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Citation: 14 Minn. J. Global Trade 345 2004-2005



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Vehicle Shopping: The Case for a Flexible EuroREIT

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INTRODUCTION

The popularity of real estate investment trusts (REITs¹) has exploded during the last decade.² As of early 2004, twenty coun-

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1. The acronym REIT (Real Estate Investment Trust) describes both a type of tax regime and entities that participate in REIT regimes. See European Public Real Estate Association, *Tax Transparency for Europe: A Comparison of the Different REIT Regimes in Europe*, 4–5, at http://81.17.33.253/media/EPRA-REIT-Survey_2003.pdf (last visited Jan. 6, 2005) [hereinafter EPRA]. REIT regimes allow companies to buy, manage, and sell real estate assets (equity REITs) or make and hold loans that are secured by real estate collateral (mortgage REITs). RALPH A. BLOCK, INVESTING IN REITs 14–15 (Veronica J. McDavid ed., 1998). See generally JOHN A. MULLANEY, REITs: BUILDING PROFITS WITH REAL ESTATE INVESTMENT TRUSTS 1 (1998). REITs are “flow through” entities that “distribute the majority of income cash flows to investors without taxation at the corporate level.” EPRA, *supra*, at 4; REITNet, *REITs 101*, at <http://www.reitnet.com/reits101/> (last visited Jan. 6, 2005). Although REIT regime requirements vary from country to country, they all allow participants to invest in “professionally-manag[ed] portfolio[s] of real estate properties.” PETER W. MADLEM & THOMAS K. SYKES, THE INTERNATIONAL ENCYCLOPEDIA OF MUTUAL FUNDS, CLOSED-END FUNDS, AND REAL ESTATE INVESTMENT TRUSTS 283 (2000). See generally EPRA, *supra*, at 5–26 (examining differences in REIT-type vehicles). REITs are liquid investments that are often publicly listed. See REITNet, *supra*; HM Treasury & Inland Revenue, *Promoting More Flexible Investment in Property: A Consultation*, 15 (Mar. 2003), available at http://www.hm-treasury.gov.uk/budget/budget_04/associated_documents/bud_bud04_adproperty.cfm (last visited Jan. 6, 2005) [hereinafter *Promoting Investment*].

2. See MADLEM & SYKES, *supra* note 1, at 283–86 (noting that investors have been attracted to REITs because they have provided “high, and usually stable current income; attractive total return potential; . . . minimized risk through portfolio diversification” and because real estate has had a track record of performing well during inflationary periods); see also Richard R. Goldberg & Wendi L. Kotzen, *Real Estate Financing Documentation: Coping with the New Realities*, (ABA Continuing Legal Educ., 2003), SH004 ALI-ABA 485, 487; *Everyone Else has got a REIT . . . So*

tries on six continents have enacted legislation permitting REIT-like structures.³ Several countries are close to passing REIT-style legislation and the European Union is reported to be considering the creation of a EuroREIT.⁴ Potential benefits of a REIT-style vehicle throughout the euro-zone include greater transparency in real estate ownership, improved liquidity in property markets, increased cross-border investment, and advancement in the globalization of real estate securitization.⁵

Although a number of barriers currently impede the establishment of a EuroREIT,⁶ many experts believe that the creation

Why Haven't We?, PROP. WK., Dec. 5, 2003, at 41; Juliana Ratner, *Everybody's Doing it, Doing it: The Rush to Invest in Property is Spreading*, FIN. TIMES, Apr. 14, 2004, at 3.

3. David M. Einhorn, et al., *Focus On REITs: REITs Continue Global March*, REAL EST. ISSUES, Spring 2004, at 39; see also Nicolas Yulico, *REITs Are a Global Sensation*, NATL. REAL EST. INVESTOR, Apr. 1, 2004, at 4.

4. See David Brown, *Investment Fund Vehicles for Pan-European Real Estate: A Technical and Commercial Review*, BRIEFINGS IN REAL EST. FIN., Mar. 2003, at 289, 298; Einhorn, *supra* note 3, at 39; *Ernst & Young Identifies Top 10 Global Real Estate Trends*, BUS. WIRE, Mar. 9, 2004, available at http://www.findarticles.com/p/articles/mi_m0EIN/is_2004_March_9/ai_114052730.

5. See *The REIT Stuff*, GLOBAL INVESTOR, Apr. 1, 2003, available at 2003 WL 18346152 (suggesting that the spread of the REIT model has improved liquidity in the global property market); Yulico, *supra* note 3, at 4 (suggesting that the globalization of REITs will result in more cross-border investment and noting that governments are heeding investor demands for the "transparency and liquidity" that REITs offer); Nick van Ommen, Address at the European Public Real Estate Association's Annual Meeting (Sept. 10, 2004), at http://www.nareit.com/mediaresources/MOgh_adam%20EPRA%20speech.pdf ("[T]he globalization of publicly traded real estate has become one of this decade's emerging themes, and . . . it bodes well for the future of cross-border real estate investments."); ANDREW DAVIDSON ET AL., *SECURITIZATION: STRUCTURING AND INVESTMENT ANALYSIS* 429 (2003) (explaining that REITs allow financial institutions to securitize real property assets); see also Leon T. Kendall, *Securitization: A New Era in American Finance*, in A PRIMER ON SECURITIZATION 1-2 (Leon T. Kendall & Michael J. Fishman eds., 1996) (explaining that securitization is a process that "converts illiquid individual loans or debt instruments which can be sold readily to third party investors into liquid, marketable securities"). See generally ERNST & YOUNG, *REAL ESTATE: THE LOCAL GLOBAL ECONOMY* 15 (2003) ("[R]eal estate markets are slowly but surely moving toward globalization by removing barriers to entry . . . and adopting the legal and professional infrastructure to attract companies, businesses and investment capital.").

6. See Angus I. Johnston, *Pan-European Property Funds: Searching for a European REIT*, GLOBAL REAL EST. NOW (PriceWaterhouseCoopers), Spring 2000, at 6, available at <http://www.pwcglobal.com/images/gx/eng/fs/re/europeanreitdutch.pdf> ("[W]hile much progress [in the EU] has been made in harmonizing laws and regulations . . . nothing has been done for real estate funds—either with respect to enabling the cross-border sale of interests in real estate funds or to resolving the tax inefficiencies inherent in cross-border real estate investing."); EPRA, *supra* note 1, at 4 ("Member States are not willing to surrender their sovereignty in direct tax matters, simply because this directly affects their financial budgets."); Brown, *supra* note 4, at 298-99 (noting that inside the EU there are "conflicting . . . investor

of a pan-European REIT-vehicle is probable.⁷ A fundamental question industry lobbyists and EU officials face in establishing a EuroREIT is determining what REIT-type vehicle will be optimal in the European Union.⁸ Although EU policy makers will likely be tempted to duplicate well-established real estate investment vehicles operating in Europe, investors would be better served by a EuroREIT that incorporates non-restrictive attributes of the new REIT vehicle in France as well as the proven REIT vehicles in the United States and Australia—"the world's most successful REIT markets."⁹

This Note will examine a number of existing models the European Union could follow in creating REIT-type legislation and will suggest that the U.S., Australian, and French vehicles present the best models for establishing a vibrant REIT industry in the European Union. Part I will focus on the genesis of the REIT. It will describe developments in the U.S. REIT industry, examine the spread of the REIT-style vehicle to other nations, and discuss the EuroREIT movement. Part II will compare the characteristics and performance of REIT-type vehicles in the United States, Australia, Belgium, France, and the Netherlands. Part III argues that EU policymakers should take a flexible, nonrestrictive approach in creating a EuroREIT.

I. GLOBAL HISTORY OF REITS

A. A HISTORY OF U.S. REITS

For individuals without a rich uncle or the desire to start a business, the path to wealth creation usually involves investment in stocks or real estate.¹⁰ In 1960, the U.S. Congress

needs, local regulatory constraints, and tax laws"). *But see* EPRA, *supra* note 1, at 4 (asserting that decisions from the European Court of Justice are prompting member states to change their tax laws and remove obstacles to the flow of capital and investment in the EU).

7. *See* Brown, *supra* note 4, at 299 (suggesting that a EuroREIT is achievable if the political will is present); Van Ommen, *supra* note 5 (predicting that a EuroREIT will emerge).

8. *See* Johnston, *supra* note 6, at 6 (suggesting that no existing structure provides a universal answer for the needs of the EU); Brown, *supra* note 4, at 298 (asserting that existing models fail to offer a perfect solution to EU needs).

9. Polly Mackenzie, *The Rise of the German REIT: Germany's Finance Ministers are Pondering REITs Following the Drop in Investor Enthusiasm for Open-ended Funds*, PROP. WK., July 30, 2004, at 50.

10. MADLEM & SYKES, *supra* note 1, at 283 ("[T]he two traditional paths to

passed the Real Estate Investment Trust Act, which combined characteristics of both of these “income generator[s].”¹¹ Congress’s intent in passing the act was reportedly to “stimulate investment in real estate by permitting the small investor to participate in a professionally managed and diversified portfolio of real estate investments.”¹² As a result, companies investing in real estate could “raise large pools of funds by selling shares of beneficial interest.”¹³

The popularity of the REIT industry in the United States has followed an unpredictable course since its birth forty-four years ago.¹⁴ The first REITs were established within a few years after Congress created the REIT structure.¹⁵ Although REITs performed quite well during the 1960s, investor interest in the new vehicle was minimal.¹⁶ At the end of the decade, however, a real estate development boom gave the industry its first taste of growth.¹⁷ Between 1968 and 1974, industry assets grew from approximately one billion dollars to over twenty billion dollars.¹⁸ This growth was short lived as REITs hit a rough stretch in the 1970s.¹⁹ Investments suffered from “rising inter-

wealth creation have been real estate and stocks.”)

11. Dale Ann Reiss, *Insider's Report*, GLOBAL REAL ESTATE NEWSLINE (Ernst & Young), Spring 2004, at 3, available at [http://www.ey.com/global/download.nsf/International/global_newsline_2004/\\$file/GlobalNewsline2004.pdf](http://www.ey.com/global/download.nsf/International/global_newsline_2004/$file/GlobalNewsline2004.pdf); see Real Estate Investment Trust Act of 1960, Pub. L. No. 86-779, §10(a), 74 Stat. 998, 1003; DAVIDSON, *supra* note 5, at 429; MADLEM & SYKES, *supra* note 1, at 283. The origins of REITs can be traced to Massachusetts in the 19th century. Louis J. Zivot, *The Evolution of a REIT Rule: Impermissible Tenant Service Income*, 33 REAL EST. L.J. 54, 56 (2004); see also MULLANEY, *supra* note 1, at 9. Prior to the Supreme Court's decision in *Morrissey v. Commissioner*, 296 U.S. 344 (1935), investors could bypass state laws prohibiting corporations from owning property by forming trusts. Zivot, *supra*, at 56; see also MULLANEY, *supra* note 1, at 9. This technique allowed investors to escape taxes on income distributed by the trust. Zivot, *supra*, at 56; see also MULLANEY, *supra* note 1, at 9.

12. Zivot, *supra* note 11, at 56 (Congress ensured that “the choice between investing in real estate vs. securities would not be based just on taxation.”); see Steven Wechsler, *REITs Take Flight*, IPE REAL EST. (Investment & Pensions Europe), Autumn 2004, at 38 (noting that lawmakers wanted to “make investments in large-scale, income-producing real estate accessible to investors from all walks of life”); H.R. CONF. REP. NO. 2214, at 8 (1960), reprinted in 1960 U.S.C.C.A.N. 3765, 3769.

13. DAVIDSON, *supra* note 5, at 429.

14. See generally MADLEM & SYKES, *supra* note 1, at 287.

15. See BLOCK, *supra* note 1, at 121.

16. See *id.* at 121–22 (“[O]nly ten REITs of any size existed during the 1960s.”); see also MADLEM & SYKES, *supra* note 1, at 287.

17. See MADLEM & SYKES, *supra* note 1, at 287.

18. *Id.*

19. See BLOCK, *supra* note 1, at 123; MADLEM & SYKES, *supra* note 1, at 287; Van Ommen, *supra* note 5.

est rates, over-building, and a national recession.”²⁰ As a result of these factors, many REITs failed or were dissolved due to the illiquid nature of the investment vehicle of that period, and “investors became disenchanted with the entire REIT industry.”²¹

During the mid-1980s, Congress altered the REIT landscape and sparked industry growth by enacting legislation that discontinued tax shelter-oriented real estate partnerships.²² The elimination of this rival investment option proved advantageous for the REIT industry.²³ The Tax Reform Act of 1986 also allowed REITs to become “self-advised . . . active operators of their properties” rather than externally managed “passive owners of real estate.”²⁴ These legislative changes along with cheaper property prices helped REITs to once again become an attractive investment.²⁵

Market conditions, industry innovations, and additional legislative changes during the 1990s enabled the REIT industry to grow dramatically in both “scale and scope.”²⁶ Because of a “credit crunch”²⁷ during this period, private companies found loans difficult to secure and “were forced to consider the equity

20. MADLEM & SYKES, *supra* note 1, at 287; see BLOCK, *supra* note 1, at 123 (noting that the REIT industry contributed to its own collapse through over-building and over-borrowing); see also DAVIDSON, *supra* note 5, at 434 (explaining that the oil embargo in 1973 brought real estate projects to a halt); Goldberg & Kotzen, *supra* note 2, at 487 (noting that spiraling interest rates contributed to the decline of the REIT industry).

21. BLOCK, *supra* note 1, at 123; see also DAVIDSON, *supra* note 5, at 434 (noting that several years passed before investors regained confidence in the REIT market).

22. Van Ommen, *supra* note 5; see Tax Reform Act of 1986, Pub. L. No. 99-514 § 501 (a), 100 Stat. 2085, 2233 (1986); see also MADLEM & SYKES, *supra* note 1, at 287; BLOCK, *supra* note 1, at 129 (noting that Tax Reform Act of 1986 relaxed restrictions on REITs).

23. MULLANEY, *supra* note 1, at 12 (suggesting that Congress’s actions made real estate investing a profit motivated decision rather than a tax motivated decision).

24. Van Ommen, *supra* note 5; see Tax Reform Act of 1986, Pub. L. No. 99-514 § 663, 100 Stat. 2085, 2302 (1986); see also Philip Coggan, *UK REITs: Opting for a Very Cautious Welcome*, FIN. TIMES, June 4, 2004, at 9 (suggesting that the REIT industry has grown significantly in the last decade as a result of regulatory changes that permit the internal management of REITs).

25. *Everyone Else has got a REIT . . . So Why Haven’t We?*, *supra* note 2, at 41.

26. Van Ommen, *supra* note 5. See generally MADLEM & SYKES, *supra* note 1, at 287; Goldberg & Kotzen, *supra* note 2, at 487 (describing the Wall Street reinvention of the REIT).

27. *Improving the Efficiency and Flexibility of the UK Real Estate Market: An Industry Briefing Document for HMT*, Investment Property Forum et. al, Sept. 2003, 70, available at <http://www.bpf.propertymall.com/files/resdoc10790997255527-1.pdf> [hereinafter *Improving the UK Real Estate Market*].

markets to raise capital.”²⁸ REITs proved to be a good match for capital-seeking companies and cautious investors who sought increased managerial accountability.²⁹ Wall Street variations on the traditional REIT corporate structure during this period “enable[d] property owners to ‘REITize’ their existing property without incurring current capital gains taxes.”³⁰ Another trend during the decade was the transformation of a growing number of real estate properties from private to public ownership.³¹ Congressional changes to REIT rules in 1999 made it possible for REITs to “tap into new growth and earnings opportunities.”³² Although originally designed to be a passive investment vehicle in 1960, the new legislation allows REITs to actively engage in business activities through fully owned subsidiaries.³³

B. THE GLOBAL MIGRATION OF REITS

An increasing number of leading global economies are operating or considering the implementation of REIT-style vehicles.³⁴ The expansion of the REIT industry outside of the

28. *Id.*

29. *See id.*

30. BLOCK, *supra* note 1, at 52–55 (outlining the characteristics of two REIT variations commonly referred to as UPREITs and DownREITs).

31. Raymond Fazzi, *No Letup in Real Estate*, FIN. ADVISOR, Mar. 2004, available at http://www.fa-mag.com/past_issues.php?id_content=3&idArticle=308&idPastIssue=81; Andre Stadler & Anton de Goede, *Performance Overview*, LISTED PROP. SECTOR-Q. REV. (Catalyst Securities, Cape Town, S. Afr.), April 2004, at 3, available at <http://www.moneymax.co.za/partners/sapoa/files/Catalyst-%20Quarterly%20report%20April%202004.pdf> (noting that real estate investment is increasingly moving from private to public hands); Wechsler, *supra* note 12, at 38 (“Most US REITs became public companies within the past 10 years, often transforming to public ownership what previously had been private enterprises.”); *see also* Van Ommen, *supra* note 5, at 9 (“The transformation into public ownership of property has allowed the industry to go through the recent economic downturn without experiencing the failures associated with past recessions.”).

32. Van Ommen, *supra* note 5, at 8. *See generally* REIT Modernization Act of 1999, Pub. L. No. 106-170, §§ 541-71, 113 Stat 1860, 1940–51 (1999).

33. *See* Zivot, *supra* note 11, at 68 (noting that the 1999 legislation allows REITs to benefit from competition with other real estate owners, but also exposes REIT investors to business risks); *see also* Van Ommen, *supra* note 5, at 8 (“This breakthrough legislation allowed REITs to take a further step toward becoming fully integrated operating companies.”). *See generally* David M. Einhorn, *Unintended Advantage: Equity REITs vs. Taxable Real Estate Companies*, 51 TAX L. 203, 204–10 (1998) (asserting that REITs were originally intended to be passive investments and arguing that they are currently acting more like active businesses).

34. *See Promoting Investment*, *supra* note 1, at 8 (“Many of the leading global economies operate a bespoke property investment vehicle.”).

United States dates back several decades.³⁵ Australia introduced the listed property trust (LPT) in 1971.³⁶ Like U.S. REITs, LPTs have evolved during the past three decades and have recently achieved a high level of popularity with investors.³⁷

The Dutch were leaders in the creation of a REIT-like structure in Europe, establishing the "fiscale beleggingsinstelling" (BI) in 1969.³⁸ In the mid 1990s, Belgium introduced a REIT-vehicle known as the "sociétés d'investissement à capital fixe en immobilière" (SICAFI).³⁹ In 2003, France passed legislation that created a REIT equivalent, known as the "sociétés d'investissements immobiliers cotees" (SIIC).⁴⁰ REIT-like structures also exist in Luxembourg, Spain, Turkey, and Greece.⁴¹ Industry reports predict that "the United Kingdom could permit the introduction of REITs as soon as 2005."⁴² REIT movements also exist in the European Union, Germany, and the Nordic countries.⁴³

A number of governments in East Asia have enacted REIT legislation in the past five years.⁴⁴ In late 2000, Japan enacted an investment trust law that established a REIT vehicle.⁴⁵ South Korea established REIT regulations in 2001 and Singapore listed its first "S-REIT" in 2002.⁴⁶ Although a REIT has not yet appeared in Hong Kong, regulations were recently put in place for a REIT vehicle and reports predict that a prominent

35. See *Improving the UK Real Estate Market*, *supra* note 27, at 64 (discussing the first offering of the Australian LPT in 1971).

36. See *id.*; see also John J. Kriz et. al., *REITs: Spreading Around the World*, REAL EST. PORTFOLIO (NAREIT), Sept./Oct. 2004, at <http://www.nareit.com/portfoliomag/04sep/oct/vested.shtml>.

37. See Kriz, *supra* note 36 ("LPTs have evolved into one of the most developed REIT-like structures around the world.").

38. See EPRA, *supra* note 1, at 5.

39. See *id.* at 6; see also Stadler & de Goede, *supra* note 31, at 3.

40. See EPRA, *supra* note 1, at 6; see also Brown, *supra* note 4, at 295; Kriz, *supra* note 36.

41. See Stadler & de Goede, *supra* note 31, at 4.

42. See Kriz, *supra* note 36.

43. *Id.*; see also Mackenzie, *supra* note 9, at 50 (predicting that the German finance ministry will launch plans for a REIT vehicle in the near future); Stadler & de Goede, *supra* note 31, at 4 (noting that the EU is investigating a EuroREIT structure).

44. See Jennifer D. Duell, *Land of the Rising REIT: Tax-Free Structures Gain Popularity in Asian Markets*, COM. PROP. NEWS, Mar. 1, 2004; Kriz, *supra* note 36; Miki Tanikawa, *Building for the Future: REIT's Go Global as Hunger for Yields Grows Real Estate*, INT'L HERALD TRIB., Dec. 20, 2003, at 13.

45. See Duell, *supra* note 44; Kriz, *supra* note 36.

46. See Duell, *supra* note 44; Kriz, *supra* note 36.

Hong Kong property firm will likely pioneer Hong Kong's first REIT in the near future.⁴⁷ Lobbyists are also seeking to expand geographic limitations on the Hong Kong REIT so that property investment in mainland China could be permitted.⁴⁸

REIT movements are also at different stages of development in Canada and Latin America. REITs have existed in Canada for eleven years and are a well-established market.⁴⁹ The recent passage of REIT legislation in Mexico provides a clear signal that the REIT movement is coming out of its infancy in Latin America.⁵⁰ Analysts predict that Brazil will make efforts in the near future to modernize its outmoded REIT structure.⁵¹

C. THE EUROREIT MOVEMENT

In light of REIT success in the United States and the spread of REITs across the globe, there is growing interest in Europe for a pan-European REIT structure.⁵² The main thrust behind a EuroREIT movement is coming from investors who are demanding "liquidity in real estate investing," greater exposure to European real estate markets, and increased cross-border tax efficiency.⁵³ Although a number of member countries have REIT-type vehicles in place, they represent a small segment in the European property market.⁵⁴ A broader EuroREIT ap-

47. See Kriz, *supra* note 36 ("Hong Kong has yet to see its first REIT. However, it is believed that the Hong Kong Housing Authority will be the likely pioneer as the first REIT."); Einhorn, *supra* note 3, at 39.

48. See Einhorn, *supra* note 3, at 39.

49. See Kriz, *supra* note 36.

50. See Roberto Ordorica, *Power of REITs*, LATINFINANCE, Oct. 04, 2004, available at 2004 WL 92824787 (discussing the UPREIT structure in Mexico).

51. See Kriz, *supra* note 36 (explaining Brazil's position as the Latin American country with the largest economy and population as a catalyst for an improved REIT structure); see also Ordorica, *supra* note 50 (noting that Brazil has made little headway in this effort).

52. See Kriz, *supra* note 36 ("REITs are on the rise in Europe."); Johnston, *supra* note 6, at 6 (discussing the growing interest in Europe for "pan-European property funds"); Brown, *supra* note 4, at 295-97 (outlining possible investment vehicles that could be implemented in the EU including REIT-type vehicles and non-REIT vehicles).

53. Johnston, *supra* note 6, at 6; see Brown, *supra* note 4, at 290 ("The market for real estate funds has emerged out of the combination of increased demand from investors for focused cross-border investment opportunities and the relative lack of product in the existing sphere of real estate investments.").

54. See Michael Fickes, *A Continental Flair*, REAL EST. PORTFOLIO (NAREIT), Jan./Feb. 2001, available at http://www.nareit.com/portfoliomag/janfeb01/feat_flair.shtml.

proach will open up new real estate investment opportunities in the European Union's twenty-five member states.⁵⁵ Once established, a EuroREIT regime will be able to spread geographically with future expansion of the European Union.⁵⁶ Future member states will be able to avoid the rigors of individually selecting and implementing their own REIT-type vehicles. Although it is unclear whether member states with functioning REIT vehicles could independently continue to maintain some form of their existing vehicles, these countries would likely benefit by converting their vehicles into a EuroREIT format.⁵⁷

The desire for market transparency and the elimination of barriers to entry among member states provide additional fuel for the EuroREIT movement.⁵⁸ Real estate investors have traditionally limited their investments to local markets due to the risk of venturing into nontransparent surroundings.⁵⁹ As with other efforts promoting the "free movement of goods, persons, services, and capital" in the European Union, implementation of a EuroREIT will require the removal of significant barriers to entry and market differences among member states.⁶⁰ Experts predict that as such steps are taken, the current "patchwork of national real estate markets" will evolve into a more integrated real estate marketplace.⁶¹

A number of EU regulatory and policy changes have already taken place that will help facilitate the creation of a EuroREIT structure. The introduction of the Euro has made cross-border

55. Europa, *The History of the European Union*, at http://europa.eu.int/abc/history/index_en.htm (last visited Jan. 6, 2005) (explaining that the EU increased in size from 15 to 25 members states on May 1, 2004).

56. *See id.* (suggesting that Bulgaria and Romania will likely join the EU in a few years and noting that Turkey is a candidate country).

57. *See* Brown, *supra* note 4, at 299 (predicting that a EuroREIT would "doubtlessly attract a large share of the funds currently flowing into single-country vehicles").

58. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 16 (1958) [hereinafter Treaty of Rome] (indicating that the elimination of cross-border barriers is a fundamental purpose of the EU). *See generally* ERNST & YOUNG, *supra* note 5, at 7 (suggesting that real estate markets are striving to remove barriers to entry, establish global standards, and develop their legal and professional infrastructures).

59. *See* ERNST & YOUNG, *supra* note 5, at 15; Brown, *supra* note 4, at 289 (noting that listed property companies have had a domestic focus).

60. Treaty of Rome, *supra* note 58; *see* NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION*, 299-300 (5th ed. 2003) (describing EU efforts to remove barriers between member states); Brown, *supra* note 4, at 299 (noting that implementation of a EuroREIT will require tax harmonization).

61. *See* ERNST & YOUNG, *supra* note 5, at 4.

investment easier.⁶² There has been a relaxation of legal and regulatory restrictions on institutional investment across borders in Europe.⁶³ The European Union is also reportedly taking steps to harmonize tax rules in order to even the playing field for member-state markets.⁶⁴ The European Court of Justice has been the catalyst for much of this movement as it has rendered a number of tax law decisions that call for member-state conformity with EU law.⁶⁵ Together, these steps aid the establishment of a EuroREIT by “lower[ing] thresholds for cross border investment.”⁶⁶

Notwithstanding these efforts, establishment of a EuroREIT will require additional “legislative harmonization and integration of direct taxation.”⁶⁷ This can be achieved through the issuance of a European Community Directive, which requires the consent of EU member states.⁶⁸ Once agreed upon, all member states must comply with a directive by incorporating new provisions into their national laws.⁶⁹

62. See Stadler, *supra* note 31, at 3 (“The recent introduction of the single monetary union in Europe has been one of the key drivers for investigations into tax efficient real estate investment alternatives being offered across the continent.”); Brown, *supra* note 4, at 289 (suggesting that the implementation of the Euro has helped promote demand for a pan-European investment vehicle).

63. Brown, *supra* note 4, at 289.

64. See *id.* (“European tax law has made some concessions to improving the efficiency of cross-border flows of capital but significant differences still exist, however, and the concept of ‘tax harmonisation’ is nascent rather than advanced.”); *Everyone Else has got a REIT . . . So Why Haven’t We?*, *supra* note 2, at 41 (discussing EU intentions to harmonize tax rules and “create a level playing field for markets”).

65. See Jan Eckert, *Competition to Attract Real Estate Investment Helps to Drive Growth of Europe’s REIT Market*, GLOBAL REAL EST. NEWSLINE, (Ernst & Young), Spring/Summer 2004, at 7, available at [http://www.ey.com/global/download.nsf/US/Newslinemay2004/\\$file/may2004Newsline.pdf](http://www.ey.com/global/download.nsf/US/Newslinemay2004/$file/may2004Newsline.pdf) (noting that the EC Court of Justice decisions are “eliminat[ing] obstacles and distortion(s) in national tax law”); EPRA, *supra* note 1, at 24. See generally, NUGENT, *supra* note 60, at 245–48 (outlining the powers and responsibilities of the European Court of Justice).

66. *Everyone Else has got a REIT . . . So Why Haven’t We?*, *supra* note 2, at 41.

67. EPRA, *supra* note 1, at 2.

68. See Eckert, *supra* note 65, at 7 (“In the European Union at present, the only means of bringing more consistency and uniformity to national tax laws, including those governing real estate, is through so-called EC directives.”); see also Mark Cooper, *Industry Should Lobby For Euro-REIT, Says MS*, ESTATES GAZETTE, May 25, 2002, at 56 (suggesting that it will be difficult for “finance ministries across Europe to give up a chunk of their right to determine tax policy”). But see Eckert, *supra* note 65, at 7 (suggesting that EC Court of Justice decisions could lead to tax harmony among EU member states). See generally NUGENT, *supra* note 60, at 239–40 (describing EC directives).

69. EPRA, *supra* note 1, at 24; see NUGENT, *supra* note 60, at 239 (“In theory . . . a directive is not binding in its entirety but only in ‘the result to be achieved.’”).

II. KICKING TIRES: A COMPARISON OF GLOBAL REIT VEHICLES

"[T]here is no 'standard' legal structure for a multi-country real estate fund."⁷⁰ In creating a EuroREIT, decision makers will scrutinize investor needs, local regulatory constraints, and conflicting member-state tax laws.⁷¹ Although no existing vehicle may offer a perfect solution for the European Union, a number of proven models already exist.⁷² It is therefore beneficial to undertake a comparative survey of successful REIT structures in order to identify ideal attributes for a pan-European real estate investment vehicle.⁷³

A. THE U.S. REIT

Like other REIT equivalents, U.S. REITs must satisfy certain requirements in order to enjoy "pass through" tax treatment.⁷⁴ A REIT must be organized in the form of a corporation or business trust, and must be managed by a board of directors or one or more trustees.⁷⁵ REITs may not form as closely-held corporations, they must have 100 or more shareholders, and the shares must be fully transferable.⁷⁶ Additionally, a REIT can "have no more than 50 percent of the shares held by five or fewer individuals."⁷⁷

70. Brown, *supra* note 4, at 292.

71. *Id.*

72. *Id.* at 298. One industry executive has warned against "creating a Concorde (which never made any money) when a perfectly good 747 already exists." Ratner, *supra* note 2, at 3.

73. The following analysis provides a general overview of selected REIT structures. The discussion focuses specifically on organizational, income, asset, distribution, development activity, and debt regulations. See *International Tax Treatment of REITs*, REAL EST. PORTFOLIO (NAREIT), Sep./Oct. 2004, available at <http://www.nareit.com/portfoliomag/03sep/oct/table.shtml>. Additional considerations warranted in a comprehensive survey would include foreign considerations, including the existence and desirability of double taxation treaties, loss of status rules, and other tax consequences. See *id.*

74. See Charles E. Wern III, *The Stapled REIT On Ice: Congress' 1998 Freeze on the Grandfather Exception for Stapled REITs*, 28 CAP. UNIV. L. REV. 717, 722 (2000) ("To qualify under the Code as a REIT and receive pass-through treatment, an entity must satisfy four tests on a year-by-year basis which relate to the REIT's organizational structure, source of income, nature of assets, and distribution of income."); see also Brown, *supra* note 4, at 296-97 (listing REIT requirements in various countries); EPRA, *supra* note 1, at 5-23 (discussing differences in REIT requirements among REIT regimes).

75. I.R.C. § 856(a) (2002).

76. *Id.*

77. MADLEM & SYKES, *supra* note 1, at 285; see I.R.C. §§ 542(a)(2) & 856(h)(1)

A key income provision requires that REITs derive at least 75% of their gross income from “real estate related sources.”⁷⁸ Of the remaining 25%, 20% can come from “passive sources such as dividends and interest.”⁷⁹ The final 5% of gross income is not restricted.⁸⁰

With regard to the asset and distribution tests, legislation requires that “[a]t least 75% of REIT assets must be comprised of real estate assets, cash . . . and government securities”⁸¹ and 90% of taxable income must be distributed to shareholders on an annual basis.⁸² Although retained earnings are taxed at the regular corporate rates, REITs generally pay little or no taxes because deductions are allotted for dividends paid.⁸³ Investors are, of course, obligated to pay taxes on dividends and capital gains.⁸⁴

A number of additional REIT characteristics and restrictions are also significant. As previously noted, recent changes to U.S. law allow REITs to engage in development activities.⁸⁵ Although it has not always been the case, most U.S. REITs today are internally managed.⁸⁶ Non-REIT corporations seeking REIT status must pay a corporate exit tax on the “excess of the assets’ fair market value over the tax basis.”⁸⁷ These entities, however, can defer the tax and “it is eliminated if the REIT holds the

(2002).

78. *International Tax Treatment of REITs*, *supra* note 73; see I.R.C. § 856(c)(3) (2002); see also MADLEM & SYKES, *supra* note 1, at 285 (noting that real estate must be the main source of REIT income); Goldberg & Kotzen, *supra* note 2, at 489 (describing the “75 percent Income Test”).

79. *International Tax Treatment of REITs*, *supra* note 73; see I.R.C. § 856(c)(2) (2002); see also Goldberg & Kotzen, *supra* note 2, at 489 (describing the “95 percent Income Test”).

80. See Goldberg & Kotzen, *supra* note 2, at 491 (“The most important use of the 5 percent basket in the case of REITs is for the receipt of income that otherwise could be classified as service income.”).

81. *International Tax Treatment of REITs*, *supra* note 73; see I.R.C. § 856(c)(4)(A) (2002); see also Stadler & de Goede, *supra* note 31, at 2; Goldberg & Kotzen, *supra* note 2, at 488.

82. I.R.C. § 857(a)(1)(A)(i) (2002); see DAVIDSON, *supra* note 5, at 430; see also Yulico, *supra* note 3, at 296; Stadler & de Goede, *supra* note 31, at 2; Wechsler, *supra* note 12, at 38.

83. See I.R.C. § 857(b) (2002); see also Wechsler, *supra* note 12, at 38 (noting that REITs generally pay no corporate-level tax).

84. See I.R.C. § 857(b) (2002).

85. See *supra* note 33 and accompanying text.

86. See *supra* note 24 and accompanying text.

87. EPRA, *supra* note 1, at 18; see 26 C.F.R. § 1.337(d)-6 (2002); 26 C.F.R. § 1.337(d)-7 (2002).

property for at least ten years.”⁸⁸ Finally, U.S. REITs can be privately held or publicly owned and they are not bound by borrowing limits.⁸⁹

The foregoing discussion spells out how the U.S. REIT achieves tax transparency and reveals that the REIT is “subject to numerous restrictions particularly on the nature of the activities and its ability to reinvest its profits.”⁹⁰ Although not identical, similar restrictions in these areas are standard in other REIT regimes.⁹¹ Additional restrictions cited above ensure that REITs benefit large numbers of investors rather than a few majority shareholders.⁹² It is important to note, however, that the U.S. REIT also has numerous attributes that are non-restrictive in comparison to other REIT regimes. These attributes include the ability to engage in development activities through wholly-owned subsidiaries, the absence of limitations on borrowing, the option of deferring or avoiding conversion costs, the freedom to select an internal or external management structure, and the ability to operate as either public or private entities.⁹³

During the last decade, this blend of restrictions and characteristics has resulted in a large and flourishing REIT sector.⁹⁴ In terms of overall market capitalization and the number of vehicles participating in the sector, the U.S. REIT outpaces its foreign equivalents.⁹⁵ As of January 2005, there are approximately 112 public U.S. REIT funds, and market capitalization of the public U.S. REIT sector is over \$250 billion.⁹⁶ Whether one examines the last three years or the last three decades, “U.S. REITs have outpaced most other market measures . . . and with significantly less volatility.”⁹⁷ Although U.S. REITs have

88. EPRA, *supra* note 1, at 18; see I.R.C. § 1374 (2002).

89. See Tony M. Edwards, *Private Parts: Potential Pitfalls For Private REITs*, National Association of Real Estate Trusts, available at <http://www.nareit.com/policy/government/privates.cfm> (last visited Jan. 6, 2005) (“The Internal Revenue Code does not require a REIT to be registered with the SEC or publicly listed on a stock exchange.”); Stadler & de Goede, *supra* note 31, at 2 (noting that the United States places no limit on REIT borrowing).

90. Brown, *supra* note 4, at 295.

91. See discussion *infra* Parts II.B–E.

92. See *supra* notes 76 and 77.

93. See *supra* notes 85 and 86.

94. See Wechsler, *supra* note 12, at 38.

95. See EPRA & NARIET, *Global Real Estate Index*, available at <http://www.nareit.com/library/global/rei.cfm> (last visited Jan. 6, 2005).

96. *Id.*

97. Wechsler, *supra* note 12, at 38; see *Everyone Else has got a REIT . . . So Why Haven't We?*, *supra* note 2, at 41 (“Over the past 30 years REITs have provided an annual total return of 12.35% compared with a 7.3% return from the Dow Jones

largely limited themselves to domestic investments, there is a growing movement toward investment in foreign markets through joint ventures.⁹⁸

B. THE AUSTRALIAN LPT (ALPT)

Australian LPTs (ALPTs) are quoted on a stock exchange like company shares.⁹⁹ Unlike the U.S. REIT, however, there are no minimum or maximum shareholder requirements for ALPTs.¹⁰⁰ ALPTs are typically managed by either a corporate trustee or a fund manager.¹⁰¹ They primarily invest in real estate for the purpose of deriving rental income.¹⁰² ALPTs are “taxed in the hands of unit holders after disbursements are made and not in the trust.”¹⁰³ However, ALPT trustees “must pay tax in respect of Australian source income distributed to foreign unitholders.”¹⁰⁴

Australian law does not specify a minimum distribution requirement for ALPTs.¹⁰⁵ Income that is not distributed to unitholders, however, is taxed in the ALPT at the corporate rate.¹⁰⁶ Accordingly, ALPTs typically distribute all of their income.¹⁰⁷

Like the United States, Australia places no restrictions on development and requires no minimum capital for entities seeking LPT status.¹⁰⁸ Entities converting to LPT status, however,

list of industrial companies.”).

98. Einhorn, *supra* note 3, at 40.

99. GEOFFREY LEHMANN & CYNTHIA COLEMAN, *TAXATION LAW IN AUSTRALIA* 706 (4th ed. 1996).

100. *International Tax Treatment of REITs*, *supra* note 73.

101. *Id.*

102. *Id.*

103. *Id.*; see Income Tax Assessment Act, 1936, pt. III, div. 6 §96 (Austl.), available at <http://scaleplus.law.gov.au/html/pasteact/2/3036/top.htm> (last visited Jan. 6, 2005) [hereinafter ITAA] (“Except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate.”).

104. *International Tax Treatment of REITs*, *supra* note 73; see ITAA pt. III, div. 6 §98a, *supra* note 103.

105. *International Tax Treatment of REITs*, *supra* note 73.

106. ITAA, pt. III, div. 6, §§ 96, 99a, *supra* note 99; see LEHMANN & CYNTHIA COLEMAN, *supra* note 99, at 713 (indicating that the trustee will be taxed at the highest marginal rate when the beneficiary is not presently entitled to a share in the trust); *International Tax Treatment of REITs*, *supra* note 73 (noting that the income not distributed to unitholders is taxed at the corporate rate of 30%).

107. See *Everyone Else has got a REIT . . . So Why Haven't We?*, *supra* note 2, at 41.

108. See *Improving the UK Real Estate Market*, *supra* note 27, at 19; *International Tax Treatment of REITs*, *supra* note 73; Stadler & de Goede, *supra* note 31, at 4.

must pay a conversion charge at the standard corporate tax rate on their "embedded capital gains."¹⁰⁹ With regard to borrowing considerations, domestically-controlled ALPTs have no restrictions.¹¹⁰ Foreign-controlled ALPTs, on the other hand, cannot exceed a 3:1 debt to equity ratio.¹¹¹ Finally, although most vehicles are externally managed, the ALPT market sustains both externally and internally managed trusts.¹¹²

On the whole, ALPT features and requirements parallel those found in U.S. REITs with a few exceptions. The ALPT has a transparent tax structure that permits flow-through taxation provided that distribution and investment requirements are met.¹¹³ The absence of minimum capital requirements, management style restrictions, development restrictions, or borrowing limitations for domestic LPTs confirms the flexibility of the structure.¹¹⁴ Unlike the U.S. vehicle, however, ALPTs must be listed on a stock exchange, converting entities are unable to avoid an exit tax, and regulations place no minimum shareholder requirement on LPTs.¹¹⁵ One or more of these factors may contribute to the fact that over 65% of the LPT sector's market capitalization comes from only ten LPTs.¹¹⁶

Like the U.S. REIT, the ALPT's mix of restrictions and flexible characteristics has allowed for steady growth in the last decade.¹¹⁷ Analysts tout the ALPT as one of the "best established REIT-like vehicles around the world."¹¹⁸ There are ap-

109. See ITAA, pt. III, div. 2, § 160M *supra* note 99; see also LEHMANN & CYNTHIA COLEMAN, *supra* note 99, at 349 (explaining that entities converting to unit trusts cannot escape capital gains taxes because of section 160 M of the Australian Tax Assessment Act); Simon Clark & Jon H. Zehner, *Regulatory Issues and REITs*, Urban Land Institute Europe, at 12, available at http://planet.uli.org/Events/582204/582204_Info.htm (last visited Jan. 6, 2005) (noting that the conversion charge for the ALPT is based upon embedded capital gains).

110. Stadler & de Goede, *supra* note 31, at 4.

111. Income Tax Assessment Act, 1997, div. 820-195 (Austl.), available at <http://scaleplus.law.gov.au/html/pasteact/1/597/7/PA035940.htm> (last visited Jan. 6, 2005); see Australian Taxation Office, *Tax Facts: An Overview of the New Thin Capitalisation Rules*, available at <http://www.ato.gov.au/content/downloads/n5361.pdf> (last visited Jan. 6, 2005) (explaining that the safe harbour debt amount for non-ADI entities, which is three-quarters of the average value of the entity's Australian assets, is also referred to as the "safe harbour ratio" of 3:1).

112. See *Improving the UK Real Estate Market*, *supra* note 27, at 19; Kriz, *supra* note 36.

113. See *supra* notes 102, 103, and 106.

114. See *supra* notes 108, 110, 112 and accompanying text.

115. See *supra* notes 99, 100, 109 and accompanying text.

116. See Kriz, *supra* note 36.

117. *Id.*

118. *Id.*

proximately sixteen LPTs in Australia at this time.¹¹⁹ Market capitalization for the sector is reported to be nearly 56 billion dollars.¹²⁰ This figure amounts to nearly 9% of the Australian stock exchange.¹²¹

C. THE DUTCH BI

In order to receive flow-through tax benefits in the Netherlands, a BI must pass a number of tests to the satisfaction of the Dutch Central Bank.¹²² Requirements include a minimum share capital threshold and corporate residency in the Netherlands.¹²³ Different organizational restrictions apply depending on whether the vehicle is listed or unlisted. The shares of listed BIs, for example, must appear on a stock exchange.¹²⁴ Additional limitations on listed BIs encourage ownership by multiple shareholders. A shareholder that is a Netherlands corporation may own less than 45% of the shares in a listed BI.¹²⁵ Individual investors may own less than 25% of the shares in a listed BI.¹²⁶ With respect to unlisted BIs, a corporate shareholder, either domestic or foreign, is limited to less than 25% of a BI.¹²⁷ Individual investors in an unlisted BI, which does not have a license, may not have a substantial interest in an investment company.¹²⁸

119. See EPRA/NAREIT, *supra* note 95.

120. *Id.*

121. Kriz, *supra* note 36.

122. Corporate Income Tax Act, § 28(2) (1969) (Neth.), available at <http://wetten.overheid.nl> [hereinafter CITA] (indicating that entities must fulfill a number of requirements to attain investment institution status). The Central Bank of Netherlands is the supervisory body for financial institutions in the Netherlands. See generally Articles of Association of De Nederlandsche Bank n.v., and Statute of the European System of Central Banks and of the European Central Bank (Bank Act 1998), available at http://www.dnb.nl/dnb/bin/doc/bankact1998_tcm13-36143.pdf; Act on the Supervision of Collective Investment Schemes (Wet toezicht beleggingsinstellingen) (1990), available at <http://wetten.overheid.nl> (providing the supervisory duties for the bank with regard to the supervision of collective investment schemes).

123. CITA, § 28(2), *supra* note 122 (noting that BIs must be limited liability investment companies with residency in the Netherlands); BW, Boek 2, Arts. 67.3 and 178.2 (Neth.), available at <http://wetten.overheid.nl>. Articles 67.3 and 178.2 of the Dutch Civil Code explain that private limited liability companies must have a minimum capital of 18,000 euros and public limited liability companies must have a minimum capital of 45,000 euros. *Id.*

124. BW, Boek 2, Art. 76(a), *supra* note 123.

125. CITA § 28(2)(c), *supra* note 122.

126. CITA § 28(2)(g), *supra* note 122.

127. CITA § 28(2)(c), *supra* note 122.

128. CITA § 28(2)(f), *supra* note 122; see *International Tax Treatment of REITs*,

There are no income restrictions on a BI as long as the income comes from investing activities.¹²⁹ In terms of distribution criteria, a BI is not taxed at the corporate level, if the taxable profit is distributed within eight months of the end of the company's fiscal year.¹³⁰ With regard to investment regulations, BIs are permitted to invest in any type of passive investment.¹³¹ Additionally, a qualifying BI can utilize either an internal or external management operation.¹³² Active development activities, however, are not permitted.¹³³

Another significant condition requires that non-BI entities desiring to switch to BI status pay a tax at the ordinary corporate income tax rate on their "built-in gain."¹³⁴ Such entities are unable to defer these costs.¹³⁵ Finally, BIs are only allowed to borrow up to 60% of the book value of their real estate assets, and 20% of their other investments.¹³⁶

Although BIs enjoy management freedom,¹³⁷ they are, generally more restrictive than the previously examined REIT vehicles.¹³⁸ This is illustrated by BI residency and minimum capital requirements, borrowing and development limitations, and conversion costs.¹³⁹ Additionally, BI shareholding limitations on listed and unlisted entities surpass those used in the United States.¹⁴⁰

In spite of these restrictions the Dutch BI has experienced significant success.¹⁴¹ Reports indicate that between 1990 and

supra note 73 (indicating that an investor in an unlisted BI is limited to less than 5% of the entity's total shares).

129. CITA § 28(2), *supra* note 122.

130. CITA § 28(2)(b), *supra* note 122.

131. See *International Tax Treatment of REITs*, *supra* note 73.

132. See *Improving the UK Real Estate Market*, *supra* note 27, at 19 (noting that there is currently a mix of internal and external BIs in the Netherlands).

133. See *supra* note 129; *International Tax Treatment of REITs*, *supra* note 73; see also Stadler & de Goede, *supra* note 31, at 3.

134. EPRA, *supra* note 1, at 19; see Special Decree Related to Article 28 of the Corporate Income Tax Act, 1970, Art. 10 (2), available at <http://www.recht.nl/exit.html?id=28757&url=http%3A%2F%2Fwetten.overheid.nl%2Fcgi-bin%2Fdeeplink%2Flaw1%2Ftitle%3DBESLUIT%2520BELEGGINGSINSTELLING%20EN> (last visited Jan. 6, 2005) (stating that assets must be marked to market before the change of the applicable tax regime to that of fiscal investment funds).

135. See *International Tax Treatment of REITs*, *supra* note 73.

136. CITA, § 28(2)(a), *supra* note 122.

137. See *supra* note 132 and accompanying text.

138. See Mackenzie, *supra* note 9 (suggesting that the BI has more restrictive rules in comparison to the U.S. REIT and the Australian LPT).

139. See *supra* notes 123, 133–136 and accompanying text.

140. See *supra* notes 76–77, 125–128 and accompanying text.

141. See Mackenzie, *supra* note 9 (discussing BI performance during the last

2002, the annual average return for BIs was 8%.¹⁴² At present, market capitalization for the sector is around 15.3 billion dollars and eight BIs are currently operating.¹⁴³ Analysts, however, are quick to point out that BI success “cannot be wholly attributed to the tax-transparent structure.”¹⁴⁴ They call attention to the fact that BI investments are focused almost exclusively on domestic property.¹⁴⁵ Consequently, BI success is largely a result of the “strength of the underlying property market.”¹⁴⁶

D. THE BELGIAN SICAFI

Belgian REIT regime regulations have the distinction of being the most complex and detailed.¹⁴⁷ In order to qualify for SICAFI status, an entity must be a resident of Belgium, it must be recognized by the Bank and Finance Commission, and the entity must be listed on the stock exchange.¹⁴⁸ Belgian law requires a SICAFI to have a minimum share capital of 1.25 million euros and dictates that at least 30% of SICAFI shares must be offered to the public.¹⁴⁹ These public shareholders must receive voting rights within a year after the registration of a SICAFI.¹⁵⁰

A SICAFI is permitted to use either internal or external management.¹⁵¹ With regard to income restrictions, “the value of an individual asset in which a SICAFI invests may not exceed 20% of the value of the entire investment portfolio.”¹⁵² Although general corporate taxes apply to the vehicle, the taxable base is set up so that taxes are limited to disallowed expenses.¹⁵³ Be-

decade).

142. *Id.*

143. EPRA/NAREIT, *supra* note 95.

144. Mackenzie, *supra* note 9, at 50.

145. *Id.*

146. *Id.*

147. EPRA, *supra* note 1, at 6 (suggesting that Belgium REIT regime formalities and procedures are exceedingly complex and detailed).

148. Act of Dec. 4, 1990, Arts. 115(2), 119(2) and 120(1) (Belg.), available at http://www.cbfa.be/nl/cs/icb/wg/pdf/law_04-12-1990.pdf (last visited Nov. 3, 2004); see EPRA, *supra* note 1, at 8 (noting that there is a mandatory listing requirement).

149. Royal Decree of Apr. 10, 1995, Arts. 4(1) and 33(1) (Belg.), available at http://www.cbfa.be/nl/cs/icb/wg/pdf/rd_10-04-1995.pdf (last visited Nov. 3, 2004).

150. *Id.* at Art. 33(3).

151. See Clark & Zehner, *supra* note 109, at 14 (noting that the SICAFI does not require external management).

152. *International Tax Treatment of REITs*, *supra* note 73. The government may grant a newly recognized SICAFI a two-year period to meet this condition. See *id.*; Royal Decree of Apr. 10, 1995, Art. 43(1) (Belg.), *supra* note 149.

153. Investment companies are subject to corporate income tax. See Act of Dec.

cause these expenses are minimal, SICAFIs generally pay little or no tax.¹⁵⁴

SICAFIs can invest in real estate companies and they are permitted to have "long leaseholds on real estate assets, and debt instruments."¹⁵⁵ A SICAFI is also permitted to invest in non-real estate assets so long as the investments are secondary to real estate investments.¹⁵⁶ In terms of distribution requirements, at least 80% of current cash flow must be dispersed to shareholders each year.¹⁵⁷ "Realized capital gains may . . . be retained with the company provided they are timely reinvested."¹⁵⁸

Belgium places a number of additional restrictions on SICAFIs. Entities converting to SICAFI status pay a reduced corporate tax rate on "unrealized capital gains of normal real estate."¹⁵⁹ The vehicle has a maximum borrowing limit of 50% of the market value of the company's assets.¹⁶⁰ Belgian rules also ban participation in real estate development activities.¹⁶¹

Like the Netherlands, Belgium provides the benefits of tax transparency to investors through a restrictive REIT-type vehicle.¹⁶² As with BIs, SICAFI investments are directed at domestic property.¹⁶³ Consequently, their success is tied to their national property market.¹⁶⁴ Recent reports indicate that the

4, 1990 (Belg.), *supra* note 148. However, the taxable base of a SICAFI is limited to disallowed expenses. *Id.* at art. 143; *see also International Tax Treatment of REITs, supra* note 73.

154. *See International Tax Treatment of REITs, supra* note 73.

155. *International Tax Treatment of REITs, supra* note 73; *see also* Royal Decree of Apr. 10, 1995, Art. 41(2) (Belg.), *supra* note 149.

156. *See International Tax Treatment of REITs, supra* note 73.

157. Royal Decree of Apr. 10, 1995, Art. 62(1) (Belg.), *supra* note 149; *see* Brown, *supra* note 4, at 296; *Everyone Else has got a REIT . . . So Why Haven't We?*, *supra* note 2, at 41; *International Tax Treatment of REITs, supra* note 73.

158. *International Tax Treatment of REITs, supra* note 73; *see* Royal Decree of Apr. 10, 1995, Art. 62(2) (Belg.), *supra* note 149.

159. EPRA, *supra* note 1, at 19 ("Companies applying for approved SICAFI status, or which merge with a SICAFI, are subject to an exit tax, which is treated in the same way as a liquidation tax, on net unrealized gains and on tax-exempt reserves, at a rate of . . . 20.085 percent."); *see* Belgian Income Tax Code, *reprinted and translated in TAX LAWS OF THE WORLD* 61-62 (rev. ed. June, 1993) (describing liquidation and liquidation tax consequences).

160. Royal Decree of Apr. 10, 1995, Art. 52(1) (Belg.), *supra* note 149.

161. Royal Decree of Apr. 10, 1995, Art. 51 (Belg.), *supra* note 149.

162. *See* Mackenzie, *supra* note 9, at 50 (suggesting that that the Belgian and Dutch REIT regimes are more restrictive than the REIT vehicles in the United States and Australia).

163. *Id.*

164. *Id.*

SICAFI has been helped by a strong economy.¹⁶⁵ Market capitalization for the sector is approximately 2.6 billion dollars at present and there are currently five operating SICAFIs.¹⁶⁶ One observer has suggested that the size differential between the BI and SICAFI markets is principally a result of the fact that BI industry has had more time to grow.¹⁶⁷ Previously discussed minimum capital, borrowing, conversion, and development restrictions are also likely dampers on market growth.¹⁶⁸

E. FRANCE'S SIIC

France's SIIC, Europe's most recent REIT structure, must appear as a listed company on a French stock exchange.¹⁶⁹ In order to qualify as a SIIC, shareholders must contribute a minimum of fifteen million euros.¹⁷⁰ The principal corporate purpose of a SIIC must be the "acquisition or construction of buildings for rental purposes and/or in companies having the same corporate purpose."¹⁷¹ With respect to distribution, 85% of SIIC recurring net profit must be dispersed to shareholders¹⁷² and SIICs must pay out "50% of the capital gains on their property sales within two years after they occur."¹⁷³ French tax authorities require that qualifying private companies pay an exit tax over four years that is equal to half of their capital gains tax liability.¹⁷⁴

Notably, France has incorporated a number of nonrestrictive measures into the SIIC. Unlike the REIT vehicles in Belgium and the Netherlands, the SIIC has no borrowing restrictions and it can engage in development activities.¹⁷⁵ Additionally, SIICs are permitted to utilize either internal or external management structures.¹⁷⁶ Reports also indicate that the French tax administration has agreed to allow foreign compa-

165. *Id.*

166. EPRA/NAREIT, *supra* note 95.

167. *See* Fickes, *supra* note 54.

168. *See supra* notes 149, 159–161 and accompanying text.

169. Law No. 2002-1575 of Dec. 30, 2002, art. 11-I-A, J.O., Dec. 31, 2002, p.22026 (Fr.). This law modifies article 208C of the French tax code.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Everyone Else has got a REIT . . . So Why Haven't We?*, *supra* note 2, at 41; *see* Law No. 2002-1575 of Dec. 30, 2002, art. 11-I-A, J.O., Dec. 31, 2002, p. 22026.

174. *See* Law No. 2002-1575 of Dec. 30, 2002, art. 11-E, J.O., Dec. 31, 2002, p. 22027; *see also* Ratner, *supra* note 2, at 3 (discussing the French exit tax).

175. *See Improving the UK Real Estate Market*, *supra* note 27, at 19.

176. *Id.*

nies to qualify for SIIC status.¹⁷⁷

In light of these considerations, France's SIIC is clearly the least restrictive REIT regime in Europe.¹⁷⁸ The decision to create a tax-efficient, competitive, non-restrictive REIT vehicle has helped the SIIC get off to a fast start.¹⁷⁹ In approximately a one-year time period, four entities have entered the SIIC sector and market capitalization has reached approximately 9.8 billion dollars.¹⁸⁰

III. SELECTING A SMOOTH RIDE: OPTING FOR A NONRESTRICTIVE EUROREIT

Although not comprehensive, the preceding survey of REIT regimes reinforces the notion that REIT vehicles share similar goals, yet have varying qualifications and restrictions.¹⁸¹ As previously emphasized, investors in all of the above countries can reap the benefits of "pass through" taxation.¹⁸² While this goal will be at the heart of EuroREIT legislation, an understanding of vehicle differences provides insight into the features that should comprise a pan-European REIT vehicle.

As noted above, there is currently a perception in the industry that U.S. and Australian REITs are less restrictive than their European counterparts.¹⁸³ Although reasonable persons could disagree on the need to make REIT vehicles "less risky,"¹⁸⁴ data indicates that REIT markets in less-restrictive regimes outperform their more restrictive counterparts.¹⁸⁵ Conse-

177. EPRA, *supra* note 1, at 10 ("The French tax administration has already agreed (formally in specific cases) to the fact that foreign companies listed on the Paris stock exchange and complying with the other SIIC conditions . . . may elect for [the] SIIC tax regime.").

178. See Eckert, *supra* note 65, at 7 ("France has set a new example and intensified the trans-European competition to structure the most tax-efficient REIT regime.").

179. See *id.*

180. EPRA/NAREIT, *supra* note 95.

181. See *supra* note 1 and accompanying text.

182. See *id.*

183. Mackenzie, *supra* note 9, at 50 (suggesting that the Belgian and Dutch REIT regimes have "more restrictive rules than the liberal United States and Australian REITs"); see Eckert, *supra* note 65, at 7 (suggesting that France has the most liberal REIT regime in Europe).

184. Mark Cooper, *Time for the Final Push*, EST. GAZETTE, June 19, 2004, at 61 (describing the current debate in the United Kingdom over the inherent level of risk that should be permissible in their proposed REIT-type vehicle).

185. See EPRA/NAREIT, *supra* note 95; see also *Improving the UK Real Estate Market*, *supra* note 27, at 20 (describing the U.S. and Australia as having the "larg-

quently, EU officials aiming to create an “attractive savings and investment product[]” throughout Europe should guard against over-legislation and over-regulation.¹⁸⁶

Among the many REIT vehicle attributes EU officials will consider in creating a EuroREIT are borrowing limitations, the permissibility of active investment opportunities, minimum capital requirements, conversion costs for companies seeking EuroREIT status, managerial requirements, residency rules, and public listing requirements.¹⁸⁷ While additional REIT regime characteristics could be compared,¹⁸⁸ an analysis of the above-mentioned attributes demonstrates that a flexible, nonrestrictive approach will be of great benefit to the European Union as it seeks to develop an attractive, viable investment vehicle.

A. BORROWING LIMITATIONS

Unlike the rules imposed on U.S. REITs, French SIICs, and domestic Australian LPTs, regulations in Belgium and the Netherlands limit borrowing opportunities for REIT vehicles.¹⁸⁹ Defenders of the limitations argue that they prevent speculative investments which violate REIT passivity requirements.¹⁹⁰ They assert that borrowing restrictions promote transparency because they force REIT entities to go to their investors to obtain money for investments.¹⁹¹ They also state that “high levels of debt financing increase [a] property sector’s sensitivity to interest rate changes.”¹⁹² Critics of the limitations point out that a constant need to go to the equity market for cash unnecessarily hampers growth and limits opportunities.¹⁹³ They also suggest that limits on borrowing can be problematic for promoters seeking to get REITs off to a successful start.¹⁹⁴ Some commentators further assert that international experience shows the

est public, unitized real estate markets”).

186. Polly Mackenzie, *Industry Bodies Make Case for a Flexible UK REIT*, PROP. WK., June 18, 2004, at 2 (“[O]ver regulation would hamper REITs, rather than create a risk-free vehicle.”).

187. See generally *supra* Part II (outlining REIT regime characteristics).

188. See *supra* note 73 and accompanying text.

189. See *supra* notes 89, 110–111, 136, 160, and 175.

190. EPRA, *supra* note 1, at 12–13.

191. Cooper, *supra* note 184, at 61.

192. *Brown’s Plans for UK Reits Reveal Abhorrence of Leverage*, EUROWEEK, Mar. 19, 2004, available at 2004 WL 69426296.

193. *Id.*

194. See Johnston, *supra* note 6, at 10 (asserting that a borrowing limit is a problem for promoters).

market will require conservative gearing anyway.¹⁹⁵ Available data provides support for this argument. The United States and Australia, which do not limit borrowing, have fairly conservative average gearing levels.¹⁹⁶ According to recent reports, the average debt/equity ratio for U.S. REITs is approximately 35%.¹⁹⁷ Analysts believe that the U.S. market will "tolerate gearing up to 50%."¹⁹⁸ Recent publications indicate that the ALPT average gearing is approximately 40%.¹⁹⁹ The Dutch BI average gearing ratio is close to its borrowing limit of 60%.²⁰⁰

EU decisionmakers should not simply base their decision in this area on the principle that borrowing limits are necessary because of traditional REIT passivity requirements. Many of the world's most successful REIT regimes do not have borrowing limitations and are allowing entities to pursue some degree of nonpassive, higher risk, activities.²⁰¹ Additionally, while regulations preventing overzealous borrowing and speculative investing may be warranted where market conditions are non-transparent, such regulation is unnecessary in areas where investors have access to information which adequately discloses investment risks. REIT-type vehicles in Europe currently receive attention from the business media and the activities of EuroREIT entities are sure to be closely monitored by analysts and commentators.²⁰² As with REITs and LPTs, which maintain reasonable gearing ratios, EuroREIT entities will have an incentive to guard against excessive borrowing because they realize that informed investors can easily liquidate their shares should the entity engage in overly-risky behavior.

In the event that EU policymakers believe that borrowing restrictions remain necessary, they should not be so restrictive that they become a deterrent to entities that might be interested in converting to EuroREIT status. A borrowing limit slightly above the 60% book value restriction in place on BIs in the Netherlands would likely allow entities to secure needed funds

195. *Id.*

196. Cooper, *supra* note 184, at 61; *see also Improving the UK Real Estate Market*, *supra* note 27, at 19 (listing average gearing (debt/equity) ratios for the U.S. and Australia).

197. *Improving the UK Real Estate Market*, *supra* note 27, at 19.

198. *Brown's Plans for UK Reits Reveal Abhorrence of Leverage*, *supra* note 192 (suggesting that the U.S. market will tolerate 50% gearing).

199. *Improving the UK Real Estate Market*, *supra* note 27, at 19.

200. *Id.* (noting that the Dutch BI has an average gearing ratio of 62%).

201. *See discussion infra* Part III.B.

202. *See supra* note 57 and accompanying text; *see infra* note 212.

from lenders and simultaneously guard against over-zealous borrowing.

B. ACTIVE INVESTMENT IN DEVELOPMENT OPPORTUNITIES

Traditionally, REITs were set up as passive investments that could provide steady and stable yields to investors.²⁰³ Parting with this practice, a number of established REITs and new REIT regimes now permit investment in development activities.²⁰⁴ The movement is a result of investors who are willing to take on additional risk to enhance the value of property and to accelerate portfolio growth.²⁰⁵ A country considering these alternatives is essentially deciding between a paternal policy that protects investors from risk accompanying investment in development activities and an approach that exposes investors to potentially greater financial gains and losses.

Participation in development activities is currently prohibited in both Belgium and the Netherlands.²⁰⁶ The United States, Australia, and France conversely permit these activities to some extent.²⁰⁷ U.S. REITs, for example, can "engage in development activities for their own portfolio, and . . . for third parties" through taxable REIT subsidiaries.²⁰⁸ France permits development activities provided that they remain ancillary to the main, passive qualifying activity.²⁰⁹ There is some indication that other REIT-type vehicles in Europe will follow France's lead in permitting some development activities. Dutch decision makers are reportedly considering changes that would allow BIs to participate in limited development activities for their own portfolios.²¹⁰

As with borrowing limitations, the market is a good guide for risk-averse investors in this area.²¹¹ Public REIT portfolios are under significant scrutiny and their activities are closely monitored by directors, auditors, investors, analysts, and the

203. See Einhorn, *supra* note 33, at 204 (noting that REITs were originally intended to be passive entities).

204. See *supra* notes 85, 108, 175 and accompanying text.

205. See Cooper, *supra* note 184, at 61 (explaining that vehicles that do not permit development activities can only grow through stock selection).

206. See *supra* notes 133, 161 and accompanying text.

207. See *supra* notes 85, 108, 175 and accompanying text.

208. Eckert, *supra* note 65, at 7; see *supra* note 33 and accompanying text.

209. See Eckert, *supra* note 65, at 7.

210. *Id.*

211. Cooper, *supra* note 184, at 61 (noting the argument that development should be left to the market).

business media.²¹² “REITs or LPTs that develop more than investors feel comfortable with soon see their share prices slip.”²¹³ In other words, investors can liquidate their shares in a REIT that they feel is too risky or simply invest only in REITs that do not pursue development activities.

With regard to promoting a viable pan-European REIT vehicle, development proponents are likely to point out that “[o]utlawing development could deter property companies from converting” to a EuroREIT.²¹⁴ For that reason, decision makers considering the permissibility of EuroREIT development activities should not pursue unneeded regulation that could hamper interest in a EuroREIT. Moreover, the European Union should permit fully-taxed EuroREIT subsidiaries to serve third parties outside of their portfolio.²¹⁵ Allowing the EuroREIT to be a fully integrated entity will allow the vehicle to provide a broad range of services to tenants and others without having to hire independent entities.²¹⁶ These steps will likely lead to increased growth and earning opportunities, as has happened in the United States.²¹⁷ Additionally, member states are likely to benefit from these increased earnings through taxation at the investor level.

C. CONVERSION COSTS

Another important issue involves whether normally-taxed entities that wish to convert to EuroREIT status should incur a conversion cost. “In all jurisdictions, an exit tax is levied upon the transition from a normally taxed entity to a tax exempt REIT.”²¹⁸ Dutch entities, for example, pay an exit tax “at the ordinary corporate income tax rates,” while Belgian and French entities pay a “reduced rate of ‘exit tax.’”²¹⁹ Corporations or trusts that want to convert to REIT status in France, Belgium, the Netherlands, or Australia are unable to avoid these exit

212. MADLEM & SYKES, *supra* note 1, at 286.

213. Cooper, *supra* note 184, at 61.

214. Mackenzie, *supra* note 186, at 2.

215. See *supra* note 33 and accompanying text.

216. See Cooper, *supra* note 184, at 61 (noting that industry groups in the UK encouraged the decision makers to allow a potential REIT-vehicle to “hold taxable subsidiaries”).

217. See *supra* note 33 and accompanying text.

218. EPRA, *supra* note 1, at 19.

219. Eckert, *supra* note 65, at 6; see *supra* notes 134, 159, 174 and accompanying text.

taxes.²²⁰ In the United States, however, it is possible to defer or eliminate the exit tax.²²¹

While start-up companies are regularly created to take advantage of newly implemented REIT structures, existing entities desiring “flow through” tax treatment are the most likely to be immediately prepared for REIT vehicle status.²²² Countries have set up exit taxes to off-set some of the tax revenue that they forego as they permit entities to convert to REIT status.²²³ Converting entities have viewed an exit tax as “the price for enjoying the benefits of the REIT structure.”²²⁴ It should be noted, however, that a conversion cost—especially one that is extremely high—will deter interest in the EuroREIT.²²⁵

Although a EuroREIT conversion charge may be inescapable in light of precedent, member states and decision makers should keep these costs at a minimum. In the event that costs are imposed, the European Union should allow qualifying entities to spread these costs over several years or permit entities to defer costs, as this would reduce the deterrent affect of a EuroREIT exit tax. Additionally, the European Union would benefit from following the U.S. model of rewarding entities that engage in long-term property investment with the elimination of conversion charges.

D. MANAGEMENT STRUCTURE RESTRICTIONS

There is not a clear division between management structure restrictions in the United States and Australia on one hand, and the European REITs on the other. Most U.S. REITs use and have benefited from an internal management structure in the last decade.²²⁶ An external management structure conversely dominates the industry in Australia.²²⁷ The other countries examined allow for a mixture of internal and external management.²²⁸

Both management styles have devoted supporters. Internal

220. See *supra* notes 109, 134, 159, and 174; see also EPRA, *supra* note 1, at 19.

221. See *supra* note 88 and accompanying text.

222. See, e.g., Kriz, *supra* note 36 (suggesting that an existing property company will pioneer the first REIT in Hong Kong).

223. Cooper, *supra* note 184, at 61 (explaining that the UK has been hesitant to develop a REIT-type vehicle because it does not want to incur a tax loss).

224. Eckert, *supra* note 65, at 6.

225. See *id.*

226. See *supra* notes 24, 86 and accompanying text.

227. See *supra* note 112 and accompanying text.

228. See *supra* notes 132, 151, 176 and accompanying text.

management advocates argue that their structures are “cheaper, more focused, and reduce[] conflicts of interest.”²²⁹ External managers assert that their structures have greater flexibility and that they benefit from a broad range of experience.²³⁰ In terms of performance, data shows that internal REITs have outperformed their external equivalents.²³¹ Some analysts, however, have suggested that some European property companies “would only convert if external management is allowed.”²³²

In light of the relative success achieved by both models and the goal of creating an attractive REIT regime, a flexible approach would be beneficial for the European Union. Allowing EuroREIT entities to adopt the business model of their choice has few, if any, downsides. Externally managed entities desiring to pursue additional growth or managerial benefits could switch to an internal structure and vice versa. This type of approach would give EuroREIT entities the freedom to find a structure that best suits their needs and goals.

E. PUBLIC LISTING REQUIREMENTS

The case for requiring EuroREITs to appear on a public stock exchange is persuasive. Public listing increases market scrutiny and encourages property to trade close to its net asset value.²³³ Additionally, it promotes a broader public investor base and ensures that investors will be able to quickly liquidate their investments.²³⁴ Countries currently requiring REIT vehicles to appear on their respective stock exchanges include

229. Mackenzie, *supra* note 186, at 2; see Cooper, *supra* note 184, at 61.

230. Mackenzie, *supra* note 186, at 2.

231. Cooper, *supra* note 184, at 61; see EPRA/NAREIT, *supra* note 95 (indicating that the U.S. REIT market is the largest of the global REIT markets).

232. See Mackenzie, *supra* note 186, at 2.

233. See *supra* note 212 (noting that publicly traded REITs are subject to increased market scrutiny); *Promoting Investment*, *supra* note 1, at 16 (suggesting that a publicly listed vehicle would trade closer to its net asset value than an unlisted vehicle).

234. See EPRA, *supra* note 1, at 8 (noting that listing requirements help prevent REITs from being held in the hands of a few investors); *Improving the UK Real Estate Market*, *supra* note 27, at 42 (suggesting that a listing requirement improves liquidity). But see Ad Buisman, *Investment in European Real Estate Expected to Increase as More Buying Opportunities Become Available, But Possibility of Increasing Inflation and Rising Interest Rates Raise Concerns*, GLOBAL REAL ESTATE NEWSLINE (Ernst & Young), Spring 2004, at 4, available at [http://www.ey.com/global/download.nsf/International/global_newsline_2004/\\$file/GlobalNewsline2004.pdf](http://www.ey.com/global/download.nsf/International/global_newsline_2004/$file/GlobalNewsline2004.pdf) (suggesting that private companies are more liquid and transparent than in the past).

France, Belgium, and Australia.²³⁵

The apparent down side to a listing requirement is that it may discourage private property companies from seeking EuroREIT status. This may be a significant issue as unlisted funds are currently attracting a significant number of investors in Europe.²³⁶ Analysts point out that “increasing transparency and liquidity of private real estate companies has given investors a high comfort level . . . in this sector.”²³⁷ Countries like the United States and the Netherlands, which do not place listing restrictions on REITs, ensure broad investor participation in unlisted REITs through regulations that call for a minimum number of shareholders and limit the maximum number of shares that can be held by investors.²³⁸

As with the previously discussed REIT attributes, the addition of a public listing requirement to EuroREIT legislation has the potential to undermine interest in the vehicle. While broad investor participation in REITs should be encouraged, it can be ensured through alternative requirements such as those used in the United States. Additionally, increased private company transparency allows sophisticated investors to weigh for themselves the pros and cons of investing with a private or public entity.²³⁹

In light of these factors, decision makers should allow entities to qualify for EuroREIT status as either listed or unlisted entities. Should the European Union decide to require public listings, regulations should not limit the exchanges on which a EuroREIT could be listed. An exclusive local listing requirement for REITs operating within a member state could further deter interest in the EuroREIT and would likely violate EU law.²⁴⁰

F. RESIDENCY REQUIREMENTS

The Netherlands and Belgium stand apart from the other examined REIT regimes in limiting REIT access to resident cor-

235. See *supra* notes 99, 148, and 169.

236. See Buisman, *supra* note 234, at 4.

237. *Id.*

238. See *supra* notes 76–77 and 125–126.

239. See Mackenzie, *supra* note 186 (suggesting that there is a “strong demand for unlisted vehicles from sophisticated and institutional investors”).

240. See EPRA, *supra* note 1, at 26 (citing European Commission, *Implementing the Framework for Financial Markets: Action Plan*, COM (99) 232 Final (Nov. 1999)).

porations.²⁴¹ Accordingly, local companies benefit from flow-through tax treatment, while foreign companies desiring to invest in property located in these companies must pay corporate taxes at standard rates.²⁴² These residency requirements clearly obstruct cross-border investment, and they may, in part, explain why there are a relatively low number of REIT vehicles in Belgium and the Netherlands.²⁴³ There is also a strong likelihood that the residency requirements are in violation of EU case law, which requires that member states “treat . . . a local branch of a foreign company and a local company alike.”²⁴⁴

With regard to the creation of a EuroREIT regime, decisionmakers could either require that qualifying entities be incorporated in an EU member state or they could make the vehicle available to all entities that can meet EuroREIT qualifications. On the one hand, member states could continue to capture corporate tax revenue from foreign companies investing in European property. On the other hand, they could forego this revenue source and encourage cross-border investment.

There is reason to believe that this issue may be controversial in Europe. Some experts believe that there would be significant political opposition in the European Union to granting EuroREIT status to an entity in a non-EU country.²⁴⁵ However, the French tax administration’s recent decision to allow foreign companies to attain SIIC status suggests that there may also be support for opening up EuroREIT eligibility to non-EU entities.²⁴⁶

As a practical matter, residency requirements will not be an issue for the primary group of entities initially seeking Eu-

241. See *supra* notes 123 and 148.

242. See EPRA, *supra* note 1, at 26 (suggesting that residency requirements “can be a serious impediment to cross border trade”).

243. See EPRA/NAREIT, *supra* note 95 (providing a listing of the number of public REIT vehicles in countries with REIT regimes).

244. See EPRA, *supra* note 1, at 26 (citing Case 270/83, *Commission v. France*, 1986 E.C.R. 273 (1987) and Case 307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt*, 1999 E.C.R. I-6161 (1999)). Commentators have suggested that at a minimum, other EU companies not residing in the Netherlands or Belgium, but with local branches in the countries should be able to qualify for their REIT regimes. *Id.*

245. Email from Ronald Wijs, Tax Attorney in the Amsterdam office of Loyens & Loeff and member of the European Public Real Estate Association Tax Transparency Committee (Dec. 12, 2004, 01:57:00 CST) (on file with author) (suggesting that it would be “highly unlikely” that the EU would give non-EU entities REIT status in spite of the EU principle of the free movement of capital which applies to non-EU countries as well as to EU member states).

246. See *supra* note 177 and accompanying text.

roREIT status, as they will be EU residents. Nevertheless, the European Union should steer clear of residency requirements which would unnecessarily deter foreign investment and the success of a EuroREIT regime. Past experiences suggests that narrowing the group of eligible REIT vehicle participants limits the attractiveness of a REIT regime.²⁴⁷ Furthermore, a non-restrictive policy that increases EuroREIT participation promotes cross-border investment and is, therefore, in harmony with broader EU goals.²⁴⁸

G. MINIMUM CAPITAL REQUIREMENTS

Another noteworthy consideration emerging from the preceding survey is the use of minimum capital requirements within REIT regimes. France, Belgium, and the Netherlands currently require that entities maintain minimum capital requirements in order to qualify and preserve their REIT status.²⁴⁹ These capital requirements range from 18,000 Euros for a private BI in the Netherlands to fifteen million Euros for the French SIIC.²⁵⁰

On the one hand, this requirement encourages large numbers of investors to come together to pool their funds. Realistically, most potential entities would have little trouble meeting the capital conditions imposed in the Netherlands and Belgium. However, at some point a share capital requirement reaches a level where it could deter entry into a REIT regime.

In the European Union, a high minimum share capital requirement could have the effect of limiting vehicle numbers as smaller companies and start-ups interested in EuroREIT status may not be able to amass the requisite capital.²⁵¹ As previously noted, other conditions, such as requiring a REIT to have a minimum number of shareholders, can be used to ensure that REIT vehicles serve large numbers of investors.²⁵² In light of the utility of this alternate option, the European Union should avoid share-capital requirements or set them at a minimal level.

247. See *supra* notes 241–243.

248. See *supra* note 60.

249. See *supra* notes 123, 149, and 170.

250. See *id.*

251. Cf. Mackenzie, *supra* note 186, at 2 (suggesting that smaller and start up companies might not be large enough to meet the requirements for public listing).

252. See *supra* notes 76–77 and 125–126.

CONCLUSION

The prospect of a pan-European real estate investment vehicle holds great promise for common investors, European property markets, and the property world. A workable EuroREIT will promote greater transparency, liquidity, cross-border investment, and securitization. Due to the increasing popularity of REIT vehicles around the globe, EU decisionmakers have a number of models to follow in developing an optimal REIT structure. In selecting attributes for a EuroREIT regime, the European Union will reap the greatest benefits and make advances toward broader policy goals by implementing a flexible, nonrestrictive approach. EU decision makers will find significant guidance in developing a viable EuroREIT by examining and adopting features of the U.S., Australian, and French REIT vehicles.

