

## **New tax qualification policy: Decree on the Comparison of Foreign Legal Forms published**

As of January 1, 2025 the new qualification policy for foreign legal forms will take effect in the Netherlands. The final Decree on the Comparison of Foreign Legal Forms was recently published, as well as several policy statements containing approvals with regard to transitional rules. This memorandum provides an overview of the latest state of affairs.

### **Basic assumptions of new qualification policy**

The new qualification policy essentially consists of the following five components:

1. the discontinuation of the open limited partnership (*open commanditaire vennootschap*; 'open CV');
2. changes to the definition of mutual fund (*fonds voor gemene rekening*; FGR);
3. the enshrinement in law of the legal form comparison method;
4. a new Decree on the Comparison of Foreign Legal Forms (the 'Decree');
5. the introduction of a fixed and symmetrical qualification method for non-comparable legal forms.

Below we briefly address the various components.

#### *1. The discontinuation of the open limited partnership*

As of January 1, 2025 the 'open CV' will be discontinued. Consequently, each CV will in principle be regarded as tax transparent for the purposes of levying corporate income tax, personal income tax, dividend tax and the conditional withholding tax. This change will also affect foreign legal forms that are comparable to the Dutch CV, such as the German GmbH & Co KG). All partners of an open CV (or CV-like entity) – both general and limited – will therefore as of January 1, 2025 in principle be taxed directly on their entitlement in the assets, liabilities, income, expenses and the costs of the CV. On the other hand, the general rule that a CV is transparent for tax purposes will be subject to an exception if the CV qualifies as an FGR or as a reverse hybrid entity. In those cases, the CV (or CV-like entity) will be treated as non-transparent for tax purposes.

The discontinuation of the qualification as an independently taxable 'open CV' will in principle be accompanied by an immediate final tax settlement. In order to avoid this, transitional rules have been provided for (see below under 'Transitional rules').

#### *2. Changes to the mutual fund (FGR)*

As of January 1, 2025 the definition of an FGR will change. Unlike for the open CV, the concept of an independently taxable FGR will therefore continue to exist. The change in definition may mean that certain funds will no longer qualify as an FGR. Or conversely, that certain transparent funds will now qualify as a non-transparent FGR. As of January 1, 2025 there will, as a rule, be an FGR if an entity or any other legal construct:

- invests in a tax sense (normal asset management);
- invests for and on account of multiple investors;
- qualifies as an investment fund or a fund for the collective investment in transferable securities as referred to in Section 1:1 of the Financial Supervision Act or the UCITS Directive or the AIFM Directive, including funds that fall under

- Section 1:13a Financial Supervision Act or Section 2:66a Financial Supervision Act ('light regime'); and
- there are negotiable mutual fund investment certificates.

The latter condition that the mutual fund investment certificates are negotiable means that the certificates may (also) be sold to third parties. Negotiability is not present if the sale can *only* be to the FGR; a 'repurchase fund'. The consent requirement that may still lead to non-negotiability under the current definition, will be canceled.

Subject to conditions, investment funds have until the end of 2025 to restructure to a repurchase fund in order to retain their tax transparency (see also our detailed [memorandum of November 7, 2024](#)).

The change in definition may mean that as of 2025 a fund will no longer qualify as an independently taxable FGR. This will in principle be accompanied by an immediate tax settlement. Transitional rules have been provided for in this respect (see below under 'Transitional rules').

### *3. The enshrinement in law of the legal form comparison method*

For the purposes of Dutch tax, the qualification of foreign legal forms currently takes place on the basis of criteria laid down in case law and on the basis of the legal form comparison method laid down in a qualification decree. The Legal Forms Tax Qualification Policy Act will enshrine the principle of legal form comparison in law. The manner in which the legal form comparison must be made has not been determined in the legislation but is elaborated on in the Decree on the Comparison of Foreign Legal Forms.

If a foreign legal form is comparable to a Dutch legal form, then the qualification of the Dutch legal form will be followed. In the case of non-comparability, the fixed method or the symmetrical method applies (see under 5 below).

### *4. Decree on the Comparison of Foreign Legal Forms*

On November 13, 2024 the [Decree on the Comparison of Foreign Legal Forms](#) was published. The Decree further elaborates on the legal form comparison method. In short, there is comparability if the legal form is comparable to a Dutch legal form in *nature* and *structure*. The Decree contains hallmarks in order to analyze whether a foreign-law legal form is comparable to a Dutch legal form in terms of *structure*. The *nature* of a foreign legal form is determined by looking at the place the particular legal form occupies in foreign law and what the foreign legislator intended with that legal form. The nature and structure analysis will lead to a qualification. That qualification may be:

- comparable to a Dutch legal form (i.e. a private limited liability company 'BV' or a limited partnership 'CV');
- not comparable to a Dutch legal form, or comparable to more than one Dutch legal form ('non-comparable legal form').

For certain legal forms an analysis has already been made. These legal forms are included in the Legal Forms list contained in the Appendix to the Decree. The legal forms appearing in that list are *presumed* to be comparable or not comparable with a Dutch legal form. The Legal Forms list is indicative. According to the explanatory notes, it is possible to deviate from the list, provided this is convincingly demonstrated on the basis of the frameworks given in the Decree. The specific facts and circumstances of an individual case may also give cause for another qualification than those appearing in the Legal Forms list.

#### *Precedence rule*

It is worth noting that a qualification as FGR or transparent fund – and the associated qualification for tax purposes as non-transparent or transparent – will *always* take precedence over another comparability qualification (precedence rule). A transparent fund is a fund for the purposes of obtaining benefits for the unitholders through investing for joint account or otherwise using the funds, unless that fund is an FGR.

#### *5. Fixed and symmetrical qualification method for non-comparable legal forms*

For foreign-law entities that are not comparable to a Dutch legal form in terms of nature and structure and are not an FGR or transparent fund, either the fixed or the symmetrical qualification method applies, depending on the answer to the question whether the entity is established.

1. If a non-comparable entity is established in the Netherlands, then it is by definition non-transparent (*fixed method*).
2. If a non-comparable entity is not established in the Netherlands, then it is non-transparent if that entity under or pursuant to the laws of a state is regarded as an independently taxable tax resident there. If not, then the entity will be regarded as transparent for tax purposes (*symmetrical or 'follow method'*)

#### **Transitional rules**

The discontinuation of the independently taxable status of the open CV – and in some cases of a fund (because it no longer qualifies as an FGR) – may lead to the levying of corporate income tax at the level of the open CV or the FGR, and to the levying of personal income tax/corporate income tax at the level of the participants in that open CV or FGR. In order to avoid immediate taxation as much as possible, transitional rules have been provided for the year 2024. The transitional rules essentially contain three types of facilities: (i) a transfer facility for the tax claim on the untaxed gains and reserves, the tax reserves and the goodwill present in the open CV or the FGR, (ii) a share merger for certain participants and unitholders, (iii) payment in installments over no more than ten years.

In some cases the transfer facility can only be applied upon request, for example if there is a right to a loss set-off, whereby the tax inspector may stipulate (standard) conditions ([Policy Statement on transfer facility discontinuation open CV](#) and [Policy Statement transfer facility end of taxpayer status FGR](#)).

*Further approvals and concessions*

For facilities (i) and (ii), it is in principle necessary for the particular open CV and the FGR to continue to exist until year-end 2024. Liquidating or winding up the open CV or FGR earlier than year-end 2024 will therefore in principle lead to immediate taxation. The Dutch tax authorities will only make a few exceptions to this via approvals and subject to conditions, if:

1. as a result of a share merger the FGR only has one unitholder and thus no longer qualifies as an FGR with taxpayer status (see [section 5A of this Policy Statement](#));
2. the limited partners in an open CV transfer their limited interest to the general partner via a share merger and as a result of this the CV ceases to exist (Approval announced, see [this Knowledge Group position](#)).

Lastly, [approval policy was recently published](#) providing for situations whereby depositary receipts are issued for the interests in an open CV via a trust office (in Dutch: a STAK), and for which the above share merger facility is applied. If depositary receipts for the interest are issued or withdrawn before or after the share merger, this may lead to real estate transfer tax being levied. The policy statement offers a concession for this that is subject to conditions.

If you would like to know more about this matter, feel free to contact us or your usual Meijburg tax advisor.

KPMG Meijburg & Co  
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