The Private Privak (Pricaf) has been amended a third time, based on the needs of the private equity sector. This reform eliminates major constraints which limited the success of the Private Privak, in particular with regard to the prohibition of controlling stakes in portfolio companies[1].

In 2003, the Belgian legislator introduced an investment vehicle for private equity investments, called the Private Privak (Pricaf). This vehicle combines the advantages of legal personality with a *de facto* tax transparency. As the original legislation was perceived as being too stringent, amendments were introduced in 2007 (Royal Decree 27.V.2007) with the aim to make the Private Privak a more flexible entity. However, even after the latter reform, the rules were considered as still too stringent, in particular with respect to the prohibition of controlling stakes in portfolio companies.

A PRIVATE PRIVAK HAS IMPORTANT ADVANTAGES

Limited tax base

The Private Privak is only taxed on a limited base (disallowed expenses other than capital losses on shares, received abnormal or benevolent advantages, and the secret commissions tax), if it invests only in (i) "good" shares, qualifying for the dividend received deduction (subject to tax condition), (ii) shares of other Private Privaks or (iii) temporarily or accessorily in cash and alike (Private Privak of the 1st category). This results in principle into an effective tax rate of 0%.

If the Private Privak invests in other allowed financial instruments issued by non-listed companies, it will be subject to the normal corporate income tax regime (Private Privak of the 2nd category).

New participation condition for capital gains on shares exemption does not apply at the level of the Private Privak or corporate investors

Since the 2017 corporate tax reform (25.XII.2017 Act), the conditions to benefit from the capital gains on shares exemption are aligned with those applying to the participation exemption for dividends received. This means that as from January 1st 2018, only holdings of at least 10% in the capital of the company or with an investment value of at least EUR 2.5 million can benefit from the exemption.

[1] 26.III.2018 Act « *Wet betreffende de versterking van de economische groei en de sociale cohesie/loi relative au renforcement de la croissance économique et de la cohésion sociale* », adapting the AIFM Act of 19.IV.2014 and the Income Tax Code ; Royal Decree of 9.V.2018 adapting the Royal Decree 27.V.2007

The participation threshold and the 1-year holding requirement do not apply for participations held in or by an investment company. A Private Privak is by definition an investment company (since it is regulated by the AIFM Act). This has also been confirmed in the Explanatory Memorandum of the Corporate Tax Reform Act.

No (30%) WHT for investors

Going concern distributions stemming from capital gains on shares are exempt from withholding taxes (in principle 30%). There is no obligation for Belgian resident individual investors to report these distributions in a Belgian tax return. However, if these distributions are reported, they are in principle taxed at 30%.

Going concern distributions to non-residents are exempt from withholding tax if they stem from other income than Belgian dividends.

Liquidation and redemption bonuses from a Private Privak 1st category do not constitute movable income, and are thus not subject to withholding taxes.

The Private Privak: flexible since the reform

Main legal reforms

The investment threshold has been lowered from EUR 100.000 to EUR 25.000. Shares of a Private Privak can now also be transferred for a minimum price of EUR 25.000 instead of EUR 100.000 to third parties.

One of the most important points of the reform is the fact that the prohibition for a Private Privak to have controlling stakes in portfolio companies has been abolished.

As before a Private Privak exists for maximum 12 years. However, if the Articles of Association stipulate so, it can now be extended with maximum 2 terms of maximum 3 years given a majority of 90% of the votes representing 50% of the share capital.

Different compartments can now be created in a Private Privak. Compartments are distinct parts of the Private Privak's assets and liabilities / sub-funds. Therefore, possible losses of other compartments do not impact the possibility to distribute dividends. At least 6 (non related) investors per compartment are required. A compartment must like a Private Privak itself be registered on the Private Privak list by the Ministry of Finance before investing in the allowed financial instruments issued by non-listed companies. Compartments must have separate books.

Shareholder agreements are no longer limited to certain items, but can cover all items allowed by company law.

In case of possible infringements of the financial law, the Ministry of Finance could delete the Private Privak of the Private Privak list without a legal possibility for the Private Privak to remedy to those infringements. As from the reform, the Ministry of Finance must inform the Private Privak of possible infringements. The Private Privak can remedy to the latter infringements until the end of the month following the month during which the Ministry of Finance informed the Private Privak.

Main tax reforms

As from tax year 2019, a tax credit of 25% of losses incurred up to EUR 25.000 per accounting year on shares of a Private Privak incorporated after January 1st 2018 (upon liquidation) is granted to individual investors. The tax credit cannot be combined with the tax credit for 'Tax Shelter for start-ups".

An indirect VVPR*bis* regime has been created, so that the investors can benefit from a withholding tax of 15% or 20% if the Private Privak invested in such "VVPR*bis*" shares.

In order to avoid a double taxation of dividends, an exemption of withholding tax has been introduced for redistributed Belgian dividends by the Private Privak to the extent that a withholding tax was due and could not be credited by the Private Privak.

The principle of annuity, according to which a Private Privak can benefit from a specific tax regime (category 1) in one tax year, and be subject to the ordinary tax regime (category 2) in another tax year, depending on the fulfilment of the aforementioned conditions, has been explicitly implemented in the tax law.

One of the conditions to be considered a category 1 Private Privak was that the latter can invest temporarily or accessorily in cash and alike for maximum 10% of the balance sheet (specific calculation method per calendar day), or unlimited for a period that equals the accounting year minus 6 months. This condition has now been aligned on the financial law. According to the financial law, a Private Privak can invest in cash and alike, without limitations in the first two years after the incorporation of the Private Privak. As from the third year, this investment can constitute maximum 30% of the balance sheet, or for a maximum period of two years without threshold. There are no limitations during the liquidation period. Keeping the Private Privak 1st category status during the liquidation period is thus easier as from the reform.

Important matters to monitor

Article 19bis ITC: strict monitoring of interest-generating assets

Article 19bis ITC is an exception to the exemption for redemption and liquidation bonuses distributed by an investment company which benefits from a tax regime deviating from the common tax regime, provided by article 21, 2° ITC. According to article 19bis ITC, the portion of the redemption or liquidation bonus is taxable as "interest" at the general rate of 30% to the extent that it originates from interest or capital gains on interest-generating assets. Article 19bis ITC only applies to the extent that the investments in receivables (including debt instruments and money on a bank account deposits) exceed 25% of the investment fund's total assets. Further to an amendment by the Act of 25 December 2017, the threshold of 25% was lowered until 10%; the new threshold however only applies to shares acquired as of January 1st 2018 by a Belgian resident **individual.**

Since 2012, article 19bis ITC also applies to the portion of the capital gain on shares in an investment funds realized further to transfers "for consideration".

Before 2013, article 19bis ITC only applied to "UCITS funds", i.e. investment companies with a so-called "EU passport". As of 2013, article 19bis ITC also applies to investment funds without an "EU passport". At the start, the viewpoint of the Belgian tax administration was that article 19bis ITC did not apply to investment companies investing exclusively in securities issued by non-listed companies, such as the Private Privak (Circular letter of 25 October 2013, n° 28). However, further to technical changes in financial law as of 2014, this viewpoint was already abandoned by the tax administration in 2016 (Addendum of 8 April 2016 to the Circular letter of 25 October 2013). Before the amendments to article 19bis ITC in the Act of 25 December 2017, commentators argued that article 19bis ITC could still not apply to a private equity investment fund, because article 19bis ITC was still referring to "UCITS", which is the wording for investment funds with an "EU passport" in the Directives regarding investment funds. However, since the Act of 25 December 2017, one should consider that this argument can no longer be upheld, at least not for shares in investment companies acquired by a Belgian resident individual investor as of January 1st, 2018.

AIFM

As a general rule, an AIFM compliant manager is needed for all Belgian Alternative Investment Funds on basis of the AIFM Act of 19 April 2014. Since the private privak qualifies as an Alternative Investment Fund, this rule also applies to the private privak.

The AIFM-Act provides a number of full "exemptions" from AIFM obligations provided by Part II of the Act of 19.IV.2014 (e.g. single investor-Funds, "group exemptions"), none of which is however relevant for the private privak.

Article 106 of the AIFM-Act however provides for a "light regime"/"de minimis regime" for "low scale managers"/"low scale funds". This "light regime" applies to managers who exclusively manage Alternative Investment Funds, which meet one of the following criteria:

- The total of the assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 M; or

- The total of the assets under management do not exceed a threshold of EUR 500 M when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

A "low scale manager" needs to register as such with the FSMA, and inform the FMSA about the Alternative Investment Funds under management, and their investment strategies. Moreover, a "low scale manager" is subject to an annual reporting duty towards the FSMA.

If the criteria for the "de minimis" regime are met and the alternative investment fund elects for self-management, the investment fund itself has to register as a "low scale manager" and comply with the annual reporting duty towards the FSMA.

As a conclusion, the Private Privak 3.0 is more attractive than ever. The legal framework is now flexible (allowing a.o. controlling stakes in portfolio companies). At the same time, it is easier for a Private Privak to benefit from the specific tax regime. Furthermore, under certain conditions, a new lowered withholding tax rate and a withholding tax exemption applies to investors.

Please do not hesitate to contact your trusted advisor at Tiberghien for further information or contact.

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