



23 May 2014

OECD Committee on Fiscal Affairs  
Tax Treaties, Transfer Pricing and Financial Transactions Divisions, OECD/CTPA  
Attn: Mr Saint-Amans, Mrs De Ruiter and Mr Sasseville  
2 Rue Andre Pascal  
75016 Paris  
France

Subject: BEPS Action 6 (Tax Treaty Abuse) and CIVs / REITs

Dear Mr. Saint-Amans, Mrs De Ruiter and Mr Sasseville,

In the conference on 14 and 15 April 2014 on the BEPS Discussion Draft regarding prevention of Treaty Abuse (“the Abuse Draft”) the point was frequently made that many Collective Investment Vehicles (CIVs), Real Estate Investment Funds (REIFs) and Real Estate Investment Trusts (REITs) would be excluded from tax treaties if the OECD recommendations on Action 6 were to be implemented. In order to provide further explanation, a number of real estate related associations including INREV, EPRA CREFC Europe, AFG, AREF, BPF, Fastighetsägarna (Swedish property Federation), IPF, IVBN, RAKLI and ZIA would like to provide some examples of real-world situations where this would result. In addition, we would like to offer some suggestions about how CIVs, REIFs and REITs can be dealt with appropriately without undermining the overall purpose of the anti-abuse proposal.

## Conference approach

During the recent Paris conference, unfortunately the technical explanations of the recommended anti-abuse provisions by the working party offered little clarity as to why some of the anti-abuse provisions are included in the proposal. More importantly, a fundamental view on the distinction between legitimate international tax structuring and structures constituting “inappropriate” tax avoidance was lacking. Many speakers made the point that the proposal ignores the fact that tax treaties were created to eliminate double taxation in order to further very legitimate public policy goals of fostering worldwide economic development and cross border investment. Our concern is that the overly broad approach the OECD is now taking could seriously limit cross border investments. In particular, we fear that the recommendations will have a very negative impact on cross border indirect real estate investments through CIVs, REIFs and REITs. Flows of both equity capital and debt capital into real estate would be affected.

During the conference, many organisations commented on the lack of provisions specifically related to CIVs, REIFs and REITs. A member of the working party stated that these comments will be carefully considered as there is no intention to reverse the conclusions of the 2010 report on CIVs. We hope that this statement will be followed up on, as the current recommendations would have precisely that effect. Indirect investment by institutional investors through CIVs, REIFs and REITs provides a vital source of equity and debt funding for real estate and infrastructure globally and a critical source of returns to pension funds and insurance companies. These vehicles’ economic function as intermediaries between institutional savers and enterprises seeking capital is vital. The built environment – the real estate and infrastructure that provide for the needs of individuals and businesses – is fundamental for the world’s well-being by providing for its economic and social needs.

## Specific indirect real estate investment-related concerns

The currently proposed ownership test in the *limitation on benefits* clause (“LOB”) only allows shareholders with the same country of residence as the entity claiming treaty protection to enjoy the benefits of the tax treaty. The requirement is very limited given today’s global economy and, for CIVs, REIFs and REITs, is generally impossible to meet. In the attachment to this paper, we have provided a number of examples of fund structures that would lose tax treaty benefits, thereby giving rise to double or even triple taxation.

In addition, the commonly used *derivative benefits or equivalent beneficiary*<sup>1</sup> clause in its currently proposed form would offer little help to CIVs as the requirement that 95% of the share interests are held by seven or fewer persons will in practice rarely be met for CIVs, REIFs and REITs.

Further, with respect to the proposal to combine the LOB with the *main purpose test* (“MPT”) and a confirmation that tax treaties do not prevent the application of “domestic anti-abuse provisions”, we would like to reiterate our main objections:

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<sup>1</sup> An “equivalent beneficiary” is another extension of the LOB provision and can usually be found in the recent tax treaties signed by the United States with EU Member States. The definition of the term includes not only a resident of one of the contracting states, but also a resident of another EU or EEA Member State, provided there is a tax treaty between the latter mentioned EU or EEA Member State and the United States pursuant to which such resident would be considered to be a “qualified person”.

- An MPT would seriously erode the functioning of tax treaties and a significant amount of inbound investment by CIVs, REIFs and REITs may be lost. The exception in the rule is unfortunately vague and therefore does not solve the problem.
- We fear that “the recommendation to confirm that domestic anti-abuse provisions can be applied in tax treaty situations” may create damaging uncertainty for investors and managers by encouraging some countries inappropriately to extend the application of the “treaty override” to nullify the potential benefits of double tax treaties in cases that are fundamentally not abusive.
- There will unavoidably be many different interpretations of the LOB, MPT and domestic anti-abuse provisions by different jurisdictions, leading to increased disputes between states and correspondingly longer periods of uncertainty for the taxpayers.
- A combination of the two mechanisms, the LOB and MPT, could result in the MPT effectively eroding the workings of a LOB. Being a qualified person under a LOB would mean very little with an MPT in place.

### **Solutions for CIVs, REIFs and REITs**

The supporting real estate related associations therefore propose that treaty benefits should continue to be available to CIVs, REIFs and REITs because, like public companies, they are either widely held or held by investors that would be entitled to similar treaty benefits if they owned the underlying assets directly. This could for instance be achieved by defining CIVs as ‘qualified persons’ under the LOB. In this respect, we would like to draw your attention to paragraph 56 of the 2010 CIV report, where a simple solution is considered in order to grant treaty access to CIVs taking into account the objective of fighting abuse (treaty shopping). The paragraph states:

Such a provision could be structured in various ways. The simplest would provide a binary application; an entity should either receive 1) full treaty benefits if the requirements for benefits are satisfied, or 2) no treaty benefits if the requirements are not satisfied. This is the standard approach under many anti-treaty shopping provisions. However, that approach would create a pure “cliff”, which effectively would deny benefits to investors who otherwise would be entitled to treaty benefits. For that reason, those countries that have developed provisions to specifically address the treatment of CIVs generally have allowed a CIV to make claims in proportion to its “good” ownership, whether defined to include only residents of the same State or other treaty-entitled investors as well. Procedures could be further simplified, without significantly increasing the risk of treaty shopping, by providing that, once the CIV has passed some threshold of “good” ownership, the CIV would be entitled to benefits with respect to 100% of the income it receives. This dual approach would avoid the “cliff” effect described above. On the other hand, the “cliff” effect applies equally above the threshold, in that some investors who might not have been entitled to benefits nevertheless would benefit. This might argue for the adoption of a high threshold. A higher threshold might also be justified if a broader class of investors, such as all treaty-entitled investors, were treated as “good” owners. Because of these variables, the choice of threshold is best left to bilateral negotiations.

In summary, if it can be demonstrated that a CIV, REIF or REIT has a certain percentage of “good” owners (i.e. so-called equivalent beneficiaries), the CIV, REIF or REIT and its investment vehicles should be entitled to full treaty benefits.

From the examples given in the Abuse Draft, it seems that the use of conduit companies is an important reason to propose the MPT. However, we strongly believe that conduit situations can be more effectively targeted by anti-conduit measures, along with beneficial ownership requirements (SAARs instead of GAARs).

We note that the 2010 CIV report had a very specific scope (excluding private equity). It would be desirable if a solution is sought for all CIVs, REIFs and REITs, including private equity funds. Like other indirect real estate investment vehicles, many of the private equity funds (also considered alternative investment funds) are invested in by large institutions such as pension funds, insurance companies, investment banks, endowments, etc., which play a vital role supporting economic growth, stability and job creation.

Given the immense adverse impact that the recommendations may have on all CIVs and, as a result, on capital flows into critical parts of the real economy such as real estate and infrastructure, the supporting real estate associations appreciate the opportunity to take part in further discussions on the Abuse Draft and to provide input to the OECD on this critically important issue.

Kind regards,



Jeff Rupp  
Director Public Affairs  
INREV



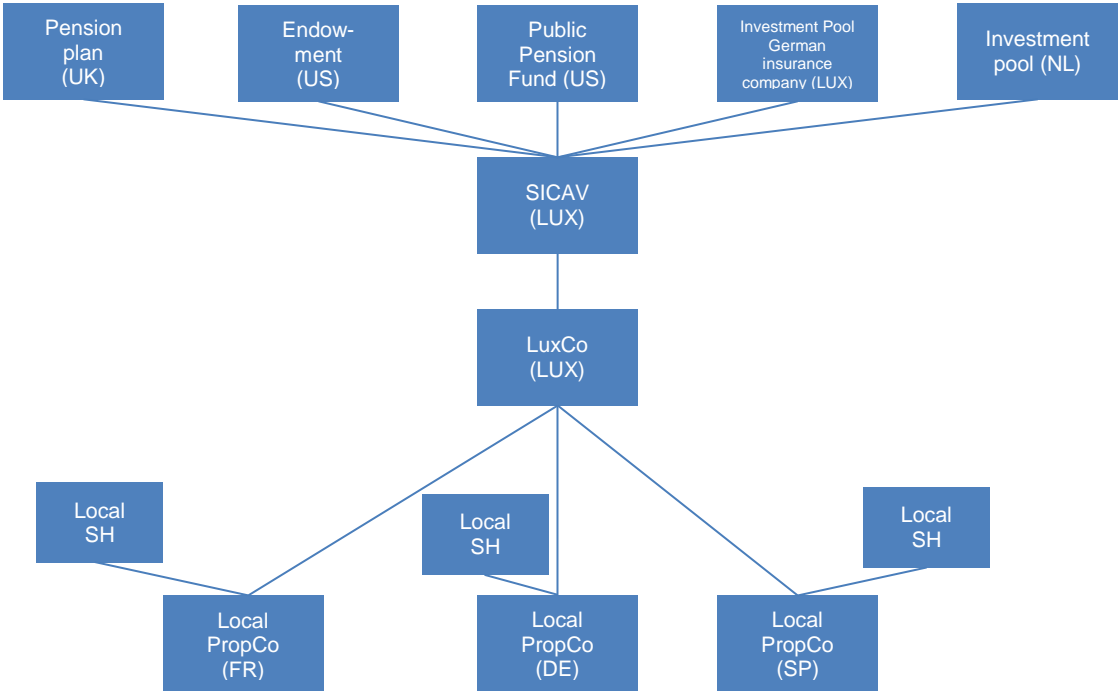
Andrew Saunders  
Director of Finance  
EPRA

**Attachment:** Examples of double taxation resulting from proposed treaty application<sup>2</sup>

**Example 1:**

A Luxembourg SICAV having the legal form of a “Société en commandite par action” invests in French, German and Spanish shopping centres via local companies holding the real estate (“Local PropCos”). Local partners are co-shareholders in the Local PropCos. The investment fund holds its participation in the Local PropCos via a normally taxed Luxembourg company that acts as the international investment holding entity.

The investors in the Luxembourg SCA are: a UK pension plan, a US endowment, a US public pension fund, the Luxembourg investment pooling vehicle of a German insurance company and a Dutch based ‘investment pool’ in which various smaller Dutch pension funds are invested. Detailed terms and conditions laid down in the investment fund’s documents set out the exact fund strategy, the governance rules (balance of power between the fund manager and the investors), the financial arrangements, the liquidity, etc.



<sup>2</sup> It should be noted that, while the examples given are deliberately specific, the problems they illustrate would affect a very broad range of similar ventures involving large volumes of cross-border flows of investment capital (both equity and debt). The effect of the proposals would conflict with the fundamental aim of treaty networks of facilitating cross-border investment in a world of national tax regimes.

Based on the proposed LOB, the Luxembourg investment holding company will not be granted treaty benefits in respect of dividends, as it is held by a Luxembourg SICAV that is not subject to income tax in Luxembourg and is therefore only treated as a resident of Luxembourg by some of the tax treaties concluded by Luxembourg. Also, the derivative benefits provision mentioned in the Abuse Draft would not help, as the investors are all resident in different countries. Had the investors in the SICAV been investing directly in the various PropCos, in most cases they would have been entitled to a reduction or exemption of withholding tax on dividend distributions made by the Local PropCos, pursuant to the tax treaties between the countries of residence of the Local PropCos and the countries of residence of the investors.

As a result, under the current proposals, double taxation would occur for the investors. For taxable investors, there is even triple taxation: the property income is taxed in the hands of the Local PropCos, non-creditable withholding tax is levied from the Luxembourg investment holding company and corporate income tax will be due on the distribution of the proceeds at the level of taxable investors (such as the German insurance company).

**Example 2:**

A French "SIIC" is quoted on the Paris stock exchange. It has acquired a Dutch company with a portfolio of property companies in various European countries. The Dutch company will not be entitled to treaty benefits in relation to its European subsidiaries, as it does not pass the shareholders' test under the LOB provision. Also, the derivative benefits test mentioned in the Abuse Draft will not offer any relief.

**Example 3:**

A Dutch BV is held by three very large investors: a Dutch pension fund, an Asian sovereign wealth fund and a Middle East sovereign wealth fund. The asset manager of this club deal investment is a Dutch based third party manager. The Netherlands has tax treaties with both countries of residence of the foreign shareholders. The Dutch BV will invest in an Indian property development company and will grant loans to this company. A detailed shareholders' agreement is in place between the shareholders of the Dutch BV.

The Dutch BV will not be entitled to treaty benefits in relation to India under the LOB. The Indian withholding tax on dividends paid to the Dutch BV will not be creditable. As a result, double taxation will occur: the Indian property development company will be subject to Indian corporate income tax on its profits. Withholding tax will be levied on dividends and interest payments to the Dutch BV at full rates.

**Example 4:**

A large group of US, German, French and Dutch investors are investing in a UK limited company that is taking 10% to 25% participations in local SPVs in a number of jurisdictions owning renewable energy assets (windmills, etc.). The investors are institutions and high net worth individuals. The larger investors in the UK limited company have a seat on its investment committee and the UK limited company has an investment / asset management team located in the UK.

The UK limited company will not be entitled to treaty benefits under the proposed LOB in relation to the jurisdictions where the local SPVs are based, due to the large pool of shareholders based in various jurisdictions. Withholding taxes on interest and dividends paid to the UK limited company will not be creditable. As a result, double taxation will occur: the local SPVs will be subject to corporate income tax on their profits. Withholding tax will be levied on dividends and interest payments to the UK limited company at full rates.

**Example 5:**

A Dutch investment pool in the form of a BV is investing in Brazilian infrastructure (roads etc.). The investor base consists of a wide group of US, UK and Dutch institutional investors. If this BV does not have access to treaty benefits in relation to Brazil, which would be the case under the proposed LOB provision, the Brazilian taxation on income and capital gains derived from Brazil would be so substantial that the investors would no longer be willing to invest in Brazil. They would want to keep their investments within the borders of their own jurisdictions. Hence, the proposed LOB would prevent the cross-border investments necessary for the further development of the infrastructure in Brazil which is badly needed for Brazilian economic development.

## Attachment 2: List of supporting associations

Organisation	Description
	<p>INREV is the European Association for Investors in Non-listed Real Estate Vehicles. Since its launch in 2003, it has grown to more than 350 members from more than 28 different countries. INREV's aim is to improve the accessibility of non-listed real estate funds for institutional investors by promoting greater transparency, professionalism and standards of best practice. INREV is led by institutional investors and supported by other market participants such as fund managers, investment banks, academics, lawyers and other advisors. As a pan-European body, INREV represents a unique platform for sharing knowledge on the non-listed real estate funds market.</p>
	<p>The European Public Real Estate Association is the voice of the publicly traded European real estate sector. With more than 200 active members, EPRA represents over EUR 300 billion of real estate assets and 90% of the market capitalisation of the FTSE EPRA/NAREIT Europe Index. Through the provision of better information to investors, improvement of the general operating environment, encouragement of best practices and the cohesion and strengthening of the industry, EPRA works to encourage greater investment in listed real estate companies in Europe.</p>
	<p>CREFC Europe is member-driven and dedicated to insightful, forward thinking that encourages vision, innovation and continuous professional growth for market participants. CREFC Europe is committed to being responsive to its members and providing them a culture of collaboration, collegiality, open and inclusive dialogue, consensus building and respect for diverse views.</p>
	<p>The AFG represents the French asset management industry. AFG members include all market participants working for individual investors or collective investment schemes.</p>
	<p>The Association of Real Estate Funds represents the UK unlisted real estate funds industry and has more than 80 member funds with a collective net asset value of over €52billion under management on behalf of their investors. The Association is committed to promoting transparency in performance measurement and fund reporting through the AREF Code of Practice, the AREF/IPD UK Pooled Property Funds Indices and the AREF/IPD Property Fund Vision Handbook.</p>



	<p>The British Property Federation is devoted to representing the interests of all those involved in property ownership and investment. We aim to create the conditions in which the property industry can grow and thrive, for the benefit of our members and of the economy as a whole. Because our membership includes the biggest companies in the property industry - property developers and owners, institutions, fund managers, investment banks and professional organisations that support the industry - we are able to provide the knowledge and expertise needed by legislators (UK and EU) and regulators (including various financial, planning and environmental bodies) in taking their decisions.</p>
	<p>The Swedish Property Federation is a highly pro-active trade organization promoting an efficient real estate market in Sweden. Almost 20,000 property owners are members, organized in one of Sweden's 5 regional property associations. Our members represent the entire spectrum of the property industry, owning or managing premises and rental apartment buildings, industrial properties and tenant-owners' associations.</p>
	<p>The Investment Property Forum (IPF) is the leading UK property investment organisation for individual members. It comprises an influential network of approximately 2,000 senior professionals, including investment agents, fund managers, bankers, lawyers, researchers, academics, actuaries and other related professionals, all active in the property investment market. The IPF's objective is to enhance the understanding and efficiency of property as an investment, including public, private, debt, equity and synthetic exposure, for its members and other interested parties, including government by undertaking research and special projects and ensuring effective communication of this work.</p>
	<p>The Association of Institutional Property Investors in the Netherlands (IVBN) was established in 1995 to promote the interests of its members, to provide a platform for institutional property investors and to further professionalism in the sector. To this end IVBN focuses on direct and indirect investment in property, concentrating on the actual bricks and mortar.</p>
	<p>RAKLI's members include Finland's most prominent owners of residential and commercial properties and infrastructure, tenants of commercial facilities, property investors, building contractors and service providers. The members represent both the private and the public sector, and member organisations number around 200 in total.</p>



The German Property Federation ZIA is a membership organisation founded in order to represent the interests of the whole real estate industry. We pursue the objective to create an environment in which real estate investments can prosper. Therefore ZIA advocates the interests of the German real estate industry vis-à-vis the political decision makers in Germany and in the EU. Our more than 140 members – including the biggest companies in the property industry - represent the industry at any stage of the supply chain. Our membership also includes a various number of property linked associations. ZIA was founded in 2006 and is a member of the Federation of German Industries (Bundesverband der Deutschen Industrie).