investment Funds”, which was published in the Official Gazette dated 3 January 2014 (No. 28871). This Communiqué aims to provide the regulatory framework for the establishment and operation of Turkish REIFs, the sale of Turkish REIF Units to Qualified Investors, and related transparency and reporting requirements for REIFs. Since July 2014 it is legally possible to establish REIFs in Turkey.

Legal form

Turkish REIFs are defined as asset pools (collective investment schemes) with no legal personality, established and managed by Portfolio Management Companies (PMCs) or Real Estate Portfolio Management Companies (REPMCs), licensed by the CMB, for a definite or indefinite period of time, on behalf of Qualified Investors, based on fiduciary ownership. Their purpose is making real estate investments in a wide range of real property assets such as land, real property, residences, offices, shopping malls, hotels, logistical centers, warehouses, parks, and hospitals. REIFs have “legal personality” only for the purposes of land registration, changes related to registration, cancellations and corrections at the Land Registry Office. One PMC and/or REPMC may found and/or manage several REIFs.

Tax status

Turkish REIF are treated as corporate taxpayers and thus have a tax personality.

Tax treatment at entity level

Income earned by a Turkish REIF is fully exempt from Turkish corporate tax. VAT and certain transaction taxes may apply to the transactions of the funds (e.g., title deed fees).

Treatment of investors

Based on the interpretation of the Turkish Revenue Administration which is expected to be published in the near future, capital gains, cash dividend distributions and cash proceeds from returning Units to the Founder (redemption) by Qualified Investors are all taxed equally.

Resident individual Qualified Investors benefit from a reduced income withholding tax rate of 10% which is the final tax burden and such investors are not required to make any tax filing.

For resident corporate Qualified Investors (including non-resident corporate taxpayers that have a permanent establishment such as a branch office in Turkey), income and gains from REIFs are subject to corporate tax at the rate of 20%, unless there is a special corporate tax exemption (e.g., for Turkish resident pension funds, Real Estate Investment Companies, etc.).

For non-resident corporate Qualified Investors, 0% withholding tax is the final taxation, for non-resident individual investors, 10% is the final taxation and these Qualified Investors are not required to make any filing.

Withholding tax

At REIF level

Corporate tax exempted income of REIFs are subject to 0% withholding tax.

At Investor level

As mentioned above 0% or 10% withholding tax is applicable based on the interpretation of the Turkish Revenue Administration.

Treaty status

Investment funds should generally be entitled to tax treaty benefits as corporate taxpayers under Turkish tax legislation. However this may need to be analysed on a case-by-case basis as some countries may challenge treaty access.

Filing obligations

REIFs are required to file an annual corporate income tax return and withholding tax return.

Regulation

REIFs are subject to the regulatory supervision of Capital Markets Board of Turkey (CMB). The regulatory framework for the establishment and operation of Turkish REIFs, the sale of Turkish REIF Units to Qualified Investors, and related transparency and reporting requirements for REIFs are regulated under the CMB Communiqué on “Principles Regarding Real Estate Investment Funds” (numbered III-52.3).

Requirements for authorisation

In order to establish a REIF, the Founder (which must be either a Portfolio Management Company (PMC) or a Real Estate PMC (REPMC) licensed by the CMB) must make an application to the CMB by submitting a draft circular, standard forms, and other required documents and information.

The CMB carefully examines the circularand how the Founder has framed operations for the proposed REIF within two months. Upon approval of the prospectus, the CMB grants permission to establish an REIF, and a custodianship agreement should be signed by the Founder and a custodian. The Founder must register the approved circular with the Trade Registry Office and publish it in the Trade Registry Gazette.

Following the establishment of the Fund, the Founder must apply to the CMB to start issuance by submitting the Issuance Certificate and other required documents within six months from the registration of the Prospectus. Approval of the Issuance Certificate by the CMB is necessary in order to raise funds from Qualified Investors.

Where a Founder is going to raise a subsequent REIF, circular and Issuance Certificate applications should be made at the same time, enabling a shorter establishment period.

Turkey
Gayrimenkul Yatırım Fonları (GYF) – Real Estate Investment Funds (REIFs)

Investment restrictions

REIFs may not engage in any activity other than Real Estate Investments and Other Allowable Investments. At least 80% of the Total Fund Value (i.e. Real Estate Investments + Other Allowable Investments + Receivables – liabilities) of a REIF must consist of Real Estate Investments.

Classifying Real Estate Investments: All investments in real estate and related rights are considered real estate investment for REIF purposes. The Founder or the Portfolio Manager of a REIF may engage in the sale, purchase, lease, and promise to sell. It can buy all types of real estate for the purpose of generating income based on lease, sale and purchase.

Investment in capital markets instruments issued by Real Estate Investment Companies, real estate certificates, participation units of other REIFs, as well as shares of joint stock companies with a minimum 75% of real estate investments in their total assets, are considered real estate investments under the above thresholds.

Other Allowable Investments: Apart from Real Estate Investments, REIFs are only permitted to invest in the below:

- shares of joint stock companies registered in Turkey,

- public and/or private debt instruments,

- foreign public and/or private debt instruments and shares of foreign companies as long as the requirements of the Foreign Exchange law are met,

- bank deposits and participation bank account deposits,

- investment fund participation units,

- repo and reverse repo transactions,

- warranties and certificates,

- lease certificates and real estate certificates,

- Settlement and Custody Bank money market transactions,

-cash collateral for derivative market instruments and premiums,

- foreign special purpose investment instruments to be approved by the CMB, and

- other investment instruments to be approved by the CMB.

- REIFs can invest at most 20% of the Total Fund Value in real estate companies (companies with assets of at least 75% real estate investments on a regular basis).
- Investments which alone account for 20% of an REIF's Total Fund Value cannot exceed a proportion of 60% of that REIF's Total Fund Value.
- The Total Fund Value of a REIF consisting of encumbered real estate property and rights cannot exceed 30% of the REIF's Total Fund Value. REIFs, however, can also be established to invest in a specific real estate property (the 60% threshold does not apply) or in a specific sector (e.g., hotels, shopping malls, etc.).
- The Founder or the Portfolio Manager of an REIF is forbidden to invest in real estate projects and construction or provide any related property management, project development, or project control activities.
- Short-term sale and purchase of REIF real estate on a regular basis, investment in commodities, or the purchase, sale or lease of real estate abroad by Founders is forbidden.
- Short sale of capital market instruments included in the REIF portfolio, margin trading and borrowing capital market instruments, derivative transactions that will incur an open position value exceeding 20% of the Total Fund Value, by REIF Founders is not permitted.

Minimum level of investment

The minimum amount of the fund to be raised and invested within one year following issuance of units must be at least TRY 10 million (otherwise the fund must be liquidated).

Pros

- Lightly regulated and flexible regulatory model, in line with the international market standards and customary practices for REIFs.
- The fund itself is fully exempt from corporate taxation.
- There is no dividend withholding tax on distributions by the fund and income from the fund is taxed at 0% withholding tax for non-resident corporate investors and 10% withholding tax for individuals which are respectively final taxation.

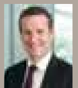
Cons

- Subject to supervision authority (i.e., CMB) as a regulated collective investment scheme.
- Need to be managed by a regulated Turkish portfolio management company.
- Investor restrictions - accessible only for the investors who are eligible for Qualified Investor status.
- There are certain portfolio restrictions.

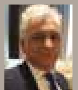
United Kingdom

- *Limited Partnership*
- *Tax Transparent Funds (TTFs)*
- *Property Authorised Investment Fund*

Contacts



Richard Williams
+44 20 7804 4491
richard.x.williams@uk.pwc.com



Irfan Butt
+44 20 7212 8696
irfan.butt@uk.pwc.com

United Kingdom
Limited Partnership

Legal form

A Limited Partnership (LP) is a business arrangement with one or more general partners, who manage the day-to-day business of the LP and assume the legal debts and obligations of the LP. The investors will be limited partners and are only liable to the extent of their investment. Limited partners typically enjoy a right to the partnership's net income and capital gains.

Tax status

The LP should generally be transparent for UK direct tax purposes.

Tax treatment at entity level

There is no tax levied at the level of the LP on income and gains but other taxes (e.g. transfer taxes, VAT etc.) apply.

Treatment of investors

Investors are typically allocated the net income/losses and disposal proceeds of chargeable assets of the LP pro rata to their participation in the LP. Investors are generally taxed in their home territory (depending on any applicable double tax treaty).

Withholding tax

Withholding tax is not levied on distributions made by the LP, although income or gains, e.g. dividends and interest income, received by the LP may suffer withholding tax, depending on the underlying territory making the payment.

Other taxes

Stamp duty land tax may be payable in respect of changes in partnership interests in the LP where underlying UK real estate is held. Other stamp taxes may also be payable in certain circumstances.

Treaty status

The LP cannot generally access double tax treaties. However, limited partners may be able to access the treaties applicable to the underlying subsidiary entities.

There is no access to EU Directives, but the EU Savings Tax Directive might be applicable when interest payments are allocated to the investors.

Filing obligations

The LP is required to submit an annual partnership return if requested to do so by Her Majesty's Revenue & Customs (HMRC).

Where the LP invests directly in UK real estate, non-UK-resident investors in the LP would normally register under the non-resident landlord scheme and be required to file non-resident landlord returns with HMRC.

Regulation

The LP is not per se under any regulatory supervision or regulatory authority, although the general partner or operator could be subject to such regulation. A "qualifying limited partnership" may be subject to additional reporting and disclosure rules. The identity and nature of the general partner would be important in this regard. The LP may be an alternative investment fund and the manager or operator an alternative investment fund manager for AIFMD purposes.

Requirements for authorisation

None.

Investment restrictions

None.

Minimum level of investment

None.

Pros

- A simple, flexible structure, which is well understood in the real estate industry as an investment fund vehicle.
- Not necessarily subject to regulatory supervision.
- Tax transparency gives non-UK investors the opportunity to benefit from: lower tax rates available for non-resident landlords
- No UK capital gains tax.

Cons

- An LP cannot be listed without prior incorporation.
- The legal form may be less suited to open-end funds.

United Kingdom
Tax Transparent Funds (TTFs)

Legal form

Following a consultation process, 2013 saw the introduction of tax transparent funds in the UK. A TTF can take the form of either an authorised and regulated limited partnership vehicle (ALP) or a contractual co-ownership arrangement (CCA).

ALP
An ALP will essentially be the same as a regular limited partnership but with additional features such as ability of the limited partners to redeem their interests without remaining contingently liable for the partnership's debts, general partner not being liable for the debts of the partnership unless guilty of wrongdoing and disapplication of the rules relating to the publication of changes in the partnership in the official Gazette.

CCA
Under a CCA, investors will own the scheme property as co-owners (although it will be held for them by a depositary). The scheme documentation will regulate the arrangement as well as providing for the scheme property to be managed by an authorised fund manager. The regulations limit each investor's liability for the debts of the scheme to the value of that investor's units from time to time, and the assets and liabilities of each sub-fund in an umbrella structure will be protected.

Tax status

ALP
An ALP is treated as transparent for income and capital gains tax purposes.

CCA
A CCA is treated as tax transparent with respect to income arising to the fund but with respect to capital gains arising to the fund it is treated as opaque.

Tax treatment at entity level

ALP
No tax levied at the level of the vehicle on income and gains but other taxes (e.g. transfer taxes, VAT etc.) apply.

CCA
No tax levied at the level of the vehicle on income and gains but other taxes (e.g. transfer taxes, VAT etc.) apply.

Treatment of investors

Investors are typically allocated the net income/losses and capital gains/losses of the vehicle pro rata to their participation in the ALP. Investors are generally taxed in their home territory (depending on any applicable double tax treaty). As a consequence of the CCA being opaque for capital gains tax purposes, UK taxable investors in such schemes will be liable to tax on gains on disposal of their units, rather than being treated as owning a share in the underlying assets.

Withholding tax

No withholding tax is levied on distributions made by either vehicle. However, dividend and interest income may suffer withholding tax depending on the underlying territory making the payment.

Other taxes

With effect from 1 April 2016 and subject to certain qualifying conditions being met, Stamp duty land tax ("SDLT") exemption is available on seeding of properties by property funds to CCAs and no charge to SDLT should also arise on transfer of CCAs units by investors. The exemption is not extended to ALPs.

Treaty status

Either vehicle cannot generally access double tax treaties. However, limited partners may be able to access the treaties applicable to the underlying subsidiary entities. There is no access to EU Directives, but the EU Savings Tax Directive might be applicable when interest payments are allocated to the investors.

Filing obligations

The ALP is required to submit an annual partnership return if requested to do so by Her Majesty's Revenue & Customs (HMRC). Where the ALP invests directly in UK real estate, non-UK-resident investors in the ALP would normally register under the non-resident landlord scheme and be required to file non-resident landlord returns with HMRC.

Investors in CCAs will be required to comply with their individual tax reporting requirements and accordingly, UK taxable investors will be required to include their taxable distributions from the scheme in their income tax returns.

Regulation

Both vehicles are subject to regulation by the Financial Conduct Authority.

Pros

- An effective structure for pooling sub funds into one large master fund to reduce administration costs rather than for any direct tax saving.
- Regulated vehicle may be more appealing for certain investor types or regimes which require the use of regulated vehicles, particularly US Asset Managers.
- Tax transparency gives non-UK investors the opportunity to benefit from:

  - lower tax rates available for non-resident landlords;

  - potentially no UK capital gains tax; and

  - tax treaty relief structured appropriately.
- The structure easily accommodates "carry" arrangements for the management team.

Cons

- Can be an administrative burden.
- New regime so some uncertainty about the international recognition of the vehicles.

United Kingdom
Property Authorised Investment Fund

Legal form

A Property Authorised Investment Fund (PAIF) is a Property Investment Fund, structured as an open-ended investment company (OEIC).

Tax status

The PAIF is opaque for UK corporate income tax purposes. A PAIF is exempt from capital gains tax but is required to distribute all its income. Its activities are also subject to all other taxes e.g. employment taxes, VAT and transfer taxes.

Tax treatment at entity level

Property investment business income is exempt from corporate income tax (e.g. income from property rental business, shares in UK REITs or non-UK REIT equivalents). Distributions from other corporate should also be exempt from UK tax. While residual income (e.g. interest income) is subject to corporate tax, a corresponding deduction should be available when the income is distributed to investors. Consequently there is effectively no taxation at the level of the fund.

Treatment of investors

UK corporate investors may have to pay corporate taxes (currently 20%) on all income and gains, with the exception of dividend income, which may be exempt from UK tax. Individual investors pay income tax at a rate of 45% on property income distributions and interest, 30.56% (effective) on dividends and 28% on gains.

Withholding tax

Withholding tax is levied at a rate of 20% on distributions of rental income or interest unless the investor is eligible to receive this income gross, e.g. UK pension funds, UK corporate or UK charities. Separate reclaims of withholding tax where there is treaty relief can be made by recipients after the distributions are received but there is no upfront treaty rate reduction.

Other taxes

With effect from 1 April 2016 and subject to certain qualifying conditions being met, SDLT exemption is available on seeding of properties into PAIFs.

Treaty status

In principle, the PAIF has access to the UK treaties, as well as to EU Directives.

Filing obligations

The fund submits a UK corporate income tax return.

Regulation

The PAIF is regulated by the UK Financial Conduct Authority.

Requirements for authorisation

The OEIC needs to fulfil the following conditions:

- Property investment business conditions.
- Genuine diversity of ownership conditions.
- A limitation on corporate ownership condition.
- Loan creditor conditions (where relevant).

A balance of business condition and, if relevant, an additional limited borrowing condition for property AIFs that are qualified investor schemes.

Investment restrictions

Maximum thresholds may apply to individual investments made by the PAIF.

Minimum level of investment

None.

Pros

- The PAIF is a regulated, onshore vehicle for UK investments, which can be exempt from UK tax.
- There is no entry charge for the vehicle to enter the regime.

Cons

- The PAIF was introduced in 2008; after a slow start more PAIFS are coming to the market.
- The vehicle is fairly heavily regulated, with a number of restrictions (e.g. gearing only up to 10% of net assets unless it is designated for sophisticated investors when borrowings may be greater).

Notes

Notes

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