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The new Dutch entity tax classification rules: what will change as per 2025?

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Edition 161

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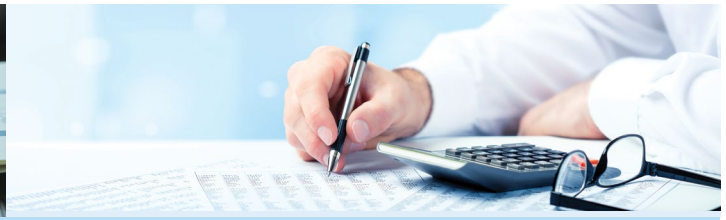

In this edition

The new Dutch entity tax classification rules: what will change as per 2025?

1. Highlights

As from 2025, all Dutch partnerships will be classified as transparent for Dutch tax purposes.[1] This includes existing non-transparent Dutch limited partnerships (CVs), which will cease to be Dutch corporate taxpayers immediately preceding 1 January 2025, due to the transition into a tax transparent classification.

In addition, the tax classification rules applicable to Dutch funds for joint account (FGR) are amended as of 1 January 2025. In short, an FGR may only be non-transparent, if it is: (i) regulated and (ii) the participations in the FGR are freely tradeable. In case the participations in an FGR can solely be repurchased by the FGR itself, the participations would be deemed to be non-tradeable and thus such FGR will be classified tax transparent, even when it is regulated.

The Dutch tax entity classification rules for entities formed under foreign law will also change. As a starting point, they will still be classified in accordance with the classification of an equivalent entity governed by Dutch law (the similarity approach). However, and this is new, if no clear Dutch equivalent entity can be identified, the classification for foreign tax purposes would generally be followed also for Dutch tax purposes, if the foreign entity is based outside the Netherlands (the symmetrical approach). Foreign entities with no clear Dutch equivalent that are based in the Netherlands will always be classified as non-transparent for Dutch tax purposes and will thus be Dutch domestic taxpayers.

The new entity tax classification rules could result in tax being due (dry tax charge) as a result of the transition from a non-transparent to a tax transparent classification. Therefore, subject to meeting certain conditions, during 2024 transitional law provides for several facilities to mitigate this exposure (e.g., roll-over facilities) for both the entities concerned as well as their participants.

2. Introduction

This edition of Quoted is dedicated to: (i) the Dutch tax act on the classification[2] of Dutch and foreign entities[3] (*Wet Fiscaal kwalificatiebeleid rechtsvormen*; hereinafter: **Tax classification Act**) and (ii) the Act on the amendment of the funds for joint account (*fonds voor gemene rekening*; hereinafter: **FGR**) and exempt investment institution (*vrijgestelde beleggingsinstelling*; hereinafter: **VBI**)[4] (*Wet aanpassing fonds voor gemene*

1 The tax classification rules for Dutch value added tax and real estate transfer tax (hereinafter: **RETT**) purposes are not addressed in this edition of the Quoted.

2 Both the term 'qualification' and 'classification' are used when it comes to classifying partnerships as tax transparent or non-transparent. In the rest of this contribution, we will use the term 'classification'.

3 Bulletin of Acts and Decrees (*Staatsblad*; hereinafter: ***Stb.***) 2023, 508.

4 The VBI will not be addressed in this edition of Quoted.

rekening en vrijgestelde beleggingsinstelling; hereinafter: **FGR Act** and jointly with the Tax classification Act referred to as the **Acts**).[5] In essence, both Acts provide new tax classification rules (including transitional law) for the Dutch limited partnership (hereinafter: **CV**), the FGR and foreign entities.[6]

According to the Explanatory Memorandum (*Memorie van Toelichting*; hereinafter: **MvT**) to the Tax classification Act, two bottlenecks underlie the introduction of the new classification rules.[7] On the one hand, the 'consent requirement' for the CV and the FGR (see paragraph 3.1, respectively paragraph 3.2) leads to hybrid mismatches in international structures. On the other hand, the current 'similarity approach' (see paragraph 3.3) as a classification method for foreign entities is not always adequate. Furthermore, amending the definition of the FGR (and VBI) aims to bring the use of the FGR (and VBI) more in line with the intended purpose and should prevent unintended use.[8] The amended classification rules will become effective as from 1 January 2025 with transitional law already having taken effect as from 1 January 2024.

Before outlining the new classification rules and transitional law in paragraph 4, paragraph 3 will provide a brief overview of the current entity tax classification rules, where the focus will also be on the bottlenecks that the new rules aim to resolve. Finally, some concluding remarks will be included in paragraph 5.

3. The tax classification rules for entities up to 2025

3.1 The CV

Currently, Dutch tax legislation recognises both an 'open' (non-transparent) and a 'closed' (transparent) CV. The open CV is defined as: '*the CV in which, outside the case of inheritance or bequest, admission or substitution of the limited partners may take place without the consent of all partners, both general as well as limited partners*'.[9] The decisive factor to determine the tax classification of a CV is thus whether the consent of all partners is required for the admission or substitution of the limited partners, the so-called '**Consent Requirement**'.

The open CV is subjectively liable to corporate income tax (hereinafter: **CIT**), dividend withholding tax (hereinafter: **DWT**) and conditional withholding tax (hereinafter: **CWT**) for the part attributable to the limited partners. For the part attributable to the general partner, the CV is always tax transparent and, as such, falls outside the scope of the CIT, DWT and CWT meaning that the results of the open CV are directly attributed to the general partner.[10] In contrast, the closed CV is tax transparent and as such not subject to CIT/DWT/CWT, which means that the results of the closed CV are attributed directly to both the general and limited partners.

Further clarification of the Consent Requirement has been provided by the State Secretary of Finance in his Decree of 15 December 2015, BLKB2015/1209M,[11] which includes among others some relaxations on how to apply the Consent Requirement in practice.

5 Stb. 2023, 523.
6 An entity that is incorporated or entered into under the laws of another state.
7 *Parliamentary Papers II* (hereinafter: **Kamerstukken II**) 2023/24, 36425, nr. 3 (MvT), p. 2-4.
8 *Kamerstukken II* 2023/24, 36423, nr. 3 (MvT), p. 1-2.
9 Art. 2(3) General Tax Act (*Algemene Wet inzake Rijksbelastingen*; hereinafter: **AWR**).
10 Dutch Supreme Court (*Hoge Raad*; hereinafter: **HR**) 7 July 1982, ECLI:NL:HR:1982:AW9546, *BNB 1982/268*, and see also art. 9(1)(e) Corporate Income Tax Act 1969 (hereinafter: **CIT Act**).
11 Government Gazette (*Staatscourant*; hereinafter: ***Stcrt.***) 2015, 46508.

3.2 The FGR

Similar to the CV, Dutch tax legislation recognizes an 'open' (non-transparent) and a 'closed' (transparent) FGR.[12] The open FGR is defined as: '*a fund for the purpose of obtaining benefits for the participants by investing or otherwise utilising money for joint account, provided that the participation in the fund becomes apparent by treadable certificates of participation* (hereinafter: **Participations**). *The Participations shall be considered tradeable in case the transfer does not require the consent of all the participants, provided that whenever the transfer can only be made to the fund for joint account or to relatives by blood or marriage in the direct line, the Participations shall not be considered tradeable*'.[13] The open FGR is subjectively liable to CIT, DWT and CWT.

The Decree of 11 January 2007, CPP2006/1870M[14], further clarifies that an FGR is closed if:

i. the Participations can only be transferred with the unanimous consent of all participants (hereinafter: **Consent Alternative**); or[15]
ii. the Participations can only be transferred to the FGR itself (or to relatives by blood or marriage in the direct line of the participant) (hereinafter: **Buy-Back Alternative**).

The FGR therefore has more flexible tax transparency requirements compared to the CV, which in principle makes it easier to establish and maintain the FGR as tax transparent. After all, in addition to the Consent Alternative (which is similar to the Consent Requirement of the CV), there is the Buy-Back Alternative in which the Participations in the closed FGR can be traded without the consent of all participants being required.[16] This is effectuated by way of a repurchase of Participations followed by a (re)issuance of Participations to joining participant(s). In practice, the Buy-Back Alternative is often preferred because it does not require the involvement of other participants in transfers of Participations in the FGR and therefore, in our experience, most closed FGRs use this option.

The current tax classification rules for the CV and FGR can thus be summarised as follows:

Current rules	Tax transparent	Tax non-transparent
CV	**Consent Requirement** The accession or substitution of a limited partner requires unanimous consent of all (general and limited) partners	All other cases
FGR	**Consent Alternative** The accession or substitution of a participant requires unanimous consent of all other participants or **Buy-Back Alternative** The FGR Participations can only be transferred to the FGR itself or to relatives by blood or marriage in the direct line	All other cases

12 Even though the terms 'open' and 'closed' do not literally follow from Dutch tax law in the context of an FGR.
13 Art. 2(4) CIT Act.
14 *Stcrt.* 2007, 15, p. 8 and amended by decision of 15 December 2015, *Stcrt*. 2015, 46505.
15 Please note that the Dutch tax authorities take the position that these alternatives cannot be combined.
16 Unlike the CV, on the other hand, an FGR may only passively invest (*beleggen*). Furthermore, there are of course non-tax reasons for choosing either an FGR or CV.

3.3 Classification of foreign entities

Until the end of 2024, based on case law[17] and the so called '**Classification Decree**'[18], foreign entities are in principle classified on the basis of the so-called 'similarity approach' (*rechtsvormvergelijkingsmethode*). In short, this means that based on the characteristics of the foreign entity, as they follow from the articles of association or the partnership agreement and foreign company law, corporate resemblance of the foreign entity is sought with a Dutch equivalent. Based on the equivalent found, the classification as transparent or non-transparent for Dutch tax purposes is followed. However, the similarity approach does not always suffice, as there are various foreign entities that do not have a Dutch equivalent. Furthermore, the Classification Decree does not provide classification rules for foreign entities that are similar to an association, foundation, FGR, trust and other special-purpose funds (*doelvermogens*).

Within the assessment framework of the Classification Decree, the Consent Requirement of the CV plays an important role. A foreign entity equivalent to a Dutch partnership will only be classified as tax transparent if the Consent Requirement is met. Therefore, the Consent Requirement also affects the Dutch tax classification of foreign entities.

The Dutch method of classifying entities as tax transparent or non-transparent based on the Consent Requirement is rather unique in the world. As a result, foreign entities that are tax transparent in their country of establishment are often classified as non-transparent from a Dutch tax perspective, as foreign entities almost never meet the Consent Requirement (creating a hybrid mismatch). Examples are an Anglo-Saxon limited partnership or the Luxembourg *Société en Commandite Spéciale* (SCSp). These entities are usually tax transparent from their domestic tax perspective but are classified as non-transparent from a Dutch tax perspective due to the Consent Requirement not being included in the fund agreement. The embedding of the Consent Requirement in the Classification Decree therefore creates hybrid mismatches in an international context, the consequences of which are in turn countered by anti-abuse measures implemented in the relevant Dutch tax laws.[19]

4. The new tax classification rules for entities per 2025

As noted, the new entity tax classification rules aim to address some bottlenecks in the current classification rules for (domestic and foreign) entities and to bring the classification rules more in line with international standards (mainly to avoid hybrid mismatches). This paragraph discusses the (main) changes that follow from both Acts:

4.1 Changes in the tax classification rules for the CV & FGR

4.1.1 Abolishment of the open CV and the Consent Requirement

The open CV will be abolished as from 1 January 2025. The Consent Requirement will therefore no longer be relevant and all open CVs will shift from a non-transparent to a transparent tax classification as from 1 January 2025 onwards. To mitigate the effect of this transition resulting in a dry tax event, transitional law applies in certain situations (see paragraph 4.1.3).

17 See, among others, Supreme Court 2 June 2006, ECLI:NL:HR:2006:AX2034; Supreme Court 1 April 2005, ECLI:NL:HR:2005:AE6419.

18 Decree of the State Secretary for Finance of 11 December 2009 (*Stcrt*, 2009, 19749).

19 See, among others, the Dutch implementation of ATAD 2 (Art. 2(12) CIT Act and part 2.2a CIT Act). Furthermore, anti-hybrid mismatch rules are also included in the Dividend Withholding Tax Act 1965 (Art. 4(9) and (10) Dividend Withholding Tax Act 1965) (Wet op de dividendbelasting 1965; hereinafter: **DWT Act**) and the Withholding Tax Act 2021 (Art. 2.1(1)(d) and (e) Withholding Tax Act 2021) (Wet Bronbelasting 2021; hereinafter: **CWT Act**)). In this context, paragraph 4.4 discusses the transitional rules for the application of the anti-hybrid mismatch rules for dividends in the CWT Act.

In conjunction with the abolishment of the Consent Requirement, other Dutch partnerships which, based on case law,[20] are considered similar to a company whose capital is wholly or partly divided into shares and thus classified as non-transparent for tax purposes will also become tax transparent.[21] Therefore, all domestic partnerships and equivalent foreign partnerships will now classify as tax transparent, even when their 'shares' are tradeable, except when the respective partnership would qualify as a non-transparent FGR[22] (see paragraph 4.1.2).

In short, from 1 January 2025, in principle all partnerships including the CV will classify as tax transparent. This finally fulfils a long-stated wish of practitioners and the market.

4.1.2 Amended FGR tax classification rules

Similar to the CV, the Consent Requirement (i.e., the Consent Alternative) is no longer relevant for the FGR. However, unlike as is the case for the CV, a tax transparent and non-transparent FGR can still be distinguished in 2025 and thereafter.[23]

To bring the actual use of the FGR more in line with its purpose, the definition of the non-transparent FGR will be amended. In short, an FGR will only be classified as non-transparent for tax purposes if: (i) it qualifies as 'investment fund' or 'fund for collective investment in tradeable securities (i.e., the so-called UCITS)' within the meaning of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*; hereinafter: **Wft**) and (ii) the Participations are tradeable.[24] Regulated funds may therefore still classify as tax transparent if the Participations can only be transferred to the fund itself (hereinafter: **New Buy-Back Alternative**).[25]

The new tax classification rules for the CV and FGR can thus be summarised as follows:

New rules	Tax transparent	Tax non-transparent
CV	All cases	-
FGR	FGR is **not regulated** under the Wft or In the case that the FGR is **regulated** and Participations are tradeable solely by way of **redemption**	FGR is **regulated** under the Wft and the Participations are **tradeable in another way than solely by way of redemption**

20 Supreme Court 24 November 1976, ECLI:NL:HR:1976:AX3276, *BNB 1978/13*.

21 In this context, the phrase 'and other companies whose capital is wholly or partly divided into shares' in the CIT Act, DWT Act and CWT Act will also be removed. Based on this phrase, partnerships, which are materially deemed to have a capital divided into shares based on the case law mentioned in footnote 20 and therefore are similar to capital companies such as a BV or NV, qualify as subjective taxpayers for CIT and DWT. *Kamerstukken II 2023/24*, 36425, no. 3 (MvT), p. 9. In addition, the codification of the similarity approach also removes the need for this phrase to regulate the subjective tax liability for CIT and DWT in the appropriate cases for foreign entities whose entity corresponds to an NV or BV (see further 4.2). *Kamerstukken II* 2023/24, 36425, no. 3 (MvT), p. 9.

22 It can be derived from the MvT that a partnership can qualify as FGR. In such case, the classification as FGR prevails.

23 The reason for this is to treat investment companies incorporated as a public limited company (*Naamloze vennootschap*; hereinafter: **NV**) and 'open investment funds' in the form of a non-transparent FGR equally, as open investment funds have the same economic function. Therefore, the FGR as non-transparent entity will not cease to exist. *Kamerstukken II* 2023/24, 36 423, nr. 3 (MvT) p. 4.

24 If the participants can only transfer their Participations to the FGR, the Participations are not considered tradeable.

25 The rationale behind these changes is that: (i) family funds can *de facto* no longer be structured as open FGRs and (ii) the definition is more in line with its originally intended purpose. In this context, the New Buy-Back Alternative also removes the possibility of transferring participations in the FGR to relatives by blood or by marriage in the direct line, which was possible under the current Buy-Back Alternative.

4.1.3 Transitional law during 2024

Transitional law applies during 2024 to all partnerships and FGRs that become tax transparent as of 2025 by means of the two Acts. We will discuss the open CV hereafter. The transitional law applies *mutatis mutandis* to the other entities (unless indicated otherwise).

From a civil law perspective, the shift in tax classification from non-transparent to transparent has no effect. The Tax classification Act therefore arranges that for tax purposes (by fiction), the open CV (insofar subject to CIT as a domestic or foreign taxpayer): (i) is deemed to have transferred its assets to its partners at fair market value at the moment in time immediately preceding 1 January 2025 and (ii) at the same time has ceased to enjoy taxable profits in the Netherlands, thus resulting in a final settlement for CIT purposes.[26] In addition, the limited partners are for CIT and personal income tax (herinafter: **PIT**) deemed to have disposed of their participation in and claims on that open CV at fair market value.[27] In addition, as a result of the abolishment of the open CV as of 1 January 2025, CVs will no longer be taxable persons for DWT and CWT purposes.[28] For (the part attributable to) the general partner, nothing will change. For that part, the open CV is currently already classified as tax transparent and will remain to be classified as such under the new rules. Furthermore, no final settlement takes place in case the open CV as of 1 January 2025 qualifies as a 'reverse hybrid' entity within the meaning of the CIT Act.[29] After all, reverse hybrids will continue to qualify as taxpayer for CIT purposes[30] and in such case the CV will thus remain subject to CIT when the new classification rules become effective.

The abolishment of the open CV (and the open (foreign) partnership in general) may in an international context result in additional tax compliance obligations. Reason being that the abolishment could result in a shift of the Dutch tax liability from the non-transparent (foreign) partnership to the (possibly large number of) foreign (limited) partners.[31] To reduce the administrative burden in such situations, the tax inspector, may (subject to meeting certain conditions) be allowed to formalize the tax liability in an efficient manner (e.g., by imposing a tax assessment at the level of the partnership).[32] Considering its practical importance, this option would however in our view preferably have been laid down in a statutory provision or decree and not left to the discretion of the tax inspector.

The abolishment of the open CV and the corresponding transitional law thus results in a (deemed) taxable event at both the level of the open CV and (potentially) at the level of the limited partners in the open CV.

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26 Art. IX(1) Tax classification Act, see also: *Kamerstukken II* 2023/24, 36425, nr. 3 (MvT), p. 14.

27 Art. IX(2) Tax classification Act, see also: *Kamerstukken II* 2023/24, 36425, nr. 3 (MvT), p. 15.

28 In this context, compared to the initial Tax classification Act of 2021 (**Consultation draft**), it has been clarified that the end of the withholding obligation does not result in a taxable event for DWT and CWT purposes, and that the (deemed) transfer of the assets of the open CV as a result of it becoming tax transparent does in general also not have any implications for the DWT and CWT Act. We assume this also applies to other non-transparent (open) partnerships and to non-transparent FGRs that become transparent as a result of the FGR Act, although this is not further explained in either of the Acts.

29 See art. 2(12) CIT Act.

30 See art. 2(3) CIT Act.

31 By way of example, a non-transparent foreign limited partnership with non-Dutch corporate partners that holds Dutch real estate is subject to Dutch CIT, whereas as from 1 January 2025, the Dutch real estate would be taxable in the hands of the non-Dutch corporate partners (assuming no exemption applies at the level of the non-Dutch partners) therefore shifting the CIT liability and compliance obligations to the partners individually.

32 See art. 64 AWR. *Kamerstukken II* 2023/24, 36425, nr. 3 (MvT), p. 26.

To among others avoid a 'dry tax' charge due to the changed classification rules, in certain cases, the transitional law provides for the following facilities (only) during 2024:

1. A roll-over facility;
2. A share-for-share merger facility;
3. A roll-over facility for miscellanious income; and
4. A deferred payment obligation.

These facilities are discussed successively in the following paragraphs. Under the current interpretation and guidance, only Dutch and foreign equivalent entities can make use of the transitional law as opposed to foreign non-equivalent entities which cannot make use thereof.

4.1.3.1 The roll-over facility in the CIT (for the open CV itself)

Based on the CIT roll-over facility,[33] it is possible to roll-over the tax claim on the hidden reserves, tax reserves and goodwill embedded in the assets and liabilities of the open CV to the limited partners, thereby preventing immediate taxation on a deemed disposal gain at the level of the open CV. To benefit from this facility, it is required that *all* limited partners are subject to CIT as taxpayers at the moment in time immediately preceding 1 January 2025, or become subject to CIT as of that time due to the new rules.[34]

As a result of applying the roll-over facility, the tax book values of the assets of the open CV are for CIT purposes transferred / rolled-over (*pro rata*) to the respective limited partners. It is further noted that some helpful clarifications and approvals on the application of the roll-over facility can be derived from a specific Decree.[35] These include among others that: (i) the carry forward of any balance in net interest expenses under art. 15b CIT Act to the limited partners; and that (ii) the carry forward of losses under art. 20 CIT Act can be transferred to the limited partners.

As noted, it is also possible to use a roll-over facility in case foreign limited partners are or become subject to CIT as foreign taxpayers as a result of the legislative amendment. However, it is required that *all* limited partners (domestic and foreign) are effectively subject to or become subject to CIT in the Netherlands, without benefiting from a subjective CIT exemption. Therefore, the gain on the deemed disposal cannot be rolled-over if at least one of the limited partners is subjectively exempt from CIT or is not subject to CIT.

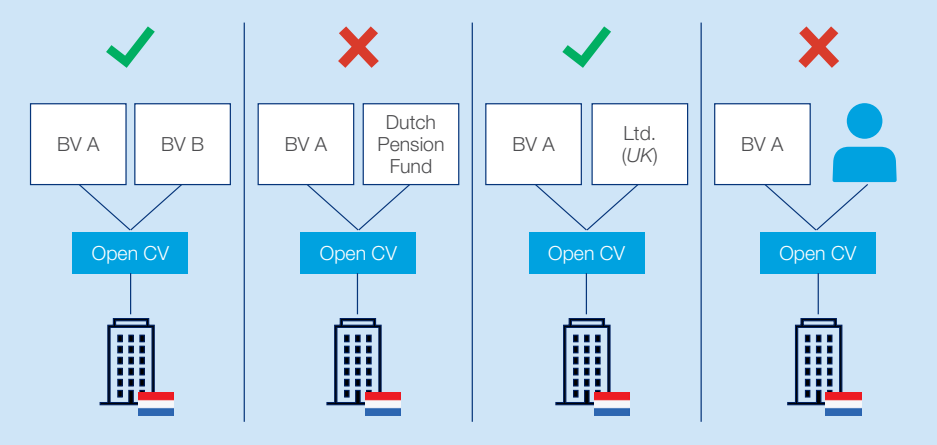
For example, if one of the limited partners in the open CV is a natural person, the roll-over facility cannot be used, because such individual in its nature cannot be subject to CIT (see below illustration). However, such limited partners could opt to first contribute their participation to a holding company (under circumstances applying the share-for-share merger facility discussed below) and subsequently make use of the roll-over facility (see paragraph 4.1.3.2).[36]

33 Art. X Tax classification Act.

34 It is further noted that some requirements that can be derived from the existing tax reorganisation facilities (art. 14 CIT Act and onwards) must also be met. Hence, with respect to the interpretation of these requirements, reference is made to the parliamentary history of these reorganisation facilities insofar the provisions correspond (*Kamerstukken II* 2023/24, 36425, nr. 3 (MvT), p. 84).

35 Decree of the State Secretary of Finance of 20 December 2023, No 2023-255883, Stcrt. 2023, 32435. The facility is also open to the partnership, the general partnership and similar entities that become transparent on the basis of the Tax classification Act. For the open FGR, a similar arrangement is included in the Decree of the State Secretary of Finance of 20 December 2023, no. 2023-255882, *Stcrt*. 2023, 32430.

36 *Kamerstukken II* 2023/24, 36425, nr. 3 (MvT), p. 17.



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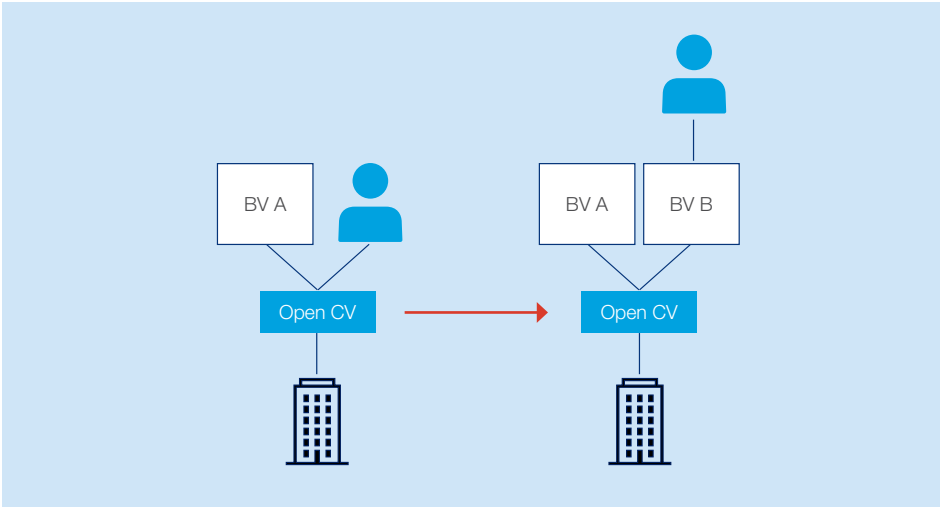
As follows from the above, an all-or-nothing approach applies, as it is not possible to apply the roll-over facility (on a pro-rata basis) for only part of the limited partners. This also means that unwilling limited partners could, in certain cases, frustrate the application of the roll-over facility for all other limited partners. Preferably, the roll-over facility should therefore in our view have applied for each limited partner individually, regardless of the position of other limited partners.

4.1.3.2 The share-for-share merger facility (for the limited partners)

CIT/PIT

The limited partners in an open CV are for PIT or CIT purposes (as the case may be) deemed to have disposed of their share in the open CV at fair market value at the moment in time immediately preceding 1 January 2025. Consequently, depending on the tax status of the limited partner, this results in a taxable event for CIT[38] and/or PIT (in Box 1 or Box 2) purposes. To avoid a dry tax event, the transitional law offers those taxpayers the possibility to apply a share-for-share merger facility during 2024.[39]

The share-for-share merger facility, in combination with the roll-over facility, can defer taxation in situations where, for example, a natural person directly participates as a limited partner in an open CV (see below illustration and paragraph 4.1.3.1).



37 The UK Ltd will become subject to Dutch CIT as a non-resident taxpayer.

38 For limited partners who are subject to CIT as taxpayers, the profits may be exempt by application of the participation exemption.

39 Art. XII Tax classification Act.

When applying the share-for-share merger facility, the participation in the open CV can be transferred to an existing or new holding company.[40] In short, no tax is due on the deemed disposal of the participation in the open CV, provided that the book value or acquisition price of the participation in the open CV is transferred to the (acquired) shares or profit-sharing certificates in the holding company to ensure that the tax claim that is present in the participation in the open CV is preserved.[41]

The share-for-share merger facility can be applied by each limited partner individually. Several limited partners can also contribute their participations into a joint holding company, for example to ensure that the holding company will hold a qualifying interest for the Dutch participation exemption.

Based on the legislative wording, there is uncertainty as to whether the share-for-share merger facility can also be applied by a Dutch taxpayer in relation to a participation in a foreign non-transparent limited partnership that is not subject to CIT (domestic or foreign Dutch CIT liability).[42] In our view, a participation in such a non-transparent limited partnership should also fall within the scope of the share-for-share merger facility, which has now also been confirmed in a recently published position by the Dutch tax authorities.[43]

Real estate transfer tax

In case Dutch real estate is held by the open CV, the share-for-share merger may result in a taxable event for Dutch RETT purposes. Reason being that: (i) the company into which the share in the open CV is transferred may acquire real estate from a RETT perspective, and/or (ii) may itself qualify as a so-called 'real estate entity' as a result of the share-for-share merger. In that latter case, the shares acquired by the contributor under the share-for-share merger facility are then deemed to qualify as immovable property and thus, in principle, Dutch RETT is due upon acquisition.

As part of the transitional law, an exemption from Dutch RETT applies to the share-for-share merger,[44] for which the following conditions apply:[45]

1. The contributor must acquire an interest in the assets of the open CV through the issued (or already held) shares in the holding entity, similar as he had immediately prior to the contribution; and
2. The contributor must retain the similar interest that is represented by the issued (or already held) shares in the holding entity for at least three years after the share-for-share merger (retention requirement). There are some exceptions to this retention requirement.

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40 This can be a Dutch tax resident holding company, but also a foreign tax resident holding company in the case of a Dutch tax resident limited partner.

41 *Kamerstukken II* 2023/24, 36425, nr. 3, p. 17 (MvT).

42 Art. XII(1) of the Tax classification Act refers to 'an open limited partnership referred to in section IX(1)' of the Tax classification Act, and section IX(1) states, 'which, as a result of this Act, with effect from 1 January 2025, is no longer subject to CIT under sections 2 or 3 of the CIT Act'.

43 KG:003:2024:8 *Overgangsrecht Wet fiscaal kwalificatiebeleid rechtsvormen met betrekking tot de open cv-achtige gevestigd in het buitenland en zonder Nederlands inkomen*.

44 Art. XV Tax classification Act.

45 *Kamerstukken II* 2023/24, 36425, nr. 3, p. 49 and 96 (MvT) and *Kamerstukken II* 2023/24, 36425, nr. 6, p. 8 (NV II). To prevent undesired use, the RETT exemption further requires that the open CV was established before publication of the Acts on 19 September 2023 at 15:15. Also, the exemption is not open to limited partners who joined a then-existing open CV after this time. Similar provisions are included in the FGR Act. The moment of establishment of the CV or FGR needs to be proven on the basis of reliable, objectively verifiable and externally verifiable data. In the case of a CV, this could be the moment of registration in the trade register of the Chamber of Commerce and, in the case of the FGR, the moment of receipt of the registration form by the tax authorities, but also, for example, a notarial deed.

4.1.3.3 The roll-over facility for miscellanious income (for the limited partners)

In case a limited partner (natural person) puts certain self-owned assets at the disposal of an open CV, there is so-called 'miscellanious income' (*terbeschikkingstelling*) within the meaning of art. 3.92 PIT Act, which is taxable at progressive rates in Box 1 of the PIT. The most common example is that of a limited partner (natural person) providing a loan to the open CV. The tax treatment of these situations will change as a result of the open CV becoming transparent, meaning that the assets that are treated as being placed at the disposal of the open CV (e.g. the loan) are deemed to have been disposed by that limited partner at fair market value. This is a taxable event.

In this context, the transtional rules offer a roll-over facility. This facility only applies to the extent the assets that were put at the disposal of the open CV contintue to be taxed in Box 1 of the PIT. This would generally only be the case if the open CV carries out a business enterprise in which the assets are used. In the aforementioned example of a loan being provided by the limited partner, roll-over would thus not be available. This is e.g. also the case if Dutch real estate was put at the disposal of the open CV, but the open CV does not carry on a business enterprise. In these examples, the transition from an open to a tax transparent CV thus gives rise to a dry tax event. The FGR Act does not provide for a corresponding facility as an FGR is not allowed to carry out a business enterprise in any event.

4.1.3.4 The deferred payment facility (for the open CV)

Finally, the transitional law offers a deferred payment facility that makes it possible to pay any tax liability that arises at the level of the open CV over a maximum period of ten years.[46] However, this can not be applied simultaneaously with the roll-over facility (paragraph 4.1.3.1).

In addition, the deferred payment is only allowed when sufficient security can be provided. This could include, for example, a bank guarantee or a right of mortgage.

It should be noted that the transitional law does not provide for a deferred payment obligation for the potential tax liability arising at the level of a limited partner. In our view, it is desirable to also extend the scope of the deferred payment obligation to the deemed disposal by a limited partner.

4.2 Codification and additional classification methods for (foreign) entities

4.2.1 Similarity approach

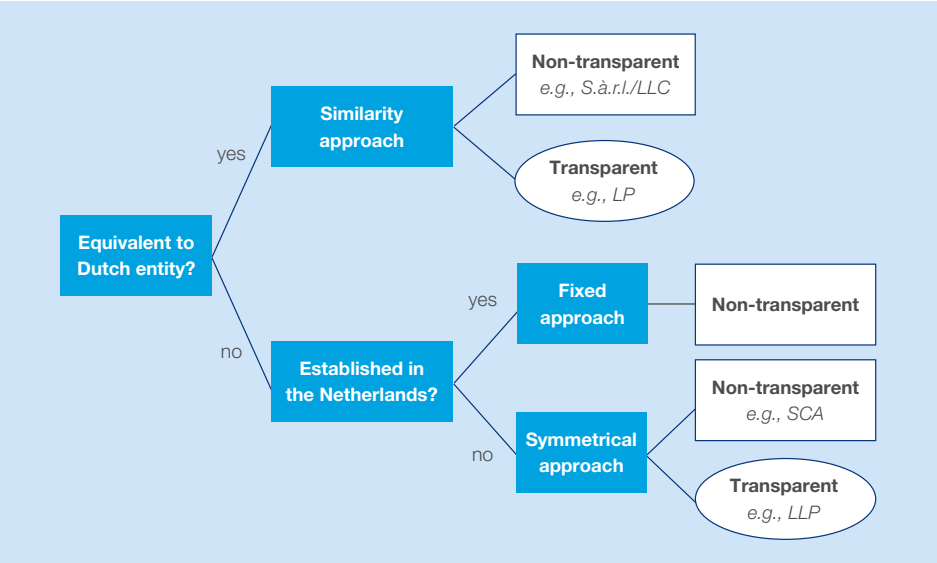
Under current law, foreign entities are classified by means of the similarity approach (see paragraph 3.3). This will remain the primary classification method.

However, the similarity approach does not always suffice, as there are various foreign entities that do not have a Dutch equivalent. Therefore, two new additional classification methods are introduced:

- the 'fixed approach' (whenever the foreign entity is tax resident in the Netherlands); and
- the 'symmetrical approach' (whenever the foreign entity is tax resident outside the Netherlands).

46 Art. 70h Collection of State Taxes Act 1990 (*Invorderingswet 1990*) (new).

The tax classification rules for foreign entities can be summarized with the following flowchart:



Both methods only come into play in case the foreign entity is *not* equivalent to any Dutch entity. It is noted that as of 1 January 2025, the classification rules that follow from the Classification Decree are no longer applicable.

A 'new classification decree' in the form of an order in council (*Algemene Maatregel van Bestuur*; hereinafter: **AMvB**) will provide the framework for assessing when an entity incorporated or concluded under the law of another state is equivalent to an entity incorporated or concluded under Dutch law. The MvT only gives three examples of foreign entities that have no Dutch equivalent, namely: the UK LLP, the Irish ULC, and the German KgaA.[47] These entities have corporate resemblance to both a partnership and a company with a capital divided into shares.

On 5 February 2024, a draft AMvB on Dutch tax classification rules for foreign entities was published and opened for consultation.[48] This draft AMvB includes the key characteristics of all Dutch entities (including partnerships), albeit that it defers to the law for the key characteristics of the FGR and the transparent fund. A foreign entity that is sufficiently equivalent in nature and structure to a Dutch entity will be treated in accordance with such Dutch law equivalent.

However, if a foreign entity is equivalent to more than one type of Dutch entity or is not equivalent with any type of Dutch entity at all, a classification based on the similarity approach will not be possible. The entity will then be classified based on the symmetrical approach or fixed approach. The draft AMvB further stipulates that in case a foreign entity contains characteristics of both a Dutch entity and an FGR, such foreign entity will be considered equivalent with the FGR. Foreign funds with legal personality will not be equivalent to an FGR.

Examples of foreign entities that have already been classified according to the draft AMvB include some commonly used foreign entities such as the Delaware LLC, which is considered equivalent to a BV and therefore remains non-transparent for Dutch tax purposes. An example of a foreign entity that is considered a non-equivalent entity is the Luxembourg *société en commandite par actions* or SCA, which will remain

47 *Kamerstukken II* 2023/24, 36423, nr. 3 (MvT), p. 45.

48 Consultation document, 'draft Decree on Dutch tax classification rules for foreign entities', 5 February 2024 (Overheid.nl | Consultatie Concept Besluit vergelijking buitenlandse rechtsvormen (internetconsultatie.nl)). The consultation period closed as per 18 March 2024.

non-transparent based on the symmetrical approach due to its non-transparent classification for Luxembourg tax purposes.

It is helpful that the list already includes the classification of various foreign entities that are often used in international investment structures (including Luxembourg, German, UK and US limited partnerships). That said, there is still a significant number of foreign entities that have not yet been classified (e.g., the French SLP and FPCI) which creates uncertainty for the market as to how such foreign entities should be classified for Dutch tax purposes as per 2025. Hopefully, such foreign entities will be classified in the final version of the AMvB which will be published later in 2024.

4.2.2 Fixed approach

Based on the fixed approach, which is not expected to often occur in practice, foreign entities with no clear Dutch equivalent that are tax resident in the Netherlands are always classified as non-transparent for Dutch tax purposes and therefore subject to CIT.

4.2.3 Symmetrical approach

For entities with no clear Dutch equivalent that are tax resident outside the Netherlands, the 'symmetrical approach' will apply.[49] Here, the Netherlands follows the tax classification of the country of establishment.

This means that the foreign entity would for Dutch tax purposes be classified as non-transparent if in the jurisdiction that treats the foreign entity as tax resident, the assets and liabilities as well as income and expenses are attributed to the foreign entity.[50]

Vice versa, foreign-based entities without corporate resemblance to a Dutch entity and to which the assets and liabilities as well as income and expenses are not attributed are thus considered transparent for Dutch tax purposes.[51] This further means that all foreign entities that have not already received a tax classification as non-transparent under the similarity, fixed or symmetrical approach will be classified as transparent for Dutch tax purposes. This ensures a Dutch tax classification for all foreign entities.[52]

4.3 Other tax aspects

4.3.1 Codification tax attribution provision

The Tax classification Act introduces a so-called 'tax attribution provision'[53] for PIT purposes, that also has effect on other tax laws including CIT, DWT and CWT. Based on this provision, the assets and liabilities as well as income and expenses, respectively costs, must be attributed to the participants in the Dutch or foreign tax transparent entity *pro rata parte* each partner's entitlement.

The introduction of this provision further anchors the tax transparency of both Dutch and foreign tax transparent entities, which is helpful.[54] However, we do expect that in the context of a participation in a tax transparent investment fund, this provision will often

49 Section 3(2) CIT Act (new). Entities with a non-equivalent legal form are entities incorporated or entered into under the law of another state, which have a legal form that is not equivalent to that of an entity as referred to in Section 2(1)(a), (b), (c), (e), (f) or (g) of the CIT Act (new) nor to that of a partnership, general partnership, CV or transparent fund as referred to in art. 2.14a(7) of the PIT Act (new).

50 Please note that the tax treatment of the jurisdiction where the foreign entity qualifies as tax resident is followed and thus not, as noted in the Consultation draft, the jurisdiction where the foreign entity has been incorporated/established.

51 For example, a UK LLP in the UK that is not independently liable to pay tax there.

52 *Kamerstukken II* 2023/24, 36425, nr. 3 (MvT), p. 7.

53 Art. 2.14bis PIT Act (new), Art. 8(16) CIT Act (new), Art. 1(14) DWT Act (new), Art. 1.2(9) CWT Act (new).

54 Currently, the State Secretary has set out his views in a letter on accounting for interests in and results from transparent entities in electronic returns (letter of 19 December 2005, no DGB2005/6747, *NTFR 2005/1746, V-N 2006/4.5*).

be difficult to apply. Reason for that is that investment funds generally do not provide all information relevant to be able to apply the attribution and in fund-of-fund structures this information is often extremely difficult to obtain or simply unavailable.

Besides the tax attribution provision, the Tax classification Act further also provides for some helpful and long-overdue changes to end existing inconsistencies in the CIT Act and DWT Act in relation to special-purpose funds, the FGR and the separated private estate (*afgezonderd particulier vermogen*).

4.3.2 Transitional provision on the anti-hybrid mismatch rules in the CWT Act

Since 1 January 2024, the CWT Act also applies to dividend distributions. In short, this withholding tax of 25.8% is withheld from dividend distributions to beneficiaries located in a low-taxing jurisdiction, to certain hybrid entities or in case of abuse. Under the CWT Act,[55] in the case of a dividend distribution[56] to a hybrid entity that classifies as non-transparent for Dutch tax purposes but as transparent in its country of residence, the hybrid entity qualifies as beneficiary. This could include, for example, foreign non-transparent limited partnerships (equivalent to a CV) without a unanimous Consent Requirement. Based on the rebuttal rule, CWT is then only not due if each qualifying participant in the hybrid entity: (i) classifies the foreign limited partnership as tax transparent and (ii) is not an entity to which CWT would have applied if the foreign non-transparent limited partnership would not have been interposed.[57] In case these requirements are not met, the full distribution is subject to CWT.

Thus, because the Consent Requirement will only be abolished from 2025, CWT may be due on a full dividend distribution for one year, while the dividend distribution will not or only partially be subject to conditional CWT after the new classification rules come into force.[58] In our view, this is rightly deemed undesirable by the caretaker government. Therefore, a transitional provision has been introduced to the CWT Act applicable during 2024, based on which not the hybrid entity qualifies as the beneficiary, but its participants and thus the CWT implications (if any) should be tested at the level of the participants. This transitional provision is however limited to dividend distributions only.[59] Hence, it unfortunately does not apply to interest and royalty payments or the DWT Act[60] and also not to non-transparent limited partnership entities established in a low-tax jurisdiction[61] which will also be tax transparent from 1 January 2025.

4.4 Entry into force of Tax classification Act and FGR Act

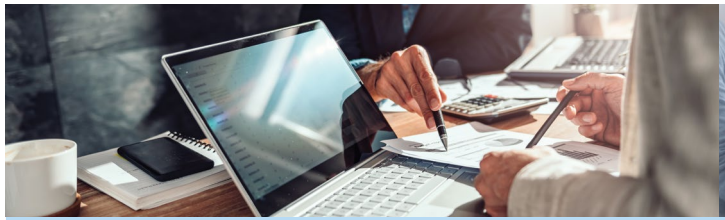
The Acts entered into force as of 2024. However, the abolishment of the open CV, the new definition of the FGR and the new classification rules will not come into force until 2025. This allows taxpayers to timely anticipate the proposed changes and make use of the transitional law during 2024.

55 Art. 2.1(1)(e) CWT Act.
56 The same applies to interest payment and royalty payments made to a hybrid entity.
57 Furthermore, it is required that the foreign non-transparent limited partnership is not established under the law of a low-tax jurisdiction.
58 See also the NOB's appeal in their response to the Tax classification bill (p.9). Published on 29 September 2023.
59 *Kamerstukken I* 2023/24, 36425, nr. 7 (NvW). Art. XIIIA Tax classification Act.
60 Art. 4(9) DWT Act.
61 These entities are currently liable to tax under the main rule of art. 2.1(1)a of the CWT Act.

5. Closing remarks

We generally welcome the abolishment of the open CV and the unanimous Consent Requirement as well as the amended definition of the FGR and the two new classification methods for non-equivalent foreign entities. Furthermore, it is very helpful that immediate taxation due to the changed classification rules can be avoided in certain situations by using the facilities offered by the transitional law.

However, it is strongly recommended to review existing structures at short notice to see whether the new classification rules may result in adverse tax consequences as per 2025 to ensure that structures can still be timely restructured, if needed.



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Quoted is a periodical newsletter for contacts of Loyens & Loeff N.V.
Quoted has been published since October 2001.

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