

Decree on the Comparison of Foreign Legal Forms published for consultation

As part of the 2024 Tax Plan package, the Legal Forms Tax Qualification Policy Act was adopted at the end of 2023. This Act introduces as of January 1, 2025 a new framework for assessing whether (foreign) legal forms qualify as transparent or non-transparent for tax purposes. Of importance for foreign legal forms is whether they are comparable with a Dutch legal form.

On February 5, 2024 a consultation on the draft Decree on the Comparison of Foreign Legal Forms was launched, containing the assessment framework for comparability.

General rules for the new qualification policy

The Legal Forms Tax Qualification Policy Act aims to bring the Netherlands more in line internationally, and to prevent qualification differences arising with regard to (foreign) legal forms. The Act provides for the following steps in order to determine the qualification:

1. If a foreign legal form is comparable with a Dutch legal form, the qualification for tax purposes of the comparable Dutch legal form will be followed.
2. If there is no comparable Dutch legal form, the qualification will depend on the place of establishment:
 - a. If the legal form is established in the Netherlands, it will be regarded as non-transparent and therefore independently taxable (fixed method).
 - b. If the legal form is not established in the Netherlands, the qualification in the country of establishment will be used (symmetrical method).

The decree that has been published for the purposes of the consultation has to do with the question whether the foreign legal form is comparable with a Dutch legal form, and therefore whether it falls under rule 1 or rule 2.

Lastly, the Act contains an important change for limited partnerships. Where, under current law, these entities can still qualify as transparent or non-transparent, as of January 1, 2025 they will, in principle, qualify as transparent.

Assessment framework for the comparability of legal forms

The starting point for assessing whether a legal form is comparable is the 'hallmarks' of the various Dutch legal forms included in the draft decree. These hallmarks cover aspects such as whether or not there is capital divided into shares, the liability members/partners have toward third parties and the management of the legal form. Based on the hallmarks, it must then be determined whether the foreign legal form is thus (sufficiently) comparable.

The draft decree includes a list of legal forms, in which different foreign legal forms have been assessed and qualified as comparable or not comparable with a Dutch legal form. If comparable, the comparable Dutch legal form is indicated. According to the explanatory notes, this list is the guiding principle, unless a relevant amendment of the foreign law has occurred since the assessment. This is a practical clarification compared to the current qualification policy, whereby although a list of qualifying foreign partnerships has been published, that list must only be regarded as 'indicative'.

If a foreign legal form does not appear on the legal forms list, the question is then whether that legal form has a comparable Dutch counterpart in terms of 'nature and structure'. This assessment of the comparability is also based on the hallmarks included in the decree.

In theoretical terms, this assessment differs significantly from current qualification policy, whereby four criteria are generally used to establish whether an entity is a company with share capital (if three of the four criteria are met), or a partnership. The new policy is based on a more substantive assessment/comparison, which also takes into account what the foreign legislator had intended with the legal form, and what place that legal form occupies in foreign law. Nevertheless, this new policy may, in certain cases, lead to a qualification of the legal form that is comparable to the qualification under the current rules.

If, on the basis of the above assessment, no comparable Dutch legal form can be found, or if the foreign legal form is comparable with more than one Dutch legal form, then the foreign legal form is non-comparable and the fixed or symmetrical method should be applied.

Final remarks

The draft decree and the accompanying legal forms list provide an elaboration of the comparability of foreign legal forms. Although the method of assessment is less clearly defined than in current qualification policy, the legal forms list may offer more practical certainty. Unfortunately, the explanatory notes to the decree do not make clear which hallmarks play an important or decisive role in the qualification. This may give rise to uncertainty when assessing foreign legal forms that do not appear on the legal forms list.

The consultation closes on March 18, 2024. For the sake of completeness we would like to stress that this concerns a draft decree, which may therefore still change.

Finally, we would like to point out the importance of assessing in good time whether this legislative amendment and the accompanying decree will result in your tax position or that of your organization changing as of January 1, 2025. Feel free to contact us if you'd like to know more about the new qualification policy or its implications.

KPMG Meijburg & Co
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