The Real Estate Investment Structure Taxation Review

Fifth Edition

Editors

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PREFACE

The real estate sector plays a crucial role in the global economy and social environment.

In particular, the commercial property sector offers the infrastructure needed for the growth and development of entrepreneurship and business, including offices, shops, industrial and logistics premises, and hotels. In Europe alone, commercial real estate represents a business of €8.5 trillion, which contributed €427 billion to the EU economy in 2021. It is also a fundamental source of employment. In 2021, the European real estate sector employed 4.2 million people – more than the car manufacturing and telecommunications sectors combined.[1]

Moreover, the sector also provides residential accommodation and is seen as a tool with which to meet social and public needs. New types of properties are emerging and have increasingly been included in investment portfolios, such as senior living, student accommodation and the life sciences market.[2] Since 2013, institutional investment in the residential sector has increased almost four times, to €606 billion in 2021. It has grown at a faster rate than commercial property and, over the same time line, its share of total institutionally invested property has doubled to 23 per cent.

The traditional retail and office sectors continue to represent a significant part of investors' portfolios, but their share has been declining over time in favour of residential property, particularly affordable and social housing. In responding to social and public needs, investors have increased the share of institutionally held residential investments, including student accommodation and senior housing, as well as holdings in 'alternative' property sectors (e.g., hotels, healthcare, car parks and mixed-use property).

In addition, urban regeneration has become a key element in many decisions taken at EU level and seeking to boost city renovation, decarbonisation and the green transition.

For the industry as a whole, the environmental, social and governance (ESG) agenda becomes clearly more pressing as each year goes by, and it is increasingly being recognised as more of an opportunity than an obligation. With the majority of stock (residential and non-residential buildings) built pre-2010 and almost a quarter pre-1945, Europe cannot achieve its emissions targets without retrofitting existing buildings to bring their energy efficiency levels into line with net zero goals.

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1 EPRA *Real Estate in the Real Economy* report 2022: https://www.epra.com/application/files/9516/6861/1334/EPRA-INREV-Real_Estate_Real_FINAL_Economy_2022_Report.pdf.

2 EPRA *Global Real Estate Total Markets Table* report: https://prodapp.epra.com/media/EPRA_Total_Markets_Table_-_Q1-2022_1649681531420.pdf.

Listed property companies and non-listed funds are constantly evaluating and improving their sustainability record through their participation in real estate sustainability benchmarks, such as GRESB and MSCI, in addition to reporting under relevant ESG frameworks such as EPRA sBPR, INREV and GRI.

In this context, attracting investment from institutional investors in highly regulated sectors such as pension funds, insurance companies and sovereign wealth funds is crucial for the growth of the real estate sector. In particular, it is desirable that those investors are involved in both financing large development projects and investing in properties held for rent.

Based on market practice, investments from foreign institutional investors are mainly carried out indirectly rather than through direct acquisitions, and particularly through specialised vehicles such as non-listed real estate funds, listed property companies and real estate investment trusts (namely REITs)

The pandemic emergency brought by covid-19 has affected the real estate sector just as it has so many other sectors. After a deep recession in most of the European economies in 2020 due to the pandemic, 2021 was characterised by an economic recovery that was forecast to continue, in principle, on a more moderate path.

However, in December 2022, annual inflation in the eurozone reached a record level of 9.2 per cent because of heightened uncertainty and geopolitical risks, as well as skyrocketing energy and raw materials prices caused by the war in Ukraine. Despite this uncertainty – and because the sector is underpinned by strong fundamentals – these conditions have not brought investments to a complete standstill. Nevertheless, we have certainly seen a slowdown. However, the underlying narrative around real estate in 2023 is one of cautious optimism, with renewed investment activity anticipated later in the year to counter the destabilising impact of high inflation and rising interest rates seen over the past 12 months.

In this regard, national legislators are bracing for a new risk phase and this will have an impact on new provisions aiming at stimulating or attracting selected investments in their countries. Parts of the NextGenerationEU recovery fund are likely to be subject to review in light of new 'what if' scenarios, as will tax credits and allowances given increased construction costs. Any review of national legislation shall also take into account international sanctions against Russia.

We are convinced that the role of the real estate sector as an economic, employment and social catalyst needs to be supported by a legislative framework that increases transparency and competitiveness, and simplifies as well as standardises bureaucratic processes.

However, the covid-19 pandemic, the war between Russia and Ukraine and the consequent inflation have all had different impacts within the European Union, depending on the country. This will, of course, further exacerbate differences between the interventions made by legislators in the individual jurisdictions, with allowances, tax credits and other tax provisions introduced and applied very differently from one Member State to another. Generally, these disparities reflect the level of impact of those elements on particular jurisdictions, the economic policies followed by their respective governments and the level of resources available to achieve those policy aims.

Correlatively, national legislators will need to adapt any new provisions to those pre-existing types of specialised real estate investment vehicles currently benefiting from tax exemptions or other advantageous allowances, for both direct and indirect tax purposes.

Given all of the above, the aim of this volume is to provide a useful guide to those international and institutional investors willing to invest in real estate properties located in Europe and elsewhere, and to illustrate in a comparative manner the possible alternatives for establishing investment platforms in Europe and investment vehicles at a local level. In particular, each country-specific chapter provides insights from leading experts on key tax considerations and investment opportunities based on the relevant national legislation. Furthermore, in this edition, we have sought to provide indications of any allowances and facilitations introduced temporarily in response to current economic crises and that may also present investors with investment opportunities in specific countries.

We would like to thank the authors of this volume for their extensive expertise and their efforts to ensure the successful outcome of this work. We hope that the reader finds this volume useful and we welcome any comments and suggestions for its improvement.

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Chapter 2

FRANCE

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I OVERVIEW

i Investment vehicles in real estate

Vehicles commonly used in France to invest in real estate properties include both unregulated and regulated vehicles.

Unregulated vehicles usually take corporate form, such as simplified joint stock companies (SASs). Entities that are transparent for tax purposes are also often used – for example, private property companies (SCIs) or, in certain specific circumstances, general partnerships (SNCs). The SCI is a corporate form that is well suited to the operation of one or more buildings but is not, in principle, best suited for use as an investment company open to a large number of shareholders.

Regulated vehicles may be listed vehicles, such as listed real estate investment companies (SIICs), or non-listed vehicles, such as collective investment funds in real estate (OPCIs) or real estate investment trusts (SCPIs). OPCIs themselves take one of two forms: either a SPPICAV (an open-ended investment company with predominantly real estate assets) or an FPI (a real estate investment fund).

Which vehicle is most appropriate will depend on a number of factors and circumstances relating to the investor's status, the nature of the transaction, the expected return horizon and certain tax issues (e.g., transfer taxes and value added tax (VAT)).

ii Property taxes

Real estate investments in France may be subject to various taxes.

Income and capital gains taxes

Income derived by French corporate investors from real estate assets located in France (rental income and capital gains) is subject to corporate income tax (CIT) in France at 25 per cent (or 25.83 per cent when the additional surcharge applies). However, income derived by certain regulated vehicles such as SIICs or SPPICAVs may be exempt from CIT, subject to, in particular, compliance with distribution requirements.

Income derived by French tax resident individuals from real estate assets located in France is subject to the following taxation:

a rental income: progressive income tax rates of up to 45 per cent and social contributions at the flat rate of 17.2 per cent (i.e., an overall rate of taxation of up to 62.2 per cent); and

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b capital gains: income tax at the flat rate of 19 per cent and social contributions at the flat rate of 17.2 per cent (i.e., an overall rate of taxation of 36.2 per cent, although rebates apply after a certain period of ownership).

Additional taxes may apply if the capital gain exceeds €50,000 (2 to 6 per cent) or if the taxpayer is subject to the contribution on high income (3 to 4 per cent).

For non-residents, rental income derived from real estate assets located in France is subject to CIT or individual income tax in France, and capital gains arising from the disposal of properties or of shares in land-rich entities are subject to a specific withholding tax.

Real estate transfer taxes

The direct acquisition of real estate assets is usually subject to transfer taxes at a rate of 5.81 per cent or 6.4 per cent, depending on the type and location of the property, a land registry fee of 0.1 per cent and notarial fees of 0.799 per cent (excluding VAT). However, subject to certain conditions, the transfer taxes may be reduced (1) to 0.715 per cent if the real estate asset qualifies as a new building for VAT purposes or if the purchaser undertakes to resell the building within five years, or (2) to €125 if the purchaser undertakes to build (or rebuild) within four years.

The acquisition of shares in a company (whether French or foreign) whose assets are mainly composed (directly or indirectly) of French real estate assets is, in principle, subject to a 5 per cent transfer tax. However, subject to certain conditions and limits, acquisitions of shares in an OPCI may be exempt from transfer taxes.

VAT

As a general rule, sales of buildings completed for more than five years are exempt from VAT (but in certain cases the seller may have to elect for VAT to be able to deduct input VAT). Sales of new buildings or building plots are, in principle, subject to VAT at the standard rate of 20 per cent.

Sales of shares in companies are exempt from VAT.

Annual 3 per cent tax on French real estate assets

All entities (regardless of their nationality) that directly or indirectly own real estate assets located in France are, in principle, subject to an annual tax equal to 3 per cent of those assets' fair market value, as determined on 1 January of each year.

However, in practice, the 3 per cent tax is limited in scope because of the large number of exemptions that are applicable.

Local taxes

French property tax (*taxe foncière*) applies to both developed and undeveloped property located in France. It is a direct local tax that is payable annually by the legal owner of the property as at 1 January of the year in question.

Real estate wealth tax

Real estate wealth tax applies to individuals (whether French or foreign) who own real estate assets, either directly or indirectly through real estate companies or real estate investment funds, with an overall net value of more than €1.3 million as at 1 January of the year in question.

II ASSET DEALS VERSUS SHARE DEALS

i Legal framework

Real estate assets may be acquired either by purchasing the properties directly (asset deal) or by purchasing a private company that in turn owns the real estate assets (share deal).

Both structures are common in practice and call for a case-by-case assessment of the following aspects: tax impact of the transfer (e.g., capital gains tax, VAT and transfer taxes); due diligence effort (more significant for share deals); and risk assumption – under an asset deal, the purchaser assumes solely those risks relating to the real estate assets, whereas, under a share deal, it assumes those risks relating to both the real estate assets and the owner company.

ii Corporate forms and corporate tax framework

Corporations

The most common corporate form for unregulated commercial property companies used in France to invest in real estate properties is the SAS, governed by Article L227-1 *et seq.* of the French Commercial Code. This is due, in particular, to the flexibility offered by an SAS compared with other commercial companies. SASs are subject to CIT under standard conditions.

Partnerships

When using a non-commercial company to invest, the most common choice is an SCI. SCIs are, in principle, transparent for tax purposes: no direct tax is levied at company level, the partners instead being taxed on their share of profits according to the tax rules applicable to them individually.

SCIs may, however, elect to pay CIT instead. SCIs are also automatically subject to CIT (without election) if they carry out a commercial activity (e.g., property trading or furnished rental activity). Therefore, to maintain their tax transparent status, SCIs are mainly used to hold unfurnished buildings with a view to renting them out.

iii Direct investment in real estate

Acquisition

Real estate transfer taxes and other fees

Transfer taxes and other fees on purchases of real estate assets built more than five years prior to the sale (i.e., existing buildings for VAT purposes) are as follows:

a transfer taxes: 5.81 per cent;[2]

b additional tax of 0.6 per cent on transfers of offices, commercial premises and storage premises located in the Ile-de-France region;

2 5.09 per cent in a very limited number of departments.

c land registry fee (*contribution de sécurité immobilière*): 0.1 per cent; and
d notary fees: 0.799 per cent before VAT (and before negotiation).

The acquisition of building plots and real estate assets built within the previous five years benefits from a reduced rate of 0.715 per cent for transfer taxes and is exempt from the 0.6 per cent additional tax if the total sale price (not just the margin) is subject to VAT.

In addition, investors can also benefit from the following preferential tax regimes (instead of the 5.81 per cent transfer taxes and the additional tax of 0.6 per cent as the case might be):

a commitment to build: fixed registration duty of €125 when a VAT-registered purchaser undertakes in the deed of sale to carry out work equating to the construction of a new building for VAT purposes within four years; and
b commitment to resell: transfer taxes are reduced to 0.715 per cent when a VAT-registered purchaser undertakes in the deed of sale to resell the real estate asset within five years.

VAT

The acquisition of real estate assets located in France may be subject to VAT depending on the transaction's legal and material features (e.g., date of completion of the building and scale of works carried out on the building) and whether the seller pays VAT.

VAT is based on EU law and is, in principle, a neutral tax. Depending on the purchaser's business activities, VAT paid on the acquisition of real estate may be recovered by offsetting it against VAT collected on other transactions (e.g., property rents) or by claiming a refund directly from the tax authorities.

The following operations are subject to VAT according to Article 257 of the French Tax Code (FTC):

a the supply of land defined as a 'building plot' by a VAT-registered person acting as such; and
b the supply of a new building by a VAT-registered person acting as such (i.e., buildings completed less than five years ago, regardless of whether they are an entirely new building or the result of work on an existing building that involved raising its height or significant renovation).

VAT is, in principle, payable on the sale price. In certain specific cases, VAT is instead payable on the transaction margin, namely the difference between the price upon the initial acquisition and that upon the subsequent sale. For this to be the case, it must be established that: (1) the legal status of the property (e.g., building plot or developed property) has not changed between acquisition and resale, and (2) the acquisition did not give rise to a right to deduct VAT. The standard VAT rate of 20 per cent applies.

When a transaction is exempt from VAT (i.e., the sale of land not defined as a building plot or the sale of a building completed for more than five years), it results, in principle, in the loss of the right to deduct input VAT. If the seller deducted input VAT when it acquired the assets or over the holding period, that deduction is made conditional upon the relevant asset being used for the purposes of taxable supplies over a certain period (20 years for real estate assets). Any change affecting the VAT status of that asset – such as a non-taxable sale or transfer – requires the taxable person to adjust accordingly the input VAT deducted at the time of acquisition or over the holding period.

To avoid this, the seller may elect to make real estate transactions subject to VAT under the standard conditions (or may charge the purchaser for the VAT regularisations). The election must be stated in the acquisition deed.

In practice, however, asset deals are usually carried out under Article 257 *bis* of the FTC, which provides that no VAT is payable in the event of a 'transfer of a totality of assets, or part thereof'. When the building is used for rental, application of this rule is subject to the following conditions:

a the seller and purchaser must be taxable persons for VAT purposes;
b the property must be used by the seller as a rental property at the time of its sale and the purchaser must continue the rental activity thereafter;
c both the seller and the purchaser must have validly elected for VAT on rents; and
d the property must be recorded as a fixed asset (rather than trading stock) in both the seller's and the purchaser's books.

Under this regime, the sale does not trigger any VAT and the purchaser is deemed to be the successor of the seller for VAT regularisation purposes.

Rental phase

Income taxes

Income from real property situated in France is subject to tax in France.

French corporate investors subject to CIT

French corporate investors that own real estate assets located in France are subject to CIT. Certain arm's-length expenses and costs may be deducted from the company's taxable rental income.

CIT rates

The standard CIT rate is currently 25 per cent (25.83 per cent when the surcharge applies). A reduced 15 per cent rate is available to small and medium-sized enterprises on their profits up to €38,120.

Net taxable income

Corporate investors are subject to CIT on a tax base equal to their accounting income as recorded on their profit and loss account, duly adjusted according to the applicable tax rules (e.g., expenses deductible for tax purposes).

As a general rule, expenses are deductible for tax purposes provided that they are: (1) incurred in the direct interest of the company; (2) related to normal business management (i.e., not excessive or fictitious); (3) recorded in the company's accounts (with relevant supporting documents such as invoices); and (4) not incurred as consideration for fixed assets (including real estate assets).

Acquisition costs

From a French accounting perspective, the transfer costs (such as transfer taxes, notary fees, land registry fee and appraisal fees) relating to the acquisition of a real estate asset can be either immediately deducted by the purchaser as an expense or included in the gross value of the property. From a tax standpoint, the same rule applies, except when transfer costs are borne by the seller.

Depreciation of the real estate asset

The value of the real estate asset booked in the accounts of the SAS must be allocated between the land, which cannot be amortised, and the built elements, which are amortised according to the component method. The depreciation schedule is broken down by component and each component must be depreciated over its useful life.

Loss in the value of land may be taken into account only by way of provisions for impairment.

Interest deduction

Interest on loans is deductible subject to the French rules on interest deduction – in particular the following.

a Interest rate limitation: pursuant to Article 39(1)(3) of the FTC, interest on loans granted by direct shareholders is deductible from the borrowing company's taxable income (1) if the borrower's share capital is fully paid up, and (2) up to the level of the average effective floating rate, published every quarter, on bank loans with a minimum maturity of two years (1.15 per cent for the first quarter of 2022). In principle, when the loan is granted by a related entity,[3] the interest rate limitation still applies but may be set at a higher level rate if the borrower can show that it satisfies the arm's-length test (i.e., it matches the rate that the borrower would have obtained from a non-related party under similar circumstances, taking into account the characteristics of the loan and the financial situation of the borrowing company, such as its credit rating). According to the French Administrative Supreme Court, a borrowing company can prove the arm's-length nature of an intragroup loan by any means.[4] Interest that is not deductible under this rule is reclassified as deemed dividends and, therefore, may attract dividend withholding tax in an international context.

b EBITDA interest limitation rule (Anti Tax Avoidance Directive I (ATAD I)): a company's aggregated net financial expenses[5] are deductible up to whichever is the higher of €3 million or 30 per cent of its adjusted earnings before interest, taxes, depreciation and amortisation (EBITDA). If a borrowing company exceeds a related party debt-to-net-equity ratio of 1.5, a fraction of the aggregated net financial expenses of the company is deductible only up to whichever is the higher of €1 million or 10 per cent of the adjusted EBITDA. Net financial expenses that cannot be deducted in a given year can be carried forward under certain conditions and subject to certain limits.

3 According to Article 39(12) FTC, two entities are regarded as related if one of the entities directly or indirectly holds the majority of the other entity's share capital or has de facto decision-making powers in that entity, or if both entities are under the control of the same third entity.

4 French Administrative Supreme Court, 10 July 2019, *SAS Wheelabrator Group*, Case No. 429426; French Administrative Supreme Court, 29 December 2021, No. 441357, *Sté Apex Tool Group*.

5 Financial expenses net of financial income.

c Anti-hybrid limitation (ATAD II): the purpose of these rules is to combat hybrid mismatch arrangements resulting from conflict between different states in the characterisation of financial instruments, payments and entities. For instance, the payment of interest under a loan gives rise to a mismatch in tax outcomes if it is deductible under French law at the borrower's level but is not included in the beneficiary's taxable income in its country of residence. In these cases, the interest deduction is denied in France if the mismatch in tax outcomes is attributable to the differences in the tax characterisation of the instrument or the underlying payment.

French individual investors

Pursuant to French domestic law, French tax resident individuals are, in principle, subject to individual income tax and social security contributions on their worldwide income, unless a double tax treaty provides otherwise.

French source real estate income is subject to the progressive individual income tax rates (up to 45 per cent) as well as social security contributions (17.2 per cent).

In addition, the specific contribution on high income may apply. The rate is 3 per cent on the portion of income exceeding €250,000 for a single person and €500,000 for a married couple, and 4 per cent for income exceeding €500,000 for a single person and €1 million for a married couple.

Non-resident investors

CIT applies to most foreign companies that own rental properties located in France.

Non-resident individuals are also subject to the progressive individual income tax but with a minimum rate of 20 per cent, unless they can prove that the rate of individual income tax on their French and foreign income combined would be lower than 20 per cent, in which case this lower rate then applies to their French income. Social security contributions also apply at 7.5 per cent for individuals who are resident in an EU Member State or in Iceland, Norway, Liechtenstein or Switzerland and at 17.2 per cent for individuals who are resident in other countries.

Permanent establishment issues

The mere ownership and leasing of real estate assets in France by a non-resident company does not, per se, give rise to a permanent establishment (PE) in France.[6]

Income from French real estate assets and capital gains on their disposal are nonetheless subject to French taxes, regardless of whether there is deemed to be a PE in France.[7]

The French tax authorities consider that income derived by a French company from real estate assets held abroad is to be included in the tax base for CIT unless it can be attributed to a PE located outside France.

6 French Administrative Supreme Court, 31 July 2009, *Overseas Thoroughbred Racing Stud Farms Limited*, Case No. 296471.

7 Articles 164 B and 209 I FTC.

VAT

Leasing out unfurnished buildings (e.g., office or commercial premises) is, in principle, exempt from VAT in France. However, the lessor can elect to apply VAT on the rents by virtue of Article 260(2) of the FTC (unless the building is used for residential purposes). To do so, the lessor must send a letter to its tax department. The election then takes effect from the first day of the month during which this letter is received.

In principle, accommodation activities are exempt from VAT, and operators cannot elect for VAT. Nonetheless, Article 261D(4)(b) of the FTC stipulates that this exemption does not apply to furnished rentals leased on a habitual basis for valuable consideration and including, in addition to the accommodation itself, at least three of the following four services:

a breakfast;
b regular cleaning;
c supply of household linen; and
d customer reception.

Territorial economic contribution

Investors may fall within the scope of a territorial economic contribution, which has two components:

a a real estate contribution (CFE), assessed on the rental value of assets subject to property tax: CFE is assessed annually by the local authorities that set the tax rate for businesses located in their area; and
b an added value contribution (CVAE), assessed on the value added generated by the business: only companies with annual pre-tax turnover of over €500,000 fall within the scope of this contribution. CVAE rates range from 0.125 per cent to 0.375 per cent (for companies with a turnover exceeding €50 million). The Finance Bill for 2023 has nevertheless repealed CVAE over a two-year period: in practice, CVAE rates for 2023 have been halved, prior to the scheduled disappearance of the tax in 2024.

CFE and CVAE are payable on an annual basis.

Real estate wealth tax

Real estate wealth tax applies to individuals (whether French or foreign) who own real estate assets, either directly or indirectly through real estate companies or real estate investment funds, with an overall net value of more than €1.3 million. Certain specific exemptions exist. For example, stakes in SIICs are excluded from the tax base if the taxpayer holds less than 5 per cent of the SIIC's share capital and voting rights. All taxable assets must be assessed at their fair market value on 1 January of the year in question.

French tax resident individuals are subject to real estate wealth tax on their worldwide assets, whereas non-residents are subject to real estate wealth tax only on their assets located in France. Real estate wealth tax is assessed according to progressive rates from 0.5 to 1.5 per cent.

Property tax

French property tax applies to both developed and undeveloped property located in France. It is a direct local tax that is payable annually by the legal owner of the property on 1 January of the year in question.

The tax on developed property is assessed on the notional rental value of the property as determined by the local land registry. The tax is calculated by multiplying half of this rental value (to take into account management, insurance, depreciation, maintenance and repair costs) by coefficients determined annually by the local authorities.

The tax on undeveloped property applies mainly to privately owned land and forests. It is likewise assessed on the notional rental value of the property and is calculated by multiplying 80 per cent of that rental value by coefficients determined by the local authorities.

The FTC provides for some exemptions. For instance, publicly owned buildings used for public services that do not generate income, buildings used for public religious worship, and property owned by foreign states and used to house diplomatic missions are all exempt. Newly developed properties also benefit from a temporary exemption of two years (under certain conditions).

Annual 3 per cent tax on French real estate assets

All entities (regardless of their nationality and including trusts, partnerships and comparable organisations with or without legal personality) that directly or indirectly own real estate assets located in France are, in principle, subject to an annual tax equal to 3 per cent of those assets' fair market value, as determined on 1 January of each year.

For these purposes, an entity is deemed to own a real estate asset indirectly when it owns an equity interest in a lower-tier entity that itself owns the asset (either directly or through any number of tiered intermediary entities).

All intermediary entities in an ownership chain are jointly liable for the payment of any 3 per cent tax payable by any higher-tier entity in that chain.

However, the FTC provides for various exemptions from the 3 per cent tax: for international organisations, sovereign states and their political and territorial subdivisions, as well as any legal entities, organisations, trusts or comparable institutions in which they hold a controlling interest. SPPICAVs and FPIs are also exempt from this tax, provided that they are not constituted in the form of a professional OPCI.

Entities established in a jurisdiction that has concluded a tax treaty with France containing an administrative assistance clause are entitled to full exemption under the standard disclosure procedure. To benefit from this exemption, they must either file an annual return or undertake to provide the French tax authorities with certain information upon request, namely:

a details of the situation, nature and market value of the French real estate on 1 January;

b the identity and address of any and all stockholders, shareholders or other members holding more than 1 per cent in the declaring entity; and

c the number of stocks, shares or other rights held by each of the stockholders, shareholders or other members holding more than 1 per cent in the declaring entity.

Exit

Capital gains taxation

Income taxes arise on the disposal of French real estate assets.

Capital gains made by French companies on the disposal of real estate assets are subject to CIT under standard conditions.

Individuals who are French tax resident are subject to individual income tax at a specific flat rate of 19 per cent and social security contributions at a flat rate of 17.2 per cent (i.e., an overall rate of taxation of 36.2 per cent). They may benefit from a deduction, however, based on how long they have held the property for (up to a full exemption from income tax after 22 years of ownership and a full exemption from social security contributions after 30 years of ownership).

Non-resident companies and individuals are subject to a specific capital gains tax under Article 244 *bis* A of the FTC. The withholding tax rates are the same as those specified above: the standard 25 per cent CIT rate for companies and 19 per cent for individuals. Social security contributions also apply at 7.5 per cent for individuals who are resident in an EU Member State or in Iceland, Norway, Liechtenstein or Switzerland and at 17.2 per cent for individuals who are resident in other countries. Ownership duration rebates also apply to non-resident individuals.

When the net taxable capital gain on developed properties is higher than €50,000, individuals (whether French resident or non-resident) may be subject to an additional tax levied at progressive rates (from 2 to 6 per cent).

Transfer taxes and VAT

As regards transfer taxes and VAT, the rules outlined above in respect of acquisitions also apply to exits.

iv Acquisition of shares in a real estate company

Acquisition

Transfer taxes

The acquisition of shares triggers transfer taxes, but the applicable rate depends on whether or not the legal entity qualifies as a real estate-rich entity.

According to Article 726(1)(2) of the FTC, legal entities of any nationality are deemed to be real estate-rich entities, for transfer tax purposes, if their shares are not traded on a regulated market and their assets primarily comprise, or have primarily comprised over the course of the preceding year, real estate properties or rights situated in France or holdings in other legal entities of any nationality whose shares are not traded on a regulated market and that are themselves predominantly invested in real estate. A legal entity's assets are deemed to primarily comprise real estate if the fair market value of its real estate assets represents more than half that of its total assets at any time during the year preceding the sale of its shares.

Sales of shares in real estate-rich entities are subject to a 5 per cent transfer tax.

Sales of shares in other entities are subject to the following transfer taxes:

a sales of shares in a joint stock corporation (SA), SAS or partnership limited by shares (SCA): 0.1 per cent. For listed companies, transfer taxes apply only if the sale is effected by deed: and

b sales of shares in other types of company, such as a private limited company (SARL), SNC or non-trading company: 3 per cent of the purchase price minus a sum equal to the number of shares sold multiplied by €23,000 and divided by the total number of shares in the company.

Transfer taxes are assessed on either the sale price or the fair market value, whichever is higher.

VAT

There is no French VAT on acquisitions of shares in real estate companies.

Rental phase

Income taxes

Investments in partnerships, such as SCIs, are, in principle, treated as direct investments for income tax purposes, owing to the transparency of partnerships for these purposes.

For investments in corporations, on the other hand, which are not transparent for income tax purposes, taxation can occur at two levels.

Corporation level

At the level of the real estate holding company, the rules for direct investments apply (see Section II.iii).

Shareholder level

Dividends paid by French companies to their shareholders are taxed as follows.

a French holding companies (not transparent for tax purposes): dividends are, in principle, included in the taxable income subject to the standard 25 per cent CIT rate. Parent companies may, however, elect for the parent subsidiary regime under certain conditions (e.g., the parent company must have directly held an interest of 5 per cent in the share capital of the distributing subsidiary for at least two years). In these cases, dividends are exempt from CIT except for an add-back amounting to 5 per cent of the dividends received (or 1 per cent for companies within the same tax consolidated group, or companies located in an EU or EEA country that would meet the conditions to belong to a tax consolidated group if established in France).

b French individual shareholders: dividends are subject to the French flat tax (PFU) at 12.8 per cent or, if the taxpayer elects for the global progressive rates of taxation on all its income, at the rate indicated for the relevant individual income tax bracket for investment income, in accordance with the rules applicable to income from shares (with, where applicable, a 40 per cent allowance). Dividends are also subject to social security contributions (17.2 per cent), meaning that dividends are taxed at an overall rate of 30 per cent if the PFU applies. The contribution on high income may also apply at a tax rate of 3 or 4 per cent depending on the income.[8]

c Non-resident shareholders: subject to any applicable double tax treaties, French source dividends are, in principle, subject to a withholding tax at the standard CIT rate[9] (i.e., 25 per cent). By way of exception, the applicable rate is 12.8 per cent for non-resident individuals and, under certain conditions, 15 per cent for certain non-profit organisations and zero per cent for French or foreign collective investment undertakings. In addition, dividends distributed by a company subject to CIT are exempt from withholding tax under the EU Parent–Subsidiary Directive, as implemented in France,[10] if the parent company (1) is the beneficial owner of the dividends; (2) has one of the legal forms listed in the Annex to the Directive; (3) has its place of effective management in an EU Member State or in Iceland, Norway or Liechtenstein; (4) is liable for CIT (without any possibility of election and without any exemption therefrom); (5) has held or undertakes to hold at least 10 per cent of

8 Article 223 *sexies* FTC.

9 Article 119 *bis* 2 FTC.

10 Article 119 *ter* FTC.

the capital of the distributing company for at least two years (or 5 per cent in certain cases); and (6) does not fall within the scope of the anti-abuse rule.[11] Dividends paid in a non-cooperative state or territory may be subject to a 75 per cent withholding tax.

VAT

No VAT applies at the level of the shareholder during the rental phase.

Exit

Preliminary remark: discount for latent capital gains tax

As part of a share deal, the purchaser may request a discount on the share purchase price because of latent capital gains taxation. The purpose of this practice is to offset latent tax liabilities, based on the unrealised capital gains on the company's real estate assets when the company's shares are valued. Indeed, purchasers of shares in such companies may have to bear this tax liability if the company subsequently sells its real estate assets.

However, under current market practice, a corporate purchaser would not typically request any discount when purchasing shares in a tax-transparent entity such as an SCI, as it should be able to cancel any latent tax liabilities on the real estate assets by dissolving the SCI without liquidation immediately after its acquisition.[12]

Income taxes on disposals of shares

The taxation of capital gains on shares of French companies is as follows.

French companies holding shares (not tax transparent)

Capital gains realised by French corporate investors on the sale of shares in real estate-rich companies are subject to CIT under standard conditions (except for real estate listed companies, for which a rate of 19 per cent applies under certain conditions; see Section IV.ii, 'Scope of the election'). However, a company is not considered to be real estate rich, for capital gains tax purposes, if the real estate is used for its own commercial or industrial activities.

Capital gains realised on the sale of shares in other companies are also subject to CIT under standard conditions, but they may be eligible for the participation exemption regime if, in particular, the seller has held a 5 per cent interest for at least two years (in these cases,

11 The withholding tax exemption does not apply to dividends distributed 'in an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose [of this exemption], are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. For the purposes of [these provisions], an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.'

12 After a period of some uncertainty, the French Administrative Supreme Court has confirmed (Conseil d'Etat, 24 April 2019, Case No. 412503, *Société Fra SCI*) its *Quemener* case law (Conseil d'Etat, 16 February 2000, Case No. 133296, *Sté anonyme Établissements Quemener*). The Administrative Court of Appeal of Paris has confirmed its application (Cour administrative d'appel de Paris, 8 July 2022, No. 16PA02400, *Lupa*; 16PA02401).

the capital gains are exempt from CIT except for an add-back amounting to 12 per cent of the gains). Thus, such a capital gain would be taxed at the effective CIT rate of 3 per cent in 2022 under currently applicable law (or 3.1 per cent when the additional surcharge applies).

French individual shareholders

Capital gains realised by French individual investors on sales of shares in non-transparent entities (whether or not real estate rich) are, in principle, subject to the PFU at 12.8 per cent or, if the taxpayers elect for the global progressive tax rates on their total income, at the relevant rate for their individual income tax bracket. Capital gains are also subject to social security contributions (17.2 per cent), meaning that capital gains are taxed at an overall rate of 30 per cent if the PFU applies.

Capital gains realised on sales of shares in a tax-transparent real estate entity, such as an SCI, are, in principle, subject to the same tax regime as is applicable to a direct sale of the real estate asset: individual income tax at a specific flat rate of 19 per cent and social security contributions at a flat rate of 17.2 per cent (i.e., an overall taxation of 36.2 per cent). A deduction may apply, however, depending on how long the taxpayer has held the shares. When the net taxable capital gain on the shares exceeds €50,000, French individuals may also be subject to the specific real estate contribution, ranging from 2 to 6 per cent.

In both cases, the contribution on high income may also apply.

Non-resident shareholders

Subject to any applicable double tax treaties, capital gains realised on the sales of shares in real estate-rich companies are subject to the specific capital gains tax set out under Article 244 *bis* A of the FTC, which is levied at the standard 25 per cent CIT rate for companies and 19 per cent for individuals. Article 244 *bis* A also applies to sales of shares in SIICs and SPPICAVs, provided that the seller directly or indirectly holds at least 10 per cent of the share capital of the company whose shares it is selling.

For individuals, social security contributions also apply at 7.5 per cent for individuals who are resident in an EU Member State or in Iceland, Norway, Liechtenstein or Switzerland and at 17.2 per cent for individuals who are resident in other countries. A deduction may apply based on how long the taxpayer has held the shares for. When the net taxable capital gain on the shares exceeds €50,000, non-resident individual investors may also be subject to the specific real estate contribution, ranging from 2 to 6 per cent.

Subject to any applicable double tax treaties, capital gains realised on sales of shares in companies that do not predominantly invest in real estate are, in principle, subject to the Article 244 *bis* B of the FTC withholding tax only if the shareholder holds or has held (together with their family members) a substantial shareholding at any time over the past five years. A substantial shareholding is defined as more than 25 per cent of the rights to the company's profits.

Transfer taxes and VAT

As regards transfer taxes and VAT, the rules outlined above in respect of acquisitions also apply to exits.

In brief, transfer taxes are, in principle, lower and the taxation of capital gains may be similarly lower with a share deal. However, purchasers generally require asset and liability guarantees.

III REGULATED REAL ESTATE INVESTMENT VEHICLE (OPCI)

i Regulatory framework

The OPCI was created by an ordinance dated 13 October 2005.[13] OPCIs are real estate investment funds whose purpose is the acquisition or construction of properties for rental purposes and the holding of interests in real estate-rich companies with a similar purpose.

ii Overview of the regulated investment vehicle

Corporate forms and articles of association

OPCIs take one of two forms: either a SPPICAV (an open-ended investment company with predominantly real estate assets) or an FPI (a real estate investment fund). SPPICAVs can be incorporated as either an SA or an SAS. The latter form is much more widely used in practice, owing to its flexibility compared with the SA. SPPICAVs are subject to both the special provisions of the French Monetary and Financial Code (MFC) and the general provisions applicable to SAs and SASs, with certain exceptions.

An FPI is a co-ownership of real estate assets, financial instruments and other assets, and does not have its own legal personality. It is not subject to the rules of the French Civil Code on joint ownership and partnerships.

In practice, virtually all existing OPCIs are SPPICAVs. With the exception of FPIs dedicated to furnished rental properties, FPIs have not been widely adopted in the market, doubtless owing to competition from SCPIs.

Corporate purpose

The main object of an OPCI is investing directly or indirectly in properties intended for rental, constructing properties intended exclusively for rental, holding such properties directly or indirectly, and carrying out work of any nature on such properties with a view to their rental. On the other hand, an OPCI cannot carry out transactions corresponding to property trading (the purchase of properties for resale) or real estate development (the construction of property for sale).

On an incidental basis, an OPCI may directly or indirectly acquire (with a view to renting them out) furniture and furnishings, equipment and all movable property allocated to the real estate and required for its operation, use and exploitation by third parties.

The corporate purpose of an OPCI may also include the management of financial instruments and deposits. This possibility is essentially used by retail OPCIs, which need to hold liquid assets to manage unit redemption requests from their shareholders.

Composition of assets and investment ratios

The property and rights that are eligible as assets of an OPCI are exhaustively defined by the MFC. For real estate assets, this list is particularly broad because, in essence, it covers all real estate and real property rights, financial leasing contracts for real estate purposes, shares in non-listed real estate subsidiaries and shares in listed real estate companies.

However, the list excludes holdings in entities, irrespective of their corporate form, in which the partners or members have unlimited joint and several liability for the entity's debts. In practice, this excludes holdings in SNCs and unregistered partnerships (SEPs).

13 Ordinance No. 2005-1278 of 13 October 2005.

A minimum of 60 per cent of an OPCI's assets must be real estate assets. This ratio must be satisfied on 30 June and 31 December of each financial year, beyond an initial period of three years following approval by the French financial markets authority (AMF). This ratio must also be satisfied on at least seven occasions per fixed period of five years. If the OPCI directly or indirectly holds controlled interests, this is assessed on a consolidated basis (i.e., as if it held the properties directly).

Legal framework

The legal framework governing OPCIs is defined by Articles L214-33 *et seq.* of the MFC. Several pieces of secondary legislation complete the framework, in particular the General Regulation of the AMF.

OPCIs are alternative investment funds (AIFs). Their formation, transformation, merger, demerger and liquidation are all subject to approval from the AMF. An OPCI must obtain this approval before marketing its units or shares. The AMF also defines the conditions under which an OPCI must inform its subscribers, as well as the conditions for all related advertising and soliciting.

OPCIs that are open to non-professional investors are subject to strict rules, particularly in matters of risk spreading and asset ratios. Intended for the general public, these retail OPCIs are open funds from which investors may withdraw by requesting the redemption of their units at net asset value.

On the other hand, the professional collective investment fund in real estate (OPPCI) is intended for professional investors. OPPCIs are more flexible than the retail vehicle in numerous ways. In particular, they are not subject to any restrictions concerning risk spreading and, therefore, may hold a single asset.

Parties involved

OPCIs are managed by an AMF-licensed portfolio management company, which represents the OPCI in respect of third parties and is supervised by a depositary.

The depositary, appointed by the OPCI, must be a credit institution or investment firm with its registered office in France. Its duties mainly involve auditing the inventory of the OPCI's assets, acting as custodian for its non-real estate assets and ensuring the legality of decisions of the OPCI and of the management company.

In addition to this classic form of supervision, OPCIs are subject to periodic checks by real estate appraisers. Real estate appraisers are experienced professionals in property valuation, appointed by the OPCI or the management company after approval by the AMF. The role of the real estate appraisers is to value the real estate assets, properties and real property rights held directly or indirectly via non-listed companies. The management company is then responsible for valuing the real estate assets at market value, basing itself on the work carried out by the appraisers.

iii Tax regime for the investment vehicle

Taxation of SPPICAVs

Situation of SPPICAVs regarding corporate income tax

SPPICAVs are exempt from corporate income tax under Article 208(3) *nonies* of the FTC. This exemption is not limited to income from their real estate activity; it covers all profits. In return, SPPICAVs are required to distribute a large part of their profits each year to ensure their taxation in the hands of the shareholders.

According to the authorities, this exemption is conditional upon the SPPICAV complying with 'the conditions of approval, investment and operation as provided for in Articles L214-33 *et seq.* of the MFC, including compliance with the distribution requirements'.[14]

Distribution requirements

According to Article L214-69 of the MFC, SPPICAVs must distribute:

a at least 85 per cent of their net rental income before the end of the fifth month of the financial year following that in which it was earned;

b at least 50 per cent of capital gains on the disposal of real estate assets before the end of the fifth month of the second financial year following that in which they were made; and

c 100 per cent of dividends paid to them by real estate subsidiaries that are exempt from CIT before the end of the fifth month of the financial year following that in which they were received.

Any income not listed above is not subject to any distribution requirements; such income may be distributed or capitalised by the SPPICAV.

Taxation of a SPPICAV's subsidiaries

Subsidiaries usually take the form of SCIs. Being tax-transparent entities, their income is directly allocated to shareholders for CIT purposes. Income allocated by the SCI to its parent OPCI is exempt from CIT at OPCI level.

When the subsidiary is a joint stock or private limited company (SA, SAS or SARL), it may elect to be exempt from CIT under the SIIC regime, provided that at least 95 per cent of its capital is held by a SPPICAV, by several SPPICAVs jointly or by one or more SPPICAVs and one or more SIICs.

iv Tax regime for investors

Dividends

Subject to certain specific rules, the taxation of dividends follows the standard rules set out in Section II.iv.[15]

However, French resident individuals who elect to apply the progressive tax rates for individual income tax cannot benefit from the 40 per cent tax allowance.

Similarly, corporate investors cannot obtain relief under the domestic parent–subsidiary regime or under the EU Parent–Subsidiary Directive, nor can non-resident shareholders

14 BOI-RPPM-RCM-20-10-30-10, No. 150.

15 See Section II.iv, 'Shareholder level'.

benefit from reduced withholding tax rates under most tax treaties, as SPPICAVs are fully exempt from CIT and, therefore, do not meet the subject-to-tax test usually required for treaty benefits.

However, under certain tax treaties, shareholders whose interest in an SPPICAV does not exceed 10 per cent may benefit from a reduced 15 per cent withholding tax rate. This is the case under the tax treaties concluded by France with the United States, the United Kingdom, Germany, China, Luxembourg and, more recently, Belgium.

Subject to certain conditions, foreign undertakings for collective investment benefit from a reduced rate of 15 per cent.

Capital gains on the sale of shares

Capital gains made on the sale or redemption of SPPICAV shares by shareholders who are natural persons are subject to capital gains tax on securities under the standard rules.[16]

Capital gains made by French corporate investors are included in their taxable income at the standard CIT rate.

Subject to tax treaties, capital gains made by non-resident shareholders holding 10 per cent or more of the shares in a SPPICAV are taxable in France.

Transfer taxes

As a general rule, the sale or redemption of OPCI shares or units is exempt from registration duties.

However, a 5 per cent transfer tax applies on:

a the sale of shares in a SPPICAV when:
- the purchaser is a corporate entity or fund that holds (or will acquire as a result of the sale) more than 20 per cent of the shares in the SPPICAV; or
- the purchaser is an individual who holds (or will acquire as a result of the sale) more than 10 per cent of the shares in the SPPICAV; and

b the redemption of shares by a SPPICAV when:
- the investor from whom the shares are redeemed is a corporate entity or fund that holds more than 20 per cent of the shares in the SPPICAV; or
- the investor from whom the shares are redeemed is an individual who holds more than 10 per cent of the shares in the SPPICAV.

IV REAL ESTATE INVESTMENT TRUSTS AND SIMILAR STRUCTURES

i Legal framework

The SIIC legal framework is a tax regime created by the Finance Law of 30 December 2002 with the aim of boosting France's appeal for real estate investment and facilitating the financing of tertiary sector real estate. It is grounded in Article 208C of the FTC, which lays down the eligibility conditions for a CIT exemption and the associated obligations.

The essential feature of this tax regime, inspired by the tax treatment of real estate investment trusts (REITs) in the United States, is that it institutes a system for taxing the

16 See Section II.iv, 'Income taxes on disposals of shares'.

profits of listed real estate companies at the level of the shareholder, with the company itself not being subject to CIT owing to its strictly real estate activities. To transfer the tax burden to shareholders, SIICs must distribute a significant portion of their profits every year.

As listed companies, SIICs are also subject to regulations governing the offering of securities to the general public and the admission of securities to trading on a regulated market.

SIIC status is not otherwise tied in to any specific regulatory framework, however. In particular, SIICs are not subject to the rules applicable to AIFs.

ii Requirements to access the regime

Companies concerned

SIICs

Companies may elect to apply the SIIC regime if their shares are admitted for trading on an eligible regulated market,[17] they have a registered capital of at least €15 million and their main object is the acquisition or construction of real estate for rental purposes or the direct or indirect holding of interests in companies with an identical corporate object.

SIICs can pursue other activities not corresponding to their main purpose (such as real estate trading, property marketing and property development) on an incidental basis without forfeiting the benefit of the SIIC regime. However, income from these other activities will be taxable under standard conditions. According to the authorities, for these activities to be deemed incidental, the value of the assets used in pursuing them must not exceed 20 per cent of the gross value of the SIIC's assets. It is also acceptable for SIICs to carry on an activity that is taxable under the framework for real estate financial leasing on an incidental basis, as long as the amount outstanding under financial leasing contracts for real estate accounts for no more than 50 per cent of the SIIC's assets.

Persons acting together within the meaning of Article L233-10 of the Commercial Code must not directly or indirectly hold 60 per cent or more of the SIIC's capital or voting rights. This condition is assessed during each financial year in which the regime is applied. This capital holding limit applies from the first financial year covered by the election. It does not apply to the fraction of capital held by a SIIC or by SIICs acting together (or foreign companies whose working and tax regimes are comparable with those of a French SIIC).

If the 60 per cent threshold is exceeded during a given financial year, the exemption regime is temporarily suspended, subject to certain exceptions, and the SIIC and its subsidiaries become subject to CIT under the ordinary conditions of the law for that financial year.

Finally, SIICs are subject to a capital spread condition. Article 208(C) of the FTC provides that 15 per cent of the company's share capital and voting rights must be spread among persons who each hold directly or indirectly less than 2 per cent. However, this condition needs to be met only on the first day of the first financial year in which the regime is applied.

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17 Regulated markets with their registered office or head office in the European Union, in a state that is a member of the European Economic Area or located outside the European Economic Area, on condition that they operate under rules identical to those laid down by Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

The SIIC's subsidiaries

If they are subject to CIT, a SIIC's subsidiaries with identical corporate purpose may also elect to apply the SIIC regime, as long as they are at least 95 per cent held by one or more SIICs at all times over the financial year.

SIICs may also invest via subsidiaries in the form of tax-transparent partnerships (SCIs or SNCs) with identical corporate purpose, without any minimum holding requirement. In this case, the earnings of the partnership are allocated for tax purposes to the partners proportionally to their interest in the partnership, and the share of earnings falling to companies that are subject to the SIIC regime will be exempt from CIT at their end.

Electing to apply the regime

Terms of the election

The SIIC regime is applicable by election. The entity in question must inform the competent tax office of its election before the end of the fourth month following the opening of the financial year for which it wishes to be subject to the SIIC regime. This election is global and irrevocable.

The notification of its election must be accompanied by a list of the subsidiaries electing to apply the exemption regime and a commitment concerning capital gains for which taxation is deferred (see below). This list must be updated and submitted with the annual tax return each year.

The regime applies retroactively as of the first day of the financial year for which the election was made.

Scope of the election

Electing to apply the regime is deemed to be a cessation of business for tax purposes, to the extent that the company in question ceases to be subject to CIT. This, as a rule, has the same tax consequences as a liquidation, in particular the immediate taxation of profits for the current financial year and the taxation of any unrealised capital gains.

There are, however, various forms of relief from this taxation. For unrealised capital gains, although the principle of an exit tax for real property rights and shares in partnerships remains, the law provides for substantial relief. The tax is due at the reduced rate of 19 per cent and payment is spread linearly over four years. The first quarter is due on 15 December of the election year and the following instalments are due on 15 December in each of the next three years.

Electing to apply the regime is generally accompanied by a revaluation of the balance sheet, to make the accounting values consistent with the fiscal values used to calculate the exit tax. The associated revaluation variance is booked to liabilities on the net balance sheet for the exit tax.

iii Tax regime

SIICs and corporate income tax

The SIIC regime provides for a CIT exemption for profits from the letting of real estate or subletting of properties for which possession is granted under real estate financial leasing contracts or on a temporary basis by the state, a local authority or one of their public establishments. The exemption also applies to capital gains on sales of the following to persons that are not related within the meaning of Article 39(12) of the FTC:

a real estate or real property rights;

b interests in partnerships or in subsidiaries subject to the SIIC regime; and

c rights pertaining to a financial leasing contract for real estate.

The exemption from CIT is subject to compliance with the distribution requirements detailed below.

If a given SIIC sells real estate assets to a related company that is also subject to the SIIC regime, capital gains are not exempt subject to the condition of distribution, but the transaction may nevertheless benefit from a regime of neutrality under certain conditions.

The SIIC and its subsidiaries must break down the corresponding income and expenses between their exempt and taxable sectors.

Distribution requirements

Article 208(C) of the FTC makes the CIT exemption subject to compliance with the following distribution requirements:

a at least 95 per cent of tax-exempt profits from the letting or subletting of real estate (e.g., financial leasing or temporary grant of possession by the state) must be distributed before the end of the financial year following that in which they were made; and

b at least 70 per cent of tax-exempt capital gains from the disposal of real estate, real estate rights, real estate financial leasing contracts or interests in partnerships or subsidiaries subject to the SIIC regime must be distributed before the end of the second financial year following that in which they were made.

Dividends from subsidiaries subject to the SIIC regime are also exempt from CIT, provided that they are fully redistributed in the financial year following that in which they were received. The same applies to dividends received from another SIIC when the beneficiary holds at least 5 per cent of the capital and voting rights in the distributing company for a period of at least two years.[18]

Failure to comply with the distribution requirements leads to the CIT exemption being cancelled in its entirety or – if the profits for the exempt sector are subsequently adjusted upwards – partially.

Profits from any incidental activities that do not benefit from the exemption are, correlatively, not subject to the distribution requirements, which apply only to exempt profits.

18 The same rule applies to dividends received by SIICs from foreign companies with an equivalent status or from SPPICAVs if the same conditions are met and if the earnings are fully redistributed during the financial year following that in which they were received.

iv Tax regime for investors

Dividends

As for OPCIs, the taxation of distributed income follows the ordinary legal framework for the taxation of dividends.

The particularities described for OPCIs also apply to SIICs. Thus, distributed dividends from the SIIC's exempt profits are expressly excluded from the benefit of the 40 per cent tax allowance for individuals who elect to apply the progressive tax rates for individual income tax. Likewise, the participation exemption is not applicable to the fraction of dividends distributed by the SIIC to corporate shareholders when they are paid out of profits that were exempt from CIT.

Profits made in France by foreign companies via a PE having elected to apply the SIIC regime are subject to a withholding tax of 25 per cent under Article 119 *bis* 2 of the FTC, unless tax treaties provide otherwise. Pursuant to Article 115 *quinquies* of the FTC, it is possible for a company to avoid the withholding tax only if it is established in the European Union and is subject to corporate income tax within the EU, does not benefit from the possibility of election or exemption from CIT and does not otherwise benefit from a specific exemption for profits made in France and deemed to be distributed.

When a SIIC distributes income to a shareholder, other than a natural person, that directly or indirectly holds at least 10 per cent of the rights to receive dividends from that company at the time of payment, and when that shareholder is not subject to CIT or an equivalent tax on the income received, the distributing SIIC is required to deduct a 20 per cent withholding tax. However, this withholding tax is not due if the distribution is made to a company bound by a requirement to fully distribute the dividends received and in which the shareholders directly or indirectly holding at least 10 per cent of the dividend rights are subject to CIT (or an equivalent tax) on these distributions.

Capital gains on the sale of shares

Capital gains from the sale of shares in a SIIC are subject to the general regime for capital gains on the sale of securities.

For legal entities subject to CIT, a reduced tax rate of 19 per cent is applicable to capital gains on the sale of securities in real estate-rich listed companies if the seller had held these securities as equity interests for at least two years. Otherwise, the capital gains are included in the taxable profits subject to CIT at the standard rate.

If made by non-residents holding at least 10 per cent of the SIIC's share capital, capital gains on sale are subject to the withholding tax provided for in Article 244 *bis* A of the FTC.

v Forfeiture of REIT status

Exit from the regime

Exit from the SIIC regime mainly occurs in the following cases:

a failure to comply with one of the eligibility conditions; and

b failure to comply with the 60 per cent condition by the end of the financial year in which the regime is suspended or under conditions that no longer allow for suspension of the regime (i.e., when the 60 per cent threshold has been exceeded for a second time).

If a company forfeits the SIIC regime by failing to comply with the associated eligibility conditions, this entails the exit of its subsidiaries that have elected to apply the regime too.

Tax consequences

In the event of the definitive exit from the regime within 10 years of election, the SIIC is required to pay additional CIT on the capital gains that were initially subject to the exit tax. Capital gains that had been taxed at the reduced rate of 19 per cent are taxed at the standard CIT rate for the financial year of exit from the regime minus the tax paid at the reduced rate. The aim is to return the SIIC to the situation it would have been in if it had not benefited from the reduced rate. In addition, latent capital gains realised on real estate assets and rights following the election for the SIIC regime are subject to a specific tax levied at 25 per cent after a rebate of one-tenth per year on the taxable basis.

Exit from the SIIC regime is retroactive to the first day of the financial year of the exit. The earnings of the company and its subsidiaries cannot, therefore, benefit from exemption subject to the condition of distribution for that financial year.

Profits that were previously taxed under the SIIC regime and that are yet to be distributed will be taxed under the standard legal conditions.

V INTERNATIONAL AND CROSS-BORDER TAX ASPECTS

i Tax treaties

France has an extensive double tax treaty network, having signed treaties with more than 100 countries.

As a rule, these double tax treaties follow the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital (the OECD Model Tax Convention). In this respect, double tax treaties usually provide that income from real estate assets may be subject to tax in the state in which the assets are located. As regards the taxation of capital gains, the source country also retains the right to tax capital gains from the alienation of immovable property situated in that country. The country where the taxpayer is actually resident should then provide relief from double taxation under the double taxation article of the relevant treaty.

France deposited its instrument of ratification of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) with the OECD on 26 September 2018 and the first changes came into force on 1 January 2019. Key changes to France's double tax treaties under the MLI include the adoption of:

a a principal purpose test;

b a definition of entities deriving their value principally from immovable property; and

c a minimum holding period of 365 days for the favourable tax regime for dividends (exemption or rate limitation).

ii Cross-border considerations

French law does not impose specific restrictions on ownership of or investment in real estate assets located in France by a non-resident person.

DAC6 Directive

The French government has transposed Directive (EU) 2018/822 (DAC6)[19] on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

As a result, potentially aggressive cross-border tax planning arrangements within the meaning of DAC6 now have to be reported to the French tax authorities. The competent French authority will share information with the competent authorities of all other Member States by means of an automatic exchange.

iii Beneficial ownership

The concept of beneficial ownership, which originated in the OECD Model Tax Convention, has seen renewed interest following the decision of the European Court of Justice on the 'Danish cases'.[20] The concept is now untied from the abuse of rights or tax fraud.

The tax authorities now have greater latitude to question certain transactions and can in particular challenge holding companies that automatically redistribute financial flows to their shareholders, conduct that allows the authorities to set aside the Parent–Subsidiary Directive or the provisions of the tax treaty entered into with the country of residence of the recipient of the income. However, the French Administrative Supreme Court has ruled that the provisions of the tax treaty between France and the country of residence of the beneficial owner of the income may apply under certain conditions.[21] It remains to be seen how this concept and the ATAD III Directive will work together.

19 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

20 CJEU, 26 February 2019, C-116/16 and C-117/16.

21 French Administrative Supreme Court, 20 May 2022, No. 444451, *Planet*.