



New Flexible Real Estate Investment Vehicle in Belgium

The Brexit decision has raised questions as to whether London's role as the financial capital of Europe may be altered and therefore open the way for other European cities to reposition themselves as financial centers. In this context, the Belgian government has tackled the issue of attracting more foreign investors, including devising new means of investing in real estate in Belgium and elsewhere.

A new and interesting opportunity for Belgian and foreign fund managers and investors to structure their real estate investments ("FIIS Regime") was recently launched, which offers both a flexible regulatory framework for real estate investments and an attractive tax regime. The contours of the FIIS Regime are set out in the Royal Decree of November 9, 2016, relating to specialized real estate investment funds ("FIIS" or "*Fonds d'Investissement Immobiliers Spécialisés*")/"GVBF" or "*Gespecialiseerd Vastgoedbeleggingsfonds*") ("Royal Decree").

The new FIIS Regime seeks to fill needs unmet by Belgium's well-known regime of regulated real estate companies ("REIT Regime"), as established by the Law of May 12, 2014, and the Royal Decree of July 12, 2014. The REIT Regime is appropriate for certain types of investments and investors, and it has given all existing Belgian real estate funds the option of benefiting from

a more closely tailored regime, rather than operating under the more burdensome framework of alternative investment funds (governed by the Law of April 19, 2014, on alternative investment funds and their managers ("AIFM Law")). However, the REIT Regime has revealed certain shortcomings, as its framework and characteristics are not always in line with the needs of institutional real estate investors. In particular, a REIT must be listed on a stock exchange and must comply with indebtedness ratio and diversification requirements.

The REIT Regime and the FIIS Regime are thus meant to coexist, with the former focused on long-term diversified investments and the latter on often shorter investment terms without diversification requirements and leverage limitations.

FIIS in a Nutshell

An FIIS is an alternative investment fund for collective investments, with a fixed number of participation rights exclusively reserved for eligible (institutional and professional) investors. Its purpose is to invest exclusively in eligible real estate assets, including, for instance, real estate located in Belgium that an FIIS holds directly, real estate located abroad that an FIIS holds directly or indirectly, shares in foreign real estate companies holding real estate abroad, and

shares in regulated institutional or public real estate companies (“*Société immobilière réglementée*”/“*Gereguleerde vastgoedvennootschap*”).

An FIIS must be incorporated as a closed-end investment company taking the form of a public limited liability company (“*société anonyme*”/“*naamloze vennootschap*”), a partnership limited by shares (“*société en commandite par action*”/“*commanditaire vennootschap op aandelen*”), or a limited partnership (“*société en commandite simple*”/“*gewone commanditaire vennootschap*”).

To counter the risk of a lack of liquidity of investments in an FIIS (since FIIS are closed-end and not listed), an FIIS must be incorporated for a maximum term of 10 years. FIIS articles of association may provide that the FIIS’s term may be extended for successive periods of a maximum of five years, provided that certain conditions are met, most notably approval of such extension by all shareholders present or represented at the relevant shareholders’ meeting.

Registration

An alternative investment fund that chooses to adopt the FIIS status (the FIIS Regime is optional) requires no license, but a relatively quick and simple registration procedure must be followed. The FIIS must apply to be included on the list of FIIS held by the Ministry of Finance and will maintain its FIIS status only if it remains registered on such list. Neither the role of the Ministry of Finance nor a company’s registration on its FIIS list implies endorsement of the appropriateness of the fund’s investment policy, overall quality of the transaction, or creditworthiness.

Financial Instruments Issued by an FIIS

Only eligible investors are entitled to subscribe to (i.e. invest in) FIIS-issued financial instruments. Eligible investors include professional investors and eligible counterparties within the meaning of MiFID, as well as “opt in” professional investors (to the exclusion of individuals, however). If certain financial instruments would be held by investors who are not eligible investors, the FIIS does not lose its institutional character as long as it can demonstrate that it has taken appropriate measures to guarantee that the financial instruments are held

by eligible investors and provided that it does not promote or contribute to these financial instruments being held by non-eligible investors. An FIIS is deemed to have taken such appropriate measures if certain conditions are met (including explicitly stating in the information document and its articles of association that only eligible investors are allowed to hold FIIS-issued financial instruments).

Since only eligible investors may invest in an FIIS, this means that the information documentation to be prepared by an FIIS can be relatively short and straightforward.

FIIS shares can also be held by a sole investor, in which case such FIIS would fall outside the scope of the AIFM Law. Furthermore, FIIS-issued financial instruments may not be listed on a multilateral trading facility or on a regulated market accessible to the public.

Recap and Other Main FIIS Features

To recap, an FIIS is characterized as follows:

- Exclusively invests in real estate;
- No leverage limitation requirement; and
- No asset class diversification requirement.

Other main features include:

- The investment policy must be disclosed to investors;
- Real estate assets held by the FIIS must be worth at least EUR 10 million at the close of the second fiscal year following registration on the list of FIIS held by the Ministry of Finance;
- An FIIS may buy or sell hedging products, except if such sale or purchase is speculative and provided that it fits in the FIIS’s global policy of hedging financial risks; and
- An FIIS may not act as real estate promoter/developer.

Accounting and Taxation

An FIIS must prepare its annual accounts in accordance with the IFRS. This is sensible, as an international investor is likely to be more familiar with IFRS than with Belgian GAAP. In addition, an FIIS is subject to the following obligations on an annual basis:

- Allocation of the result: 80 percent of its net result must be distributed; and
- Breakdown of the result: the annual report must include a breakdown of its net result (in order to determine the source—whether foreign or Belgian—of the allocated dividend).

The tax regime of the FIIS is set out by the Program Law of August 3, 2016, as supplemented by the Royal Decree which provides for a specific withholding tax exemption.

FIIS tax benefits can be summarized as follows:

- **Corporate Income Tax:** The taxable basis of an FIIS is limited to (i) all so-called received “abnormal or benevolent advantages” and (ii) certain disallowed expenses. As a result, the entirety of an FIIS’s investment income (e.g., rental income, capital gains, and dividends) will be tax-exempt;
- **VAT:** Management fees for services provided to an FIIS are exempt from Belgian VAT.
- **Stock Exchange Tax:** Disposals and acquisitions of participations in an FIIS are exempt from the stock exchange tax;
- **Withholding Tax:** Dividends paid by an FIIS to its non-resident investors are exempt from withholding tax to the extent that these are derived by the FIIS from foreign-source income (i.e., non-Belgian dividend or real estate income). Dividends received from another FIIS that are then distributed by the FIIS to nonresidents can also benefit from the exemption (i.e., are not considered as Belgian source income), but only where those dividends do not, in turn, derive from Belgian dividend or real estate income (i.e., applying a “look-through” approach); and
- **Double Tax Treaties:** An FIIS, in principle, can benefit from any double tax treaty to which Belgium is a party.

In return for this favorable tax regime, an FIIS is subject to the following taxes:

- **Exit Tax:** An exit tax is triggered when a company is registered as an FIIS, as well as in the event of contributions

of a branch of activity/universality to an FIIS, (de)mergers, and any other similar transactions to which an FIIS is a party. Contributions of real estate in exchange for new shares in the FIIS will also be subject to tax. The tax on any unrealized capital gains and untaxed reserves is due at a rate of 16.995 percent (instead of the standard 33.99 percent rate); and

- **Subscription Tax:** An FIIS will be annually subject to a so-called “subscription tax” at a rate of 0.01 percent, calculated on the basis of the total net amounts invested in Belgium.

Continued Application of AIFM Law

Provided that the FIIS qualifies as an alternative investment fund within the meaning of the AIFM Law, an FIIS manager must comply with the provisions of such law, including those imposing prior authorization from the Belgian Financial Services and Markets Authority, liquidity requirements, etc. However, a lighter application of the AIFM regime will apply to so-called “small” managers of alternative investment funds.

An FIIS falling within the scope of the AIFM Law will also benefit from the terms of the European passport regime.

A Restructuring Tool for Existing Investments

Beyond the benefits of incorporating an FIIS in Belgium for future investments in real estate assets, Belgian or foreign investors can also restructure an existing real estate portfolio in a tax-efficient manner by way of contribution, merger, or demerger with a newly incorporated FIIS.

Entry into Force

The Royal Decree entered into force on November 28, 2016. The provisions of the Program Law of August 3, 2016, related to direct income taxes (corporate income tax and exit tax) are applicable as from assessment year 2016 on transactions and attributed income as from July 1, 2016. The provisions related to indirect taxes (VAT, stock exchange and subscription tax) are applicable as from August 26, 2016.

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