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-


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. Several countries are close to passing REIT-style legislation and the European Union is reported to be considering the creation of a EuroREIT. 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.

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

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5. See The REIT Stuff, GLOBAL INVESTOR, Apr. 1, 2003, 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 (“The 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) (“Real 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 (“While 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. 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. 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." 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. In 1960, the U.S. Congress

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

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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." 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."

During the mid-1980s, Congress altered the REIT landscape and sparked industry growth by enacting legislation that discontinued tax shelter-oriented real estate partnerships. The elimination of this rival investment option proved advantageous for the REIT industry. 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." These legislative changes along with cheaper property prices helped REITs to once again become an attractive investment.

Market conditions, industry innovations, and additional legislative changes during the 1990s enabled the REIT industry to grow dramatically in both "scale and scope." Because of a "credit crunch" 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).

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 PROF. 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.").
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. Australia introduced the listed property trust (LPT) in 1971. Like U.S. REITs, LPTs have evolved during the past three decades and have recently achieved a high level of popularity with investors.

The Dutch were leaders in the creation of a REIT-like structure in Europe, establishing the “fiscale beleggingsinstelling” (BI) in 1969. In the mid 1990s, Belgium introduced a REIT-vehicle known as the “sociétés d’investissement à capital fixe en immobilière” (SICAFI). In 2003, France passed legislation that created a REIT equivalent, known as the “sociétés d’investissements immobiliers cotees” (SIIC). REIT-like structures also exist in Luxembourg, Spain, Turkey, and Greece. Industry reports predict that “the United Kingdom could permit the introduction of REITs as soon as 2005.” REIT movements also exist in the European Union, Germany, and the Nordic countries.

A number of governments in East Asia have enacted REIT legislation in the past five years. In late 2000, Japan enacted an investment trust law that established a REIT vehicle. South Korea established REIT regulations in 2001 and Singapore listed its first “S-REIT” in 2002. 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).
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.
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).
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. Lobbyists are also seeking to expand geographic limitations on the Hong Kong REIT so that property investment in mainland China could be permitted.

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. 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. Analysts predict that Brazil will make efforts in the near future to modernize its outmoded REIT structure.

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. 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. Although a number of member countries have REIT-type vehicles in place, they represent a small segment in the European property market. 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.
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.").
proach will open up new real estate investment opportunities in the European Union's twenty-five member states. Once established, a EuroREIT regime will be able to spread geographically with future expansion of the European Union. 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.

The desire for market transparency and the elimination of barriers to entry among member states provide additional fuel for the EuroREIT movement. Real estate investors have traditionally limited their investments to local markets due to the risk of venturing into nontransparent surroundings. 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. 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.

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

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 (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 239-48 (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/03sepoct/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." Of the remaining 25%, 20% can come from "passive sources such as dividends and interest." The final 5% of gross income is not restricted.

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" and 90% of taxable income must be distributed to shareholders on an annual basis. Although retained earnings are taxed at the regular corporate rates, REITs generally pay little or no taxes because deductions are allotted for dividends paid. Investors are, of course, obligated to pay taxes on dividends and capital gains.

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. Although it has not always been the case, most U.S. REITs today are internally managed. 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." These entities, however, can defer the tax and "it is eliminated if the REIT holds the..."
property for at least ten years."\textsuperscript{8} Finally, U.S. REITs can be privately held or publicly owned and they are not bound by borrowing limits.\textsuperscript{9}

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."\textsuperscript{90} Although not identical, similar restrictions in these areas are standard in other REIT regimes.\textsuperscript{91} Additional restrictions cited above ensure that REITs benefit large numbers of investors rather than a few majority shareholders.\textsuperscript{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.\textsuperscript{93}

During the last decade, this blend of restrictions and characteristics has resulted in a large and flourishing REIT sector.\textsuperscript{94} In terms of overall market capitalization and the number of vehicles participating in the sector, the U.S. REIT outpaces its foreign equivalents.\textsuperscript{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.\textsuperscript{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."\textsuperscript{97} Although U.S. REITs have

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\item \textsuperscript{88} EPRA, supra note 1, at 18; see I.R.C. § 1374 (2002).
\item \textsuperscript{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).
\item \textsuperscript{90} Brown, supra note 4, at 295.
\item \textsuperscript{91} See discussion infra Parts II.B–E.
\item \textsuperscript{92} See supra notes 76 and 77.
\item \textsuperscript{93} See supra notes 85 and 86.
\item \textsuperscript{94} See Wechsler, supra note 12, at 38.
\item \textsuperscript{95} See EPRA & NARIET, Global Real Estate Index, available at http://www.nareit.com/library/global/rei.cfm (last visited Jan. 6, 2005).
\item \textsuperscript{96} Id.
\item \textsuperscript{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
\end{itemize}
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,
must pay a conversion charge at the standard corporate tax rate on their "embedded capital gains." With regard to borrowing considerations, domestically-controlled ALPTs have no restrictions. Foreign-controlled ALPTs, on the other hand, cannot exceed a 3:1 debt to equity ratio. Finally, although most vehicles are externally managed, the ALPT market sustains both externally and internally managed trusts.

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. The absence of minimum capital requirements, management style restrictions, development restrictions, or borrowing limitations for domestic LPTs confirms the flexibility of the structure. 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. 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.

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

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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. Market capitalization for the sector is reported to be nearly 56 billion dollars. This figure amounts to nearly 9% of the Australian stock exchange.

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. Requirements include a minimum share capital threshold and corporate residency in the Netherlands. 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. 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. Individual investors may own less than 25% of the shares in a listed BI. With respect to unlisted BIs, a corporate shareholder, either domestic or foreign, is limited to less than 25% of a BI. Individual investors in an unlisted BI, which does not have a license, may not have a substantial interest in an investment company.
There are no income restrictions on a BI as long as the income comes from investing activities. 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. With regard to investment regulations, BIs are permitted to invest in any type of passive investment. Additionally, a qualifying BI can utilize either an internal or external management operation. Active development activities, however, are not permitted.

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." Such entities are unable to defer these costs. 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.

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

In spite of these restrictions the Dutch BI has experienced significant success. Reports indicate that between 1990 and 2005...
2002, the annual average return for BIs was 8%.\textsuperscript{142} At present, market capitalization for the sector is around 15.3 billion dollars and eight BIs are currently operating.\textsuperscript{143} Analysts, however, are quick to point out that BI success "cannot be wholly attributed to the tax-transparent structure."\textsuperscript{144} They call attention to the fact that BI investments are focused almost exclusively on domestic property.\textsuperscript{145} Consequently, BI success is largely a result of the "strength of the underlying property market."\textsuperscript{146}

D. THE BELGIAN SICAFI

Belgian REIT regime regulations have the distinction of being the most complex and detailed.\textsuperscript{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.\textsuperscript{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.\textsuperscript{149} These public shareholders must receive voting rights within a year after the registration of a SICAFI.\textsuperscript{150}

A SICAFI is permitted to use either internal or external management.\textsuperscript{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."\textsuperscript{152} Although general corporate taxes apply to the vehicle, the taxable base is set up so that taxes are limited to disallowed expenses.\textsuperscript{153} Be-

\begin{itemize}
\item 142. Id.
\item 143. EPRA/NAREIT, supra note 95.
\item 144. Mackenzie, supra note 9, at 50.
\item 145. Id.
\item 146. Id.
\item 147. EPRA, supra note 1, at 6 (suggesting that Belgium REIT regime formalities and procedures are exceedingly complex and detailed).
\item 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).
\item 150. Id. at Art. 33(3).
\item 151. See Clark & Zehner, supra note 109, at 14 (noting that the SICAFI does not require external management).
\item 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.
\item 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.\textsuperscript{154}

SICAFIs can invest in real estate companies and they are permitted to have "long leaseholds on real estate assets, and debt instruments."\textsuperscript{155} A SICAFI is also permitted to invest in non-real estate assets so long as the investments are secondary to real estate investments.\textsuperscript{156} In terms of distribution requirements, at least 80% of current cash flow must be dispersed to shareholders each year.\textsuperscript{157} "Realized capital gains may... be retained with the company provided they are timely reinvested."\textsuperscript{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."\textsuperscript{159} The vehicle has a maximum borrowing limit of 50% of the market value of the company's assets.\textsuperscript{160} Belgian rules also ban participation in real estate development activities.\textsuperscript{161}

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

\begin{itemize}
\item 4, 1990 (Belg.), supra note 148. However, the taxable base of a SICAFI is limited to disallowed expenses. \textit{Id.} at art. 143; see also \textit{International Tax Treatment of REITs}, supra note 73.
\item 154. \textit{See International Tax Treatment of REITs}, supra note 73.
\item 155. \textit{International Tax Treatment of REITs}, supra note 73; see also Royal Decree of Apr. 10, 1995, Art. 41(2) (Belg.), supra note 149.
\item 156. \textit{See International Tax Treatment of REITs}, supra note 73.
\item 157. Royal Decree of Apr. 10, 1995, Art. 62(1) (Belg.), supra note 149; see Brown, \textit{ supra note 4, at 296; Everyone Else has got a REIT... So Why Haven't We?}, supra note 2, at 41; \textit{International Tax Treatment of REITs}, supra note 73.
\item 158. \textit{International Tax Treatment of REITs}, supra note 73; see Royal Decree of Apr. 10, 1995, Art. 62(2) (Belg.), supra note 149.
\item 159. EPRA, \textit{ 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 \textit{TAX LAWS OF THE WORLD} 61–62 (rev. ed. June, 1993) (describing liquidation and liquidation tax consequences).}
\item 160. Royal Decree of Apr. 10, 1995, Art. 52(1) (Belg.), supra note 149.
\item 161. Royal Decree of Apr. 10, 1995, Art. 51 (Belg.), supra note 149.
\item 162. \textit{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).}
\item 163. \textit{Id.}
\item 164. \textit{Id.}
\end{itemize}
SICAFI has been helped by a strong economy. Market capitalization for the sector is approximately 2.6 billion dollars at present and there are currently five operating SICAFIs. 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. Previously discussed minimum capital, borrowing, conversion, and development restrictions are also likely dampers on market growth.

E. FRANCE'S SIIC

France's SIIC, Europe's most recent REIT structure, must appear as a listed company on a French stock exchange. In order to qualify as a SIIC, shareholders must contribute a minimum of fifteen million euros. 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." With respect to distribution, 85% of SIIC recurring net profit must be dispersed to shareholders and SIICs must pay out "50% of the capital gains on their property sales within two years after they occur." 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.

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. Additionally, SIICs are permitted to utilize either internal or external management structures. Reports also indicate that the French tax administration has agreed to allow foreign compa-
In light of these considerations, France's SIIC is clearly the least restrictive REIT regime in Europe. The decision to create a tax-efficient, competitive, non-restrictive REIT vehicle has helped the SIIC get off to a fast start. In approximately a one-year time period, four entities have entered the SIIC sector and market capitalization has reached approximately 9.8 billion dollars.

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

Although not comprehensive, the preceding survey of REIT regimes reinforces the notion that REIT vehicles share similar goals, yet have varying qualifications and restrictions. As previously emphasized, investors in all of the above countries can reap the benefits of “pass through” taxation. 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. Although reasonable persons could disagree on the need to make REIT vehicles “less risky,” data indicates that REIT markets in less-restrictive regimes outperform their more restrictive counterparts. Consequent
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, non-restrictive 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

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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.
190. EPRA, supra note 1, at 12–13.
191. Cooper, supra note 184, at 61.
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.\textsuperscript{195} Available
data provides support for this argument. The United States and
Australia, which do not limit borrowing, have fairly conservative
average gearing levels.\textsuperscript{196} According to recent reports, the aver-
age debt/equity ratio for U.S. REITs is approximately 35\%.\textsuperscript{197} Analysts believe that the U.S. market will "tolerate gearing up
to 50\%."\textsuperscript{198} Recent publications indicate that the ALPT average
gearing is approximately 40\%.\textsuperscript{199} The Dutch BI average gearing
ratio is close to its borrowing limit of 60\%.\textsuperscript{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.\textsuperscript{201} Additionally, while regu-
lations preventing overzealous borrowing and speculative in-
vesting 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 re-
ceive attention from the business media and the activities of Eu-
roREIT entities are sure to be closely monitored by analysts and
commentators.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{195}Id.
\item \textsuperscript{196} Cooper, supra note 184, at 61; see also Improving the UK Real Estate Mar-
ket, supra note 27, at 19 (listing average gearing (debt/equity) ratios for the U.S. and
Australia).
\item \textsuperscript{197} Improving the UK Real Estate Market, supra note 27, at 19.
\item \textsuperscript{198} Brown's Plans for UK Reits Reveal Abhorrence of Leverage, supra note 192
(suggesting that the U.S. market will tolerate 50\% gearing).
\item \textsuperscript{199} Improving the UK Real Estate Market, supra note 27, at 19.
\item \textsuperscript{200} Id. (noting that the Dutch BI has an average gearing ratio of 62\%).
\item \textsuperscript{201} See discussion infra Part III.B.
\item \textsuperscript{202} See supra note 57 and accompanying text; see infra note 212.
\end{itemize}
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. "REITs or LPTs that develop more than investors feel comfortable with soon see their share prices slip." 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. 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. 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. These steps will likely lead to increased growth and earning opportunities, as has happened in the United States. 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." 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.'" Corporations or trusts that want to convert to REIT status in France, Belgium, the Netherlands, or Australia are unable to avoid these exit costs.

212. MADLEM & SYKES, supra note 1, at 286.
213. Cooper, supra note 184, at 61.
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.\textsuperscript{220} In the United States, however, it is possible to defer or eliminate the exit tax.\textsuperscript{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.\textsuperscript{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.\textsuperscript{223} Converting entities have viewed an exit tax as "the price for enjoying the benefits of the REIT structure."\textsuperscript{224} It should be noted, however, that a conversion cost—especially one that is extremely high—will deter interest in the EuroREIT.\textsuperscript{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.\textsuperscript{226} An external management structure conversely dominates the industry in Australia.\textsuperscript{227} The other countries examined allow for a mixture of internal and external management.\textsuperscript{228}

Both management styles have devoted supporters. Internal

\textsuperscript{220} See supra notes 109, 134, 159, and 174; see also EPRA, supra note 1, at 19.
\textsuperscript{221} See supra note 88 and accompanying text.
\textsuperscript{222} See, e.g., Kriz, supra note 36 (suggesting that an existing property company will pioneer the first REIT in Hong Kong).
\textsuperscript{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).
\textsuperscript{224} Eckert, supra note 65, at 6.
\textsuperscript{225} See id.
\textsuperscript{226} See supra notes 24, 86 and accompanying text.
\textsuperscript{227} See supra note 112 and accompanying text.
\textsuperscript{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." External managers assert that their structures have greater flexibility and that they benefit from a broad range of experience. In terms of performance, data shows that internal REITs have outperformed their external equivalents. Some analysts, however, have suggested that some European property companies "would only convert if external management is allowed."

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. Additionally, it promotes a broader public investor base and ensures that investors will be able to quickly liquidate their investments. 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.
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 (suggesting that private companies are more liquid and transparent than in the past).
France, Belgium, and Australia.\textsuperscript{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.\textsuperscript{236} Analysts point out that “increasing transparency and liquidity of private real estate companies has given investors a high comfort level . . . in this sector.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{240}

F. RESIDENCY REQUIREMENTS

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

\textsuperscript{235} See supra notes 99, 148, and 169.
\textsuperscript{236} See Buisman, supra note 234, at 4.
\textsuperscript{237} Id.
\textsuperscript{238} See supra notes 76–77 and 125–126.
\textsuperscript{239} See Mackenzie, supra note 186 (suggesting that there is a “strong demand for unlisted vehicles from sophisticated and institutional investors”).
\textsuperscript{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)).
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. 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. 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." 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. 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.

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 EPRANAREIT, 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 suggest that narrowing the group of eligible REIT vehicle participants limits the attractiveness of a REIT regime.247 Furthermore, a nonrestrictive 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.

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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.