IN-DEPTH

Real Estate M&A And Private Equity

BELGIUM

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In-Depth: Real Estate M&A and Private Equity (formerly The Real Estate M&A and Private Equity Review) is a multinational guide for understanding and navigating the increasingly complex and dynamic world of liquid real estate and the transactions that mostly produce it. Leading practitioners from around the globe offer practical insights into what is going on around the conference tables and in the markets in their jurisdiction, with an eye to cross-border trends and transactions.

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Belgium

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Introduction

The main highlights of the Belgian capital market for the period from 2021 to 2023 are as follows:

1. Investment volume: €3.7 billion (2021); €8.8 billion (2022); and €2.7 billion (2023). After reaching record levels in 2022, Belgium aligned with the international downward trend in 2023, which saw the lowest investment volume of the past 10 years.
2. In terms of asset classes, investment volume for 2023 was divided as follows: 26 per cent for offices, 22 per cent for residential (spread between care, multifamily and student housing), 15 per cent for industrial, 33 per cent for retail and 4 per cent for hotel and leisure, which makes 2023 a disastrous year for offices (whose share has dropped from 66 per cent in 2022 to 26 per cent in 2023).
3. In terms of investment volume and investor perspective, private investors (including family offices) set the tone, which is often seen in times of financial crisis. In addition, the market was local, with Belgian investors representing 71 per cent of the capital invested.
4. After such poor results in 2023, 2024 has started strong, although real estate investors remain prudent and are keeping a close eye on developments in the financial markets, as well as on global elections. Nevertheless, two impressive transactions have taken place recently: TPG's successful public bid for the Belgian real estate investment trust (REIT) Intervest and the acquisition of a portfolio of EU buildings by the Belgian fund Cityforward (sponsored by the Belgian state).

The Belgian capital market is dominated by (local and foreign) institutional investors, generally REITs or private equity real estate (PERE) funds. These institutional investors are usually involved in large-ticket transactions when it comes to offices.

Year in review

M&A transactions

The year 2023 ended with the launch of TPG's takeover bid for Intervest, which appeared to be successful and was followed by a squeeze-out in 2024. Following this public-to-private transaction, Intervest lost its REIT status and opted for the status of specialised real estate investment fund (FIIS) in Belgium.

Private equity transactions

PERE funds cannot be established in Belgium. However, it remains an attractive country for foreign institutional investors. As mentioned above, 2023 was a disastrous year for investment, and reportable transactions by foreign institutional investors were rare.

Notable transactions include the takeover of City Center by MEAG and the purchase of a nursing home portfolio by BNP Paribas REIM.

Real estate companies and firms

Publicly traded REITs and real estate operating companies – structure and role in the market

Overview

Belgium has 15 REITs (société immobilière réglementée (SIR)). The top five REITs, in terms of fair value of the portfolio, are:

1. Warehouse De Pauw (WDP), specialised in logistics properties, active in Belgium, the Netherlands, France, Romania, Luxembourg and Germany, which took the top spot from Cofinimmo (fair value portfolio: €6.8 billion);
2. Cofinimmo, currently investing in healthcare and offices but which tends to specialise in care housing, active in Belgium, the Netherlands, France, Spain, Italy, Germany, Finland and the United Kingdom (fair value portfolio: €6.2 billion);
3. Aedifica, specialised in care housing, active in Belgium, the Netherlands, Finland, Sweden, Germany, Ireland, Spain and the United Kingdom (fair value portfolio: €5.9 billion);
4. Xior Student Housing, specialised in student housing, active in Belgium, the Netherlands, Portugal and Spain (fair value portfolio: €3.2 billion); and
5. Montea, specialised in logistics properties, active in Belgium, the Netherlands, France and Germany (fair value portfolio: €2.2 billion).

Legal structure

To maintain Belgium's attractiveness and competitiveness, a new type of listed real estate fund (SIR, commonly named BE-REIT) has been introduced. This allows real estate investors that wish to opt for regulated status (and thus benefit from a preferential tax regime) to avoid the burden of compliance with the Belgian Act on Alternative Investment Fund Managers (the AIFM Law).

The activities of a BE-REIT may only consist of:

1. placing, directly or through a company in which it participates in accordance with the law and its implementing regulations, immovable property at the disposal of users;
2. if applicable, possessing immovable property; and
3. participating in infrastructure projects as further defined by the legislation.

The BE-REIT must thus mainly engage in an operational activity with a long-term strategy rather than an investment activity. The BE-REIT does not, therefore, follow a defined investment policy but has a business strategy based on creating long-term value (instead of engaging in buying to sell within the framework of a defined investment policy). To that extent, the BE-REIT Law requires the BE-REIT to exercise its activities itself, maintain direct relationships with its clients and suppliers and have, for the purpose of exercising its activities as described above, operational teams at its disposal that make up an important part of its workforce.

In terms of capital and listing requirements, the BE-REIT must have a minimum share capital of €1.2 million and all shares must be listed on a stock exchange, with a minimum 30 per cent free float. Listing can only occur after registration on the BE-REIT list and after the publication of a prospectus.

BE-REITs are under the supervision of the Financial Services and Markets Authority (FSMA).

Tax aspects

BE-REITs are formally subject to income tax, but their investment proceeds (including capital gains) are not included in their taxable base. Taxation of the investment occurs at two different points:

1. upon entry into the regime (e.g., conversion or merger of an existing company), an exit tax of 15 per cent applies on the net latent gain. The same exit tax applies upon contribution of a real estate asset to a BE-REIT in exchange for shares; and
2. upon yearly dividend distributions, a 30 per cent withholding tax applies, which is subject to reduction or exemption by virtue of a tax treaty. A specific withholding tax exemption applies for foreign pension funds.

It is important to note that the basis on which the dividend withholding tax applies is different depending on the investors and the underlying investments.

Distributions made to Belgian residents are subject to the withholding tax for the entire amount of the dividend distributed. Distributions made to foreign residents are subject to withholding tax only for the part of the dividend stemming from Belgian-source profits; foreign-source profits are exempt from Belgian withholding tax.

Restrictions on activities and investments

The principal activity must be the active management of real estate assets, subject, however, to diversification requirements and leverage restrictions:

1. a maximum of 20 per cent of the total assets can be invested in one real estate project; this risk diversification requirement does not apply when the tenant, user or beneficiary is an EEA Member State; and
2. the loan-to-value ratio is limited to 65 per cent of the (consolidated) assets (under specific conditions limited to 33 per cent), and the (consolidated) interest expenses

are limited to 80 per cent of the total income. Mortgage (or other collateral) is limited to 50 per cent of the global fair value of the immovable property and to 75 per cent of the value of each immovable property mortgaged, subject to exceptions when it concerns the participation in public–private partnerships.

Developments are allowed but cannot be sold before, during or within five years of completion (no promotion). The BE-REIT is also allowed to hold shares in subsidiaries investing in real estate, including institutional BE-REITs, but specific requirements, including minimum participation thresholds, apply in the case of public–private partnerships or joint ventures.

In terms of returns to investors, the BE-REIT is obliged to distribute annually 80 per cent of its net profits (as determined by royal decree) less the net decrease of its indebtedness. Capital gains realised are not included in this distribution obligation provided that they are reinvested within a four-year period.

Challenges

The trend within Belgian REITs is specialisation in terms of the asset class and internationalisation, which bring their own challenges.

Specialisation in terms of asset classes is challenging when considering the risk diversification requirement. The FSMA has confirmed that this risk diversification requirement is assessed not only in consideration of the value of the property but also the exposure to the tenant. Tenants of the same group are considered as one single tenant for the purposes of this assessment. Under certain conditions, a derogation is still possible, but it means that the leverage limit of the REIT cannot exceed 33 per cent of its consolidated asset value.

The absence of a harmonised REIT regime in Europe, certainly combined with the fact that Belgian REITs are operating companies, brings its own regulatory and tax challenges. A notable example is whether Belgian REITs can opt for the FBI regime[1] for their Dutch subsidiaries, which, based on the shareholders' test, requires the Belgian REIT to be similar to an FBI while the activities allowed are not exactly the same. The same is true in terms of taxation and profit repatriation: it is not always possible for a Belgian REIT to apply for a similar regime in the country of investment and, in this case, the Belgian REIT faces investments in foreign countries subject to local income taxation and to withholding tax when profits are repatriated. Another frequent challenge concerns the investment in France via a branch under the SIIC status.[2] In this case there is a harmonisation of the tax regimes in both Belgium and France, but France levies a branch tax on profit repatriation and then raises the question on whether this branch tax is a tax burden for the REIT (therefore decreasing its capacity to distribute dividends) or a tax burden for the shareholders of the REIT with, as the case may be, the availability of a tax credit.

PERE firms – footprint and structure

Overview

Although a legal and tax regime is available, PERE funds cannot be established in Belgium. Most parties active in the Belgian market are foreign investors, mainly from France, Germany and Luxembourg (with SICAV-SIFs[3] and RAIFs[4] generally serving as fund platforms for foreign institutional investors).

Belgium has 207 PERE funds or FIIS, a dedicated fund structure available for institutional investors. The funds formed to date can, however, be described as 'captive funds', holding local real estate investments of local players (e.g., banks or insurance companies) or of foreign institutional investors.

Legal structure

The FIIS aims to provide asset managers and institutional investors with a flexible and efficient fund vehicle for their real estate investments in Belgium and abroad. It is a closed-end real estate fund with the following main characteristics:

1. it benefits from a flexible regulatory regime;
2. it must take the form of a Belgian limited liability company (société anonyme) or a Belgian ordinary partnership (société en commandite); this last corporate form has a separate legal personality in Belgium and is therefore treated as a corporation, but might be seen as transparent in other jurisdictions. The FIIS can be incorporated by one single eligible investor;
3. the shares or partnership interests in an FIIS can only be subscribed by or offered to institutional investors;
4. it is limited to a 10-year lifespan, with the possibility of an extension if this is unanimously agreed by the investors;
5. it can only invest in real estate, broadly defined, but without a compulsory diversification requirement or leverage limits (see point (d));
6. under International Financial Reporting Standards, the FIIS must file its accounts annually; and
7. it enjoys a specific tax regime.

Tax aspects

The FIIS tax regime and the BE-REIT tax regime are the same.

Restrictions on activities and investments

The FIIS can only invest in real estate, defined as follows:

1. Belgian and foreign real estate assets, as well as rights in rem on these assets;
2. shares of foreign real estate companies holding foreign real estate assets;
3. shares of Belgian BE-REITs;
4. shares of Belgian FIISs;

5. shares of Belgian or foreign alternative investment funds (AIFs) investing in real estate;
6. shares of EEA REITs (as further defined by royal decree);
7. options on real estate assets;
8. real estate certificates;
9. rights under real estate leasing; note, however, that the activity of a lessor under a lease with a purchase option can only be ancillary (with an exception for real estate assets dedicated to public interests, including social housing and teaching);
10. concession rights granted by a public body; and
11. loans to subsidiaries and guarantees or security to the benefit of subsidiaries.

With respect to shares in a Belgian real estate company, the FIIS can acquire those shares but is obliged either to merge with this company or to convert the company into an FIIS within 24 months.

The FIIS is subject to a minimum investment of €10 million at the end of the second financial year following its registration on the FIIS list. This is a one-off assessment based on the acquisition value or the appraised value used to compute the exit tax.

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

No compulsory diversification requirement or leverage limits apply to the FIIS.

The FIIS is also subject to the same annual distribution obligation as the BE-REIT.

Challenges

On the regulatory side, it should be determined in which of the following two categories the FIIS shall fall.

1. First category: the fund raises capital from a certain number of investors, without public issue, with a view to invest it in real estate in accordance with an investment policy in the interest of the investors. The fund is an AIF in the sense of the AIFM Directive and has opted for investment in real estate. In this case, the AIFM Law fully applies to the FIIS and its manager, it being understood that a 'light' regulatory regime is available when the assets under management do not exceed €100 million (with leverage) or €500 million (without leverage and without right to reimbursement within five years of the initial investment).
2. Second category: the fund is not an AIF in the sense of the AIFM Directive because it is incorporated by one single investor or it constitutes a joint venture (i.e., an entity being used as an investment vehicle in which the shareholders, as a collective group, are granted day-to-day discretion or control). With respect to the exemption because of one single investor, it must be noted that the incorporation documents must mention that the fund will only have one single eligible investor as per the relevant European Securities and Markets Authority guidelines, and this investor is not itself an AIF. In this case, the fund may opt voluntarily for AIF status and limit

its investments to real estate. This option and the registration on the FIIS list held by the Ministry of Finance is required to benefit from the specific tax regime. As a consequence, the regulatory obligations are extremely light and basically limited to compliance with the corporate law and with the FIIS Decree.

Transactions

Legal frameworks and deal structures

In deals involving Belgian PERE funds (FIIS), the regulations are extremely limited and are meant to protect the institutional character of the FIIS:

1. the articles of association of the FIIS and all documents related to the issue or transfer of its shares or partnership interests must provide that only eligible investors can acquire shares or partnership interests;
2. each investor that acquires or subscribes to shares or partnership interests confirms its quality in writing to the FIIS and commits to only transfer to an eligible investor who shall undertake the same commitment;
3. the FIIS shall suspend the payment of any dividend to a non-eligible investor; and
4. in cases where the FIIS is self-managed and is subject to the full set of provisions of the AIFM Law, any transfer of a holding of 10 per cent or more must be approved by the FSMA prior to completion.

There are two typical deal structures in public M&A: share purchase and merger. Relevant regulations and constraints are described below.

Share purchase

A potential buyer can purchase shares of Belgian REITs either on the market or through private sales. Two compulsory requirements will then apply:

1. disclosure of important participations (see 'Disclosure requirements and duties of the board', below); and
2. a mandatory public takeover. As from the crossing of the 30 per cent threshold, on a stand-alone, group or consortium basis, the shareholder is obliged to launch a public takeover on all the shares issued by the REIT.

A mandatory public takeover requires a prospectus approved by the FSMA.

Voluntary public takeover

A public takeover is subject to the observance of a strict (disclosure) procedure and requires the involvement of the FSMA and the target.

The bidder must file its announcement and a draft prospectus with the FSMA, which shall announce the bid and notify the target one business day after receipt. This is merely an announcement, and is not yet an approval of the prospectus.

The period of review of the prospectus by the parties starts with the comments of the board of the target filed with the FSMA and the FSMA approving the prospectus. After formal approval of the prospectus, the board of the target must file a draft response memorandum, which is also to be approved by the FSMA.

As from this last approval, the acceptance period starts, during which the board of the target shall also inform the works council. The acceptance period often lasts for two to 10 weeks.

Parties wishing to launch a counter bid have until two calendar days before the end of the acceptance period to announce their intent. However, a counter bid shall only be accepted if the price per share offered is 5 per cent higher than the price of the initial offer.

The results of the offer are published five business days after the closure of the acceptance period, with the price being paid 10 business days after this publication, followed by a five to 10 business day period for the potential reopening of the takeover bid.

In practice, shareholders owning an important participation often enter into (soft) undertakings to tender their shares to the offer.

There are two important aspects to note within this process:

1. the bidder must provide certainty to the FSMA with respect to the availability of funds (and therefore its capacity to close). The full price (i.e., for the purchase of all shares) of the offer must be guaranteed, generally by a bank guarantee; and
2. in cases where the bidder expects a delisting, it must reach the squeeze-out threshold of 95 per cent, which will allow a reopening of the takeover bid and the compulsory tendering of the remaining shares to the offer.

Merger or other type of contribution

Belgian mandatory takeover legislation provides for certain exemptions, of which the following are the most relevant. No mandatory bid will have to be launched in cases where the 30 per cent threshold is exceeded:

1. as a result of a merger, to the extent the person (on a stand-alone, group or consortium basis) exceeding the threshold did not cast the majority of the votes in the merger resolutions at the REIT's general meeting; or
2. as a result of a capital increase in cash resolved by the general meeting respecting the legal preference right of existing shareholders. It is important to note that only contributions in cash might be exempted from a mandatory public takeover, not a contribution in kind.

Both transactions are subject to mandatory rules provided in Belgian corporate law, including quorum and majority requirements:

1. quorum: at least 50 per cent of the capital should be present or represented at the first shareholders' meeting. A second meeting can validly decide irrespective of the portion of the capital being represented; and
2. majority: the transaction must obtain the positive vote of at least 75 per cent of the votes cast, abstentions not being included in either the numerator or the denominator.

In terms of pricing and the exchange ratio, the Belgian REIT legislation also contains strict requirements in the context of a merger:

1. in the case of a merger, the fair value of the REIT's portfolio must be valued by the independent real estate expert of the REIT. This valuation is not required if the merger proposal is filed within four months of the latest valuation and to the extent that the expert confirms that, considering the general economic status and the state of the assets, no new valuation is required. This new valuation is not binding, but the issue price must be justified based on this valuation; and
2. the issue price of the shares of the REIT should not be less than the lower of:
    - the last published net asset value per share dating back to up to four months prior to the date of the filing of the merger proposal or, if the REIT so decides, the date of the merger deed; and
    - the average stock price of the 30 calendar days preceding that same date.

Except in cases where the subsisting entity intends to go public or one of the restricted exemptions applies, a prospectus approved by the FSMA is required to issue or list the new shares, or both.

Disclosure requirements and duties of the board

As from the crossing of a 5 per cent threshold, on a stand-alone, group or consortium basis, the shareholder is obliged to disclose and publish its participation in the REIT. The threshold is often lowered to 3 per cent in the articles of association of most REITs.

The law implementing the Shareholders' Rights Directive II allows listed Belgian companies to request certain information from intermediaries to identify their shareholders.

Assuming that there is no hostile bid, the board shall most probably collaborate on a regular due diligence exercise over the REIT. The board decides which information will be disclosed taking into account various factors such as the corporate interest of the target, confidentiality duties and equal treatment of shareholders, as well as EU Market Abuse Regulation (MAR) and competition aspects. The Belgian takeover legislation requires that the same information is provided to any competing bidder. Confidentiality agreements with the target or reference shareholders, or both, are common practice to ensure confidentiality of negotiations and information obtained within the context of the due diligence.

MAR and insider list

Because the REIT is listed on a regulated market, the information about a potential transaction and its financing may be considered inside information for the purposes of the MAR. The parties involved will usually acknowledge being familiar with the statutory prohibitions and restrictions for holders of inside information established under the MAR, and the supplemental rules enacted thereunder, as well as with the legal and regulatory consequences relating to the misuse or improper circulation of inside information, including sanctions and penalties associated with serious or very serious offences under the MAR, and with criminal offences regarding insider trading on the securities markets, and they will undertake to comply with these prohibitions and restrictions.

The parties involved will also have the obligation to maintain 'insider lists', of which the FSMA can request a copy.

The FSMA may require the parties to a potential bid to make a public announcement; for example, if there are rumours in the market (the 'put up or shut up' rule).

If the bidder receives inside information on the target, it must disclose this information in the prospectus, and it cannot acquire or sell target securities until this information is no longer sensitive.

Acquisition agreement terms

Public M&A

In public M&A, with a REIT as a target, the consideration depends on the type of deal structure: in a share purchase and (mandatory) public takeover, the consideration will consist of cash, while the consideration in a merger will consist of shares.

In the case of a voluntary public takeover, the bidder can subject its bid to conditions, generally referring to the level of participation it wants to acquire. Mandatory public takeovers cannot be conditional.

Because of the high level of transparency that is imposed on REITs, the practice shows that representations and warranties, indemnification and covenants are rare, and any risk is usually factored into the offered price.

The situation is quite different when the REIT acts as the seller or purchaser. In this case, the deal terms are quite similar to any other real estate transaction, with standard conditions precedent, representations and warranties, indemnification clauses and covenants. One specific deal structure to mention when a REIT acts as a purchaser is the deal being structured as a contribution in kind in the capital of the REIT and remunerated in shares (subject to the 30 per cent threshold not being exceeded). The 'seller' then places the REIT's shares on the market shortly after the acquisition, subject to a lock-up period applicable to 5 per cent to 10 per cent of those newly issued shares. This type of deal guarantees an acquisition without cash contribution for the REIT concerned.

If the public M&A takes the form of a voluntary public takeover, the bid must relate to all securities issued by the target. The bid may be conditional on the approval of competition authorities, or any other regulatory approvals, and is often subject to conditions such as

an acceptance threshold or the non-occurrence of a material adverse event beyond the bidder's control. In practice, the FSMA refuses to approve any condition that is likely to limit the success of the bid.

PERE transactions

PERE transactions are similar to other real estate transactions, with standard conditions precedent, representations and warranties, indemnification clauses and covenants. When being a target or a party to a transaction, PERE funds are used to take out insurance to limit, or even reduce to zero, their own exposure.

The most widely used insurance, imported from the UK market, is warranty and indemnity (W&I) insurance, which covers undisclosed risks for the period prior to closing. Parties usually negotiate their terms of acquisition and then provide the purchase agreement to an insurance broker. The insurance company usually reviews the agreed representations and warranties to, as the case may be, exclude some from the insurance coverage. Standard exclusions concern the condition of properties, certain environmental matters and transfer pricing.

Occasionally, purchasers also buy title insurance to guarantee title to the underlying real estate asset. Belgian mortgage registers have a 'negative' value: they will only mention disputes over ownership when litigation is entered into and has commenced. Neglecting to mention disputes does not mean that the ownership is not disputable.

The market is currently seeing the development of tax insurance to guarantee identified risks and, in specific circumstances, transfer pricing. In this process, the purchaser must (at least) provide the insurer with a robust defence memorandum stating the arguments in favour of the taxpayer and the likelihood of success in a case of litigation.

Hostile transactions

Public M&A hostile transactions do not need to be reported. TPG's public bid for Intervest was supported by Intervest's management. This is partly due to the fact that most Belgian public companies are owned by a controlling shareholder or group of shareholders. In addition, Belgian law allows the target's board of directors to implement measures to safeguard the corporate interest and frustrate a hostile bid.

Financing considerations

There are two layers of financing: acquisition financing, typically to acquire the shares of the target (whether the latter is listed); and real estate financing or refinancing with the target as borrower.

Acquisition financing is characterised by the legal prohibition of financial assistance, meaning that the target cannot grant security interests over its assets to guarantee or facilitate the acquisition of its own shares. Acquisition finance is therefore generally an unsecured financing with the following notable exceptions:

1.

the investor or shareholder shall pledge the shares they hold in the borrower, and the borrower shall pledge the shares and receivables it owns in the target, and strict subordination agreements and waterfall provisions shall bind the parties;

2. the target company might be converted into an ordinary partnership. Under Belgian law, this type of partnership has legal personality, but it is not subject to capital protection rules. Consequently, the prohibition of financial assistance does not apply; and
3. in a 'double FIIS structure', the acquisition financing and the real estate financing are consolidated after the merger, with the assets of the target also being used as collateral. Usually, the acquisition financing takes the form of a bridge loan, refinanced after the merger.

Real estate financing will first depend on the leverage capacity of the target company; for both corporate law and tax law reasons, it is not possible to over-leverage a company, or to grant security interests (in a portfolio refinancing scenario) in excess of the company's own benefits of the transaction unless appropriate justification exists considering the company's own corporate interest. Up to this leverage capacity, the company acts as borrower and grants a market standard collateral package that includes a mortgage, pledge of receivables (e.g., rent receivables, insurance receivables) and pledge of bank accounts. The shareholder usually pledges the shares of the target company and subordinates intra-group loans. A few points must be kept in mind:

1. a mortgage is subject to 1 per cent transfer tax and 0.3 per cent registration duty computed on the amount for which it is registered;
2. general banking terms and conditions usually include a right of pledge and set-off provisions in favour of the account bank that could interfere with the pledge of bank accounts in favour of the lender. Therefore, it is common practice to require from the account bank a waiver of these rights and provisions. This should be disclosed and discussed with the account bank ahead of the closing; and
3. subordination of intra-group loans is generally only partial in the sense that the target company can still use excess cash to reimburse the intra-group loan.

Tax considerations

The typical deal structure described above does not, as such, have adverse tax consequences for the REIT or the FIIS concerned:

1. share transactions are not subject to transfer tax or other types of stamp duties; and
2. a merger between two REITs or two FIISs, or an FIIS and a REIT, is realised through tax neutrality.

Looking at the Intervest deal, the switch from the REIT regime to the FIIS regime is also tax neutral.

The situation is, however, quite different for investors that will acquire shares in the REIT or the FIIS. Distributed dividends are subject to 30 per cent withholding tax subject to an exemption or reduction based on an applicable tax treaty. The withholding tax exemption as provided for by the EU Parent-Subsidiary Directive is not available. Of note is the dividend withholding tax exemption provided by domestic law when the foreign investor is a pension fund. To benefit from this exemption, the pension fund must:

1. be a non-resident legal person with the sole purpose of managing and investing in funds collected for the purposes of paying statutory or supplementary pensions;
2. engage in these management and investment activities without the aim of making profit and in the framework of its statutory purpose;
3. be exempt from income taxes in its country of residence;
4. be the owner of usufructuary of the income-generating assets; and
5. not be obliged to transfer the income of these assets to the beneficial owner by virtue of a contractual obligation.

The pension fund must deliver a certificate to the Belgian payor confirming the fulfilment of the above conditions to benefit from the Belgian withholding tax exemption.

In deal structures where the REIT or the FIIS acts as purchaser, a specific tax regime exists. In the case of a merger in a REIT or an FIIS, or in the case of a contribution of a real estate asset to the REIT or the FIIS, the latent gain is not subject to the ordinary corporate income tax at 25 per cent, but to the exit tax at 15 per cent.

Cross-border complications and solutions

With the exception of EU AML requirements and sanctions, Belgium has no entry barriers for foreign investors in real estate, although the implementation of Regulation (EU) 2019/452[5] has established screening processes for foreign direct investment in highly sensitive sectors or sectors likely to affect security or public order, such as critical infrastructure.

Investors should pay specific attention to EU and local merger control regulations, as practice shows that the group and market definitions can be quite broad (certainly for PERE funds where the asset manager has the control and is part of a large international group), and the Belgian thresholds are quite low.

Corporate real estate

The trend in the Belgian market is based on asset classes, and not on the type of investor. For hotel, leisure and (care) housing, the trend is to separate operating companies (opcos) and property companies (propcos), with the investor keeping the propco, and the opco being carved out, generally via a standard sale of the business. A standard (long-term) lease agreement is then concluded between the opco and the propco. In the hotel sector, it is common to see one single structure, with the operation being taken care of via a hotel management agreement.

Special considerations

Since 1 January 2024, an anti-abuse provision, in the form of a supplementary 10 per cent taxation, has been in existence. This aims to tackle short-term transactions executed by Belgian FIISs where the latent gain on the real estate asset would (only) be subject to the exit tax. This supplementary tax, which first requires that exit tax is due, is triggered in three situations:

1. the registration of the FIIS list, which triggers the exit tax on the latent gain in the real estate asset owned by the FIIS: a supplementary 10 per cent tax shall be due if the FIIS is omitted from the list within five years of its registration;
2. a corporate restructuring involving an FIIS (e.g., the transfer of a regular company into an FIIS), which triggers the exit tax on the latent gain on the real estate asset transferred to the FIIS: a supplementary tax of 10 per cent shall be due if the FIIS is omitted from the list within five years of its registration; and
3. the contribution of real estate assets to the capital of the FIIS, which triggers the application of the exit tax to the capital gain realised by the contributor: a supplementary tax of 10 per cent shall be due if the contributor does not hold the FIIS shares received in exchange for an uninterrupted period of five years from their acquisition.

Note that this new anti-abuse measure has a retrospective effect and only concerns FIIS funds and not BE-REITs.

Outlook and conclusions

The market remains quiet and attentive, although the first months of 2024 have shown more activity (preparatory activities for sales) compared to 2023.

The REIT sector has seen two successful public-to-private transactions in recent years: Befimmo in 2022 and Intervest in 2024, and the question remains whether this will set a trend.

For REITs, specialisation and internationalisation remain hot topics, combined with a lack of harmonisation or (cross-border) recognition of the REIT regime at EU level. REITs may decide to further extend their reach via public M&A transactions such as cross-border mergers.

Endnotes

1 The Dutch equivalent of REITs. ^ Back to section

2 The French equivalent of REITs. ^ Back to section

3 Luxembourg investment company with variable capital formed as a specialised investment fund. ^ Back to section

4 Luxembourg reserved alternative investment fund. ^ Back to section

5 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. ^ Back to section

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