The new legislation brings major legal changes, which are analysed in the first chapter of this article. In the second part of this article we will analyse the opportunities the new legislation brings from a tax perspective.

Legal changes
The most important legal changes can broadly be categorised into four topic areas.

First, the Decree establishes a more flexible procedure for raising capital. Under the old rules, REITs could only raise share capital through a time-consuming capital increase with preferential subscription rights of the existing shareholders, and an offer period of minimum 15 days. Under the new rules, REITs can limit (three business days) or cancel the preferential subscription rights of shareholders. In such case, the existing shareholders are given an irrevocable priority allocation right, which basically has the same economic effects as a preferential subscription right, without the inconveniences (in particular the long subscription period). The Decree also eases the restrictions on the issue of shares as consideration for the acquisition of property by way of a contribution in kind. Further, the Decree explicitly specifies that REITs can issue not only shares but also other types of securities, such as convertible bonds and warrants, but still no profit shares (winstbewijzen/parts bénéficiaires). Finally, REITs can now pay dividends to their shareholders, not only in cash, but also in shares. The REITs WDP and Cofinimmo already offered a dividend in shares, accepted respectively by more than 70% and 37.70% of the shareholders.

Second, the Decree provides REITs with a variety of ways to structure their real estate portfolios, in particular by the introduction of the ‘institutional REIT’. The institutional REIT can have shareholders other than the REIT, but such shareholders must be institutional or professional investors, such as pension funds or credit institutions. The institutional REIT can be created as an ad hoc joint venture for a specific project with a third party, e.g., a PPP transaction. Institutional REITs are of particular interest to large REITs, as they can now structure their different types of activities in pools of separate subsidiaries, for instance by region or by sector (offices, residential, pubs, senior housing, etc.). It must be noted that under the new Belgian rules, it seems that only Belgian companies controlled by a Belgian REIT can qualify for institutional REIT status. As of June 30, 2011 Pubstone NV/SA (held by the REIT Cofinimmo and having an interest in 820 locations in Belgium in which pubs are operated) was converted into and approved as the first institutional REIT with AB Inbev maintaining at that time a shareholding of 10%.

The Decree lays down specific conditions for a public REIT to hold, either directly or indirectly, shares in an institutional REIT or a real estate company that is not wholly owned by the public REIT. These conditions can be seen as a trade-off for the introduction of the institutional REIT. The public REIT must have (exclusive or joint) control over the subsidiary and its control cannot be held jointly with another REIT over which it has no control. The controlling entity (or entities) must hold at least 50% of the share capital of the subsidiary and the aggregate value of its (or their) participation must not represent more than 30% (in case of exclusive control) or 20% (in case of joint control) of the consolidated net assets of the controlling REIT. If there is joint control, the REIT must be granted call and put options vis-à-vis the other shareholder(s) that can be exercised if a conflict arises between the REIT and the other shareholder(s) (‘deadlock’). If a public REIT controls one or more REITs, it cannot at the same time have a Belgian law subsidiary that has the form of a real estate company. Thus, the public REIT will
have to choose the type of subsidiaries it wants to have. If a public REIT controls one or more institutional REITs and acquires control over a Belgian law real estate company, it must comply with this rule within two years.

As under the old Decree, the property risk of public REITs has to be spread. In principle, public REITs must diversify and cannot invest more than 20% of their consolidated assets in a single building or site which represents one single investment risk for the REIT. The 20% rule is not applicable to institutional REITs as such.

Third, the Decree brings major changes to the financial requirements for REITs, in particular in relation to their debt ratios and profit distributions.

The public REIT’s debt level must not exceed 65% of the value of its assets, not only on a consolidated but also on a statutory basis, but after deduction of the permitted interest rate swaps or other derivatives used to hedge the REIT’s exposure to interest rate fluctuations. The 65% limit does not apply when it is exceeded solely due to a variation in the fair value of the assets. However, if the breach of the 65% rule lasts for more than two years, a general meeting of shareholders has to decide whether to dissolve the REIT or to take other measures to remedy the breach, even if the breach is solely due to a variation of the fair value of the assets. If and when the consolidated debt ratio exceeds 50%, the REIT must submit a plan to the supervisory authority outlining how it intends to prevent its debt ratio from exceeding 65%, and the statutory auditor must prepare a report. The 65% rule does not apply to institutional REITs on a statutory basis.

REITs are still obliged to distribute 80% of their net profits to their shareholders, except if their debt ratio exceeds the 65% limit or would exceed it because of the distribution. Undistributed profits must be allocated to the reserves and must be used to reduce the debt ratio below the 65% limit. The 80% rule also applies to institutional REITs. However, unlike a public REIT, an institutional REIT can distribute profits if, on a statutory basis, its debt ratio exceeds 65%.

Fourth, the Decree introduces a variety of new rules in various specific fields.

The new rules range from a reduction in the amount of information to be provided to the supervisory authority, more possibilities to grant security interests and a broader scope of the REIT’s promoter role. The Decree also provides new rules on financial reporting. The real estate experts must now rotate, and their remuneration cannot depend on the value of the property they evaluate. The board must include at least three independent directors and the remuneration of the directors and managers is regulated. Security interests can now, under certain conditions, be granted for up to 50% of the fair value of the property (instead of 40%).

**Tax regime**

The new rules do not modify the tax regime applicable to REITs. However, this regime has been extended to the institutional REITs.

Provided all requirements set forth by the Decree are respected, all REITs (public and institutional REITs) are subject to Belgian corporate income tax at the normal corporate tax rate of 33.99% (which should allow them to claim treaty protection). However, REITs only have a limited taxable base. This base consists of received abnormal or benevolent benefits on the one hand and non-deductible costs (other than reductions in value and capital losses on shares) on the other.

The wording ‘abnormal or benevolent’ refers to income which is derived from not at arm’s length transactions. Abnormal refers to the fact that the price or consideration paid for the transaction is not at arm’s length, whereas benevolent normally implies that no price or consideration is paid. By only engaging in at arm’s length transactions, REITs can avoid that this type of income is added to their taxable base. The envisaged non-deductible costs include, among others, non-deductible taxes, certain regional taxes, fines, non-deductible car expenses, restaurant and representation cost, business gifts, certain social benefits granted to employees and certain interest payments (for example interest which exceeds the market interest rate).

Moreover, with regard to payments for which the tax reporting formalities have not been complied with, a separate tax on so-called ‘secret commissions’ will become due (at a rate of 30%). This tax can obviously be avoided by complying with the tax legislation on reporting of salaries, fees and commissions.

This regime implies that the normal business profits (such as rental income and capital gains) are not taxed.

It must be noted that, if an existing company is transformed into a REIT, latent capital gains and exempted reserves are subject to a so-called ‘exit tax’ (as these companies exit the normal tax regime and switch to the advantageous regime) of 16.995%, i.e., half the normal corporate income tax rate. This exit tax is also due if a REIT is involved in a merger, split off and similar operations. The consequence of this exit tax is a step-up of the assets to their market value.

REITs are also subject to a yearly tax of 0.01% (institutional REITs) or 0.08% (public REITs) on the
net amounts invested in Belgium on December 31, of the previous financial year. And, if a REIT holds the full ownership or any other rights in rem (long lease right, independent or other building right or usufruct) of immovable property, the yearly real estate tax (onroerende voorheffing/précompte immobieler) is due by the REIT. In practice, this annual real estate tax is usually recharged to the tenants.

There is no all-embracing withholding tax exemption which applies to (inbound and outbound income of) REITs.

Public REITs do however benefit from a withholding tax exemption on all received moveable income, except Belgian source dividends which are in principle subject to withholding tax at a rate of 15% or 25%. This Belgian withholding tax can be credited against corporate income tax (if any) due by the REIT, and the possible excess is reimbursable. No tax credit is available for foreign withholding tax.

Dividends distributed by REITs are in principle subject to a 15% or 25% withholding tax. Nonetheless, certain exemptions may apply, such as the exemption for dividends paid by a public REIT that invests at least 60% of its assets in Belgian residential real estate, the exemption for dividends paid to certain foreign entities that are tax exempt in their country of residence (e.g., pension funds) or the application of the EU Parent-Subsidiary Directive. Also, in cross-border relations, reductions of withholding tax based on double tax treaties may apply. Interest paid by a REIT is in principle subject to a 15% withholding tax, notwithstanding certain exemptions such as the exemption for interest payments to EU banks or interest payments to certain related entities (application of the Interest-Royalty Directive).

Concerning VAT, no specific rules are available (apart from a VAT exemption on certain management fees) and therefore the general rules have to be applied on a case by case basis.

Conclusion

The Belgian REIT sector has largely welcomed the Decree. Many of the new rules provide much-needed flexibility for a number of REITs in current markets. The Belgian REIT sector has already expressed its desire to have a more recurrent review on the rules applicable to Belgian REITs. It should be noted however, that some specific rules introduce new restrictions. Also, the flexibility introduced by the Decree does not always imply transparency.