KPMG Meijburg & Co Tax & Legal

Internet consultation on abolition of real estate FBI, amendment of VBI regime and change in definition of mutual fund

The Dutch Ministry of Finance has launched an internet consultation on a bill containing changes to the fiscal and the exempt investment institution, and a change in the definition of a taxable mutual fund. For example, as of 2025 a fiscal investment institution may no longer directly invest in property, while as of 2024 the exempt investment institution regime will no longer be available for the investment of private (family) capital. The draft bill contains accompanying measures to avoid the (immediate) levying of corporate income tax, personal income tax and real estate transfer tax.

1. Introduction

The measures under consultation had already more or less been announced by the government. On December 15, 2022 we had therefore reported that the government was intending to regulate that:

- As of 2025 fiscal investment institutions (*fiscale beleggingsinstellingen*; FBIs) would no longer be allowed to *directly* invest in property.
- As of 2024 the exempt investment institution (*vrijgestelde beleggingsinstelling*; VBI) regime would effectively no longer be available to families investing private (family) capital.
- As of 2024 the definition of an independently taxable mutual fund (*fonds voor gemene rekening*; FGR) would be revised.

In launching an internet consultation on the draft bill, the government has provided more specific details about these measures. The announced accompanying measures to avoid corporate income tax, personal income tax and real estate transfer tax being levied immediately as a result of the above measures have also been elaborated on. In the following sections we discuss the (accompanying) measures in more detail.

2. Changes to FBI regime

2.1. Changes to corporate income tax

Under the draft bill, as of January 1, 2025 an FBI may no longer *directly* invest in property or in rights to which the property is subject (hereinafter: property). This prohibition relates to property located in the Netherlands and outside the Netherlands. As of 2025, an FBI may also no longer be engaged in the management of a related entity whose assets, from a consolidated perspective, generally consist almost exclusively (at least 90%) of property. The proposal also prohibits an FBI from managing a property development or property management subsidiary as of 2025. Moreover, a funding limit of 20% of the book value of the investments will apply to *all* investments; thus also for investments in, in short, real estate entities.

2.2. Temporary real estate transfer tax exemption in connection with changes to FBI regime

The government wants to introduce a conditional and temporary real estate transfer tax exemption in order to give FBIs that currently own property the opportunity to restructure. This exemption should apply for the 2024 calendar year. The exemption can be used if, in summary, the following conditions are met:

1. The *economic ownership* of the property is acquired.
2. This economic ownership is acquired from an FBI that will lose its FBI status as a result of the measures.
3. The economic ownership will be acquired by means of a participation in a transparent (not independently taxable) entity.
4. The acquirer is entitled in equal measure to the assets of the transparent entity, in the same way that it previously was via its shares in the FBI.

This exemption does not mean that current exemptions cannot be relied on in order to avoid the acquisition of the legal ownership being subject to real estate transfer tax (for example, via an internal reorganization exemption).

3. Changes to the FGR

3.1. Changes to corporate income tax

It has been proposed changing the definition of a taxable FGR (also referred to as an 'open FGR') in the Corporate Income Tax Act 1969. According to the proposal, as of 2024 there will only be a taxable FGR if the fund is an investment institution or a UCITS as referred to in the Financial Supervision Act and the certificates of participation are tradable. Certificates that can only be sold to the fund do not qualify as tradable. In such cases, the fund is thus transparent (i.e. not independently taxable).

The change in the definition of taxable FGR will mainly have implications for 'family FGRs'. According to the proposal, as of 2024 these funds – which families use to invest their private capital – will become not independently taxable, which among other things means that the regimes available for corporate income tax purposes (the VBI and FBI regimes) will no longer be able to be applied.

3.2. Tax consequences of changes in FGR definition and associated facilities

Where appropriate, an FGR becoming not independently taxable will entail the following tax facts:

1. The FGR is deemed to have sold all its assets to its unitholders at fair market value. If the FGR is a normal taxpayer, it will in principle have to pay corporate income tax on any positive difference between the book value and the fair market value.
2. The participants in the FGR are deemed to have sold their certificates of participation at fair market value. In principle, personal income tax (natural persons) or corporate income tax (legal entities) will have to be paid on any positive difference between the acquisition price/book value and the fair market value.

Avoiding the immediate levying of personal and corporate income tax

There are three ways to avoid personal and corporate income tax being levied immediately.

Firstly, a payment arrangement may be entered into under certain conditions. The personal or corporate income tax payable should then be paid in 10 years (one-tenth each year), with no late payment interest being charged

Secondly, the corporate income tax claim present at the open FGR may be transferred to the participants in the fund. However, this is only possible if all the participants are corporate income taxpayers and a written request for this is submitted before December 31, 2024. Standard conditions may be imposed. These standard conditions will be similar to the standard conditions imposed for a tax-facilitated legal merger or division. If not all the participants are corporate income taxpayers, then the transfer facility cannot be used. If the open FGR is a VBI, then there is no corporate income tax claim and thus there is no need to use a transfer arrangement. It is noteworthy that no transfer arrangement has been made for the tax claim at the level of the unitholders in the open FGR. These unitholders can only make use of the aforementioned deferral of payment arrangement or the facility available when converting an open FGR into a company (discussed below).

The third option offered to natural persons is the tax-neutral conversion of an open FGR into a company. This is done by contributing the units in the open FGR to a company in exchange for the issue of shares (share swap). The substantial interest claim resting on the units in the open FGR is transferred to the shares in the company. This share swap facility can be used if the share swap takes place before December 31, 2024. In that case, the share swap facility will have retroactive effect to January 1, 2024. This facility is not available to unitholders that are not natural persons. As stated above, they can only use the payment arrangement.

Avoiding real estate transfer tax
If the assets of an open FGR include property, the share merger facility may result in real estate transfer tax being levied at two levels, Firstly, at the level of the company, because it acquires the ownership of the property. And secondly at the level of the unitholders, because they acquire shares during the share swap. If these shares qualify as shares in a real estate legal entity, real estate transfer tax is payable if more than – in short – a one-third (1/3) interest is acquired. The proposal therefore includes an arrangement that ensures that using the share merger facility (subject to conditions) does not result in the levying of real estate transfer tax. The acquired shares should be held for at least three years.

4. Changes to VBI regime

It is proposed to as of 2024 only make the VBI regime available to entities that are an investment institution or UCITS as referred to in the Financial Supervision Act. These are, roughly speaking, institutions with a license and that are regulated by the Netherlands Authority for the Financial Markets. This means that the current options for using the VBI regime when investing private capital will no longer be available. What losing the VBI status will typically mean for these 'family VBIs' is that the entity will become a normal corporate income taxpayer. To be absolutely clear we would like to point out that this concerns family VBIs that have the form of a public limited company (an NV). By restricting the VBI regime to investment institutions or UCITS as referred to in the Financial Supervision Act, these NVs will only become corporate income taxpayers. In principle, nothing will happen at the shareholder level, albeit that shareholders holding a substantial interest in the NV will no longer have to take a deemed annual return on investment into account. With regard to family VBIs that have the form of an open FGR, the same applies as that stated under 3 above.

5. KPMG Meijburg & Co comments

Not all the measures regarding the VBI and FBI regimes were a surprise (see our memorandum of December 15, 2022 for our comments on this). What is new is that the funding limit of 20% will also apply to investments in real estate entities. Also new is that an FBI may no longer manage certain real estate entities and property development and property management subsidiaries.

The changes in the definition of taxable FGR and the associated transitional measures are to some extent new. The fact that transitional rules have been provided for is an improvement compared to the proposal of March 2021 (see our memorandum of March 31, 2021). It is also good that consideration has been given to real estate transfer tax. We wonder whether similar measures will also apply in the event the tax legal concept of an open limited partnership is discarded. A proposal to this effect is planned for later this year.

Hopefully, the revised FGR definition will result in fewer qualification mismatches with regard to the FGR. The revised definition does however mean that roughly 1600 family funds that are currently run as a taxable FGR will have to reconsider their tax position. The simultaneous changes to the VBI regime mean that those family funds will not be able to use it. After all, those changes also mean that that regime will no longer be available for the investment of private capital. As previously stated, it is conceivable that foreign regimes may again become more attractive for these families.

For the sake of completeness, please note that the bill under review in the internet consultation is a draft bill. The final bill will probably be presented to the Lower House of Parliament on Budget Day 2023; some aspects of it may then have been amended as a result of the consultation now in progress. The bill will then work its way through the normal legislative process in the Lower and Upper Houses of Parliament. Changes may still be made to the bill during this process. However, we expect the bill that is currently under internet consultation and the final Act to broadly be the same.

If you have any questions about the above, your Meijburg advisor would be pleased to answer them for you.

KPMG Meijburg & Co
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