

BELGIAN TAX REFORM – WHAT'S THE IMPACT ON THE INVESTMENT FUND SECTOR ?

Aside from the 2018-2020 Belgian corporate income tax reform which was addressed in our previous client briefing of 29 December 2017, several important changes were brought about by the federal laws adopted at the end of December 2017 with respect to the taxation of investment funds and their investors.

Increased taxation for investors in debt investment companies/funds

In case of a sale of or repurchase of shares in (and liquidation of) an investment company/fund (UCI) investing more than 25% of its assets in debt instruments/receivables, a 30% withholding tax must be withheld by the paying agent on the interest portion received by the Belgian tax resident individual (including interest and capital gains on debt instruments/receivables), provided that the UCI qualifies as a "capitalisation" investment company/fund.

Three changes are made to this tax which extend its scope of application.

First, the 25% threshold mentioned above is reduced to 10%. This threshold should, in principle, be computed by each UCI, which must then inform the paying agents to this effect so that the paying agents can apply the correct tax treatment. The result of this change is that more investment companies and funds will be caught by the tax (including equity funds holding cash or short term deposits on an ancillary basis).

Secondly, the notion of 'UCI' has been extended to cover not only UCIs investing in transferrable securities, but also AIFs investing in other types of assets (with possibly unexpected consequences for certain investments in, for example, a FIIS/GVBF, hedge funds, etc.).

These two changes are applicable to income paid or attributed in respect of UCI shares/units which were acquired as from 1 January 2018.

Thirdly, with respect to contractual investment funds (FCP/GBF), this tax will now be due upon receipt by the fund of the taxable (interest) income and no longer upon disposal/repurchase of the fund's units or the liquidation of the fund. For investment companies, on the contrary, the tax trigger will remain the disposal/repurchase of the company's shares or the liquidation of the company.

This last change will be applicable to income attributed as from 1 January 2018.

Tax on stock exchange transactions

Certain rates of the tax on stock exchange transactions ("SET") are increased as from 1 January 2018. More specifically, the (reduced) 0.09% rate is increased to 0.12% (applicable notably to public debt instruments, bonds, shares in (certain) investment companies and contractual investment funds) and the residual rate of 0.27% is increased to 0.35% (applicable notably to shares in ordinary companies, real estate certificates, etc.). Both (i) the higher rate of 1.32%, which is applicable to the repurchase of capitalisation shares by investment companies registered in Belgium with the FSMA, and (ii) the caps per transaction applicable in respect of all the rates remain unchanged.

Furthermore, the following additional changes/clarifications were made to the scope of application of SET. These changes aim to solve existing discriminations between Belgian and foreign (EEA) UCIs (UCITs/AIFs).

The Belgian legislator clarified the notion of UCI (*organisme de placement collectif/instelling voor collectieve belegging*) by referring to four categories:

- Belgian UCITS (public, institutional and private) and UCIs investing in receivables;
- Belgian AIFs (public, institutional and private);
- foreign UCITS/AIFs which are registered in Belgium with the FSMA because they offer their shares/units to the public in Belgium; and
- one new additional category: foreign UCITS/AIFs which are registered in a Member State of the European Economic Area but which are not registered in Belgium with the FSMA because they do not offer their shares/units to the public in Belgium.

As a result of the first change, the Belgian legislator extended the scope of application of the reduced SET rate of 0.12% to shares/units in all UCIs as defined above (also including the foreign (EEA) UCIs forming the last category defined above, which were previously excluded from this reduced rate (and were subject to the ordinary 0.27% (now 0.35%) ordinary SET rate)).

The Belgian legislator clarified that the 1.32% SET will not apply to the repurchase of own shares by an investment company belonging to the last category defined above. Hence, as this was already the case before, only the repurchase of own shares by an investment company (Belgian or foreign) which is registered in Belgium with the FSMA because it offers its shares to the public in Belgium will be subject to this 1.32% SET.

Lastly, the Belgian legislator clarified that the SET exemption for transactions on shares/units in institutional investment companies/funds also applies to foreign (EEA) investment companies/funds. Previously, it was not clear whether this exemption applied only to Belgian or also to foreign investment companies/funds.

Clarification of the participation exemption rules applicable to participations in investment companies

With regard to dividends distributed by real estate investment companies (e.g. SIR/GVV, FIIS/GVBF, etc.) the participation exemption regime (the dividends-received deduction, or "RDT/DBI") only applies for the portion of the dividends that originates from dividends and capital gains realised on shares of *bona fide* (i.e. fully taxable) companies. Moreover, it is required that the real estate

investment company's articles of association provide for the annual distribution of 80% of its net income. The law now specifically provides that this condition will be met if the company complies with the 80% pay-out ratio which is applicable to it under its regulatory regime, which will make it easier for it to comply with this condition of distribution.

Until now, a relative uncertainty existed as to whether, and to what extent, the tax exemption for capital gains on shares realised by Belgian tax resident companies applied in respect of shares in certain tax exempt investment companies. The law now clarifies that this exemption will be proportional to the percentage of the underlying income (dividends and capital gains) which can benefit from the RDT/DBI regime. In addition, the law and the preparatory works confirm that the minimum one year holding period and the minimum level of participation will not apply to shares held in investment companies.

(Anticipated) changes to the *private pricaf/pricaf privée* tax and regulatory regime

The enacted (and expected) changes to the Private Pricaf ('private pricaf'/*pricaf privée*) tax and regulatory regime are also worth mentioning. The Private Pricaf is a tax exempt fund structure dedicated to private equity investments which is suitable for both individual and institutional investors. The Private Pricaf regime's success has been limited until now, notably due to a regulatory prohibition on the Private Pricaf taking controlling participations in target companies (subject to certain strict exceptions). Although this has not been voted yet, it is expected that this restriction should be released, together with some other changes aimed at increasing the flexibility of the vehicle.

From a tax perspective, the voted tax reform already explicitly provides (similarly to the other investment companies – see here above in this respect) that (i) the minimum participation thresholds (and the one-year minimum holding period) for the application of the RDT/DBI regime and capital gains tax exemption do not apply, whether at the level of the Private Pricaf or at the level of its shareholders, as the Private Pricaf qualifies as an 'investment company', and (ii) the tax exemption of capital gains realised on shares in the Private Pricaf will apply in a proportional way, based on the percentage of the underlying income which can benefit from the RDT/DBI regime. Please note that the capital gains on shares in a Private Pricaf continue to benefit from a specific favourable tax regime, i.e. a full (and not proportional) tax exemption provided that the Private Pricaf invests at least 90% of its assets in shares qualifying for the RDT/DBI regime and/or shares in other Private Pricafs (or assimilated foreign vehicles) and not more than 10% in cash or other short term deposits.

New interest deductibility limitation regime potentially applicable to certain investment companies

Belgium introduced under the 2018-2020 tax reform package the various measures of the EU ATA Directives (I and II). Among these, there is a new limitation rule applicable to the tax deductibility of interest costs.

Under this rule, net borrowing costs will only be tax deductible under certain limits, i.e. either EUR 3 million per year (calculated at group level in Belgium) or (ii) 30% of the corrected (taxable) EBITDA of the company, whichever is higher.

Whereas the EU ATA Directive and the Belgian income tax code provide that this measure is not applicable to tax exempt/low taxed investment companies qualifying as UCITs or AIFs, it remains uncertain whether this exemption will

also be applicable to Belgian SIR/GVVs and/or to the Belgian investment company in receivables ("SIC"/"VBS") (as neither of these vehicles qualifies as a UCIT or an AIF). This is a major concern for the Belgian SIRs/GVVs. Although this is considered to be a legislative flaw, a reparation law is still awaited

New withholding tax exemption for Belgian and foreign dividends and decrease of the tax exemption of interest received on savings deposits for Belgian tax resident individuals

To stimulate investment in shares, a new withholding tax exemption for Belgian tax resident individuals is introduced, which applies to Belgian and foreign dividends up to a threshold of EUR 627 per year (figure for 2018). This measure applies to all 'equity-based' instruments and therefore also *parts bénéficiaires/winstbewijzen*. Dividends distributed by UCIs or through FCP/GBF and legal structures (as defined under the Cayman tax, see below) are however excluded from this exemption. The taxpayer can choose the dividends to which the exemption applies and the exemption should be requested through the income tax return. Please note that a new planned legislative change will increase the EUR 627 threshold to EUR 800.

As of 2018, Belgian tax resident individuals may only benefit from a tax exemption on the first EUR 940 of income they derive from savings deposits instead of the previous threshold of EUR 1,880. For savings accounts held in the name of a married couple (or a civil union), the exemption applies to twice this amount, i.e. EUR 1,880.

Other new tax rules worth mentioning

- The 0.15% **tax on securities accounts** (applicable to individuals holding qualifying securities with a value of more than EUR 500,000 on one or more securities accounts) is in the process of being voted. It is relevant for the investment funds sector since the shares/units held in UCIs through a securities account will be subject to this tax, except for those acquired under a life insurance contract or a pension savings scheme.
- The **Cayman tax** has been amended so as to increase its effectiveness and close some existing loopholes, i.e. it will now also apply (i) in case of double legal structures (*'constructions juridiques'/ 'juridische constructies'*), (ii) to legal structures which would be placed into a contractual arrangement (such as a life insurance product), and (iii) associations without legal personality (taxation in principle in the hands of its managers, etc.). The government also expressed its intention to make the Cayman tax applicable to 'private' investment companies (*'fonds dédiés'/ 'geïndividualiseerde fondsen'*). However, this measure has not yet been implemented.
- The rate of '**exit tax**' which applies in the case of the registration/conversion of a company as/into a real estate investment company such as a SIR/GVV, FIIS/GVBF, etc. (as well as to certain reorganisation transactions involving such investment companies), will be reduced from 16.995% to 12.75% as from tax year 2019 and then increased again to 15% as from tax year 2021. Due probably to a legislative flaw, certain reorganisations with a SIR/GVV or a FIIS/GVBF carried out in 2018 would not be able to benefit from the

12.75% reduced exit tax rate but would still be subject to the 'old' 16.995% rate.

- Until now, the RDT/DBI regime was limited to 95% of the amount of the received dividends. This limitation now disappears so that 100% of the dividends may benefit from this regime. The 1.6995% reduced withholding tax rate (applicable to dividends distributed to certain foreign companies holding a participation of less than 10% in the capital of the Belgian distributing company but with an investment value of at least EUR 2.5 million) is abolished. It is replaced by a **full withholding tax exemption**, which would apply (similarly to the abolished reduced withholding tax rate) only if, and to the extent that, for the foreign beneficiary company, the Belgian withholding tax would not be creditable/refundable in its country of tax residence. This change is a logical consequence of the increase of the RDT/DBI regime mentioned above.

CONTACTS



Alexandre Ooms
Partner

T +32 2533 5073
E alexandre.ooms
@cliffordchance.com



**Pierre-Olivier van
Caubergh**
Senior Associate

T +32 2533 5910
E pierre-
olivier.vancaubergh
@cliffordchance.com



**Thomas Linard de
Guertechin**
Associate

T +32 2533 5909
E thomas.
linarddeguertechin
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

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