



Laga Newsflash

Important legislative developments for B-REIT and S-REIF sectors

Although the elections are fast approaching, the Federal Parliament has been very active during the past months, resulting in the adoption of numerous bills. Some of those are of significant importance for **B-REITs** ("Société Immobilière Réglementée" ("SIR") / "Gereguleteerde Vastgoedvennootschap" ("GVV")) and **S-REIFs** ("Fonds d'investissement immobilier spécialisé" ("FIIS") / "Gespecialiseerd Vastgoedbeleggingsfonds" ("GVBF")).

Neutralisation effects of the 30% EBITDA rule

The Corporate Tax Reform Law of 25 December 2017 enacted a new 30% EBITDA interest limitation, based on the EU Anti-Tax Avoidance Directive (ATAD). According to this rule, the 'exceeding borrowing costs' (i.e. net financing costs) are deductible up to the higher amounts of either a maximum 30% of the EBITDA or EUR 3,000,000. Initially, it was foreseen that this '30% EBITDA rule' would be applicable as of 1 January 2020 (tax year 2021).

S-REIFs that do qualify as an Alternative Investment Fund ("AIF") as per AIFM legislation (implying that they have multiple investors) are excluded from the 30% EBITDA rule.

Following the Repair Law of 30 July 2018, B-REITs and S-REIFs that do *not* qualify as an AIF, were also excluded from the '30% EBITDA rule' by default. By excluding the exceeding borrowing costs as a disallowed expense, they are no longer included in the taxable base of such companies. As with the 30% EBITDA-rule, this *de facto* exclusion would enter into force as of 1 January 2020 (tax year 2021).

In the framework of the 2018/2019 Budget discussions, the Federal Government decided to bring forward the entry into force of the 30% EBITDA-rule to *1 January 2019* (tax year 2020). However, the initial law implementing this measure omitted the adjustment of the *de facto* exclusion for the B-REITs and S – REITs as well, and were potentially (again) subject to the 30% EBITDA restriction for 2019, leading to unforeseen tax costs in some situations.

This entry into force discrepancy between the 30% EBITDA rule and the *de facto* exclusion for B-REITs and S-REIFs is now rectified by a law containing various tax provisions and published in the *Official Journal* of 6 May 2019. This means that B-REITs and S-REIFs (non-AIF) will also not be taxed on any 'exceeding borrowing costs' in 2019 (tax year 2020).

Accelerated BookBuild allowed for B-REITs

During the last plenary session of the Chamber of Representatives on 25 April 2019, a law containing various financial provisions was adopted. This law amends the B-REIT Law of 12 May 2014 (among others), allowing B-REITs to raise capital in cash through the so-called Accelerated BookBuild ("ABB") technique, without having to grant a preferential subscription right or irreducible allocation right to existing shareholders.

The ABB is a specific technique of raising capital with little or no marketing, so that a company can quickly (without complying with a legal minimum subscription period) attract financing or benefit from specific market circumstances. This should allow B-REITs to have more flexibility in accessing capital markets.

A B-REIT will be able to increase its capital in cash without preferential subscription rights or irreducible allocation rights for existing shareholders if:

- (i) the capital increase is executed within the limits of the authorised capital (being a capital increase approved by the board of directors), and
- (ii) the cumulative capital increases via the ABB technique over a period of 12 months do not exceed 10% of the share capital upon the capital increase decision.

Specific measures applicable to S-REIFs

Initially, it was foreseen that a S-REIF should have a share capital of at least EUR 1,200,000. The abovementioned law containing various financial provisions now abolishes that minimum share capital requirement.

This implies that an S-REIF with the legal form of public limited liability company ("société anonyme" (SA) / "naamloze vennootschap" ("NV")) is subject to the standard minimum share capital requirement of EUR 61,500. On the other hand, an S-REIF with the legal form of an ordinary limited partnership ("société en commandite simple" ("SCS") / "gewone commanditaire vennootschap" ("GCV")) does not have a minimum capital requirement.

Furthermore and going forward, it is also explicitly allowed for a joint-venture, which technically speaking does not qualify as an AIF, to request S-REIF status.

Finally, the abovementioned law expands the Federal Tax Administration's ('FTA') supervision competencies with respect to institutional AIF's (such as the S-REIF). Upon the FTA's request, an institutional AIF must provide all information and documents regarding its operations, including the type of executed investments, in order to assess its compliance with the applicable legislation. Additionally, the statutory auditor of an institutional AIF must (i) proactively inform the FTA when it is aware of a breach by such AIF of the applicable legislation and (ii) provide a special report to the FTA when requested.

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