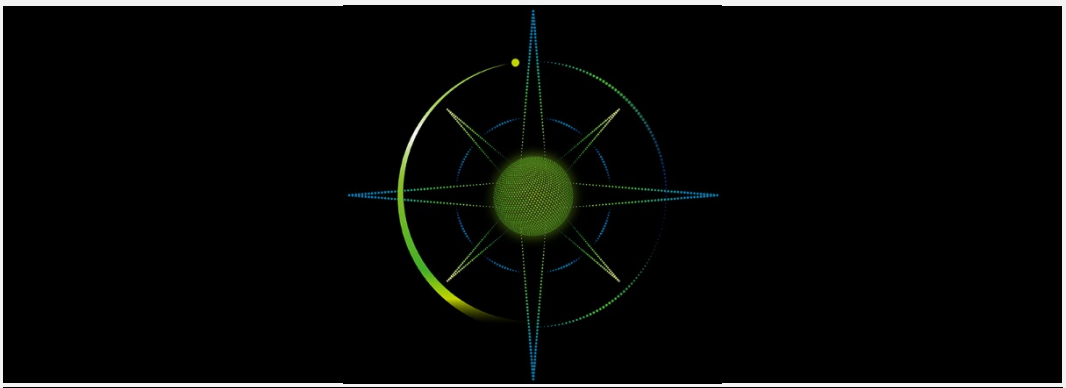

Real Estate & Financial Services

Tax alert

Belgium enacts specific tax framework for European long-term investment funds

Legislation enacting a specific tax framework for European long-term investment funds (**ELTIFs**) was published in Belgium's official gazette on 28 January 2022 (Dutch | French) as part of a law containing various tax provisions and applies as from 7 February 2022.

Launched in 2015 as part of the EU's Capital Markets Union (**CMU**) to strengthen investments in the "real economy," such as social and transport infrastructure projects, real estate, and small and medium-sized enterprises (SMEs), this long-term investment vehicle has yet to achieve the success to match its ambitions. According to the EU Commission's November 2021 proposal to amend the ELTIF regime (see "ELTIF 2.0," below), as at October 2021 there were only 57 ELTIFs across all EU member states (none of them in Belgium) and a relatively small amount of net assets under management (estimated at around EUR 2.4 billion).

In Belgium, the regulatory status of ELTIFs has long been debated. Although the question was recently settled by including this investment vehicle in the broader framework of the Belgian Law of 19 April 2014 on Alternative Undertakings for Collective Investment and their Managers (implementing EU directive 2011/61/EU, the **AIFM directive**), the ELTIF still lacked a competitive Belgian tax framework to attract both institutional and retail investors.

This alert provides an overview of the key features of both the regulatory and tax frameworks for ELTIFs, with an emphasis on real estate projects.

Flexible, open, and diversified

ELTIFs were introduced by EU regulation 2015/760 dated 29 April 2015 (the **ELTIF regulation**), which had as its primary objective the creation of an enabling tool for putting the EU economy on the path of smart, sustainable, and inclusive growth in line with the EU's Europe 2020 strategy.

The ELTIF's investment policy is limited to specific categories of eligible asset, i.e., 70% of its equity must be mainly invested in debt or equity instruments issued by (or loans granted to) "qualifying portfolio undertakings" (**qualifying SMEs**) or in "real assets."

Qualifying SMEs must meet specific requirements that include not being listed on an exchange or traded on a multilateral trading facility or, alternatively, having a market capitalisation that does not exceed EUR 500 million.

A real asset is any asset that has value due to its substance and properties and that may provide returns. Real assets include (i) infrastructure assets and (ii) other assets that give rise to economic or social benefits, such as education, counselling, or research and development. Commercial property or housing qualify as real assets only when integral to, or an ancillary element of, a long-term investment project that contributes to the EU objective of smart, sustainable, and inclusive growth (article 2(6) of the ELTIF regulation, but see also the revised definition of real assets under "ELTIF 2.0," below).

From a practical perspective, ELTIFs currently may invest in infrastructure projects connected with energy, transport, communications, water, and waste, as well as education, health, welfare support, and industrial facilities. Investments in commercial property or housing are also permitted to the extent that they serve the (duly documented) purpose of contributing to smart, sustainable, and inclusive growth (e.g., social housing or student housing).

Any individual real asset held by an ELTIF either directly or indirectly via qualifying SMEs must have a market value of at least EUR 10 million. For diversification purposes, an ELTIF currently may not invest more than 10% of its total equity in a single real asset, subject to certain exemptions.

To allow managers of ELTIFs a certain degree of flexibility in investing their funds, trading in assets other than long-term investments is permitted up to a maximum threshold of 30% of the ELTIF's capital. As a result, ELTIFs may also invest in transferable securities as defined in EU directive 2009/65/EC (the **UCITS directive**) to increase their portfolio's liquidity profile.

The main benefits of ELTIFs as a means of investing in real assets may be summarised as follows:

- ELTIFs have an investment lifespan exceeding the 10-year investment cap set for Belgian specialised real estate investment funds ("*Fonds d'investissement immobilier spécialisé*/*Gespecialiseerd vastgoedbeleggingsfonds*" or **FIIS/GVBF**);
- ELTIFs have a fully harmonised European label for financial products, which allows for an EU-wide, passport-based distribution to both professional and retail investors; and
- The distribution rules applicable to ELTIFs are more flexible than those for other Belgian real estate investment funds.

However, the regulatory requirement that ELTIFs may be managed only by EU alternative investment fund managers authorised under the AIFM directive may be seen by real estate professionals to diminish the attractiveness of ELTIFs.

Belgian tax regime for ELTIFs

The ELTIF regulation allows each individual EU member state to establish a competitive tax regime for ELTIFs. In Belgium, the new specific tax framework provides that ELTIFs benefit from the following tax attributes familiar to Belgian (real estate) fund managers:

- Corporate income tax neutrality as provided in article 185*bis* of the Belgian Income Tax Code 1992 (**BITC**);
- The possibility for Belgium-based corporate investors to benefit from the dividend received deduction (**DRD**) provided in article 202 *juncto* 203 of the BITC; and,
- An exemption from Belgian withholding tax (**WHT**) for nonresident investors on dividends distributed by Belgian ELTIFs, introduced in a new article 264/2 of the BITC.

In accordance with article 185*bis*, Belgian resident ELTIFs are subject to a favourable income tax regime, as their taxable base, subject to the standard 25% corporate tax rate, is limited to abnormal or benevolent advantages received, plus certain disallowed expenses. As a result, income streams (both periodic income and capital gains) deriving directly or indirectly from investments in real assets are, in principle, not subject to corporate income tax at fund level. This is the same tax regime as currently applies to Belgian REITs and REIFs.

Dividends paid by a Belgian investment company are in principle taxable in the hands of corporate resident investors at the standard 25% corporate income tax rate. However, ELTIFs may offer their Belgian corporate investors the benefit of the DRD subject to certain conditions (see below), to prevent income taxed in the hands of the ELTIF's portfolio of qualifying SMEs being subject to economic double taxation at the level of the ELTIF's corporate investors.

Although minimum participation and holding period requirements do not apply to dividends distributed by Belgian investment companies (such as ELTIFs), the benefit of the dividend participation exemption under the DRD generally requires a Belgian investment company's articles of association to provide for an annual distribution of 90% of its net profits (the "**DRD SICAV/BEVEK**" regime); 80% in the case of a real estate investment company, such as an FIIS/GVBF or a Belgian regulated real estate investment company (**SIR/GVV**). However, to be compatible with the long-term investment perspective, such a strict annual distribution requirement had not been introduced for Belgian ELTIFs. As a result, a Belgium-based ELTIF may opt to accumulate its revenue (dividends and capital gains on shares) for several consecutive years and, subsequently, still offer its Belgian corporate investors the benefits of the DRD exemption on distributed dividends, provided that the underlying income meets certain taxation requirements.

It should be noted that the DRD regime applies to dividends arising in full or in part from real estate income received by Belgian ELTIFs, provided that such income (i) derives from assets located in the EU or in a foreign jurisdiction with which Belgium has entered into a tax treaty providing for the exchange of information, and (ii) is subject to tax in that other jurisdiction without benefiting from a favourable income tax regime.

In respect of nonresident corporate investors, the ELTIF's tax regime provides for an exemption from Belgian WHT (either at source or via a WHT repayment claim) on distributions made by ELTIFs from dividends and capital gains on shares meeting specific taxation requirements and provided that certain other conditions, such as the completion of an affidavit, are met. ELTIFs also are eligible for WHT reductions or exemptions provided through Belgium's extensive network of tax treaties.

Investment vehicles regulated by the Belgian Financial Services and Markets Authority, such as ELTIFs, are subject to an annual subscription tax in Belgium imposed at a rate of 0.0925% on net assets placed in Belgium. Where an ELTIF's compartments or share classes are dedicated to qualified (non-retail) investors, the subscription tax rate may be reduced to 0.01% (see "ELTIF 2.0," below).

ELTIF 2.0

Having regard to both the versatility of ELTIFs from a regulatory viewpoint (which permits investment in private equity, real estate, and transferable securities up to certain thresholds) and the competitive Belgian tax regime for ELTIFs, the expectation is that ELTIFs have a promising future in Belgium, and are likely to play a definitive role in respect of the long-term investment projects required in a post-COVID recovery landscape. This view can only be strengthened by the regulatory changes now being proposed by the EU Commission as part of its CMU 2.0 Action Plan.

On 25 November 2021, the EU Commission issued a new proposed regulation, ELTIF 2.0, amending Regulation 2015/760. The objective of the proposal is to make the ELTIF regulatory regime much more flexible through measures including:

- Broadening of the scope of real asset investment strategies that ELTIF managers may pursue;
- Decreasing the minimum investment threshold in individual real assets from EUR 10 million to EUR 1 million, granting more flexibility to ELTIF managers;
- Decreasing the ELTIF's general threshold for investments in eligible assets from 70% to 60%, allowing ELTIFs to increase their investments in transferable securities as defined in the UCITS directive;
- Introducing a range of waivers for ELTIFs marketed solely to professional investors in respect of, for example, diversification rules and borrowing limits;
- Removing investment restrictions for retail investors; and
- Streamlining the concept of qualifying SMEs, together with increasing the market capitalisation threshold for qualifying SMEs from EUR 500 million to EUR 1 billion. Under the proposal, the threshold would apply only at the time of the initial investment.

Deloitte Belgium's Real Estate and Financial Services tax consultants would be pleased to provide you with further information and insights on this subject.

Contacts

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