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Qualification of investment funds as of January 1, 2025: more clarity as a result of Funds Decree and Knowledge Group position of Dutch tax authorities

A Dutch tax authorities' Knowledge Group position on the German Sondervermögen and the Funds Decree were published on December 4 and 6, 2024 respectively.

The Funds Decree contains the policy on mutual funds effective as of January 1, 2025. As of that date new rules will apply. Many investment funds that are now non-transparent will become transparent in the new year. But the opposite may also be the case. Domestic real estate investment funds may also become subject to corporate income tax. A change in qualification may have far-reaching consequences for the taxation and compliance obligations of investment funds and their unitholders.

The Knowledge Group position means that as of January 1, 2025 German Sondervermögen will in principle all be regarded as non-transparent for Dutch tax purposes. Under current law, German Sondervermögen with only one unitholder are regarded as tax transparent, as a result of which the structure is 'looked through' to the underlying participant. If that entity is an exempt entity (for example an exempt government body or qualifying pension fund), then it will not be subject to corporate income tax in the Netherlands or it will be entitled to a dividend tax refund if it invests in Dutch shares. According to the Knowledge Group position, this will therefore change as of January 1, 2025. A reservation is made for Sondervermögen that have taken advantage of the 'Transparenzoption', under which the income of the fund is not taxed at the fund but at its unitholders. The Knowledge Group position does not however make clear whether this option will (automatically) mean that these funds are transparent for Dutch tax purposes. If a further review indicates that using the Transparenzoption (§30(1) of the Investmentsteuergesetz) affects Dutch taxation of the Sondervermögen in question, the Dutch tax authorities' Knowledge Group will address that in a separate position.

In this memorandum we discuss current developments in the qualification of the fund. For more information about this we refer to our memorandums of November 7 and November 22, 2024. We do not address the changes for fiscal investment institutions.

1. Legal framework as of January 1, 2025

On January 1, 2025 the following changes will take effect:

1. The open limited partnership (*open commanditaire vennootschap*; 'open CV') will be discontinued.
2. The definition of mutual fund (*fonds voor gemene rekening*; FGR) will change.
3. The legal form comparison method will be enshrined in law and will be elaborated on in a general Administrative Order (*Algemene Maatregel van Bestuur*). Comparable foreign legal forms will be treated the same as their Dutch counterpart. With regard to non-comparable legal forms, in foreign situations the foreign qualification will be followed (the symmetrical method) and in Dutch situations these legal forms will always be subject to corporate income tax (the fixed method).

Re 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. This applies to both CV-like entities that are current transparent for tax purposes and to CV-like entities that are non-transparent. All Dutch and foreign legal concepts that meet the new definition of open mutual fund will therefore in principle be subject to corporate income tax. The Funds Decree elaborates on when there is an (open) mutual fund.

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 our memorandum of November 22, 2024). In the opposite situation, if a transparent CV-like entity becomes independently taxable as of January 1, 2025, this will also result in taxation at the unitholders. There are no transitional rules for these situations.

Re 2. Changes to the definition of mutual fund

As of January 1, 2025 the definition of a mutual fund (*fonds voor gemene rekening*; FGR) will change. 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 generally be a FGR if:

- there is a fund;
- there is investment or funds are otherwise used for and on behalf of multiple investors;
- a fund 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');
- there are negotiable mutual fund investment certificates.

The above elements are elaborated on in the Funds Decree, see below.

The 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, i.e. 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 our memorandum of November 22, 2024). No transitional rules have been provided for the opposite situation,

Re 3. The enshrinement in law of the legal form comparison method, the symmetrical method and the fixed 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 or symmetrical method applies.

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.

2. A closer look at the Funds Decree

The Funds Decree, which will apply as of 2025 (when the new qualification will also take effect), explains the aforementioned elements as follows.

Fund

A mutual fund (*fonds voor gemene rekening*) and a transparent fund are not civil-law legal forms. Both terms stand for a contractual partnership where there is usually an independent custodian and an independent manager. In addition to a legal personality, the manager of an FGR also has a license from the Netherlands Authority for the Financial Markets (AFM) or is exempt from that requirement. The use of the word 'fund' means that there are separated assets.

Obtaining benefits for multiple unitholders

For both an FGR and a transparent fund there must be benefits that are obtained for the unitholders through investment for joint account or otherwise using the funds. These

investment benefits arise from the assets of two or more unitholders that, with one (or more) common investment objective(s), have actually been pooled. This objective must concern benefits that are realized through investment. Solely realizing tax benefits is not an investment objective. The terms 'mutual' (Corporate Income Tax Act) and 'collective' in collective investment (Financial Supervision Act) are, in this respect, synonyms and mean that there must be more than one unitholder. A German Sondervermögen with multiple unitholders meets this requirement. A fund with only one unitholder cannot be regarded as an FGR or a transparent fund. On December 4, 2024 the Dutch tax authorities' Knowledge Group announced that a German Sondervermögen with only one unitholder is however a fund – read: separated assets – but is not comparable to a Dutch legal form and therefore qualifies as non-transparent via the symmetrical method. Whether this is tenable under EU law is debatable.

Investment or otherwise using the funds

The term 'investment' is explained in legal tax terms. With regard to the question whether there is investment, and thus not entrepreneurship, the criteria developed in case law for this are used. The phrase 'otherwise using the funds' is only for elaborating on the term 'investment'. This phrase does not mean that the activities of an FGR or a transparent fund may constitute a business with substance.

Investment fund or fund for the collective investment in transferable securities as referred to in Section 1:1 Financial Supervision Act

An important condition that as of January 1, 2025 will be included in the definition of FGR, is that the fund must be regarded as an investment fund or fund for the collective investment in transferable securities as referred to in Section 1:1 Financial Supervision Act (or in comparable foreign regulatory rules). The definitions of those funds follow from implemented EU directives. Of relevance for assessing whether a legal form incorporated or entered into under the laws of an EU Member State meet this criterion, is the implementation of those directives in the laws of the relevant Member States. In any case, an investment fund does not have a legal personality.

Negotiable mutual fund investment certificates

The negotiability of mutual fund investment certificates has already been incorporated into the aforementioned definitions in the Financial Supervision Act. Mutual fund investment certificates must be able to be sold (for example to third parties, group companies or to blood relatives or relatives by marriage). In a transfer of mutual fund investment certificates under universal or singular title pursuant to inheritance law, there is no sale in the aforementioned sense. On the other hand, other transfers pursuant to universal or singular title do qualify as a 'sale'.

If the mutual fund investment certificates can only be sold to the fund (the repurchase fund), the certificates are regarded as non-negotiable. The fund conditions must show that a (conditional) repurchase right of the unitholder applies. Even if the fund holds the mutual fund investment certificates in a portfolio after the (re-)purchase in order to subsequently re-issue the certificates, there are still non-negotiable certificates and the fund is not an FGR. That is also the case if the unitholder sells their mutual fund

investment certificate back to the fund, while the fund immediately re-issues that certificate to a third party designated by the unitholder. Subject to conditions, secondary trading is also possible within a repurchase option.

KPMG Meijburg & Co comments

The new qualification rules and the changed definition of mutual fund may result in investment funds being given a different qualification as of January 1, 2025. That applies to both domestic and foreign investment funds. A different qualification also means that the return on investment will be taxed differently, creates other compliance obligations (for example the practical scheme for filing tax returns for foreign transparent investment funds will no longer apply) and may lead to tax having to be paid at the investment fund or at the unitholders.

It is nice that the policy was made public before the end of the year. But nevertheless: it doesn't leave much time to analyze the consequences for investment funds and their unitholders and to take appropriate measures. The consequences can be far-reaching, certainly if there are no transitional rules, such as for transparent investment funds that will become non-transparent.

Finally, it is worth noting that while the decree does indeed address the requirement of Section 1:1 Financial Supervision Act, it does not address situations where a fund is established outside the EU and does not fall under the Financial Supervision Act (or comparable AIFM or UCITS regulatory legislation).

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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