

## Benelux Fund Briefing

Benelux Investment & Private Equity Funds:

New fund regimes and recent developments

January 2007



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# 1. New Luxembourg specialised investment fund

## 1.1 Introduction

A new law on specialised investments funds ('SIF') will be enacted at the latest on 14 February 2007 (the 'SIF Law'). The SIF Law will succeed and replace the 1991 law on undertakings for collective investment, the securities of which are not intended to be placed with the public.

The new SIF regime is the result of a combination of features taken from the 2002 regime for traditional undertakings for collective investment and features taken from the 2004 regime for investment companies in risk capital ('SICAR'). The end product is a lightly regulated, operationally flexible and fiscally efficient investment fund regime for an international qualified investor base. The key characteristics of the SIF regime are described below.

## 1.2 Key characteristics of the SIF regime

### **Eligible investors**

Compared to its predecessor regime, the SIF Law substantially broadens the investor base. Any institutional, professional or 'well-informed' investor may not only invest in, but also initiate or launch a SIF.

The 'well-informed' investor status requires that the investor adhere to the 'well-informed' status and further:

- (i) invests at least EUR 125,000, or
- (ii) if the investment amount is smaller, presents an appraisal from a credit institution, a qualifying investment enterprise, or by a management company certifying the investor's expertise, experience and knowledge in adequately appraising an investment in the relevant SIF.

A SIF may furthermore be initiated and launched by any qualifying investor, a significant innovation although in line with the experiences gained from the lightly regulated SICAR regime. A SIF initiator thus no longer needs the 'deep pockets' associated with the promotership of the undertakings for collective investment under the 2002 Law.

### **Investment and leverage restrictions**

Although the principle of risk diversification still applies, there will be no pre-set quantitative, qualitative, geographic or other type of investment restrictions. The SIF initiator(s) may thus freely determine their investment policies (e.g., within a single- or multicompartiment (umbrella) SIF), investment restrictions or limitations without being bound by any pre-set regulatory guidelines provided the policies are based on the principle of risk spreading. SIFs will furthermore not be bound by any borrowing restrictions.

## **Supervision**

The setting up of a SIF no longer requires prior authorisation of the Luxembourg regulatory authority of the financial sector (*Commission de Surveillance du Secteur Financier* or 'CSSF'). However, the constitutional documents of the relevant SIF need to be filed with the CSSF within one month following the creation of the SIF. Although the CSSF will verify the compliance by the relevant SIF and its directors with applicable laws and regulations prior to admitting the fund on the official SIF list, the SIF may start as soon as it has been created.

## **Qualifications of management**

The CSSF will devote special attention to reviewing the qualification of the directors (*dirigeants*) of the SIF. The legal representatives of each SIF thus need to submit evidence of their professional qualification, good standing and integrity to manage the SIF. The directors will not be subject to any residency requirement. Furthermore, the professional qualification of directors will in practice be appraised for all the directors of a SIF considered together and not necessarily in respect of each director separately.

## **Disclosure / reporting**

Each SIF will need to prepare an 'issuing document', which may be labelled as a private placement memorandum, offering memorandum or prospectus, as the case may be. Even though no minimum content is prescribed (except if a Prospectus Directive compliant prospectus is to be prepared), such documents must include any information necessary for the investors to make an investment decision.

A SIF will only have to produce an annual report following a pre-set reporting template providing for a minimum level of disclosure. This annual report will be provided to investors and the CSSF within six months from the end of the period to which it relates. The SIF will not have to publish a net asset value.

## **Organisational flexibility**

A SIF may be structured as a common fund governed by a contractual arrangement (*fonds commun de placement* - 'FCP' managed by a management company), as an investment company with variable capital (i.e., SICAV) opting for the corporate form of a private limited liability company (*société à responsabilité limitée* - 'S.à r.l.'), public limited liability company (*société anonyme* - 'SA'), partnership limited by shares (*société en commandite par actions* - 'SCA') or cooperative company in the form of a public limited liability company (*société coopérative sous forme de société anonyme* - 'SCSA') or any other legal regime available under Luxembourg law, such as a limited partnership (*société en commandite simple*), for example.

A SIF may thus for example replicate the operational and legal flexibility typically associated with Anglo-Saxon partnerships. As a result of the important choice of fund vehicles, the operational flexibility will reach an unprecedented level of structuring flexibility. The initiators will in addition have all the flexibility they need for the organisation of subscriptions,

redemptions or distributions, the valuation of assets, or the compartmentalisation of assets, risks or investors.

The minimum capitalisation of the SIF (share capital and premium included) will need to be at least EUR 1,250,000 within a period of one year following approval by the CSSF.

#### **Custodian**

As is the case for all Luxembourg fund vehicles, the assets of the SIF have to be safeguarded by a Luxembourg-established custodian bank. However, the SIF Law no longer imposes specific functions on the custodian bank, thus resulting in fewer constraints (compared to funds governed by the 2002 Law) in the relationship between the SIF and its custodian bank.

#### **Taxation**

The tax regime of the SIF continues the proven and tested tax regimes for Luxembourg investment funds (SICAVs).

Whether the SIF is organised with or without legal personality, capital contributions will be subject to a one-time fixed capital duty charge of EUR 1,250.

SIFs are otherwise only subject to an annual subscription tax (*taxe d'abonnement*) of 0.01% assessed on the total net assets of the SIF. Further, in accordance with the 1991 Law, the subscription tax will not apply to (i) SIFs which invest in other undertakings for collective investment governed by the 2002 Law and which have already been subject to an annual subscription tax, (ii) SIFs which invest in certain money market instruments only, as well as (iii) SIFs implementing pension pooling schemes.

Luxembourg has signed more than 40 double tax treaties many of which do not extend their benefits to Luxembourg undertakings for collective investment. However, the following jurisdictions do grant treaty protection to Luxembourg SICAV/SICAFs/SIFs: Germany, Austria, People's Republic of China, Korea, Spain, Finland, Indonesia, Ireland, Israel, Malta, Morocco, Uzbekistan, Poland, Portugal, Romania, Slovak Republic, Singapore, Slovenia, Thailand, Trinidad and Tobago, Tunisia, and Vietnam. The following countries may extend treaty benefits on a case-by-case basis: Bulgaria, Greece, Italy, Russia and Switzerland.

SIFs which are organised as common funds (FCP) may in principle never claim treaty benefits themselves. Due to the lack of legal or fiscal nature of the FCP itself, investors may directly claim any treaty benefits under the tax treaty concluded between the country of residence of the investor(s) and the country in which the respective SIF investment is made.



*"In designing the SIF,  
Luxembourg carefully  
listened to  
fund sponsors"*

*Gilles Dusemon, attorney*

### 1.3 Conclusion

SIFs with their low entry-level threshold, flexible legal structuring options and favourable tax regime complete the product range of existing investment vehicles available in Luxembourg.

SIFs will continue within the track record set by Luxembourg FCPs and SICAVs further aiming to deliver a tailor-made on-shore investment fund regime to an international initiator and investor base in a way that compares favourably with other international off-shore fund schemes.



# 2. The new Dutch fully exempt investment fund

## 2.1 Introduction

The Dutch Government has published a legislative proposal comprising the introduction of a new tax-exempt regime for investment funds (*vrijgestelde beleggingsinstelling* - 'VBI'). This new regime will be introduced alongside the existing classical FBI regime (*fiscale beleggingsinstelling*). The VBI regime is expected to enter into force at the beginning of 2007.

The VBI regime will be very similar to the Luxembourg SICAV regime, providing for a full exemption from Dutch corporate income tax, as well as an exemption from dividend withholding tax on profit distributions. In addition, and contrary to the existing (classical) FBI regime, the VBI regime does not impose shareholders' requirements, financing limits or any distribution obligations.

## 2.2 Main conditions

The main conditions of the VBI regime are as follows:

- The fund or its manager either holds a license, or qualifies for an exemption from the supervision of investment institutions under the Act on Financial Supervision;
- The fund is an open-ended investment vehicle;
- The fund applies certain risk diversification measures;
- Investments are limited to marketable shares and bonds, instruments commonly traded on the money market, commodity derivatives, forward contracts, swaps, and options on aforementioned instruments. The VBI regime will not be open to direct investments in real estate and (mortgage) loans;
- The legal form of the fund is either a Dutch public limited company (*Naamloze Vennootschap* - 'NV'), a mutual fund (*fonds voor gemene rekening* - 'FGR'), or certain comparable foreign entities. The latter enables foreign investment funds to apply for the VBI regime as well (e.g., a Luxembourg SICAV resident in the Netherlands).

## 2.3 Other

In addition, and contrary to the FBI regime, the VBI regime does not contain shareholders requirements, gearing limits or an obligation to annually distribute the available profit. For the sake of completeness, the VBI regime will be introduced alongside the existing (and amended) FBI regime. However, it should be noted that investors resident in the Netherlands will be required to annually mark-to-market their investment in the VBI.

# regime

From an international tax perspective, foreign investors in a VBI will not be subject to Dutch tax as a non-resident taxpayer. In addition, since full exemption from Dutch corporate income tax applies, the VBI will not be considered resident in the Netherlands for tax treaty purposes - denying withholding tax reclaims on its dividend or interest income as the Netherlands will not issue certificates of residency.

The proposed VBI regime is expected to enter into force with retro-active effect as of 1 January 2007, becoming available for tax years starting on or after that date.



# 3. Overhaul of the Dutch classic FBI regime

## 3.1 Introduction

The Dutch 'classic' FBI is widely used as a (quoted) investment fund for investments in securities and real property (the 'Dutch REITs'). In most cases, the FBI has the form of a Dutch stock company (NV or BV). An FBI is subject to a Dutch corporate income tax rate of 0%, provided certain requirements are met (see below). An FBI may claim tax treaty benefits, for example on dividends received by the FBI. Under certain circumstances, an FBI can request a (partial) payment from the Dutch tax authorities to compensate for loss of foreign withholding tax.

The current FBI regime was introduced in 1969 as one of the first 'flow through' regimes. Given the growing European competition in the field of investment fund regimes and under pressure from case law from the EU Court of Justice, the Dutch Government has decided to propose a bill for the modernisation of the FBI regime. The most important aspects of this modernisation are described below.

## 3.2 Modernised characteristics

### **Legal form / residence**

Currently, only a Dutch resident NV, BV or open FGR may apply for the FBI regime. Under the modernised regime, foreign legal entities comparable to a Dutch NV, BV or open FGR may also apply for the FBI regime. For example, a German AG resident in Germany can, in principle, apply for the Dutch FBI regime given its Dutch-based real estate.

### **Shareholder requirements**

The most important amendment is a relaxation of the shareholder requirements. First of all, the requirement that a foreign shareholder may not own 25% or more in an FBI will be completely abolished. Secondly, the more lenient shareholders' restriction for quoted FBIs will, under the new regime, also apply to FBIs that are non-quoted but are subject to regulatory supervision by having a license under the Act on Financial Supervision. Each of these categories has its own set of conditions. More stringent conditions are imposed on FBIs that do not have a regulatory license.

### **Gearing limits / profit distribution obligation**

No amendments are made to the gearing limits (60% of the total tax book value of real estate and 20% of the total tax book value of all other investments), or the profit distribution obligation (net taxable profit, excluding capital gains, must be fully distributed within eight months after the end of the financial year).

### 3.3 Other

In a separate bill, an exception is proposed to the requirement that an FBI is only allowed to invest in purely passive investments. Today, property development activities are considered to be beyond the scope of purely passive investment activities. Under the new proposed law, an FBI will be allowed to conduct property development activities, provided (i) the development activities are carried out in a special taxable subsidiary which will develop the property for the benefit of the FBI, or (ii) the development activities by the FBI itself do not increase the value of the 'determined value'<sup>1</sup> of the property by more than 30%.

Distributions by an FBI are subject to Dutch dividend withholding tax. The rate of withholding tax is reduced from 25 to 15% as of 1 January 2007. Moreover, EU tax-exempt shareholders, such as pension funds, can also claim a full refund of Dutch dividend withholding as of 1 January 2007. Distributions from the tax-free reinvestment reserve, to which all capital gains are posted, are free from Dutch dividend withholding tax under domestic law. This means that as of this year, many exempt institutional investors resident in other EU Member States (for example, EU pension funds) will not suffer any tax leakage in connection with distributions made by FBIs.



*"EU law developments  
were the main trigger  
for the modernisation of  
the Dutch FBI regime"*

*Ronald Wijs, tax lawyer*

<sup>1</sup> The determined value is the real estate's value under the Dutch Valuation of Immovable Property Act (*Wet Waardering Onroerende Zaken* or 'WOZ').

# 4. New Act on Financial Supervision

## 4.1 Introduction

As of 1 January 2007, the Act on Financial Supervision (*Wet op het financieel toezicht* - 'AFS') has come into force in the Netherlands.

The AFS is designed to be the conclusive piece of legislation to implement the transition from sector-oriented supervision (i.e., banks, brokers, insurers, collective investment schemes, each having their 'own' set of rules and regulator) to functional supervision. Accordingly, prudential supervision (solvability and stability of the financial institutions) is now generally exercised by the Dutch Central Bank and supervision of the market behaviour of financial institutions by the Financial Markets Authority ('AFM').

The AFS replaces almost all existing financial legislation by one single act (and ancillary rules and regulations issued pursuant thereto), including the former Act on the supervision of collective investment schemes. Although it was intended that the AFS would merely be a harmonisation exercise, it entails great many changes (albeit mostly not very radical).

## 4.2 Points of particular interest to investment funds

### **From 'professional market parties' to 'qualified investors'**

The exemptions that used to be available to ensure being exempt from the licensing requirement for collective investment schemes remain available. However, where investment schemes rely on an exemption on the basis of their investors being so-called 'professional market parties', it should be noted that the description of the predefined group of professionals has changed and broadened under the AFS. This group will now be referred to as 'qualified investors'. A qualified investor must meet either one of the following criteria:

- A legal entity or company that is licensed or otherwise regulated to be active on the financial markets;
- A legal entity or company that is neither licensed nor otherwise regulated to be active in the financial markets of which its corporate objects is limited such as to solely invest in securities;
- A national or regional public body, central bank, international or supranational financial organisation or other similar international institution;
- A legal entity or company with its registered seat in the Netherlands, that: (i) is considered to be a 'small company' pursuant to ancillary rules and regulations issued on the basis of the AFS. A 'small company' is defined as a legal entity or company that, according to its most recent (consolidated) annual accounts, meets at least two of the following criteria: (x) an average number of employees of less than 250 during the financial year, (y) a balance sheet total with a maximum of EUR 43,000,000 and (z) an annual net turnover with a maximum of EUR 50,000,000; and (ii) is registered as a qualified investor with AFM at its own request;

- A legal entity or company, not being a legal entity or company as meant in the previous paragraph under (i) (i.e., any entity or company larger than a 'small company');
- A person residing in the Netherlands who meets certain rules issued by governmental decree and is registered with AFM as a qualified investor at their own request;
- A natural person or company that is considered a qualified investor in another member state, as meant in section 2(1)(e) under (iv) or (v) of the Prospectus Directive (2003/71/EC).

#### **Debt financing by collective investment schemes**

Many collective investment schemes operate on the basis of leveraged financed investments. Where investment schemes obtain debt financing for the purpose of financing investments (either pending receipt of draw downs of capital, or on a more permanent basis), they could under certain circumstances in the past qualify as a 'credit institution' (i.e., a bank) under the Dutch Act on the Supervision of Credit Institutions (*Wet toezicht kredietwezen*). This was due to the broad definition of a credit institution that included an institution obtaining repayable funds and investing such funds for its own account.

Under the AFS, this scope issue has been resolved. Debt financing by investment schemes will now only be AFS sensitive, and will hence only possibly trigger a banking licensing requirement, if the proceeds of such debt financing are used for the purpose of on-lending (as opposed to investing) the same for the scheme's risk and account.

#### **'Comply or explain' reporting by Dutch institutional investors**

Investment schemes, life insurers and pension funds, with a seat in the Netherlands holding (certificates for) shares in companies that are listed on a market in financial instruments will, under the AFS, be required to comply with, or explain their non-compliance with, the provisions of the Dutch Corporate Governance Code applicable to them as institutional investors. The relevant provisions of the Dutch Corporate Governance Code relate to the disclosure of the institutional investor's policy with regards to the exercise of voting rights. Reporting must be established at least once a year in the institutional investor's annual accounts, as well as on their website or, alternatively, to the address of each participants or client (i.e., the ultimate beneficiaries) to the extent such participant or client consented thereto. The reporting requirements do not apply to unregulated investment schemes (investment schemes that are either excluded or exempt from the licensing requirement under the AFS).

# 5. Other fund developments in the Benelux

## 5.1 Luxembourg

The following Luxembourg developments are relevant:

- The minimum (par) value of shares in Luxembourg public and private limited liability companies has been abolished.
- The European Commission's decision of 19 July 2006 (C 3/2006) providing that the Luxembourg holdings 1929 company and 'holdings milliardaires' company regime amount to State Aid. The regime should be abolished by the end of 2010. The Luxembourg Government enacted a law to abolish the Holding 1929 (and holding milliardaires) regime with a transitory period ending on 2011.
- The CSSF Circular 06/241 dated 5 April 2006 on the risk capital concepts under the SICAR law, providing regulatory guidance to initiators as to which investment policies may qualify under the SICAR regime.
- Contrary to rumours, the Luxembourg capital duty (1%) has not been abolished as of 2007. It should be noted that most Luxembourg investment funds are not liable to capital duty (apart from a fixed forfeited amount upon incorporation).

## 5.2 The Netherlands

The following recent Dutch developments are relevant:

- On 23 January 2007, the Dutch Ministry of Finance published two Decrees in which it alleviates the Dutch rules to achieve and maintain tax transparency for Dutch *commanditaire vennootschappen* ('CV'; the Dutch equivalent of the limited partnership) and *fondsen voor gemene rekening* ('FGR'; the Dutch mutual funds).
  - Tax Transparency of Dutch CV. The Dutch tax authorities take the position that a Dutch CV is tax transparent only if each change of interest in the CV among its limited partners (including admission of a new limited partner and substitution of a limited partner) is subject to the prior unanimous consent of all partners, both general partners and limited partners. Such prior unanimous consent must be given 'expressly' by all partners for each such event. This unanimous consent condition to achieve tax transparency for the CV is modified by Decree of 11 January 2007, no. CPP2006/1869M. The Decree provides that consent is deemed to have been given by a partner if he does not specifically reject a request for his approval within four weeks following the date of notification of the admission or substitution of a limited partner.
  - Tax Transparency of Dutch FGR. Last year, the Dutch tax authorities published a circular letter providing guidance on the transparency rules applicable to the FGR, which Decree has now been replaced by Decree of 11 January 2007, no. CPP2006/1870M. In summary, a Dutch FGR will be treated as tax transparent if the FGR agreement provides that (a) either the transfer of FGR units is subject to an almost identical (alleviated) consent requirement as the one that applies to the CV (see above), or (b) the transfer of units is exclusively realised by way of repurchase and issue of certificates by the FGR itself. The possibility to create "liquidity" by way of repurchase by the FGR without triggering non-transparency for the FGR, enhances the ability to use the FGR for an open-ended fund.

- The Dutch corporate income tax law has been overhauled with effect from 1 January 2007 regarding several important amendments to improve the competitive tax position of the Netherlands. For example, the standard rate of Dutch dividend withholding tax has been reduced from 25 to 15%, as of 1 January 2007. Moreover, certain exempt EU-based investors (such as pension funds) are allowed to claim a full refund of Dutch withholding tax on dividends (for example, a UK pension fund investing in Dutch securities).
- Various amendments to the Dutch participation exemption regime may also be of interest to the fund industry (for example, private equity funds and property funds). The criteria governing the application of the participation exemption regime to low taxed passive subsidiaries have been substantially changed. At present, there are still many discussions with the tax authorities on the exact interpretation of the new rules. To benefit from the participation exemption, an ownership of 5% or more of the issued share capital in the portfolio company is required. In case of a dilution below the 5% ownership, a three year transitional period will apply, which is in particular helpful for Dutch venture capital funds.

### 5.3 Belgium

As of 1 January 2007, a new pension fund dedicated legal form will be implemented in Belgium. This new vehicle will benefit from a favourable tax regime which is similar to the Belgian SICAV.

The main aspects of this new vehicle can be summarised as follows:

- **Corporate aspects:** the pension fund will be incorporated in the form of a pension funding organisation (*organisme de financement de pension/organisme voor de financiering van pensioenen*), subject to an agreement of the Banking, Finance and Insurance Commission.
- **Financial aspects:** specific investment rules will apply to diversify the investment risks.
- **Tax aspects:**
  - This fund will be subject to corporate income tax, with a reduced taxable basis (i.e., de facto zero taxable basis).
  - This fund will benefit from an exemption of the tax on stock exchange transactions and on delivery of bearer securities.
  - This fund will benefit from an exemption of the annual countervailing duties to the inheritance duties of 0.17% on the assets of the fund.

Under the new Belgium-US Tax Treaty, such Belgian-based pension funds will qualify as residents and therefore benefit from the provisions of this Treaty. Consequently, the dividend distributions and interest payments from the US to a Belgian pension fund will not be subject to withholding tax in the US as of 1 January 2008.

Existing pension funds have a five-year time period to comply with the new legal provisions.

As of 1 January 2007, the Belgian domestic withholding tax exemption, which already exists for recipient companies in EU Member States, is extended to dividends distributed to parent companies resident in countries with which Belgium concluded a tax treaty (provided certain conditions are met).

# Annex

## Comparison of four non-tax-transparent fund vehicles: Luxembourg SICAV, Dutch FBI, Dutch VBI and Belgian SICAV



Matter	Luxembourg SICAV	Dutch FBI	Dutch VBI <sup>2</sup>	Belgian SICAV
<b>1. Introduction</b>				
<i>Legal form</i>	SICAV ( <i>Société d'investissement à capital variable</i> ) in the form of a <i>Société Anonyme (public limited liability company - 'SA')</i> .	NV, BV ( <i>limited liability company</i> ) or FGR ( <i>mutual fund</i> ) or a comparable entity within the EU.	NV ( <i>public limited liability company</i> ) or FGR ( <i>mutual fund</i> ) or a comparable entity within the EU.	SICAV ( <i>Société d'investissement à capital variable</i> ) or BEVEK ( <i>Beleggingsvennootschap met veranderlijk kapitaal</i> ) in the form of a public limited liability company (SA, NV, SCA or CVA).
<i>Corporate profile</i>	Separate legal personality. Investor liability limited.	Separate legal personality if NV or BV. Investor liability limited.	VBI is owner of assets, legal personality if NV. Investor liability limited.	Separate legal personality. Investor liability limited.
<b>2. Tax regime</b>				
<i>Investors' requirements</i>	None (but regulatory requirements apply)	Various shareholders' restrictions apply for tax purposes.	None	None
<i>Profit distribution obligation and other obligations</i>	No obligations.	Profits must be distributed within eight months after the fiscal year-end. Gearing limitations, an activity tests and certain other restrictions apply.	Investments restricted to categories of securities / financial instruments listed in regulatory law. Risk spreading principle must be applied. Open-ended character is obligatory.	In principle, no obligations
<i>Tax treatment at fund level</i>	Not subject to corporate income tax, and not subject to net wealth tax.  Annual subscription tax of 0.05% on net asset value of SICAV, reduced to 0.01% for institutional investor funds.  Limited capital duty (one time flat tax EUR 1200).	Corporate income tax at a rate of 0%. Capital gains may be added to a tax free reinvestment reserve.  No capital duty.  The FBI is entitled to a payment in cash made by the Dutch authorities in lieu of a partial credit for foreign dividend withholding tax incurred by the FBI.	Exempt from corporate income tax.  No capital duty. No other levy.	Subject to corporate income tax, but de facto zero taxable basis.  No capital duty.  Annual tax of 0.08% on the net asset value of the SICAV / BEVEK, reduced to 0.01% for institutional and professional investor funds.
<i>Treaty application</i>	SICAV can make use of 23 bilateral tax treaties. Most important are: Germany, Spain, People's Republic of China, Portugal, Austria, Turkey, Singapore and Korea.	As the FBI is subject to corporate income tax (although at a rate of 0%), in general, the FBI can make use of bilateral tax treaties.	The VBI is exempt of corporate income tax, and, therefore, cannot make use of bilateral tax treaties.	As the SICAV / BEVEK is subject to corporate income tax (although on a reduced taxable basis), in general, the SICAV / BEVEK can make use of bilateral tax treaties.
<i>Withholding tax treatment</i>	No withholding tax	Dividend distributions are subject to 15% withholding tax. Distributions from the reinvestment reserve can be made free from dividend withholding tax.	No withholding tax	Dividend distributions are subject to 15% withholding tax.
<b>3. Other</b>				
<i>Flexibility</i>	No transfer restrictions, lock-up, open/closed ended, redemption and distribution etc.. However, mandatory Luxembourg custodian, auditor and administrative agent.	The conditions of the FBI regime (shareholders' requirements, gearing limitations, activity test, etc.) and legal requirements for corporations must be taken into account.	VBI may not be used as a real estate fund. There is a limit on the permitted scope of assets.	The conditions of the SICAV regime and legal requirements for corporations must be taken into account.
<i>Regulatory / Risk diversification rules</i>	Subject to prior authorisation and on-going supervision by CSSF ( <i>Commission de Surveillance du Secteur Financier</i> ). Appointment of Luxembourg custodian entrusted with the safeguarding of the SICAV's assets. Risk diversification rules apply on a case-by-case basis.  If the SICAV qualifies as a UCITS ( <i>Undertakings for Collective Investment in Transferable Securities</i> ), a European passport is available.	Regulatory supervision is not a condition for benefiting from the FBI regime (tax regime). However, depending on the investors' base, the manager or the FBI may be subject to a licence requirement and on-going supervision by the AFM ( <i>Autoriteit Financiële Markten</i> ). In practise, an exemption often applies (e.g., for funds with an institutional investors' base).  If the FBI qualifies as a UCITS, a European passport is available.	VBI or its manager must qualify as an investment fund for purposes of Dutch regulatory law and is, consequently, subject to a licence requirement and on-going supervision by the Dutch regulator (AFM), unless an exemption applies.  If the VBI qualifies as a UCITS, a European passport is available.	Subject to prior authorisation and on-going supervision by CBFA ( <i>Commission bancaire, financière et des assurances</i> ). Risk diversification rules apply.  If the SICAV qualifies as a UCITS (Undertakings for Collective Investment in Transferable Securities), a European passport is available.

2 Entry into force of this regime is expected for first half year of 2007.

## Comparison of four tax-transparent fund vehicles: Luxembourg FCP, Dutch CV, Dutch FGR and Belgian FCP



Matter	Luxembourg FCP	Dutch CV	Dutch FGR	Belgian FCP
<b>1. Introduction</b>				
<i>Legal form</i>	FCP ( <i>Fonds commun de placement</i> ), a joint ownership of assets.	Commanditaire vennootschap ( <i>limited partnership</i> ).	Fonds voor gemene rekening ( <i>mutual fund</i> ), a joint ownership of assets.	FCP ( <i>Fonds commun de placement</i> ) or GB ( <i>Gemeenschappelijk beleggingsfonds</i> ) a joint ownership of assets.
<i>Corporate profile</i>	Co-ownership of assets established under Luxembourg law, managed by a Luxembourg management company. No separate legal personality. Investor liability limited to contribution and capital commitments.	Limited partnership with no separate legal personality. Investor liability limited to contribution and capital commitment. In practice, a CV is often a 'Dutchified' Anglo-Saxon LP.	Co-ownership of assets. No separate legal personality. Investor liability limited to contribution and capital commitment.	Co-ownership of assets established under Belgian law, managed by a Belgian management company. No separate legal personality. Investor liability limited to contribution and capital commitments.
<b>2. Tax regime</b>				
<i>Transferability</i>	No restriction on transfer of FCP interests.	To be considered transparent for Dutch tax purposes, if unanimous consent from all the limited partners is required for transfer of limited partnership interests and admission of new limited partners.	To be considered transparent for Dutch tax purposes, if (i) unanimous consent from all the unitholders is required for transfer of units or (ii) units may only be transferred to the FGR itself.	If a public fund, there are no restrictions on transfer of FCP interests. If an institutional fund, the FCP interests may only be transferred to institutional investors. If a private fund, the FCP interests may only be transferred to other private investors.
<i>Tax treatment</i>	No corporate income tax, no withholding tax, no capital duty, and no net wealth tax.  Annual subscription tax of 0.05% on net asset value of FCP, reduced to 0.01% for institutional investor funds.	No corporate income tax, no withholding tax, no capital duty. No net wealth or annual subscription tax.	No corporate income tax, no withholding tax, no capital duty. No net wealth or annual subscription tax.	No corporate income tax, no withholding tax, no capital duty, and no net wealth tax.  Annual subscription tax of 0.08% on net asset value of FCP, due by the management company, reduced to 0.01% for institutional and professional investor funds.
<b>3. Other</b>				
<i>Flexibility / Costs</i>	No transfer restrictions, lock-up, open/closed ended, redemption and distribution etc. However, mandatory Luxembourg custodian, auditor and administrative agent.	Flexibility in partnership agreement: lock-up, open/closed ended, redemption and distribution etc. However, transferability rules must be taken into account for tax transparency.	Flexibility in fund agreement: lock-up, open/closed ended, redemption and distribution etc. Transferability rules must be taken into account for tax transparency.	Flexibility in fund agreement: lock-up, open/closed ended, redemption and distribution etc. Transferability rules must be taken into account.
<i>Regulatory / Risk diversification rules</i>	Subject to prior authorisation and on-going supervision by CSSF ( <i>Commission de Surveillance du Secteur Financier</i> ). Appointment of Luxembourg custodian entrusted with the safeguarding of the FCP's assets. Risk diversification rules apply on a case-by-case basis.	If set up as an institutional fund not subject to prior authorisation or on-going supervision. No reporting obligations and no external audit required.	If set up as an institutional fund not subject to prior authorisation or on-going supervision. No reporting obligations and no external audit required.	Subject to prior authorisation and on-going supervision by CBFA ( <i>Commission bancaire, financière et des assurances</i> ). Risk diversification rules apply.

# The Loyens & Loeff Fund Team

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The Loyens & Loeff Fund Team, consisting of some 50 dedicated experts, focuses on the structuring and advising of private equity funds, investment funds, European private equity real estate funds, REITs and all other aspects of the investment management industry. These include investment and joint-venture work for institutional investors (pension funds) and carried interest structuring for fund management. Our multi-disciplinary Fund Team is combining corporate, tax, finance, regulatory and real estate expertise.

Our clients include a variety of funds and fund managers: European captive and independent private equity funds (buy-out and venture capital), mutual funds, quoted REITs with a European property portfolio, cross border private equity real estate funds, US investment banks managing European opportunity funds and investment managers setting up 'fund-of-funds'. We advise large institutional investors who are setting up their own investment funds or pooling vehicles, or who act as lead investors for funds set-up by others.

## The firm

Loyens & Loeff is an independent Benelux law firm with offices in all major financial centres in the world and more than 700 lawyers. Our Fund Team maintains close relationships with leading law firms and tax advisers in Europe, the United States and the Far East.

In 2006, for the second time in three years, Loyens & Loeff has been chosen as 'Benelux Law Firm of the Year' by Chambers and Partners.



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