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Client briefing March 2012

Dutch law funds for joint account

This client briefing provides a concise overview of the main legal, tax and regulatory features of funds for joint account (*fondsen voor gemene rekening*, hereinafter abbreviated as "FGR") established under Dutch law at this moment. The effects of the implementation of the Alternative Investment Fund Managers Directive are not covered in this briefing.

Introduction

The FGR is a pooled investment vehicle offering substantial flexibility to the user. The FGR can be used as a vehicle for both institutional and retail investment funds and asset pooling. FGRs can be structured as open-end, (semi) open-end and closed-end funds. FGRs can also be structured as an umbrella fund and though most FGRs are private funds, participations in FGRs can be listed on Euronext.

The FGR is not a legal entity. It is created by agreement (often referred to as its "Terms and Conditions") between a manager (the "Manager") and one or more investors (the "Participants"), which obliges the Manager to invest and manage for the joint account of the Participants moneys and/or other assets contributed by the Participants. Usually, the legal ownership of the FGR assets is held by a separate depositary (the "Depositary"), albeit for the risk and account of the Participants. Unless specific regulatory rules require otherwise, any legal person or even a natural person may act as Depositary.

From a legal perspective, parties are free to determine the financial and governance structure of the FGR. However, as the FGR is directly and indirectly addressed by both Dutch tax and regulatory legislation, tax and regulatory aspects often affect the chosen structure.

Organisational documents and registration

Organisational documents

The FGR is established by the execution of a private or notarial deed setting out its Terms and Conditions. The initial parties are the Manager and at least one Participant. In most cases a Depositary is also an initial party to the Terms and Conditions. Subjects which are typically dealt with in the Terms and Conditions are:

- name and seat of the FGR
- purposes of the FGR
- admittance of new Participants/ the conditions of such admittance
- transferability of participations
- contribution obligations of the Participants
- allocation of the results of the FGR
- substitution of the Manager and/or Depositary
- dissolution and liquidation of the FGR.

The terms under which the Manager and the Depositary perform their services on behalf of the FGR are sometimes also set out in the Terms and Conditions. In other instances they are laid down in a separate management agreement and/or, as the case may be, custody agreement.

Registration

There is no requirement to register the FGR with the Chamber of Commerce in the Netherlands. In any event, it is generally assumed that it is not possible to effect such registration.

Governance, financial relationships and fees

From a legal perspective, parties are free to choose and set out in the Terms and Conditions any possible governance, financial and fee structure. There are no specific FGR-related restrictions under Dutch law. However, as stated above, tax and/or regulatory aspects sometimes have a substantial impact on the structure.

Contents

- Introduction
- Organisational documents and registration
- Governance, financial relationships and fees
- Tax position
- Regulatory framework

In practice, in respect of governance, structures vary from Participants which have limited voting and control rights, to structures providing a full range of checks and balances between management, Participants and supervising and advisory bodies.

Tax position

With regard to the Dutch tax position of FGRs, a fundamental distinction exists between a "closed" FGR and an "open" FGR.

Closed FGR

A "closed" FGR is considered a transparent entity for Dutch corporate income and dividend withholding tax purposes and therefore not subject to Dutch corporate income and dividend withholding tax. An FGR is a closed FGR if:

- participations in the FGR are not transferable other than to the FGR itself by way of redemption or
- participations are transferable only with the consent of all existing Participants.

As a result of the tax transparency of the closed FGR, all of its income and capital gains are attributed to the Participants as if they were investing directly in the underlying FGR assets. The Depositary, which holds the FGR's assets for the risk and account of the Participants, will for Dutch tax purposes, not be seen as the owner of those assets. Therefore, it is not taxed in respect of any of the FGR's income or capital gain.

Open FGR

FGRs, which do not meet the transferability criteria for the closed FGR, are "open" FGRs. Open FGRs are subject to Dutch corporate income tax and dividend withholding tax. However, provided that certain conditions are met, the open FGR can opt for status as an "Exempt Investment Institution" ("VBI") or a "Fiscal Investment Institution" ("FBI"):

- VBI

Under the VBI regime, qualifying FGRs are fully exempt from Dutch corporate income tax as well as from Dutch dividend withholding tax. On the other hand, the VBI lacks tax treaty protection and will not be entitled to a refund of dividend withholding tax on dividends distributed to it.

- FBI

Unlike the VBI, the FBI is subject to Dutch corporate income tax, albeit at a rate of 0%. The FBI also benefits from tax treaty protection. The main disadvantage of the FBI is, however, that the law sets material requirements as to its shareholders' and financing structure and requires that in principle 100% of its net current income is distributed within eight months from fiscal year-end (the balance of realised capital gains and capital losses can be credited to a special reinvestment reserve).

Regulatory framework

In general, an FGR will fall within the definition of an "investment institution" in the meaning of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, the "Wft"). If so, the FGR is subject to the Wft's normal rules relating to investment institutions. The key supervisor in this area is the Dutch Authority for the Financial Markets (*Stichting Autoriteit Financiële Markten*, the "AFM").

An FGR wishing to offer participations to investors in the Netherlands requires an AFM licensed manager (the FGR itself is not subject to a licence regime) and a prospectus which is compliant with detailed rules set out in the Wft and other related legislation.

However, many FGRs will be able to use an exemption from the prospectus and licensed manager requirements in one or more of the following (briefly summarised) situations:

- If the offer is made to certain "qualified" investors (including *inter alia* most institutional investors).
- If the interests offered have a minimum denomination of €100,000 or, if lower, can only be purchased and sold-on for an amount of €100,000.
- If the interests are offered to a maximum of 99 private individuals (not being qualified investors).

When making use of (one of) the two last exemptions, a standard health warning will need to be included in the offering and marketing materials. This health warning is not required when marketing to qualified investors only.

When marketing to qualified investors only, the manager can also voluntarily opt for a light supervision regime and obtain a declaration of supervision. This declaration can be applied for with the AFM and entails a notification procedure and compliance with certain rules.

If an exemption is not applicable and the fund (manager) is established in France, Guernsey, Ireland, Jersey, Luxembourg, the United Kingdom, the United States or Malta, an FGR can make use of another form of light supervision ("light licence regime"). This light licence regime entails a notification procedure and compliance with prospectus content and other rules.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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