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Quoted

The new Dutch entity tax classification rules

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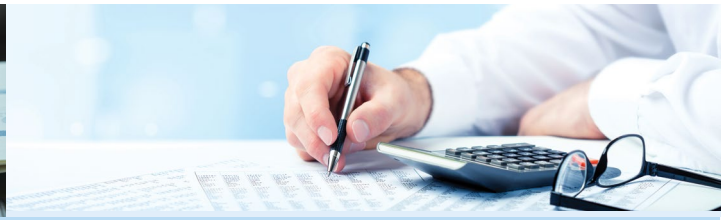

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About Loyens & Loeff

The new Dutch entity tax classification rules

1. Highlights

As from 1 January 2025, all Dutch and foreign partnerships are, as a main rule, classified as transparent for Dutch tax purposes,[1] except when a partnership should be considered a fund for joint account (*fonds voor gemene rekening*; **FGR**).

In addition, the tax classification rules applicable to FGRs were amended as of 1 January 2025.

The Dutch tax entity classification rules for entities formed under foreign law also changed as of 1 January 2025. As a starting point, they are still classified in accordance with the classification of an equivalent entity governed by Dutch law (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 for Dutch tax purposes, if the foreign entity is based outside the Netherlands (symmetrical approach). Foreign entities with no clear Dutch equivalent that are based in the Netherlands are always classified as non-transparent for Dutch tax purposes and are thus Dutch domestic taxpayers.

2. Introduction

This edition of Quoted is an update of our Quoted[2] of June 2024 on the new Dutch entity classification rules. The previous edition also focused on the pre-2025 rules including the grandfathering rules that applied during 2024.

This edition solely focuses on the current (2025) rules and addresses: (i) the Dutch tax act on the classification[3] of Dutch and foreign entities[4] (*Wet Fiscaal kwalificatiebeleid rechtsvormen*; hereinafter: **Tax classification Act**) and (ii) the Act on the amendment of the fund for joint account (FGR) and exempt investment institution (*vrijgestelde beleggingsinstelling*; hereinafter: **VBI**)[5] (*Wet aanpassing fonds voor gemene rekening en vrijgestelde beleggingsinstelling*; hereinafter: **FGR Act** and jointly with the Tax classification Act referred to as the **Acts**).[6] In essence, both Acts provide new tax classification rules for the Dutch limited partnership (CV), the FGR and foreign entities.[7]

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 https://www.loyensloeff.com/quoted-161.pdf
3 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'.
4 Bulletin of Acts and Decrees (*Staatsblad*; hereinafter: **Stb.**) 2023, 508.
5 The VBI will not be addressed in this edition of Quoted.
6 Stb. 2023, 523.
7 An entity that is incorporated or entered into under the laws of another state.

3. The new classification rules for entities per 2025

3.1 Partnerships

All Dutch partnerships including CVs and equivalent foreign partnerships, as a main rule, classify as tax transparent, except when the respective partnership would also qualify as a non-transparent FGR (i.e., the FGR classification prevails).

Due to the prevailing classification of the FGR, if certain conditions are met, tax transparent partnerships that are 'investment funds' may have transitioned into a non-transparent FGR as of 1 January 2025 (see further paragraph 3.3).

3.2 FGR & transparent fund

Opposed to the CV, a tax transparent and non-transparent FGR can still be distinguished in 2025 and thereafter, albeit that a tax transparent FGR would be referred to as a 'transparent fund'.

As of 1 January 2025, an FGR will only be classified as non-transparent for Dutch 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**), (ii) it is established for collective investments, (iii) it has a strategy that is classified as 'normal' portfolio management and (iv) the participations in the FGR are embodied by 'tradeable participation certificates'. Participation certificates are not considered tradeable if they are only transferable to the FGR by way of redemption (hereinafter: **Redemption Fund**). These criteria will be further outlined in paragraph 3.3.

In addition, the new Dutch entity tax classification rules have introduced the so-called 'transparent fund' which qualifies as tax transparent. A 'transparent fund' is a fund that aims to obtain benefits for its participants by investing or otherwise utilising monies for joint account, but does not qualify as FGR. A Redemption Fund is an example of such a transparent fund.

3.3 Fund Decree and Fund Letter

In November 2024, the Dutch State Secretary for Finance published a decree addressing the amended definition of the FGR and the new definition of the 'transparent fund' for Dutch tax purposes (hereinafter: **Fund Decree**).[8] A Q&A document addressing a number of practical questions in relation hereto was published by the Dutch Ministry of Finance in April 2025 (hereinafter: **Q&A Document**); several of which are discussed below.[9]

Separately, in the beginning of 2025, a public consultation was launched to obtain input from the market on the issues and uncertainties on, in particular, the FGR Act and the Fund Decree, which was followed by a round table discussion with various stakeholders. In June 2025, the Dutch State Secretary for Finance issued a letter on the outcome thereof, in which three main bottle necks (*knelpunten*) in respect of the FGR definition are identitied (hereinafter: **Fund Letter**).[10]

It is stipulated in the Fund Decree that a 'fund for joint account' and a 'transparent fund' are not civil legal forms. Both terms stand for a contractual partnership that usually includes an (independent) depositary and a(n) (independent) manager. The use of the word 'fund' expresses the existence of a segregated capital.

8 Decree of 27 November 2024, no. 2024-9447, Government Gazette (*Staatscourant*) 2024, 38389.

9 Questions and Answers practical implementation corporate income tax (*Tax classification Act and FGR Act) (Vragen en antwoorden uitvoeringspraktijk vennootschapsbelasting (Wet fiscaal kwalificatiebeleid rechtspersonen en Wet aanpassing fonds voor gemene rekening en vrijgestelde beleggingsinstelling)*), 14 April 2025.

10 Letter regarding implementation motion on bottle necks and solutions in relation to FGRs (*Kamerbrief over uitvoering motie over knelpunten en oplossingen ten aanzien van het fonds voor gemene rekening*), 12 June 2025.

The Fund Decree provides, among others, guidance on the aforementioned cumulative criteria that must be met by a(n) (investment) fund to be classified as, or re-classified into, a non-transparent FGR. In short, the Fund Decree provides the following additional explanation on the key characteristics:

i. The investment fund should invest for joint account (i.e., be established for collective investments).

In general, the purpose of an FGR (and a transparent fund) is to obtain benefits for its participants by investing for joint account. This implies that an investment fund with only one participant cannot be classified as an FGR. However, an investment fund is not considered to lose its character as FGR, if the participations in the investment fund are in the hands of one single investor for a short period of time, in anticipation of more participants joining the investment fund.

Unfortunately, the Fund Decree does not address how to deal with certain single investor investment funds, where for example the general partner only has a very limited (nominal) profit right or where there is a second limited partner with either a de minimis or a special profit right (e.g., carried interest). In the Q&A Document, it is clarified with respect to the general partner in a single-investor fund that the fund will not be considered to invest for joint account (only) if the general partner does not have a profit right at all.

ii. The investment fund should have an investment strategy that is classified as 'normal' portfolio management (i.e., generally not a 'value-add' strategy).

To answer the question whether the investment strategy of an investment fund should be considered 'normal' portfolio management (not entrepreneurial by nature) reference is made to relevant criteria developed in Dutch case law. The additional reference to 'otherwise utilizing funds' ('*anderszins aanwenden van gelden*') merely provides an extension of the concept 'normal' portfolio management. It does not mean that the activities of a non-transparent FGR (or transparent fund) may constitute a business undertaking for Dutch tax purposes. The Fund Decree does unfortunately not provide for any new insights in this respect.

In the Fund Letter, it is acknowledged that uncertainty can arise as to whether an investment fund is to be considered to meet the 'normal' portfolio management test, due to its subjectivity and the need for a factual assessment. This is identified as a bottle neck. However, the Dutch State Secretary for Finance sees no possibility of amending this test to resolve the uncertainty. Certainty on this test can be obtained in the form of an advance tax ruling.

iii. The investment fund should be an 'investment fund' (e.g., an AIF) or 'fund for collective investment in tradeable securities' (i.e., a UCITS) within the meaning of the Dutch Wft.

The Fund Decree explicitly states that an investment fund should meet the definition of an 'investment fund' or 'fund for collective investment in tradeable securities' as referred to in the Wft to fall within scope of the FGR classification. As a result, certain types of entities, such as most 'family funds', are automatically excluded. However, it appears that certain employee participation schemes of investment funds that are structured as limited partnerships may also fall in scope of the FGR definition, despite the fact that such entities are exempt from regulatory supervision. In the Q&A Document, it is explicitly confirmed that also entities exempt from regulatory supervision may classify as an FGR.

In the Fund Letter, it is acknowledged that the 'investment fund' concept requires knowledge of financial supervisory rules to determine whether an entity classifies as an FGR. The Dutch State Secretary for Finance has identified this as a bottle neck and it will be investigated whether this test can be simplified (e.g., that only entities that are registered as investment fund in the register of a financial regulator can classify as an FGR). A draft legislative proposal open for public consultation is expected in the fall of 2025.

Furthermore, the Fund Decree stipulates that a non-Dutch investment fund will be treated as an 'investment fund' or 'fund for collective investment in tradeable securities' for purposes of the FGR classification if it: (i) is established or incorporated under the laws of another EU member state that does not make a legal distinction between an 'investment fund' (*beleggingsfonds*) and an 'investment company with legal personality' (*beleggingsmaatschappij*) for purposes of the implementation of the AIFMD or UCITS Directive[11]; and (ii) possesses a legal form that is not comparable to a Dutch public limited company (*naamloze vennootschap*) or Dutch private limited company (*besloten vennootschap*). Whether the fund has legal personality is as such irrelevant for purposes of the FGR classification, based on the Q&A Document. Due to the references to the Dutch implementation of the AIFMD and UCITS Directive, uncertainty can arise for limited partnerships in other EU jurisdictions and non-EU jurisdictions. Notably, the distinction between an 'investment fund' (*beleggingsfonds*) and an 'investment company with legal personality' (*beleggingsmaatschappij*) in the Dutch implementation is not made in the AIFMD. As part of the same bottle neck, the Dutch State Secretary for Finance will investigate whether these issues for foreign limited partnerships can be mitigated by a legislative change.

iv. The participations in the investment fund should be embodied by 'tradeable participation certificates', whereby participation certificates are not considered tradeable if they are only transferable to the investment fund by way of redemption (in which case it would be a Redemption Fund).

To qualify as Redemption Fund, the fund documentation must show that a (conditional) redemption right applies. Hence, also semi open-ended investment funds with illiquid assets (e.g., real estate) and closed-ended investment funds may qualify as Redemption Fund.

The redemption mechanism entails that the participation certificates are only transferable to the fund itself and thus a direct secondary transaction between investors is in principle not allowed (see further below). For the sake of completeness, it is noted that also a transfer to a group company of the investor and the transfer to an investor's relative by blood or marriage constitute a prohibited transfer to a third party. It follows from the Q&A Document that the transfer restriction also applies to any participation certificates of the general partner.

The only exception that applies to the restriction on transfers is a transfer by virtue of inheritance under universal or special title (*verkrijging onder algemene of bijzondere titel*). Any other transfers under universal and special title (including mergers and demergers) are explicitly not excluded from the transfer restrictions.

Hence, in order to qualify as Redemption Fund a regular sale and transfer by an investor of a participation in the fund is not allowed, but the Fund Decree does clarify that it is still possible to include a so-called 'Secondary Trade' clause in the fund agreement. A Secondary Trade allows the investor to sell its participation to a buyer 'through' the Redemption Fund (i.e., by way of a redemption and reissuance). In such case the settlement of the redemption and reissuance price should be effectuated via the (manager or general partner of the) Redemption Fund, albeit that any up- or discount in relation to the net asset value (NAV) can be settled directly between the selling and acquiring investors.

In addition, in case the financial settlement of a Secondary Trade has not actually been effectuated through the (manager or general partner of the) investment fund, such investment fund may still be regarded a Redemption Fund, if its constitutional documentation or prospectus prescribe that: (i) transfers by participants to third parties

11 If the investment fund is established in or incorporated under the laws of another EU member state that does make a legal distinction between an 'investment fund' and an 'investment company with legal personality', the local classification will be followed, based on the Q&A Document.

are deemed to take place via the investment fund; and (ii) the manager (or general partner) charges a fee to the seller for the deemed redemption of the participation certificates and/or to the purchaser for the deemed issuance of the participation certificates.

Unfortunately, the Fund Decree does not provide any further guidance as to when an investment fund is deemed to have issued 'participation certificates' and this is also not covered by the Fund Letter. Generally, the profit and voting rights of limited partnerships are allocated between investors based on their commitments / capital account. It can be debated whether such limited partnerships have issued 'participation certificates', or whether they are required to create and issue a 'unit' type of instrument, based upon which the profit and voting rights are allocated between the investors. Based on the Q&A Document, such 'units' do not seem required.

3.4 Impact Fund Decree and Fund Letter

Although the Fund Decree elaborates on the FGR criteria in more detail and provides clarity with respect to certain relevant matters, the most uncertain characteristics remain unclear. For example, the relevance between a 'passive' investment strategy and a strategy that is considered more entrepreneurial / value-add of nature (e.g., with a higher risk profile / return) has been acknowledged in the Fund Decree and again in the Fund Letter. However, objective criteria to determine the main objective of an investment fund are not provided, requiring investment (and its investors) to make case-by-case assessments using existing criteria in Dutch case law to determine whether the investment activities of an investment fund can be classified as normal portfolio management. Based on the Fund Letter, no further clarifications can be expected in this regard. In addition, no attention was given to the concept of 'participation certificates' other than the transferability thereof.

Furthermore, the assessment whether an investment fund meets the definition of an 'investment fund' or 'fund for collective investment in tradeable securities' as referred to in the Wft remains complex. Fortunately, based on the Fund Letter, it will be investigated whether this assessment can be simplified and a draft legislative proposal may be published for public consultation in the fall of 2025.

Separately, it is acknowledged in the Fund Letter that the current legislation, and the potential (re)classification of transparent (Dutch and foreign) limited partnerships as non-transparent FGR, does not align with the purpose of changing the Dutch tax classification rules (notably, bringing the Dutch classification rules more in line with international standards) and can be problematic in certain situations. However, in other situations, an investment fund becoming transparent may also create issues. In respect of the latter, an example is given in the Fund Letter where a large group of foreign investors invests in Dutch real estate via an entity that has become transparent as from 2025 and thereby creates Dutch tax filing obligations for the investors (while the entity previously functioned as a 'blocker').

The Dutch State Secretary for Finance considers this a bottle neck as well, and has announced that he will further investigate an amendment of the FGR definition, such that not all limited partnerships are at risk of being (re)classified as an FGR. However, in scenarios where a tax transparent classification of a limited partnership could be an issue (see above), an option should remain to (re)classify such limited partnership as a non-transparent FGR. In this respect, the Dutch State Secretary for Finance intends to submit a draft legislative proposal for public consultation in the fall of 2025.

3.5 Transitional rules and other announcements

In parliamentary proceedings (dated 29 November 2024 and 6 December 2024), it has been recognised that the Dutch government is aware of issues and uncertainty that may arise with respect to the Dutch tax treatment of certain legal forms, especially CVs and foreign limited partnerships.

For that reason, additional transitional rules have been implemented which allow investment funds that were transparent prior to 1 January 2025 to restructure into a Redemption Fund during the calendar year 2025 (to avoid adverse consequences that would otherwise have arisen as of 1 January 2025). One of the conditions is that the investment funds should already in 2024 have demonstrated the intention (e.g., via minutes or correspondence) to take measures in the course of 2025 to meet the conditions of a Redemption Fund. It is noted that if an investment fund is ultimately not restructured into a Redemption Fund during 2025 (e.g., if this is not possible from a legal or commercial perspective), the investment fund will be classified as a non-transparent FGR as per 1 January 2025.

Furthermore, two bottle necks in the new rules for the FGR (as referred to in paragraph 3.4) will be further investigated by the Dutch government during 2025. The Dutch State Secretary for Finance intends to propose changes, with draft legislative proposals expected to be circulated, and open for public consultation, in the fall of 2025. However, it may take (at least) until 1 January 2027 until any changes in legislation will enter into effect. Until that time, uncertainties will remain. In addition, it is unclear if the transitional rules as set out above will be extended to the moment that any legislative changes will enter into effect.

4. Codification and additional classification methods for (foreign) entities

4.1 Similarity approach

For entities formed under foreign law, the similarity approach is the primary method of classification. 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. Therefore, two additional classification methods apply:

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

4.2 Fixed approach

Based on the fixed approach, which is not expected to occur often 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 Dutch corporate income tax.

4.3 Symmetrical approach

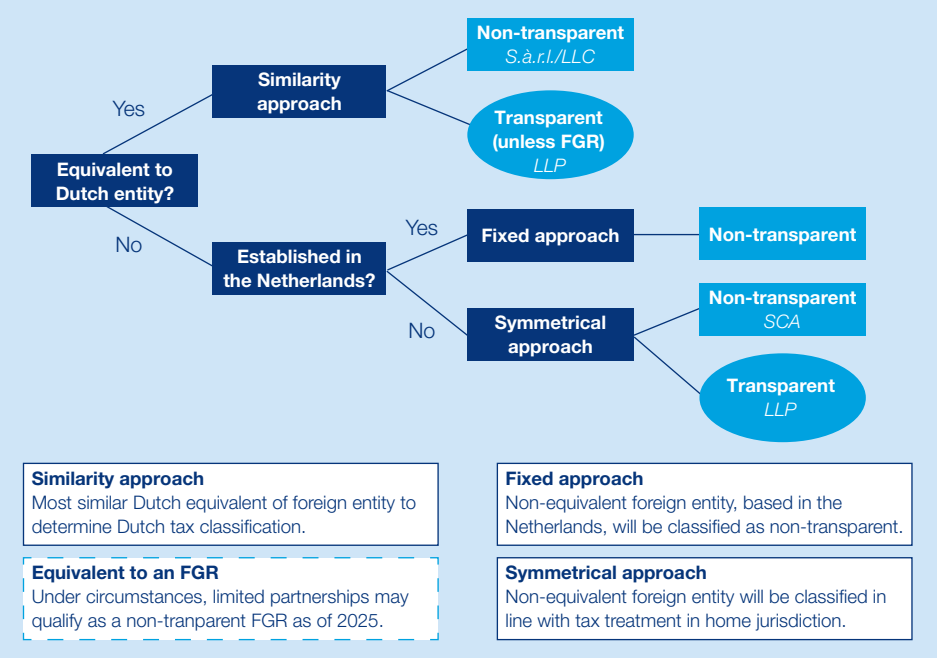
For entities with no clear Dutch equivalent that are tax resident outside the Netherlands, the 'symmetrical approach' will apply. Here, the Netherlands follows the tax classification of the country of establishment.[12]

12 For countries with a federal tax / state tax system, the federal tax classification will be followed, based on the Q&A Document.

This means that the foreign entity will 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.

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.[13]

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



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

14 Decree of 9 November 2024, Stb. 2024, 339.

4.4 Classification Decree

The Dutch State Secretary for Finance has published a decree containing the legal framework for the comparison of foreign entities with Dutch legal forms, applying as from 1 January 2025 (hereinafter: **Classification Decree**).[14] The Q&A Document contains several clarifications in relation to the Classification Decree as well.

The Classification Decree contains the key characteristics of all Dutch entities including partnerships (except the FGR and transparent fund of which the characteristics are included in the Fund Decree). A foreign entity that is sufficiently equivalent in nature and structure to a Dutch entity will for Dutch tax purposes be classified in accordance with such Dutch law equivalent (similarity approach as referred to above under 4.1).

However, if a foreign entity is equivalent to more than one type of Dutch entity or is not equivalent to 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 Classification Decree contains an Appendix with a list of foreign entities that have already been classified based on the Classification Decree. Examples 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 non-transparent based on the symmetrical approach due to its non-transparent classification for Luxembourg tax purposes.

It is helpful that the list already contains 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. Based on the Q&A Document, the list will annually be updated to reflect the classification of additional foreign entities as confirmed by the Dutch tax authorities' knowledge group. In addition, the Q&A Document contains a form that is intended to assist in classifying foreign entities that have not yet been classified.

4.5 Other

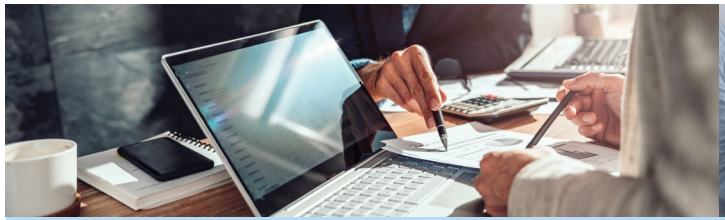
The Tax classification Act has a so-called 'tax attribution provision' for personal income tax purposes, that also has effect on other tax laws including corporate income tax, dividend withholding tax and conditional withholding tax. Based on this provision, the assets and liabilities as well as income and expenses, respectively costs, must be attributed to the participants in the Dutch or foreign tax transparent entity *pro rata parte* each participant's entitlement.

The introduction of this provision further anchors the tax transparency of both Dutch and foreign tax transparent entities, which is helpful. However, we do expect that in the context of a participation in a tax transparent investment fund, this provision will often 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 provision. In fund-of-fund structures this information is often extremely difficult to obtain or simply unavailable.

5. Closing remarks

We generally welcome the new tax classification rules for partnerships as well as the amended definition of the FGR and the two new classification methods for non-equivalent foreign entities.

Furthermore, the Fund Decree provides for some helpful insights and the commitment of the Dutch State Secretary for Finance for certain bottle necks in the FGR definition as set out in the Fund Letter is promising.
However, the scope of the prevailing FGR classification criteria remains unclear due to lack of guidance with respect to certain FGR characteristics. For newly established investment funds that may qualify as FGR, it is recommended to include a redemption mechanism into the fund documentation to classify as tax transparent Redemption Fund.



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The authors of this issue are:
Michiel Beudeker (michiel.beudeker@loyensloeff.com) and
Wouter van der Leij (wouter.van.der.leij@loyensloeff.com).

You can of course also approach your own contact person within Loyens & Loeff N.V.

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