



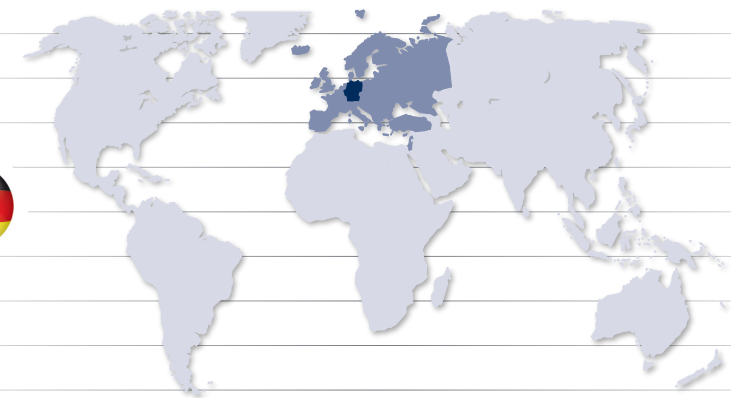
Europe

# Germany

(G-REIT)

## Global REIT Survey

September 2010



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## General introduction

	Enacted year	Citation	REIT type
G-REIT	2007	Law on German real estate joint stock companies with publicly quoted shares (Real Estate Investment Trust law - REIT law).	Corporate type.

After intensive three-year political discussions, Germany implemented the German Real Estate Investment Trust (G-REIT) in 2007 in order to meet the market demands inspired by the introduction of the REIT in other European countries. The G-REIT is a joint stock company with specific rules laid out by the REIT law.

The REIT law came into force on June 01, 2007 with retroactive effect as of January 01, 2007. The REIT law is supported by changes in various tax laws, such as the German Income Tax Act and the Investment Tax Act. The REIT law has been amended by the Tax Amendment Act 2009 (*Jahressteuergesetz* 2009). One of the major changes was that shareholders may benefit from the privileged taxation generally applicable for dividend income if such dividends are sourced by pre-taxed profits of the G-REIT and certain further requirements are fulfilled.

The tax authorities published on July 10, 2007 an administrative guidance according to which upon registration as a REIT with the Commercial Register, tax exemption is to be assumed to start with the beginning of the year of registration, and therefore upon application, no tax prepayments are to be assessed.

Up to now three REITs are listed, and 6 companies are registered at the Federal Central Tax Office (*Bundeszentralamt für Steuern*) as pre-REITs. The listed companies, Alstria AG, Hamborner AG and Fair Value AG, have together a market capitalisation of approx. EUR 0.7 billion.

### Sector summary (end of May 2010)

Listing Country	Number of Companies	Sector Performance- 12 Months %	Sector Mkt cap £bn	% of Global REIT MKT
Germany	2	68.7	0.4	0.1%

### German REITs

	Market cap (€m)	Sector type
Alstria Office REIT-AG	446	Office, Residential, Retail
Hamborner REIT AG	181	Retail, Office
Fair Value REIT-AG	39	Industrial, Logistic, Office, Retail

## 2 Requirements

### 2.1 Formalities / procedure

#### Key requirements

- G-REIT: Registration with the Commercial Register.
- Pre-REIT: Registration with the Federal Central Tax Office.

#### G-REIT

The G-REIT must be registered with the Commercial Register which examines whether the G-REIT qualification requirements are met. The G-REIT comes into existence with its registration.

The main requirements for the registration of a G-REIT are as follows:

- joint stock company with minimum share capital of EUR 15 million;
- corporate seat and place of management in Germany;

- by-laws must provide for certain provisions (e.g. purpose of the company, compensation of shareholders with a shareholding of less than 3% in case of termination of the tax-exempt G-REIT status, etc.);
- listing at stock exchange;
- at least 25% widely held shares at IPO (after listing reduced to 15%);
- direct shareholding of a shareholder must be less than 10%;
- asset, equity and activity requirements (see under no. 2.4. and 2.5).

### Pre-REIT

Before registration with the Commercial Register, a pre-REIT status can be obtained. A pre-REIT can be characterised as a joint stock company which does not yet have to fulfil all the requirements for a G-REIT. The Pre-REIT status requires registration with the Federal Central Tax Office. Similarly to the G-REIT, the Pre-REIT status allowed capital gains from the transfer of real estate to the pre-REIT to be subject to exit tax rules (see no. 3.2). At the end of each business year following the year of registration, the pre-REIT must prove to the Federal Central Tax Office that its activities comply with certain G-REIT requirements.

With the exception of the exit tax rules, the taxation of the pre-REIT follows the general tax rules applicable for corporations.

For the registration as a pre-REIT the company must fulfill the following requirements:

- joint stock company;
- corporate seat in Germany.

The pre-REIT must fulfil at the end of the business year following the year of registration and each consecutive year the following requirements:

- objectives of the pre-REIT must be limited to the objectives of a G-REIT;
- 75% of its total assets must consist of immovable property;
- 75% of its gross earnings must be derived from renting, leasing, letting and disposal of real estate;
- a pre-REIT service company's assets may not exceed 20% of the pre-REIT's total assets;
- a pre-REIT service company's gross earnings may not exceed 20% of the pre-REIT's gross earnings.

The assets and gross earnings requirements mentioned above must be verified by an auditor upon the request of the Federal Central Tax Office.

## 2.2 Legal form / minimum share capital

Legal form	Minimum share capital
Joint stock company.	EUR 15 million.

### Legal form

The only legal form which is permitted for a G-REIT is the joint stock company (*Aktiengesellschaft - AG*). The company's name must include the words "*REIT-Aktiengesellschaft*" or any other reference, which contains the words "Real Estate Investment Trust" or the abbreviation 'REIT'. Because of its qualification as a joint stock company, the G-REIT is subject to the standard regulations of the Joint Stock Company Act and the Commercial Code. This is the case, unless the REIT Act specifically indicates otherwise.

### Minimum share capital

A G-REIT must have a share capital of at least EUR 15 million. All shares must be voting shares. Different categories of shares are not allowed. Shares can only be issued against the full payment of the issuance price.

## 2.3 Shareholder requirements / listing requirements

Shareholder requirements	Listing mandatory
<ul style="list-style-type: none"> <li>- 15% of the shares must be widely held (25% at the time of IPO).</li> <li>- A shareholder is not allowed to own directly 10% or more of the shares or the voting rights of the company.</li> </ul>	Yes

### Shareholder requirements

At least 15% of the G-REIT shares must be widely held, which means that such shares must be owned by shareholders who may each hold less than 3% of the voting rights of the G-REIT. Consequently, at least six shareholders are needed to satisfy this 15% requirement. At the time of the stock exchange listing, the precondition of widely held shares must be fulfilled for at least 25% of the shares of the G-REIT.

In addition, it is not allowed that a single shareholder directly holds 10% or more of the shares or the voting rights of a G-REIT (including shares held on his/her behalf by a third party). However, this limitation is not applicable to an indirect shareholding. Consequently, holding structures legally allow circumventing this threshold.

At the end of each calendar year, the G-REIT is obliged to inform the Federal Financial Service Agency (*Bundesanstalt für Finanzdienstaufsicht*) of the shares which are widely held. The Federal Financial Service Agency will inform the Federal Central Tax Office if the 15% widely held shareholding requirement is not met. The REIT law provides for further reporting requirements which apply to a shareholding of 3%, 80% and 85% of the G-REIT's voting rights.

### Listing requirements

A G-REIT's shares must be admitted to trading in an organised market in the meaning of the Securities Trading Law in a Member State of the European Union or in another signatory state to the Treaty on the European Economic Area (Iceland, Liechtenstein, Norway).

A pre-REIT must apply to be admitted to trading in an organised market mentioned above within three years of the application being made to register the joint stock company as a pre-REIT. The time allowed may be extended by one year on application by the Federal Financial Supervisory Authority if there are exceptional circumstances justifying such an extension. Should no application be made within the time allowed, or should application be made within that time and be refused, the company will lose its status as pre-REIT.

## 2.4 Asset levels / activity test

### Restrictions on activities / investments

- 75% immovable property requirement.
- 75% immovable property income requirement.

At least 75% of the total assets of the G-REIT must be comprised of immovable property and at least 75% of its gross earnings must derive from rental, leasing, letting and disposal of immovable property.

A G-REIT may only provide secondary activities (activities serving third party investment portfolio) via a 100% owned REIT service company. The assets related to such services are not allowed to exceed 20% of the total assets of the G-REIT. In addition, the gross earnings from such services are not allowed to exceed 20% of the gross earnings of the G-REIT.

A G-REIT must not engage in trading in real estate. Trading is assumed when the G-REIT receives revenues from the disposal of real estate within a period of five years, which exceeds 50% of the average value of its real estate portfolio within that same period. The valuation of the real estate portfolio will be based on fair value as defined in IAS 40.

Investments in immovable property, which is used primarily (i.e. more than 50%) for residential purposes, are prohibited if the property is located in Germany and was built prior to January 01, 2007. The G-REIT may invest in all kinds of real estate abroad insofar as the real estate can be owned by a REIT corporation, REIT partnership or a REIT trust or a corporation, partnership or trust comparable to a REIT under the laws of the respective foreign country.

The G-REIT is allowed to hold German real estate via a German partnership, but not via a German corporation. A German corporation may only be held for such purposes if the company acts as an unlimited liable partner in a real property partnership without any participation in the property of the partnership (i.e. the corporation is a 0% general partner in the real estate partnership.) This refers to the structure of a GmbH & Co. KG, which is a

partnership with an unlimited liable partner corporation. The partnership must have the same business objectives as the G-REIT itself.

Foreign real estate may be held through a German or foreign property partnership as well as through a 100% owned German or foreign property corporation of the G-REIT.

## 2.5 Leverage

### Leverage

The equity must equal at least 45% of the total asset value of immovable property (valuated at IAS 40).

The equity of the G-REIT, as generally shown in its consolidated accounts (if no obligation to consolidated accounts is existing, the single accounts are decisive) at the end of the fiscal year, must equal at least 45% of the total asset value of immovable property in the accounts (valued at IAS 40). As at least 75% of all assets at the end of each business year must be immovable assets, the equity must not fall below 33.75% of total assets. This means the leverage of a G-REIT cannot exceed 66.25%.

## 2.6 Profit distribution obligations

Operative income	Capital gains	Timing
90% of net income of the year.	Deferral of 50% of the capital gains from real estate assets allowed.	Distribution is required until the end of the following business year.

### Operative income

The G-REIT has to distribute at least 90% of its net income, calculated under German GAAP, to its shareholders until the end of the following business year.

### Capital gains

Up to half of the proceeds from disposals can be transferred to a reserve. The distributable profits will be reduced accordingly.

Any unused reserves must be dissolved at the latest by the end of the second financial year after creation. The reserves can either be deducted from the acquisition or construction cost of real estate assets acquired or created in the respective two years or must be added to the distributable profits in the year in which they are dissolved.

## 2.7 Sanctions

### Penalties / loss of status rules

- Several penalties.
- Loss of REIT status.

Penalties will be levied by the competent tax office as follows:

- if less than 90% of the gross earnings are distributed, the penalty amounts to 20% to 30% of the difference;
- if less than 75% of the assets consist of immovable property, the penalty amounts to 1% to 3% of the difference;
- if less than 75% of the gross earnings is derived from qualifying income, the penalty amounts to 10% to 20% of the difference;
- if more than 20% of the gross revenue consists of real estate advisory or other related services to third parties, the penalty amounts to 20% to 30% of the earnings exceeding this threshold.

If for three consecutive years, the G-REIT continuously violates one and the same qualifying requirement as defined by the REIT law, it will lose its status as a tax-exempt corporation after the end of the third year. If the G-REIT continuously violates different qualifying requirements over five consecutive years, it will lose its status as a tax-exempt corporation after the end of the fifth year.

If the G-REIT performs forbidden real estate trading activities, it will lose its status as a tax-exempt corporation for the financial year in which the limit is exceeded.

If the G-REIT is de-listed, it will lose its status as a tax-exempt corporation at the end of the financial year prior to the year of de-listing.

If 10% or more of the shares or the voting rights of a G-REIT can be attributed directly to one shareholder, this will not cause the G-REIT to lose its tax-exempt status. Nor will the shareholder forfeit his dividend or voting rights. However, he would only be able to exercise the rights of a double tax treaty applicable for a shareholding of less than 10% of the G-REIT's shares.

If less than 15% of a G-REIT's shares are in free float for three consecutive years, the G-REIT will cease to be tax exempt from the end of the third year. The same applies if the aforementioned 10% threshold is violated for three consecutive years. These rules do not apply as long as the G-REIT cannot infer the breach from the notifications required under the Securities Trading Law.

## 3 Tax treatment at the level of REIT

### 3.1 Corporate tax / withholding tax

Current income	Capital gains	Withholding tax
All income is tax-exempt.	Capital gains are tax-exempt.	Reduced withholding tax on distributions to the G-REIT.

#### Current income

The income of a G-REIT is not subject to corporate or trade income taxes irrespective of whether the income is generated from real estate assets or not. The tax exemption applies for the first time as of the beginning of the business year in which the G-REIT is registered as a REIT with the Commercial Register. The tax exemption only applies to the G-REIT's income.

Consequently, the income of a subsidiary or a partnership of the G-REIT (the latter is, according to German tax principles, only tax transparent for corporate income tax but not for trade income tax) remains subject to taxation at their level. In this context it should be noted that German trade tax law provides under certain requirements for a trade tax exemption for income from real estate.

#### Capital gains

As is the case of the G-REIT's other income, capital gains are exempt from corporate and trade income taxes.

#### Withholding tax

Dividend distributions from German subsidiaries of the G-REIT to the G-REIT are in the first place subject to the standard withholding tax of currently 25%, but two-fifth of this tax can be reclaimed by the G-REIT upon application.

#### Other Taxes

Taxes other than income taxes will be levied. Specifically, real estate transfer taxes will be levied on the acquisition and sale of real estate.

#### Accounting rules

The income is to be determined based on German GAAP. Real estate assets can only be depreciated using the straight line method.

The thresholds which must be met by the G-REIT (see no. 2.4 and 2.5) are determined based on IFRS rules.

The financial statements of the G-REIT must be audited. The auditor must confirm inter alia that the threshold requirements were met.

### 3.2 Transition regulations/Exit-Tax

#### Conversion to REIT status

- 50% tax exemption on conversion into a G-REIT for eligible assets.
- 50% tax exemption on disposal of eligible assets to the G-REIT or pre-REIT.

The G-REIT obtains tax exempt status at the beginning of the taxable year, in which the joint stock corporation has been registered as a G-REIT in the Commercial Register. This event is treated as a taxable liquidation of the (prior) taxable joint stock corporation. The conversion of a property company into a G-REIT is thus (always) a taxable event, and the REIT law does not provide for a tax-free conversion. However, in the case that real estate was transferred to a G-REIT by way of a conversion into G-REIT status, only 50% of the

capital gain becomes taxable (so-called exit taxation) if the real estate asset was acquired/constructed by the converted entity before January 01, 2005, and further provided that the conversion was made with legal effect prior to January 01, 2010.

A seller was taxed on only 50% of the capital gain from the sale of German real property to a G-REIT or a pre-REIT, if (i) as of January 01, 2007, the property was an asset of a German business of the seller for a period of at least five years, (ii) the property was not considered inventory, and (iii) the purchase agreement was executed after December 31, 2006, and prior to January 01, 2010. The exit tax was also applicable for Sale-and-Lease-Back transactions.

The exit tax privilege was not granted in case of certain transactions, which were tax privileged under other rules.

The exit tax privilege will retroactively be withdrawn if *inter alia* the G-REIT or pre-REIT (i) disposes of the land and the buildings within four years of concluding the contracts as mentioned above or (ii) if the pre-REIT loses its status as pre-REIT, or (iii) the pre-REIT does not become a REIT corporation within four years after the purchase of the real estate. The party acquiring the property will be jointly liable for the taxes, which arise as a result of losing the exit tax privilege.

### 3.3 Registration duties

#### Registration duties

Real estate transfer tax.

The transfer of real estate to and from a G-REIT is not exempt from real estate transfer taxes of generally 3.5% of the sales price (Berlin, Hamburg and Saxony-Anhalt: 4.5%). For real estate transfer tax the conversion of a corporation into a Pre-REIT or G-REIT is not regarded as a taxable event according to German tax principles. The same applies for the conversion of a limited liability company (GmbH) into a stock corporation (AG).

## 4 Tax treatment at the shareholder's level

### 4.1 Domestic shareholder

Corporate shareholder	Individual shareholder	Withholding tax
In general fully taxable.	- In general final withholding tax of 25% plus a 5.5% solidarity surcharge on the withholding tax, totalling 26.375%.	- Final withholding tax for privately held shares. - Otherwise creditable/refundable withholding tax.

#### Corporate shareholder

The taxation of dividends at the level of the corporate shareholder depends on the taxation of the underlying income (pre-taxed profits) distributed by the G-REIT. Pre-taxed profits of a G-REIT can be caused by the taxation of profits of a real estate of the G-REIT in a foreign jurisdiction or the taxation of a subsidiary or a partnership (with foreign real estate) of the G-REIT. In case the underlying income has been taxed with at least 15% German corporate income tax or a comparable foreign income tax and certain further requirements are met, dividends sourced by such pre-taxed profits are 95% exempt from corporate income tax at the shareholder level. Otherwise, dividend income remains subject to corporate income tax at the level of the corporate shareholder at ordinary tax rates. The dividend income is subject to trade income tax.

Capital gains on the disposals of G-REIT shares are always subject to corporate and trade income tax at ordinary tax rates.

#### Individual shareholder

From January 01, 2009 onwards, dividends and all (i.e. short- or long-term) capital gains on the disposition of shares in a G-REIT realised by individuals as non-business income are subject to a (in principle) final withholding tax of 25% (plus solidarity surcharge of 5.5% thereon).

Long-term capital gains on privately held G-REIT shares acquired prior to January 01, 2009 remain tax exempt provided that the shares were held for more

than one year and the shareholder did not own an interest of 1% or more in the G-REIT at any time during the five years preceding the sale of the shares.

Capital gains on privately held shares acquired on January 01, 2009 and onwards are fully subject to personal income tax (i.e. the final withholding tax does not apply), where the shareholder owned during the five years preceding the sale an interest of 1% or more in the G-REIT.

Dividends received by individuals as business income are fully subject to personal and trade income tax (trade income tax will be credited for personal income tax under certain requirements), unless the underlying income has been taxed with corporate income tax as outlined above (see under corporate shareholder). In case the underlying income has been taxed, the dividends are only with 60% subject to personal income tax. The dividend income is subject to income tax and fully subject to trade income tax.

Capital gains on the disposal of G-REIT shares held in a business are fully subject to personal and trade income tax.

**Withholding tax**

Dividends from a G-REIT, as well as other benefits granted in addition to or instead of dividends, are subject to a withholding tax at a rate of 25% plus a 5.5% solidarity surcharge on the withholding tax, in total 26.375%. In case the G-REIT shares are privately held by an individual shareholder, the withholding tax is final. Otherwise the withholding tax is creditable / refundable at the shareholder's level.

**4.2 Foreign shareholder**

Corporate shareholder	Individual shareholder	Withholding tax
<ul style="list-style-type: none"> <li>- Final withholding tax for dividends.</li> <li>- Generally, tax exemption for capital gains.</li> </ul>	<ul style="list-style-type: none"> <li>- Final withholding tax for dividends.</li> <li>- Generally, tax exemption for capital gains.</li> </ul>	<ul style="list-style-type: none"> <li>- 25% plus a 5.5% solidarity surcharge, resulting in a rate of 26.375% (or a reduced treaty tax rate or a reduced withholding tax rate for foreign corporate shareholders).</li> <li>- EU Parent-Subsidiary Directive not applicable.</li> </ul>

**Corporate shareholder**

The withholding tax on dividends to foreign (non-resident) shareholders is a final tax, provided that the G-REIT shares are not assets of a German permanent establishment of such shareholder.

Capital gains from the disposal of G-REIT shares are taxable if the shares are assets of a permanent establishment, or if the foreign shareholder has held at least a 1% shareholding at any time within a five-year period prior to the sale of the shares. Usually, double tax treaties provide for a tax exemption of capital gains on the disposal of shares in Germany. However, several German tax treaties do not protect investors from the German capital gains tax, as they give Germany the right to tax capital gains from the disposition of shares in a real estate company.

**Individual shareholder**

The same principles apply as for foreign corporate shareholders.

**Withholding tax**

German domestic tax law provides that the foreign corporate shareholder is principally entitled to a refund of two-fifths of the withholding tax resulting in a final tax of 15% (which is equal to the corporate income tax rate) plus a 5.5% solidarity surcharge, resulting to a rate of 15.825%.

A double tax treaty may reduce the dividend withholding tax rate which amounts under German tax law to totally 26.375% (25% withholding tax plus 5.5% surcharge on the tax). Most German tax treaties provide that foreign shareholders are entitled to a reduced withholding tax rate of 15% if they are domiciled in the other treaty state. An exemption to this rule is, for example, the double tax treaty with Ireland. It provides for a reduced withholding tax rate of 10% for portfolio investments. Entitlement to a refund also requires that the investor qualifies for the treaty benefit under the German anti-conduit rules.

A corporate shareholder will not be able to exercise his rights to a further withholding tax reduction which would accrue to him if his shareholding was 10% or more.

Because of the tax-exempt status of the G-REIT, the EU Parent-Subsidiary Directive is not applicable.

## 5 Tax treatment of foreign REITs and its domestic shareholders

Foreign REIT	Corporate shareholder	Individual shareholder
Fully taxable.	Like dividends from G-REIT if foreign REIT is a qualifying REIT.	Like dividends from G-REIT if foreign REIT is a qualifying REIT.

### Foreign REIT

A foreign REIT's German source income is taxable in Germany at the standard rules and rates applicable to a non-resident corporate taxpayer.

### Corporate shareholder

Dividends distributed from a qualified foreign REIT as defined by the REIT law are fully taxable at the corporate shareholder level as far as the dividend was not sourced by pre-taxed profits (like in the case of dividends received from a G-REIT). A foreign REIT is qualified under the following cumulative requirements:

- the REIT is not domiciled in Germany;
- the gross assets of the REIT consists of more than 2/3 of immovable property;
- more than 2/3 of the gross earnings are derived from rental, leasing, letting and disposal of immovable property; the distribution deriving from immovable property of the REIT do not carry underlying foreign taxes like the German corporate income tax;
- the REIT is not under the supervision of a financial supervision commission;
- the shares of the REIT are listed at an organised market.

In order to avoid the double taxation any foreign withholding taxes levied on distributions will be credited in Germany (Switch-over clause).

Dividends received from a non-qualifying foreign REIT are taxed according to general German tax principles depending on the qualifications of the for-

ign REIT as a corporation or transparent entity. If the non-qualifying REIT is under German tax principles a corporation, 95% of the dividends and capital gains from the disposal of the shares in the REIT would be exempt from corporate income tax at the level of the corporate shareholder. The dividend income would be subject to trade income tax.

### Individual shareholder

As of January 01, 2009, dividends distributed from a qualifying foreign REIT as defined by the REIT Act, are taxable at the individual shareholder level with a flat rate of 25% plus solidarity surcharge if the shares are privately held (like in the case of dividends received from a G-REIT). Dividends received from a non-qualifying foreign REIT are taxed according to German tax principles depending on the qualifications of the foreign REIT as a corporation or transparent entity. If the non-qualifying REIT is under German tax principles a corporation, dividends and capital gains from the disposal of privately held shares would be subject to taxation at the level of the individual shareholder with a flat rate of 25% plus solidarity surcharge. ■

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