

## **Cayman tax and collective investment schemes: reform envisaged in 2023**

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### **Cayman tax - Law**

The Cayman tax provides for the taxation by transparency of individuals on the income of a legal structure that would be subject to personal income tax and the taxation as dividends or distributions from these legal structures derived from income that has not been subject to the Belgian tax regime. It applies in particular to any company which has legal personality or a legal form analogous to that of a Belgian company and which, under the legislation of the State in which it is established, is not subject to income tax or is subject to income tax amounting to less than 15% of the taxable income of this structure determined in accordance with Belgian rules<sup>1</sup>.

However, legal forms established in a State that is part of the European Economic Area are excluded, except in cases determined by Royal Decree.

### **Exception for investment funds**

There is one exception, however, which states that legal constructions do not include :

- a public or institutional undertaking for collective investment or an undertaking for collective investment in debt securities which meets the conditions of Directive 2009/65/EC on the coordination of provisions relating to undertakings for collective investment in transferable securities (UCITS);
- a public or institutional undertaking for collective alternative investment covered by the Law of 19 April 2014 on undertakings for collective alternative investment and their managers<sup>2</sup>.

### **Exception to the exception**

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<sup>1</sup> CIR, art. 2, § 1, 13°, al. 1, b).

<sup>2</sup> CIR, art. 2, § 1, 13°/1, al. 1.

However, an exception to the exception stipulates that the exception does not apply to entities whose rights are held by one person or by several related persons, all considered per sub-fund of the fund.

Persons are related if one of them exercises control over a legal entity, if they are related or allied up to the 4<sup>th</sup> degree, or if they are married, legally cohabiting or have established their domicile at the same address.

### **Royal Decree**

A Royal Decree of 18 December 2015 amended by Royal Decree of 21 November 2018, both confirmed by law, establishes the list of companies established in the European Economic Area that constitute legal arrangements.

This includes investment undertakings in which the rights are held by one person or several related persons, all considered by sub-fund<sup>3</sup>.

For the purposes of the Decree, the definition of investment undertakings has been slightly amended.

It includes :

- 1°. an undertaking for collective investment meeting the conditions of Directive 2009/65/EC on UCITS established in a Member State of the European Economic Area;
- 2°. an undertaking for collective alternative investment covered by Directive 2011/61/EU of 8 June 2011 on alternative investment fund managers ;
- 3°. an investment undertaking which has only one member and which would have been included in the preceding definitions if it had had more than one member.

The reference to alternative investment funds covered by the Directive includes all institutions which raise capital from investors for investment according to a specific management policy and which are not covered by the UCITS Directive relating to UCIs with a European passport (Directive 2009/65/EC). Private equity funds are therefore also covered, as previously discussed.

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<sup>3</sup> CIR, art. 1<sup>er</sup>, al. 1, 1°.

However, the decree does not define the percentage of the fund that must be held by third parties when, for example, a family holds a large majority. This shortcoming has been criticised by the Cour des Comptes. The Minister of Finance intends to propose a decree setting a minimum percentage which should reach to make it possible for the structure to escape liability to the Cayman tax<sup>4</sup>.

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<sup>4</sup> On the former regime, see J. Malherbe, La transparence fiscale en Belgique ("Taxe Caïman : Quelques questions d'interprétation"), *in* Mélanges Pascal Minne, Fiscalité internationale et patrimoniale, Brussels, Bruylant, p. 563.