



## Close of 2022: top legal & tax developments for fund managers

As the year comes to a close, we thought it would be helpful to list the legal, regulatory & tax developments each Dutch fund manager should have on the top of its agenda.

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### ESG Developments: SFDR Delegated Regulation and CSRD/CSDD

Compliance with the Sustainable Finance Disclosure Regulation (**SFDR**) remains a hot topic for fund managers and their investors. The Corporate Sustainability Reporting Directive (**CSRD**) and the Corporate Sustainability Due Diligence (**CSDD**) Directive may have an impact on portfolio companies.

#### Background

The AFM recently issued a report on its investigation into compliance by fund managers with certain elements of the SFDR named “Op weg naar betere toepassing transparantieregels duurzaamheid (afm.nl)”. In its report the AFM concluded that disclosures on websites and in prospectuses need to be more concrete *inter alia* with respect to the integration of sustainability risks in investment decision making and in the remuneration policy of fund managers. Furthermore, the SFDR Delegated Regulation (Level 2), containing detailed regulatory technical standards, will enter into force as of 1 January 2023. As a consequence, a fund manager that manages or markets an “article 8” or “article 9” fund must make additional disclosures on its website, in the fund’s prospectus and annual report.

For portfolio companies, the CSRD and the CSDD Directive may become relevant. CSRD entails new requirements relating to sustainability reporting in management reports. This sustainability report must be included in a specific and clearly identified section of the management report. All ‘large’ (non-listed) companies will have to comply with the mandatory sustainability reporting. A company is ‘large’ if it satisfies at least two out of the following three criteria: its average number of employees exceeds 250 during the financial year, it has a balance sheet value of more than EUR 20 million and/or it has a net turnover of more than EUR 40 million. The requirements apply as of 1 January 2025 (reporting in 2026 on the financial year 2025).

The proposed CSDD Directive introduces due diligence obligations for qualifying companies in respect of the actual and potential negative impacts on human rights and the environment resulting from their own activities, the activities of their subsidiaries and the activities in the value chain carried out by entities with which the company has an established business relationship. This Directive still needs to be adopted.

For more information on the CSRD and the CSDD please read our publication on this topic: [genoteerd-149.pdf](#) (loyensloeff.com).

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## Marketing Investment Funds: ESMA Marketing Communication Guidelines

Managers must continue to pay close attention to the rules relating to the marketing of funds and to the contents of the marketing materials used.

### Background

In 2021 Directive (EU) 2019/1160 and Regulation (EU) 2019/1156 with respect to the cross-border distribution of collective investment undertakings by licensed managers and EuVECA managers (the **Cross-Border Distribution Laws**) became effective. In addition, in February 2022, detailed guidelines issued by the European Securities Market Authority (**ESMA**) on the contents of marketing communications in the context of the distribution of funds under the Cross-Border Distribution Laws became effective. Since the ESMA Marketing Communications Guidelines are quite granular (see: [Guidelines on marketing communications under the Regulation on cross-border distribution of funds \(europa.eu\)](#)), we have prepared a checklist to assist you in verifying whether your marketing communications meet the content requirements as prescribed by ESMA.

If you would like to know more on these requirements or would like to receive a copy of our marketing communications checklist, please contact us.

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## Marketing Investment Funds to retail investors: new PRIIPs KID

Since January 2018 fund managers are required to issue a key information document (**KID**) to retail investors in the EEA under Regulation (EU) 1286/2014 on key information documents for packaged retail and insurance-based investment products (**PRIPs**). The PRIIPs KID is to be drawn up in accordance with the regulatory technical standards set forth under the PRIIPs Delegated Regulation. New PRIIPs regulatory technical standards (**RTS**) amending the Delegated Regulation enter into force on 1 January 2023, introducing certain (material) changes to the existing PRIIPs KID.

### Background

The new RTS provide for changes to the presentation and content of the KID, including the calculation and presentation of risks, rewards and costs. Investment funds offered to retail investors, that currently produce a UCITS key investor information document also have to produce a PRIIPs KID from 1 January 2023 onwards.

We have prepared a template KID that complies with the requirements under the new RTS. Please contact us to provide you with an updated KID for the new year.

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## Trust Register FGR

UBOs of FGRs need to be registered in the trust register by 1 February 2023, but future relief is expected.

### Background

FGRs need to be registered by their manager with the trust register of the chamber of commerce by 1 February 2023, including providing to the Chamber of Commerce information on all participants in the FGR (which qualify as UBOs). For licensed fund managers, there is an exemption for providing information on individual participants in the FGR if the FGR is marketed to more than 150 persons. Also, the European High Court of Justice recently decided to restrict access to UBO information by the public. This judgement does not relieve the manager from the obligation to register UBO-information but the manager could request for the shielding of UBO-information on the basis of this judgement. For more information on this judgement: [European Court of Justice puts a stop to a publicly accessible UBO-register | Loyens & Loeff \(loyensloeff.com\)](#).

If you need assistance with registering an FGR with the Chamber of commerce, please let us know.

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## AML/KYC developments: EBA Guidelines on compliance officer and compliance management

AML compliance remains to be an important part of the supervisory agenda of the AFM. It is therefore imperative to have up to date compliance policies and procedures in place. From 1 December 2022 onwards new guidelines became applicable that prescribe how the different roles within your AML/KYC organization should be shaped and performed.

### Background

On 1 December 2022 the EBA Guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT Compliance Officer (the **EBA Guidelines**) entered into force (see: [EBA publishes Guidelines on role and responsibilities of the AML/CFT compliance officer | European Banking Authority \(europa.eu\)](#)). Following the entry into force of the EBA Guidelines the role and responsibilities of the executive board and the compliance officer have been further detailed. Fund managers should amend their AML policies so that they comply with the EBA Guidelines. In the policy the roles and responsibilities of the executive board and the compliance officer have to be further specified and certain other new items should be included, such as, annual internal reporting obligations, ensured access to information, a risk assessment framework and specified compliance monitoring.

If you have not yet updated your policy, please contact us.

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## Change in Dutch Tax Classification of Partnerships

The Dutch tax treatment of (foreign) partnerships is expected to change in 2024.

### Background

The Dutch Ministry of Finance announced the release of a legislative proposal regarding new partnership classification rules for Q2 2023. Currently, unlike international standards, limited partnerships may qualify as taxable entities or as tax transparent based on certain consent requirements for admissions and transfers. The proposal will introduce new classification rules in line with international standards, most likely resulting in the abolishment of the consent requirements, meaning that (Dutch and foreign) limited partnerships will become tax transparent from a Dutch perspective by default. The overhaul of the classification rules may affect Dutch fund structures as well as international fund structures with Dutch investors, investment teams and/or investments. The potential impact of these rules should be checked for each partnership structure with a Dutch angle. The new rules are expected to take effect as per 1 January 2024, which means that there will be limited time for restructuring (if required). For more information on this topic: [The Netherlands brings entity tax classification rules | Loyens & Loeff \(loyensloeff.com\)](#).

If you would like to know more on the expected changes or would like to discuss potential restructuring options, please contact us.

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## Introduction of Conditional Withholding Tax on Dividends

The scope of the conditional withholding tax will be extended to (dividend) distributions in 2024.

### Background

The Dutch government has adopted a legislative proposal that introduces a withholding tax on (dividend) distributions made by Dutch companies to 'associated beneficiaries' in blacklisted jurisdictions or non-blacklisted jurisdictions in situations that are deemed 'abusive' (including certain hybrid and conduit structures). To determine whether entities are considered an 'associated beneficiary', control is the relevant criterion.

This conditional withholding tax will enter into force as of 1 January 2024. The applicable tax rate will be linked to the highest Dutch CIT rate of 25.8% (tax rate 2023). The potential impact of this conditional withholding tax should be checked for Dutch fund structures, in particular where investors invest through a limited partnership (CV) in Dutch companies.

If you would like to know more on the potential impact of these rules on your fund structures, please contact us.

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## Developments in Financing

Alternative lending solutions keep gaining ground. This requires fund managers to focus on the (regulatory) impact of those structures on their portfolio companies and the fund.

### Background

Several sources of leveraged financing have experienced the impact of dried-up liquidity over the course 2022 – that includes corporate and high yield bond markets but also very much the bank lending market for all types of leveraged financing. As a result, the vast majority of Dutch private equity-backed acquisitions are financed with unitranche debt provided by an alternative lender. Rising interest rates and the impact of other macroeconomic developments make it even more challenging to obtain (traditional) financing at the level of a portfolio company. Besides private credit solutions, an increasing number of fund managers are seeking financing and liquidity solutions structured at the level of the fund – any fund level leverage (other than the typical capital call facility, if correctly structured) such as a NAV facility or a hybrid facility, may have regulatory implications specifically in relation to a potential requirement of obtaining an AIFMD license or expansion of an existing license.

If you would like to know more on structuring alternative lending solutions including fund finance solutions and the legal challenges with respect to those products, please contact us.

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## DORA

Fund managers with an AIFMD or UCITS license need to prepare themselves for the Digital Operational Resilience Act (**DORA**).

### Background

DORA has recently been adopted by the European parliament and will enter into force within 24 months after publication in the official journal of the EU. Amongst others, DORA poses new requirements to licensed fund managers in relation to ICT, business continuity, outsourcing, digital operational resilience testing and data protection. Fund managers with a license should perform a gap analysis against the new requirements, and where necessary update their policies, procedures and practices. Fund managers and their IT service providers need to comply with these requirements by the end of 2024. Since these requirements may require market parties to engage new service providers and implement changes in their ICT infrastructure and business continuity it is advisable to already start preparing the gap analysis next year. To read more on DORA see: [Digital finance: Council adopts Digital Operational Resilience Act - Consilium \(europa.eu\)](#).

If you would like us to help you with performing a gap analysis and amend policies and procedures to comply with DORA, please let us know.

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## Abolishment of Real Estate Investments by Dutch FBIs

Direct real estate investments by Dutch FBIs (*Fiscale Beleggingsinstellingen*) are expected to be abolished in 2025.

### Background

On 20 September 2022, the Dutch government announced its intention to disallow the Dutch FBI to directly invest in real estate (i.e., the Dutch REIT regime) as of 1 January 2024. This is regardless of whether it concerns Dutch real estate or non-Dutch real estate. Indirect investment through a company that holds real estate will still be allowed as long as it concerns portfolio investment in real estate. An FBI can therefore (continue to) invest in real estate by holding shares in a regularly taxed subsidiary. On 9 December 2022, the effective date was announced to be postponed to 1 January 2025. The legislative proposal is expected to follow on Budget Day 19 September 2023. The intention to abolish the FBI regime for direct real estate investments has major consequences for Dutch FBIs. Hence, Dutch real estate FBIs are entering a time of uncertainty.

If you would like to know more on the expected changes or would like to discuss potential restructuring options, please contact us.

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## Modernization of Dutch Partnership Laws

The outdated Dutch partnership laws are currently under review. Where prior attempts to modernize these partnership laws that date back to 1838 have failed, hopes are that this time new proposed partnership laws will indeed be enacted.

### Background

A second preliminary draft bill in relation to the modernization of Dutch partnership laws (*Tweede Ambtelijk voorontwerp Wet modernisering personenvennootschappen*) was presented for consultation on 10 October 2022. This means that members of the public can submit their comments to the proposed bill for consideration. If this draft bill is implemented in its current form, Dutch (limited) partnerships will be changed in a number of respects and, for instance, will be granted legal personality.

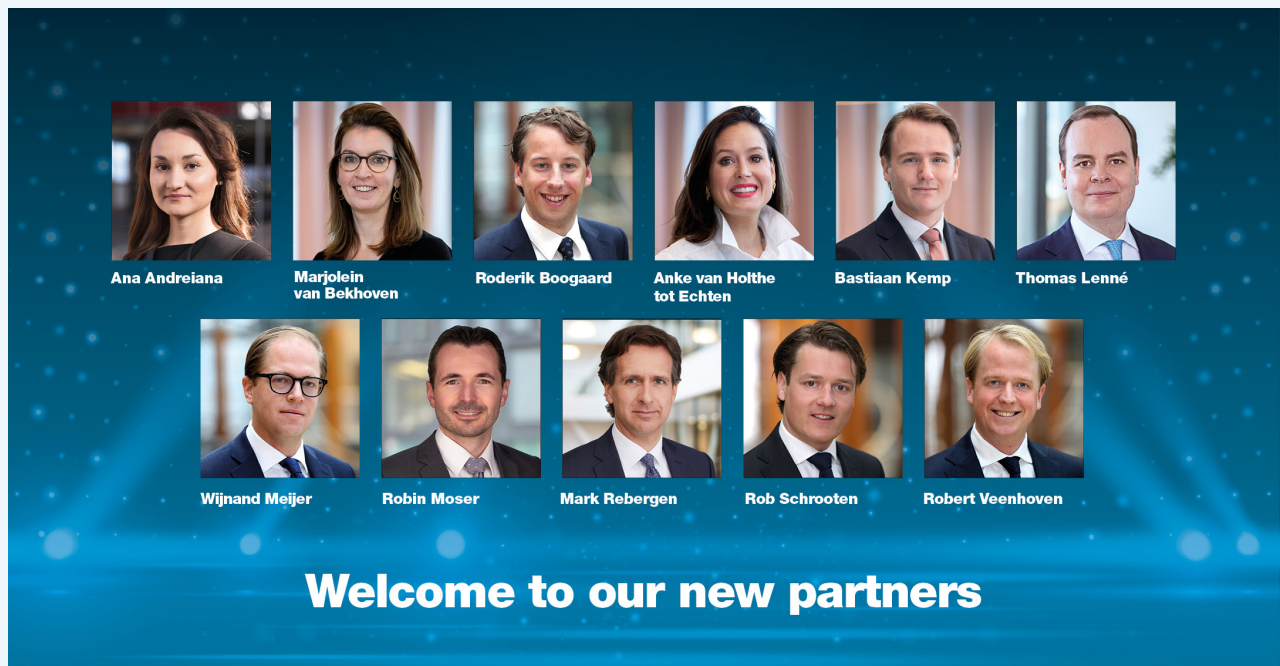
Having legal personality may affect the treatment of Dutch (limited) partnerships, *inter alia*, from a regulatory perspective (as, for example, a separate entity holding legal title to the assets of a fund managed by a licensed manager may no longer be necessary) and may very well simplify structuring of investment funds. The legal personality should not affect the tax transparency of the partnership from a Dutch tax perspective (except for the real estate transfer tax). On the other hand, from a non-Dutch tax perspective legal personality of the partnership may affect the foreign tax treatment of such Dutch partnership. We are currently in the process of preparing a response for the consultation of the draft bill and shall keep our clients informed of any developments in relation to the modernization of Dutch partnerships laws through our normal channels.

For questions please contact your regular Loyens & Loeff advisor or contact a member of the [Loyens & Loeff Investment Management group](#).

Please [subscribe](#) to Loyens & Loeff news and event invitations.

We are happy that firmwide 11 new partners have been appointed!

Roderik Boogaard and Robert Veenhoven will join the Investment Management group as a partner, as per 1 January 2023.



Finally, we would like to thank you and your team for the pleasant cooperation during the past year and look forward to assisting you on your new initiatives and the challenges ahead!



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