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## Reduction to half of mortgage and cadastral taxes available also to open-ended foreign real estate funds

### 1. Background

Transfers of instrumental buildings are ordinarily subject to *ad valorem* mortgage and cadastral taxes, respectively of 3% and 1% (applied on the higher of the price and the market value of the assets transferred). However, in case of instrumental buildings, the above-mentioned rates are reduced by half if either the transferor or the transferee is a closed-ended real estate investment fund set up in accordance with Article 37 of Legislative Decree no. 58/1998 (the “**Italian Financial Act**”).

### 2. The dispute in the main proceedings

UBS Real Estate Kapitalanlagegesellschaft mbH (“**UBS Real Estate**”), a German company managing, *inter alia*, two open-ended real estate funds established under German law (the “**UBS Funds**”) purchased, on behalf of the UBS Funds, two instrumental buildings located in Italy (the “**Properties**”). UBS Real Estate paid mortgage and cadastral taxes at ordinary rates in connection with the relevant transfer deed.

After closing, taking the view that open-ended real estate funds were also entitled to the Reduction, UBS Real Estate filed a refund claim with the Italian Tax Authorities (“**ITA**”) for half of the amount of mortgage and cadastral taxes paid when it purchased the Properties.

As a result of a de-facto denial (i.e., ITA remained silent to the request), UBS Real Estate brought actions against ITA before the Tax Courts. The matter was brought up to the Italian Supreme Court.

During the proceedings the Italian Supreme Court referred the specific matter to the European Court of Justice (the “**ECJ**”). With the decision of 16 December 2021, joined cases C-478/19 and C-479/19, the ECJ ruled that:

- since only real estate funds governed by the law of Member States other than Italy can be set up in the form of open-ended investment funds and are, consequently, liable to be denied the reduced rates, the application of the distinguishing criterion based on the ‘open-ended’ or ‘closed-ended’ nature of real estate funds leads to funds governed by the law of other Member States being disadvantaged;
- Article 63 of TFEU must be interpreted as precluding legislation of a Member State to provide for a different treatment between open-ended real estate funds and close-ended real estate funds (i) to the extent that those two categories of funds are in objectively comparable situations and (ii) unless a difference in the tax regime is justified by the objective of limiting systemic risks of the real estate market (i.e., an overriding reason in the public interest).

### 3. The decision of the Italian Supreme Court

With decision no. 28595 of 3 October 2022 (the “**Decision**”), the Italian Supreme Court, applying the principles laid down by the ECJ, ruled in favor of UBS Real Estate by concluding that Article 35(10-ter) of the Decree 2006 is in contrast with Article 63 of TFEU since (i) it concerns situations which are objectively comparable and (ii) the different tax regime cannot be justified on the basis of a public interest.

#### 4. Points of attention

Since Article 35(10-ter) of Decree 2006 (as interpreted by the Italian Supreme Court and by the ECJ) applies to “real estate investment funds”, it is pivotal assessing whether foreign funds actually qualify as collective investment undertakings. In fact, lacking a definition of “foreign investment fund” under Italian law, this status shall be ascertained based on a case-by-case analysis, in light of a) the provisions in force in the State of establishment of the foreign entity and b) the actual features of the foreign fund.

For these purposes, one should assess the substantial compliance by foreign funds to the regulatory features laid down by the Italian Financial Act when defining Italian collective investments undertakings (**OICR**), paying particular attention to (i) the raising of capital from investors, (ii) the plurality of investors, (iii) the independence of the managers from the investors and (iv) the pre-defined investment policy. The “real estate” nature of the fund shall then be assessed based on the fund’s rules and on other applicable provisions.

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