

# FGR, the Rising Star of Dutch Investment Funds

Financial Markets Legal Update  
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ten Hove & Joyce Kerkvliet

# FGR, the Rising Star of Dutch Investment Funds

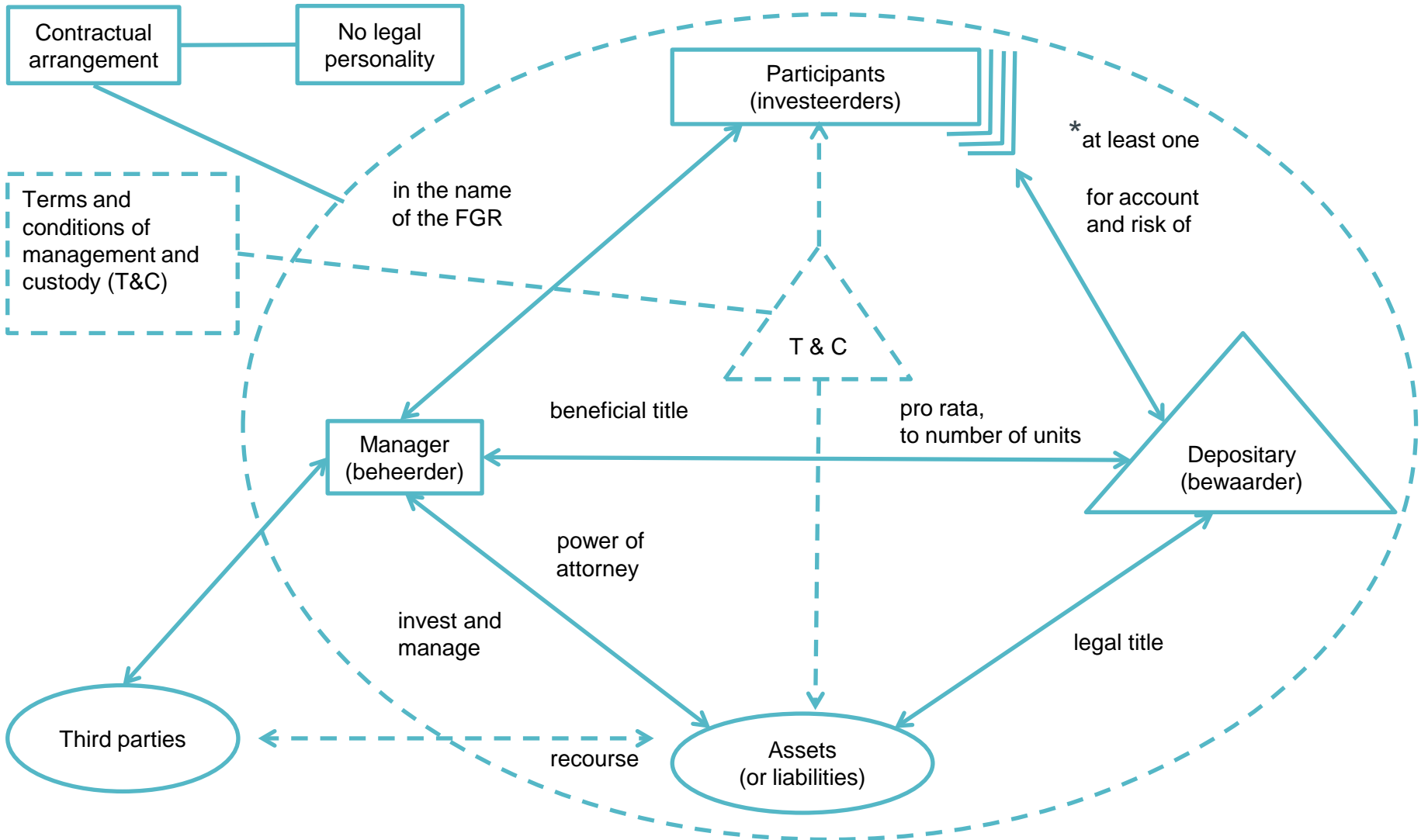
## Main legal, tax and regulatory features

- Introduction
- Overview of main
  - Legal
  - Tax; and
  - Regulatory features
- Questions

The Netherlands is a very attractive on-shore gateway for international investment institutions

# Legal considerations

# Mutual Fund (Fonds voor gemene rekening (FGR))



# Legal (civil-law) considerations

## Main characteristics – FGR or mutual fund

- What
- Who are involved
- Establishment
- Legal status
- T&C
- Title to assets
- Liability
- Dutch trade register

# Tax considerations

# Corporate income tax

- Article 2 (3) Dutch corporate income tax act:
- *Onder een fonds voor gemene rekening wordt verstaan een fonds ter verkrijging van voordelen voor de deelgerechtigden door het voor gemene rekening beleggen of anderszins aanwenden van gelden, mits van de deelgerechtigdheid in het fonds blijkt uit verhandelbare bewijzen van deelgerechtigdheid. Een fonds voor gemene rekening wordt als onderneming aangemerkt. De bewijzen van deelgerechtigdheid worden als verhandelbaar aangemerkt indien voor vervreemding niet de toestemming van alle deelgerechtigden is vereist, met dien verstande dat ingeval vervreemding uitsluitend kan plaatsvinden aan het fonds voor gemene rekening of aan bloed- en aanverwanten in de rechte linie de bewijzen niet als verhandelbaar worden aangemerkt.*

# Corporate income tax

## Open FGR (open *FGR*)

- FGR is subject to Dutch corporate income tax (unless it is a fiscal investment institution or a tax exempt investment institution).
- Profit distributions by FGR are subject to dividend withholding tax.
- Has to file an annual CIT return (and dividend withholding tax returns).

## Closed FGR (*besloten FGR*)

- FGR is 'invisible' for Dutch corporate income tax and dividend withholding tax purposes.
- All profits made by the FGR are attributed to the participants in the FGR as if they are directly investing in the underlying assets.
- FGR is not subject to Dutch corporate income tax and dividend withholding tax.
- Does not have to file an annual CIT return and dividend withholding tax returns.



# Corporate income tax

*An FGR is closed if:*

*'approval requirement'*: the transfer of a participation is subject to the prior written consent of all participants. Such approval is deemed to be provided if no response has been received four weeks after the day the consent has been requested.

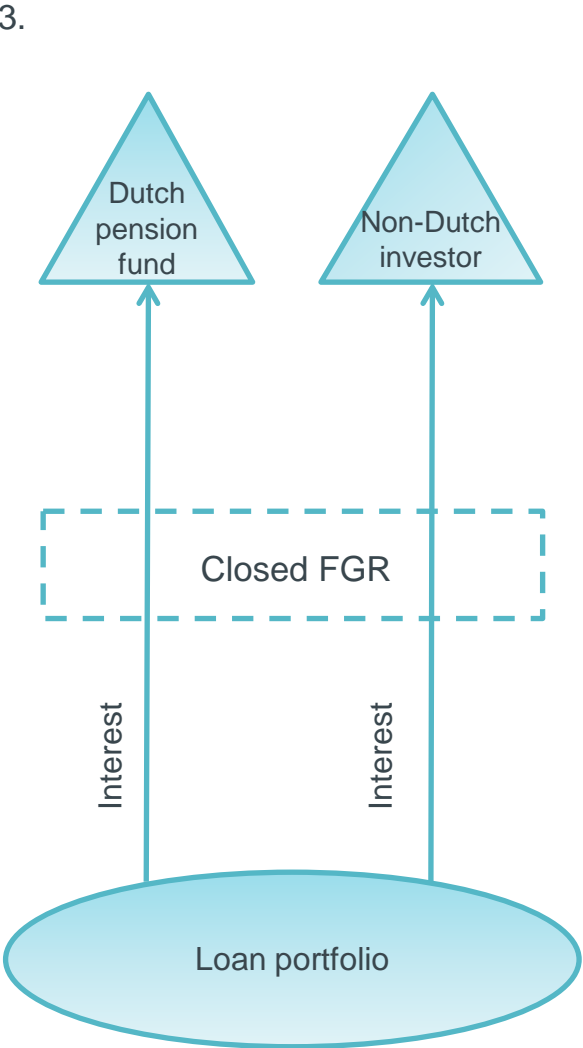
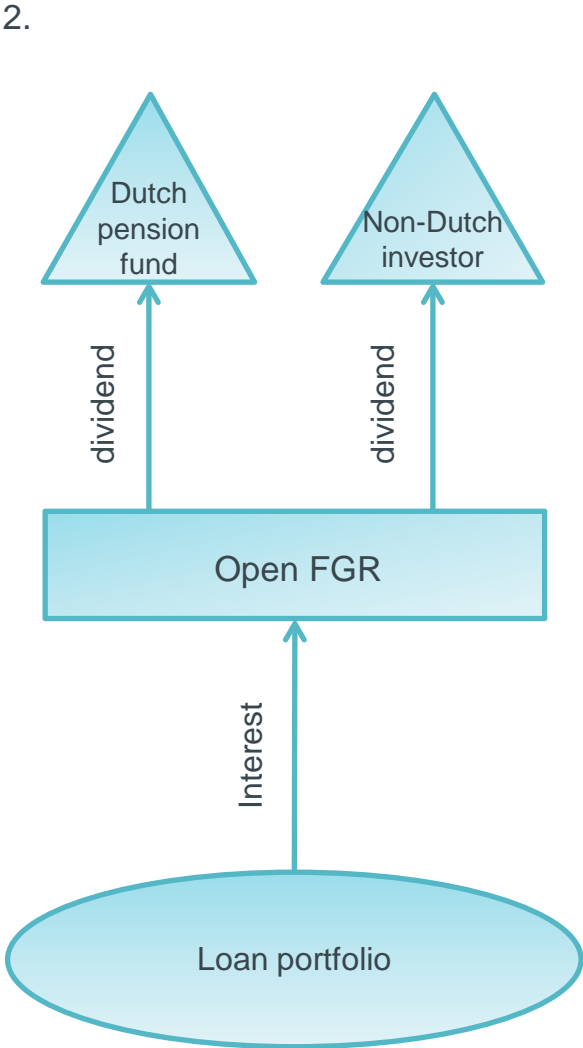
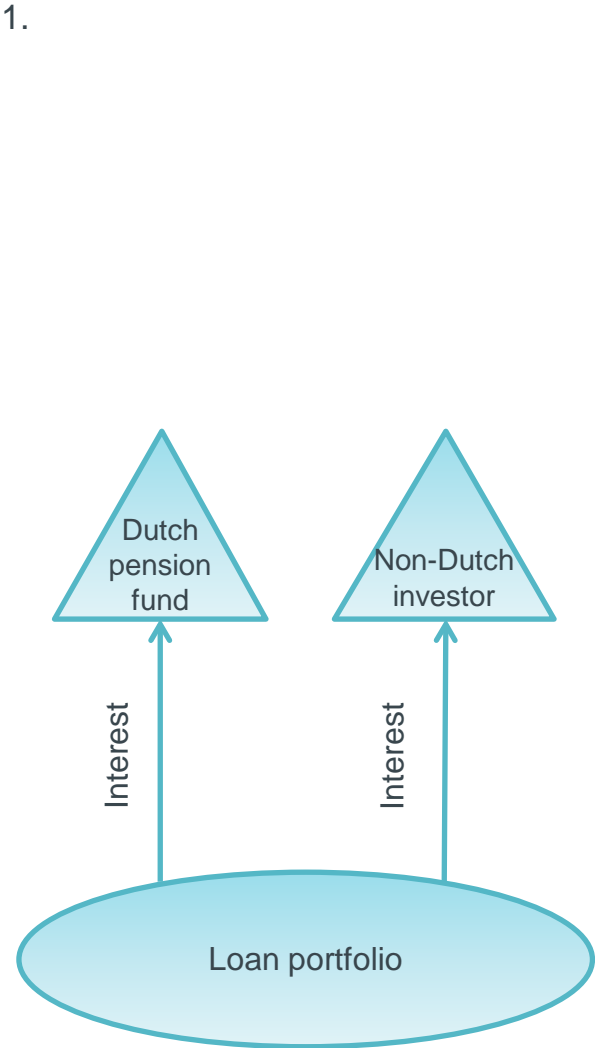
*OR*

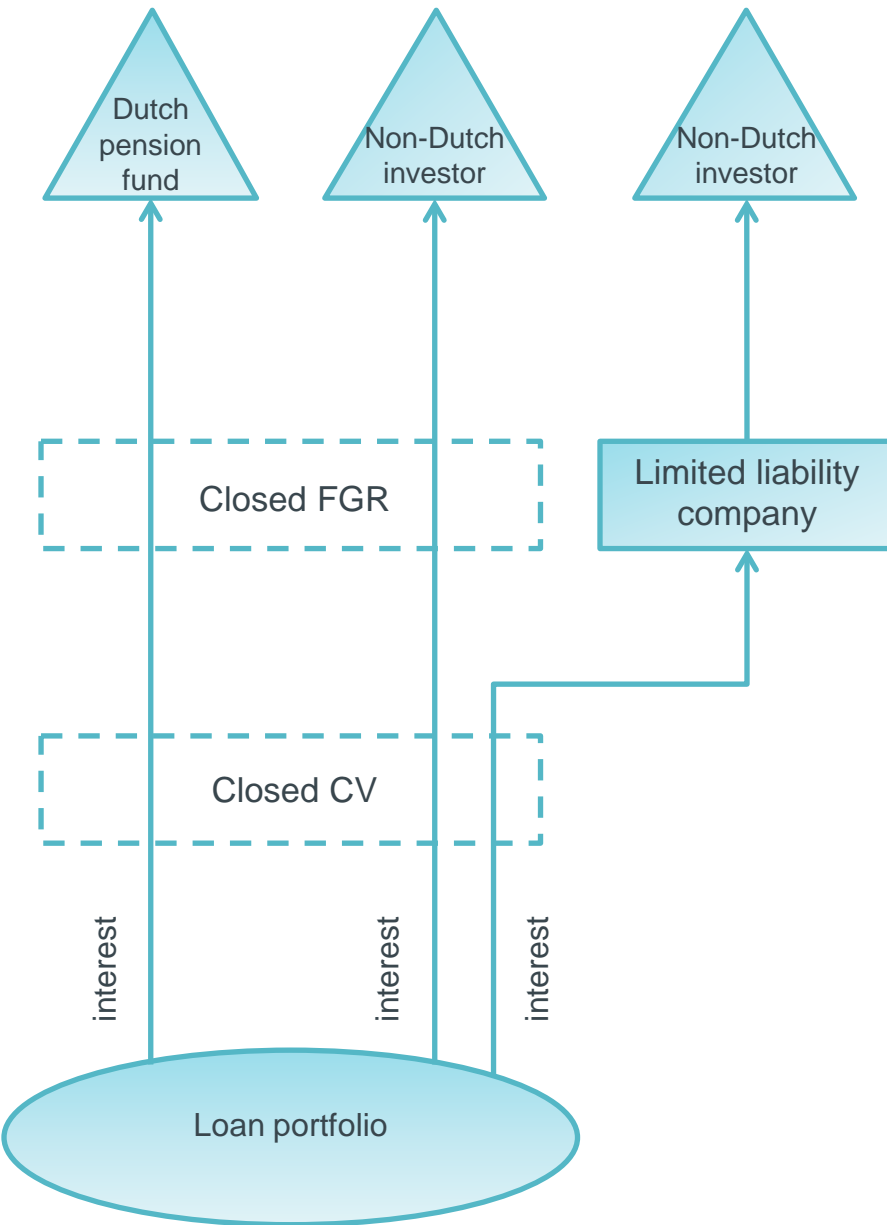
*'repurchase requirement'*: participations can only be transferred to the FGR itself. The FGR can subsequently offer these participations to other parties.

(One of) these mechanisms must be included in the FGR Ts&Cs and be complied with in practice.

If the FGR is not closed, then it is open.

# Examples





### Stacking partnerships ('stapelen')

- The stacking of partnerships concerns the situation in which a tax-transparent entity (*i.e.* closed FGR or CV) participates in another tax-transparent entity

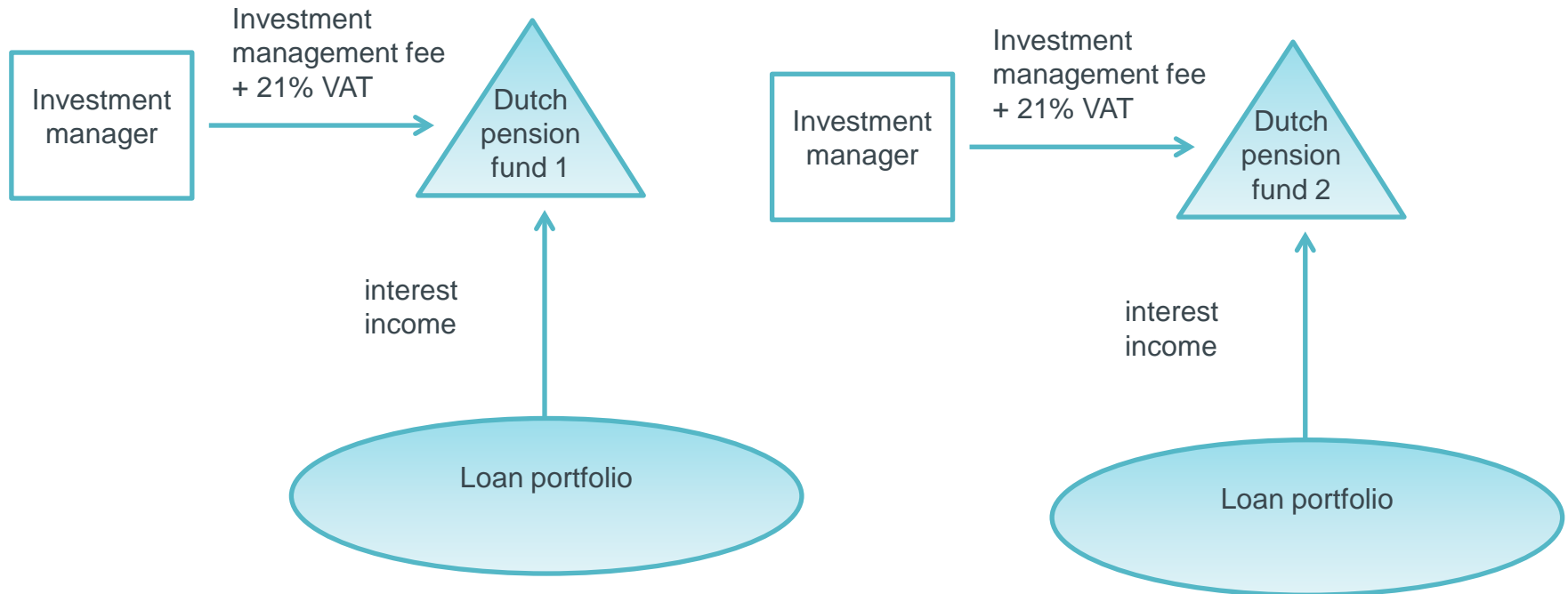
#### *Tax treatment before 2016*

- All partners in both the closed FGR and all partners in the closed CV should give their permission when changing the partners in the FGR or CV ('reciprocal consent requirement').

#### *Tax treatment as of 2016*

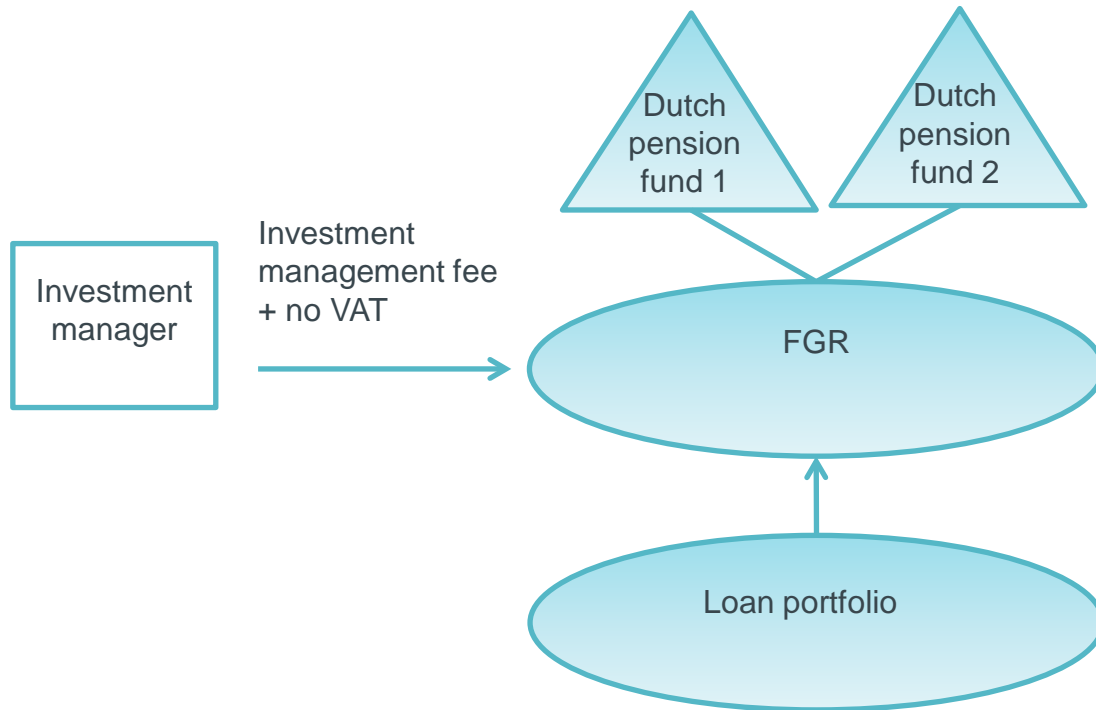
- The State Secretary has approved that in order to qualify as tax transparent, as of 1 January 2016 only all direct partners should grant their permission when changing the partners in the FGR or CV ('single consent requirement' – if this 'single consent requirements has been included in the FGR/CV agreement.
- This relaxation has made the closed FGR / closed CV more popular.

# VAT exemption for collective fund management services



A pension fund (and other financial institutions) can generally not recover (all) VAT charged to it. So this VAT is an actual cost for such pension fund / financial institution.

# VAT exemption for collective fund management services



Requirements to be met to apply the VAT exemption:

1. there is a collectivity; and
2. qualifying investment management services are provided to the collectivity

# Requirement 1: there is a collectivity

Collectivity means:

- (i) there are two or more parties;
- (ii) these parties pool (part of) their assets (*e.g. through* an FGR); and
- (iii) the risks in relation to these assets are shared between the investors

A pension fund that carries out a defined benefits (DB) scheme is not considered to be a collectivity.

A pension fund that carries out a defined contributions (DC) scheme is considered to be a collectivity.

## Requirement 2: qualifying investment management services

Investment management means: management services provided to a fund.

Until recently, the general view was that a fund / investment manager did not have to be subject to 'governmental supervision' in order to be eligible to the VAT exemption.

However this view has been changed on the basis of recent ECJ and Dutch Supreme Court case law. Based on this case law:

A fund is a qualifying fund, if it is subject to 'governmental supervision', *i.e.* it is a:

- UCITS
- non-UCITS (*i.e.* AIF) that is in a comparable position as a UCITS.

## Requirement 2: qualifying investment management services

A non-UCITS is in a comparable position as a UCITS, if it is subject to governmental supervision (Act on financial supervision / Wet Financieel Toezicht).

This leaves open a number of questions/uncertainties:

- Foreign governmental supervision
- Fund itself not subject to governmental supervision, but the investors are subject to governmental supervision
- Reliance on older commitments by Dutch State Secretary of Finance (e.g. asset pooling by pension funds)
- Fund management by fund managers subject to 'AIFM light' regime



# Regulatory considerations

# Regulatory regime

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").

As such, there are 2 relevant requirements under the Wft:

- Licensing requirement for the manager (AIFM); and
- Prospectus requirement for offerings.

Most FGRs operate under an exemption from these 2 requirements!

# Regulatory regime: exemption from licensing requirement

“Small AIFMs” exemption:

- AUM, including assets acquired through use of leverage, does not exceed € 100 million
- AUM does not exceed € 500 million where AIFs are unleveraged, have no redemption rights during five years following investment

Can opt in and become authorised:

- pros – benefit from the AIFMD passport
- cons – all aspects of the Directive apply (e.g., reporting)

For Netherlands additional “marketing” restrictions, which are equal to the first few exemptions from the prospectus requirement

## Regulatory regime: exemption from prospectus requirement

A prospectus is not required when offering securities to the public in the Netherlands, if securities either:

- Are offered to qualified investors only;
- Are offered to less than 150 potential investors;
- have a denomination or consideration of at least EUR100,000 for each security.

*A prospectus is also not required if a public offering of non-listed securities has a total consideration of less than EUR 2.5 million calculated over a 12-month period.*

## Holder of the legal title: FSA concept for regulated funds

- A manager administering an investment fund (*beleggingsfonds*) must ensure that the legal title of the investment fund's assets are acquired for the benefit of the unitholders by a trustee. This is to keep the fund's assets (of which the investors are the beneficiaries) separate from the manager's assets.
- Only a legal person, whose sole object according to its articles of association is to hold assets and administer the goods in which an investment fund invests, can act as a trustee of a fund.

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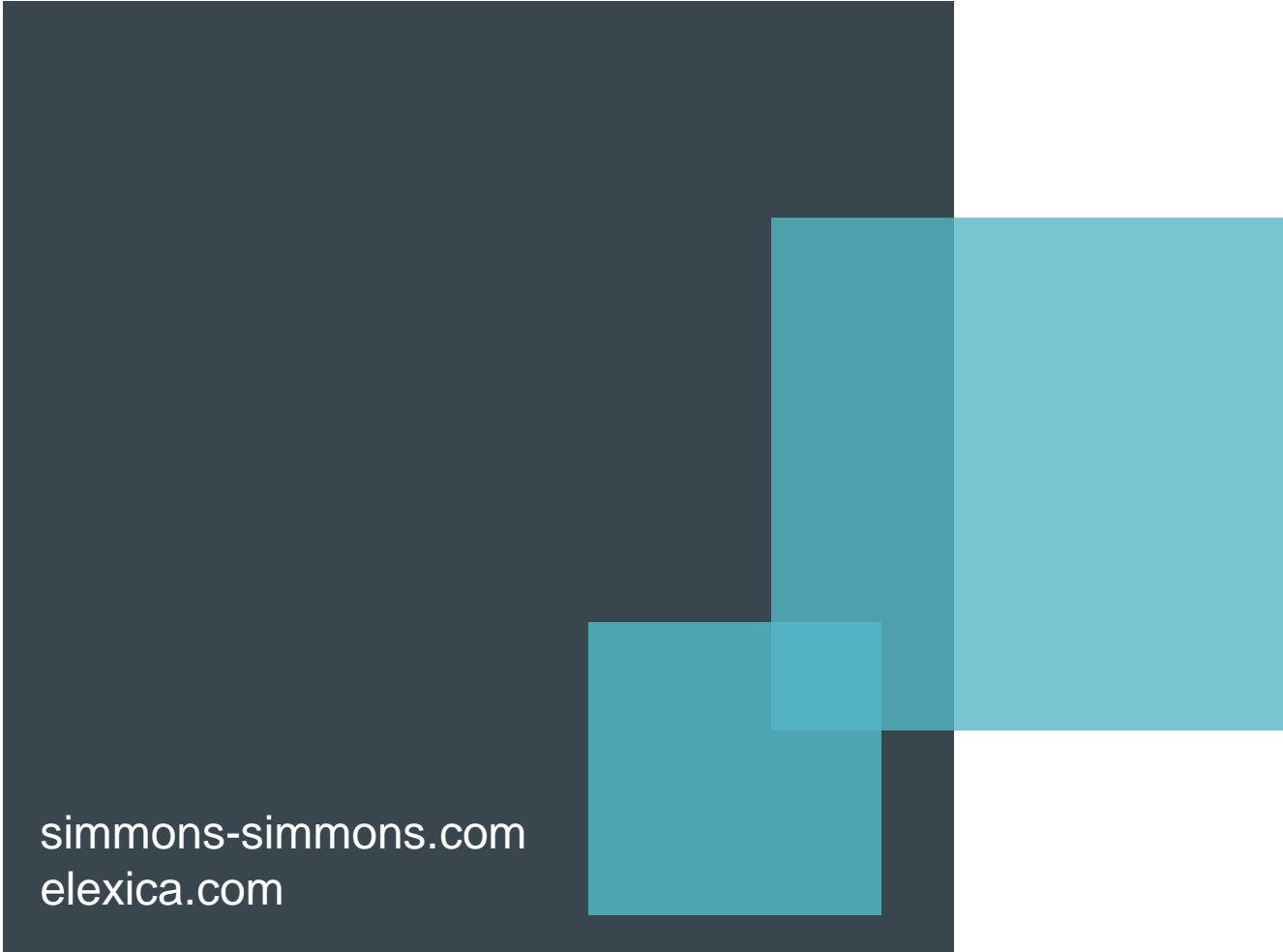
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