

# **Real Estate Investment Trusts in Europe**

Europeanising Tax Regimes

---

*Wolfgang Speckhahn*



Wolters Kluwer



# Real Estate Investment Trusts In Europe

## Europeanising Tax Regimes

Wolfgang Speckhahn



Wolters Kluwer

*Published by:*  
Kluwer Law International B.V.  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.wolterskluwerlr.com](http://www.wolterskluwerlr.com)

*Sold and distributed in North, Central and South America by:*  
Wolters Kluwer Legal & Regulatory U.S.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@wolterskluwer.com](mailto:customer.service@wolterskluwer.com)

*Sold and distributed in all other countries by:*  
Quadrant  
Rockwood House  
Haywards Heath  
West Sussex  
RH16 3DH  
United Kingdom  
Email: [international-customerservice@wolterskluwer.com](mailto:international-customerservice@wolterskluwer.com)

*Printed on acid-free paper.*

ISBN 978-90-411-9096-3

e-Book: ISBN 978-90-411-9110-6  
web-PDF: ISBN 978-90-411-9111-3

© 2017 Wolfgang Speckhahn

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal & Regulatory U.S., 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Website: [www.wolterskluwerlr.com](http://www.wolterskluwerlr.com)

Printed in the United Kingdom.

# Real Estate Investment Trusts In Europe

## EUCOTAX Series on European Taxation

---

VOLUME 52

---

### *Series Editors*

Prof. Dr Peter H.J. Essers, Fiscal Institute Tilburg/Center for Company Law, Tilburg University

Prof. Dr Eric C.C.M. Kemmeren, Fiscal Institute Tilburg/Center for Company Law, Tilburg University

Prof. Dr Dr h.c. Michael Lang, WU (Vienna University of Economics and Business)

### *Introduction*

EUCOTAX (European Universities Cooperating on Taxes) is a network of tax institutes currently consisting of eleven universities: WU (Vienna University of Economics and Business) in Austria, Katholieke Universiteit Leuven in Belgium, Corvinus University of Budapest, Hungary, Université Paris-I Panthéon-Sorbonne in France, Universität Osnabrück in Germany, Libera, Università Internazionale di Studi Sociali in Rome (and Università degli Studi di Bologna for the research part), in Italy, Fiscaal Instituut Tilburg at Tilburg University in the Netherlands, Universidad de Barcelona in Spain, Uppsala University in Sweden, Queen Mary and Westfield College at the University of London in the United Kingdom, and Georgetown University in Washington DC, United States of America. The network aims at initiating and coordinating both comparative education in taxation, through the organization of activities such as winter courses and guest lectures, and comparative research in the field, by means of joint research projects, international conferences and exchange of researchers between various countries.

### *Contents/Subjects*

The EUCOTAX series covers a wide range of topics in European tax law. For example tax treaties, EC case law, tax planning, exchange of information and VAT. The series is well-known for its high-quality research and practical solutions.

### *Objective*

The series aims to provide insights on new developments in European taxation.

### *Readership*

Practitioners and academics dealing with European tax law.

### *Frequency of Publication*

2-3 new volumes published each year.

*The titles published in this series are listed at the end of this volume.*

# Preface

This research investigates the impact of EU law and policies on direct taxation in REITs, and movement towards a harmonised EU REIT with common direct taxation of REITs' profits. It represents the first comparative study of EU MS REIT regimes to identify an emerging common understanding informed by European jurisprudence and Europeanisation policy and theory.

After identifying the fundamental elements of a REIT (following the original US model) within a context of Europeanisation theory, the research examined EU policy mechanisms (such as 'goodness of fit' and adaptational soft pressure) and the impact of relevant case law from the European Court of Justice. It then presented in-depth case studies of three Member States: France (an example of a well-established REIT regime), Bulgaria (a new accession state) and Spain (a recent REIT regime).

The research found an emerging common understanding between MS REIT regimes, offering the prospect of a European harmonised REIT form distinguishable from the US model. It also found negative approaches to direct taxation in cross-border situations, and Member State concerns about loss of sovereignty and tax base, which should be recognised within any harmonised direct tax regime.

The research can claim to be the first comparative analysis of MS REIT regimes to address a common understanding, and thus is relevant to practitioners and academics in the fields of European law and international taxation. It has the potential to contribute towards an improved common direct taxation approach and the harmonisation of European REITs within the wider processes of Europeanisation. The research was limited to REIT regimes within EU MSs, and further research could analyse relevant MSs' tax regimes outside the 'common understanding' REIT model, and further explore the issues of loss of sovereignty and tax base in MSs.

# List of Abbreviations and Glossary

AE	Anonymos Eteria (AE) is the legal form of a joint stock company under Greek law
AEOI	Automatic Exchange of Information
AEOID	Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64/1, 11.03.2011
AG	Aktiengesellschaft (AG) is a listed company with shares according to German Corporations law
AIFM	Alternative Investment Fund Manager (as defined by the AIFMD)
AIFMD	AIFM Directive (Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 095/2010, OJ L174/1, 1.7.2011
Art.	Article
AUM	Assets under management
bn	Billion
CCTB	Common Consolidated Tax Base
CEE	Central East Europe
CET	Contribution Economique Territoriale, the French territorial economic contribution tax
CFE	Cotisation Foncière des Entreprises under French law
CGI	Code Général des Impôts (CGI) is the French Tax Code
CIT	Corporate Income Tax
CoC	Code of Conduct
Commission	Commission of the European Union

CVAE	Cotisation sur la Valeur Ajoutée des Entreprises under French law
DTT/ DTTs	Double Tax Treaty / Double Tax Treaties
ECB	European Central Bank
ECJ	European Court of Justice
ECR	European Court Reports
EEA	European Economic Area
EEC Treaty	Treaty of the European Economic Community
EEC	Eastern European Countries
EFTA	European Free Trade Area
EPRA	European Public Real Estate Association (EPRA) is a common interest group, which aims to promote, develop and represent the European public real estate sector
EU	European Union
EUCIT	European Union Corporate Income Tax
EuroREIT	European Real Estate Investment Trust
FBI	Fiscale Beleggingsinstelling (FBI) is the Dutch REIT
FDI	Foreign direct investment
FGR	Fonds for Gemene Rekening, a trust form under Dutch law
FIM	Financial Instruments Markets Directive (the 'FIM Directive'), EU Directive 2004/39/CE of 21 April 2004
F-REIT	Finnish REIT
GAV	Gross Asset Value
G-REIT	German-REIT or German Real Estate Investment Trust
HMRC	Her Majesty's Revenue and Customs
HST	Home-State Taxation Model
IRS	Internal Revenue Service (USA)
ITA	Income Tax Act
ITR	Income Tax Rate
JSSPIC	Joint Stock Special Purpose Investment Company (JSSPIC) is the Bulgarian REIT
LLC	Limited Liability Company according to US Federal States Corporations law
LLP	Limited Liability Partnership according to US Federal States Corporations law
L-REIT	Lithuanian REIT
MS or MSs	Member State(s) of the European Union
MS REIT	Member State Real Estate Investment Trust



n/a	not applicable
NV	Naamloze vennootschap (usually abbreviated N.V. or NV) is the Dutch term for a public limited liability company. The company is owned by shareholders, and the company's shares are not registered to certain owners, so that they may be traded on the public stock market. The phrase literally means 'innominate partnership' or 'anonymous venture' and comes from the fact that the partners (the shareholders) are not directly known. This is in contrast to the term for a private limited company, which is called Besloten Vennootschap.
OECD	Organisation for Economic Co-operation and Development
OPCI	Organisme de Placement Collectif dans l'Immobilier (OPCI) is a property funds regime under French law
REIC	Real Estate investment Company (REIC) is the name for the Greek REIT regime
REIT	Real Estate Investment Trust
SA	Société Anonyme (SA) is a Limited Liability Company according to French Corporations law
	<i>Or</i>
	Sociedad Anónima, the corporate legal form in Spain
SCA	Société en Commandite par Actions (SCA) is a Corporation with shares according to French Corporation law
SE	Societae Europaeae
SICAFI	Société d'Investissement à Capital Fixe en Immobilière (SICAFI) is the Belgian REIT
SICAV	Société d'Investissement à Capital Variable (SICAV) is an investment company in the form of a joint stock company (société anonyme).
SIIC	Sociétés d'Investissement Immobilier Cotées (SIIC) is the French REIT
SIIQ	Società di Investimento Immobiliare Quotate (SIIQ) is the Italian REIT
SOCIMI	Sociedades Anónima Cotizadas de Inversión en el Mercado Inmobiliario (SOCIMI) is the Spanish REIT
SpA	Società per Azioni, the Italian corporate legal form
SPIC	Special Purpose Investment Companies Act (Bulgaria)
SPV	Special Purpose Vehicle
SZIT	Szabályozott Ingatlanbefektetési Társaság (Hungarian REIT)
Treaty	Treaty of the European Union
TRS	Taxable REIT Subsidiary

List of Abbreviations and Glossary

---

UCITS	Undertakings for Collective Investment in Transferable Securities (UCITS)
UK	United Kingdom
UK-REIT	United Kingdom REIT or United Kingdom Real Estate Investment Trust
USA	United States of America (USA or US)
USD	United States Dollar
US-REIT	United States REIT or United States Real Estate Investment Trust
VAT	Value Added Tax

## List of Figures

Figure 1.1	Conceptual Framework	12
Figure 1.2	Interaction Between an MS and the EU	17
Figure 1.3	Dimensions of Interrelation	19
Figure 1.4	The Three Domains of Change	20
Figure 1.5	Relationship Between the EU and Its MSs: Bottom-Up and Top-Down	23
Figure 1.6	Interaction of Aspects of the 'Process' of Europeanisation	24
Figure 1.7	Research Methodology	26
Figure 2.1	REITs Within the Investment Universe	37
Figure 2.2	Cross-Border Investments: Overview of Scenarios	58
Figure 4.1	MSs Subject to Main Proceedings Before ECJ	162
Figure 6.1	Proposal and Formulary Apportionment of Income: Example	221

# List of Tables

Table 1.1	Framework of REIT Criteria	27
Table 2.1	Overview on the US-REIT Regime	42
Table 2.2	REIT Regimes in the EU: Overview	44
Table 2.3	Requirements for Legal Form and Residency by MS REIT Regimes	46
Table 2.4	Requirements to the Listing of REITs by MSs Regimes	47
Table 2.5	Shareholder Conditions for MS REIT Regimes	50
Table 2.6	Conditions to Operating Activities of REIT Regimes in MSs: Overview	51
Table 2.7	Conditions to Status of MS REIT Regimes: Overview	53
Table 2.8	Conditions to Status of REIT Regimes in MSs (Continued) – Overview	56
Table 2.9	Taxation of REITs: Overview	62
Table 2.10	Sanctions by REIT Regimes in MSs – Overview	66
Table 2.11	Spectrum of Requirements for REIT Regimes in the EU: Overview	68
Table 2.12	Common Understanding of Legal Requirements: Overview	71
Table 2.13	Common Understanding of Operating Activities: Overview	72
Table 2.14	Common Understanding of Status: Overview	73
Table 2.15	Common Understanding of Tax Treatment – Overview	75
Table 2.16	Common Understanding of Sanctions – Overview	75
Table 2.17	Common Understanding of the ‘European REIT’ – Overview	76
Table 2.18	Comparison: The ‘Classic’ US-REIT Model versus MS REIT Regimes – Overview	78
Table 3.1	Investment Scenarios in Scope of the Freedom of Establishment – Summary	100
Table 3.2	Investment Scenarios in Scope of the Freedom of Movement of Capital	104
Table 3.3	Investment Scenarios in Scope of the Treaty – Summary	111
Table 3.4	Restrictions to the Treaty – Summary of Suspect Provisions	112
Table 4.1	ECJ: Leading Cases – Overview	125
Table 4.2	Legal Requirements for REITs: Suspect Criteria	154
Table 4.3	Tax Treatment for REITs: Suspect Criteria	158
Table 4.4	Summary of Suspect Elements in MS REIT Regimes: Overview	159

List of Tables

---

Table 5.1	ECJ Cases in France: Summary	172
Table 5.2	Legal and Tax Overview on the French SIIC Regime	174
Table 5.3	Legal and Tax Overview of the Bulgarian JSSPIC Regime	180
Table 5.4	Legal and Tax Overview on the Spanish SOCIMI Regime	186
Table 5.5	Case Study Findings – Overview	190
Table 6.1	Comparison of Proposals on Company Taxation	202
Table 6.2	Requirements of the EuroREIT – Overview	224

# Table of Contents

Preface	xi
List of Abbreviations and Glossary	xiii
List of Figures	xvii
List of Tables	xix
PART I	
Introduction and Dimensions of Europeanisation	1
CHAPTER 1	
Introduction to the Research: Challenging MS Tax Regimes	3
1.1 Introduction	3
1.2 Literature Review	4
1.3 Research Aims	7
1.4 Research Framework and Methodology	9
1.4.1 Research Framework	10
1.4.2 Europeanisation	13
1.4.3 Research Methodology	25
1.5 Chapter Structure	32
CHAPTER 2	
REITS in the EU: A Comparative Analysis	35
2.1 Objectives for This Chapter	35
2.2 REIT: A Definition	36
2.3 The US-REIT: The 'Model' for REITs	38
2.3.1 Fundamentals	38
2.3.2 Legal Requirements	39
2.3.3 Operating Activities	40

# Table of Contents

2.3.4	Status	40
2.3.5	Tax Treatment	41
2.3.6	Sanctions	41
2.3.7	Conclusion: The US-REIT as a Model for the EU	42
2.4	REIT Regimes in the EU	43
2.5	Characteristics of REITs in the EU	45
2.5.1	Legal Requirements	45
2.5.1.1	Legal Form and Residency	45
2.5.1.2	Listing	47
2.5.1.3	Shareholder Requirements	49
2.5.2	Operating Activities	51
2.5.3	Status	52
2.5.3.1	Asset Test	52
2.5.3.2	Income Test	55
2.5.3.3	Gearing Test	55
2.5.3.4	Distribution Test	56
2.5.4	Tax Treatment	57
2.5.4.1	Investment Scenarios and Scope of Analysis	57
2.5.4.2	Domestic REITs	58
2.5.4.2.1	Income Tax	58
2.5.4.2.2	Capital Gains Tax	59
2.5.4.3	Foreign REITs	59
2.5.4.3.1	Shareholder in a Domestic REIT	59
2.5.4.3.2	Direct Investment in Domestic Real Property	60
2.5.4.4	Findings	61
2.5.5	Sanctions	64
2.5.5.1	Penalties	64
2.5.5.2	Loss of Status	65
2.5.6	Findings	66
2.6	Existence of a 'Common Understanding'	69
2.6.1	Legal Requirements	70
2.6.2	Operating Activities	71
2.6.3	Status	72
2.6.4	Tax Treatment	73
2.6.4.1	Domestic REITs	73
2.6.4.2	Foreign REITs	73
2.6.4.3	REIT Taxation	74
2.6.5	Sanctions	75
2.6.6	Common Understanding of a European REIT	75
2.7	Comparison of US-REIT versus MS REITs	78
2.8	Conclusion: Emergence of a Standard	80

## PART II

Mechanism of Europeanisation: 'Goodness of Fit' and Adaptational Pressure	83
---	----

## CHAPTER 3

MS REIT Regimes and EU Law	85
3.1 Objectives for This Chapter	85
3.2 Sources of EU Law – Primary European Law	86
3.2.1 Sources for 'Legal Requirements'	87
3.2.2 Sources to 'Taxation' – EU Competence versus MSs' Sovereignty	88
3.3 The Fundamental Freedoms	91
3.3.1 Freedom of Establishment	93
3.3.1.1 Scope and Statute Elements	93
3.3.1.2 Types of Establishment	94
3.3.1.3 Direct Cross-border Activity Without Setting up of a Subsidiary	95
3.3.1.4 'Establishment' by Participation	95
3.3.1.5 Test for Company	96
3.3.1.6 Implied Warranty and Prohibition of Discrimination or Restriction	97
3.3.1.7 Summary	98
3.3.2 Freedom of Movement of Capital	100
3.3.2.1 Scope and Statute Elements	101
3.3.2.2 The Definition of 'Capital'	101
3.3.2.3 Restrictions and Discriminations	102
3.3.2.4 Justification	103
3.3.2.5 Summary	104
3.3.3 Freedom of Movement of Services	106
3.3.3.1 Catchall Clause	106
3.3.3.2 Ancillary Services by REITs	106
3.3.4 Other Treaty Connecting Factors – Fiscal State Aid	107
3.4 Secondary European Law	109
3.5 International Company Law	109
3.6 Conclusion	110

## CHAPTER 4

MS REIT Regimes and ECJ Case Law	115
4.1 Objectives for This Chapter	115
4.2 The ECJ Case Law	116
4.2.1 Additional Secondary Source of Law	116
4.2.2 Scope of Cases	117
4.3 Leading ECJ Cases	118
4.3.1 Case 'Dassonville'	118



Table of Contents

4.3.2	Case ‘Cassis de Dijon’	120
4.3.2.1	‘Rule of Reason’	120
4.3.2.2	‘Rule of Mutual Recognition’	121
4.3.2.3	Excursus – Case ‘Keck’	122
4.3.2.4	The ‘Cassis de Dijon’ Principle	122
4.3.3	Case ‘Avoir fiscal’	123
4.3.4	Fundamentals of Leading Cases	124
4.4	Cases on Company/Corporate Law	126
4.4.1	Scope of Analysis	126
4.4.2	Basic Principles for Companies	126
4.4.3	Summary on Company Mobility in the EU	131
4.5	The Case Law on (Direct) Tax	132
4.5.1	Scope of Analysis	132
4.5.2	Principle of ‘Equal Treatment’	134
4.5.3	Tax Treatment of Non-resident Companies	136
4.5.3.1	Equal Treatment	137
4.5.3.1.1	Case ‘Stauffer’	137
4.5.3.1.2	Case ‘Prunus’	138
4.5.3.1.3	Summary	138
4.5.3.2	Prior Authorisation	139
4.5.3.2.1	Cases ‘Konle’, ‘Albore’ and ‘VBV’	139
4.5.3.2.2	Case ‘Scientologie’	140
4.5.3.2.3	Case ‘Belgium 2011’	140
4.5.3.2.4	Summary	140
4.5.3.3	Tax Benefits	141
4.5.3.4	Withholding Tax	143
4.5.3.5	Capital Gains	145
4.5.3.6	Summary	145
4.5.4	Equal Treatment in Direct Taxation (?)	147
4.6	Justification or Justi-fiction?	147
4.6.1	Justification	148
4.6.1.1	Fiscal Supervision	148
4.6.1.2	Coherence of the Tax System	150
4.6.1.3	Balanced Authority for Taxation Between MSs	151
4.6.2	‘Justi-fiction’?	151
4.7	Suspect Elements in MS REIT Regimes	153
4.7.1	Legal Requirements	153
4.7.2	Tax Treatment	155
4.7.3	Summary of Conflicts	158
4.8	Conclusion	160
PART III		
‘Outcome’: The Impact of the EU		165