

## Newsalert

### Tax Department

**Conclusions of the General Advocate Hogan on the potential infringement of EU principle of the reduced Italian transfer taxes applicable to sales and purchases of real estate assets executed by closed-ended real estate investment funds (“REIFs”)**

### Introduction

On 25 February 2021, the General Advocate Gerard Hogan (the “**General Advocate**”) issued his conclusions (the “**Conclusions**”) in relation to the joined cases C-478/19 and C-479/19 (*UBS Real Estate GmbH – “UBS RE”*), concerning the potential infringement of EU principles of the reduced transfer taxes regime applicable to sales and purchases of commercial real estate assets carried on by Italian closed-ended REIFs pursuant to Article 35(10-ter) of Law Decree no. 223/2006.

In particular, according to such provision, the transfer of commercial real estate assets executed by a VAT taxable person are subject to transfer taxes (mortgage tax and cadastral tax) at the reduced rate of 2% on the fair market value - *in lieu* of the ordinary 4% rate - in case part of the transaction (as seller or as purchaser) is a REIF set up as a “closed-ended” under Article 37 of Italian Consolidated Financial Code (“**TUF**”).

### The Case Law

The joined cases C-478/19 and C-479/19 resulted from the denial of the reimbursement of the full transfer taxes paid (*i.e.* 4%) by UBS RE, as asset management company of two open-ended REIFs established under German law, in the context of the purchase of two commercial real estate in Italy executed in 2006.

Following negative judgements of the Italian lower-tier tax Courts (Judgements nos. 283/2009 and 35/2012), UBS RE challenged the denial before the Italian Supreme Court, which referred to the EU Court of Justice to evaluate whether Article 35(10-ter) of Law Decree no. 223/2006 – that limits to closed-ended REIFs the reduction of transfer taxes – is in contrast with EU principles of freedom of establishment and free movement of capital (Judgement no. 15432/2019).

On 25 February 2021, the General Advocate issued his Conclusions before the EU Court of Justice.

### The Conclusions

According to the General Advocate, the alleged unequal treatment must be examined only from

the perspective of the EU principle of free movement of capital (Article 63 of TFUE). In this respect, a direct or indirect discrimination between investors may be compatible with EU Law if justified by one of the grounds expressly provided for by EU Treaties (conclusions of General Advocate Tizzano in C-411/03, *SEVIC Systems*) or by overriding reasons in the public interest (C-135/17, *X-GmbH*).

In particular, the General Advocate analysed the requirements that a REIF should meet to benefit from the reduction of transfer taxes pursuant to Article 35(10-ter) of Law Decree no. 223/2006, namely (i) establishment under Italian law (*i.e.* Article 37 of TUF) and (ii) closed-ended nature.

With reference to the first requirement, the General Advocate clarified that the “direct” discrimination based on the “nationality” of the REIF may not be justified based on one of the abovementioned grounds, considering that any potential risk of avoidance would be independent from the nationality of the REIFs.

With reference to the second requirement, the General Advocate pointed out that the “indirect” discrimination between closed and open-ended REIFs may be justified by the need to mitigate a potential systemic risk in the commercial real estate market (“*snowball*” effect). Indeed, in case of open-ended REIFs, a market crisis may induce investors to ask for the early repayment of part of the invested sums. Differently, in closed-ended REIFs the redemption of the units can only be requested on the scheduled date or after a certain number of years of subscription.

Therefore, it would be legitimate to encourage only the development of closed-ended REIFs and the tax provision at issue meets a reason in the public interest (Judgements nos. C-297/16, *CMVRO* and C-436/08, C-437/08, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*).

Accordingly, the General Advocate proposed that the Court of Justice should answer to the Italian Supreme Court as follows: the principle of free movement of capital (Article 63 of TFUE) is to be interpreted as allowing the use of a criterion based on the opened or closed-ended nature of a REIF as a condition for obtaining a reduction of transfer taxes on sales/purchases of real estate assets if the justification for the said criterion is preventing a systemic risk in the real estate market and provided that there is no “direct” discrimination based on factors such as whether the REIFs are managed in Italy or governed by Italian law.

Finally, it is worth mentioning that, at domestic level, Italian Provincial Tax Court of Milan has recently ruled in favour of the application of the reduced transfer taxes regime to foreign French REIF subject to supervision (Judgment no. 5952/2018).

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