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**PLASBOSSINADE ADVOCATEN NOTARISSEN
ESTABLISHING A BUSINESS ENTITY IN THE
NETHERLANDS**

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ESTABLISHING A BUSINESS ENTITY IN THE NETHERLANDS



“Establishing a Business Entity in the Netherlands”

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INTRODUCTION

PlasBossinade Advocaten Notarissen is a Dutch full-service law firm based in Groningen and Rotterdam at which lawyers, civil law notaries and tax lawyers practice law in all commercial areas.

This contribution is a brief summary on establishing a business entity in the Netherlands. On request our specialists are ready to give more information.

TYPES OF BUSINESS ENTITIES

In the Netherlands, there is a distinction between entities which qualify as legal entities (‘rechtspersonen’) and partnerships (‘personenvennootschappen’) which do not.

Legal entities are subjects of law and as such have rights and obligations. The rights and obligations of partnerships are held by the persons or legal entities for whose account the partnership is carrying on its business activities.

Legal entities with share capital

The most common type of legal entity with share capital in the Netherlands is the limited liability company, named *besloten vennootschap* or B.V. for short. The other type of legal entity with share capital is the public company named *naamloze vennootschap* or N.V. for short. The B.V. and N.V. are in many aspects very similar.

The Societas Europaea (S.E.) is the European equivalent of the N.V. and may also be incorporated in the Netherlands, provided

that the company will operate under the laws of at least two EU member states and will be governed by the SE-Directive.

As of 2012 shares in a B.V. may be traded, that is on a stock exchange or otherwise. Formerly mandatory transfer restrictions applied for shares in a B.V., such as pre-emption rights of other shareholders or mandatory approval by the board or another body within the B.V. Because of these mandatory transfer restrictions, the shares in a B.V. could not be traded freely. Nowadays share transfer restrictions are optional, however frequently used still in situations where personal collaboration in the B.V. is the main purpose.

The minimum capital requirement of € 45.000,-- for the N.V. is a relevant distinction between the two types of companies. Per October 2012 the minimum capital requirements for the B.V. ended, making it possible to transfer shares freely and liberating the possibilities to contribute on shares and to distribute dividends.

As a result, since October 2012, it is relatively easy to establish a B.V. in the Netherlands and to trim it to one’s specific needs.

We will now dive deeper into specific aspects regarding the B.V. and N.V. The following rules apply to both entities, unless stated otherwise.

Name

The incorporator is free in choosing a name, provided that in doing so it will not infringe on existing names or trademarks. The name is also the trade name under which the B.V. operates, with the letters ‘B.V.’ added. The B.V. may use more trade names and can file these at the Dutch trade registry held by the Dutch Chamber of Commerce. The addition ‘B.V.’ is reserved for the statutory name.

Seat

The B.V. has its statutory seat in the Netherlands and needs to have an address in the Netherlands. It may operate abroad.

Share capital

The share capital needs to have a value of at least € 0,01, for the B.V., € 45,000 for the N.V. and € 120,000 for the S.E.

Types of shares

Ordinary shares have voting and dividend rights. Solely in the B.V. it is possible to have shares without voting rights or shares without profit rights. Each share should have at least either voting rights or profit rights (and may have both rights). Other types of shares are preferred shares, which have a preference over the profits and priority shares, which entitle the holder to a right of approval in respect of certain board or shareholder resolutions.

Obligations for shareholders

The articles of association of a B.V. may impose certain obligations on the holders of shares which go beyond paying for the issued shares. For instance, the obligation to enter into a joint venture agreement or a shareholder's agreement. Acting in contravention with such additional obligations may trigger a suspension of the voting rights attached to the shares or the obligation to offer the shares. However, this is not mandatory.

Issue and transfer of shares

The issue and transfer of shares requires a notarial deed, unless shares are listed on the stock exchange. The articles of association may contain a clause which provides pre-emptive rights for existing shareholders or a right of prior approval for the transfer by a certain body of the company.

Shareholders' meeting

The shareholders' meeting is the highest body within a B.V. and decides on all matters which are not within the competence of other bodies. As a result, the shareholders meeting decides on e.g.: adopting the annual accounts, amending the articles of association, appointment, and dismissal as well as the deciding on the remuneration of managing directors and supervisory directors, and the winding up of the company.

Shareholders' resolutions

Shareholders' resolutions are taken by simple majority, based on the nominal value of the shares, unless the articles of association provide for a special majority and/or quorum. In respect to the dismissal of directors the required majority may not be more than two-thirds of the votes representing at least half of the issued share capital. Should the articles of association demand a larger majority or quorum, such provisions will be null and void.

Ultimate beneficial owner

As of September 2020, it is required to list the natural person or persons which are the ultimate beneficial owner of a legal entity in the registry held by the Dutch Chamber of Commerce.

Board

The board consists of one or more directors. Their appointment and remuneration is decided on by the shareholders meeting. There are no restrictions on nationality or place of residence of directors. Nevertheless, as of July 2016 it is possible that a specific natural person is forbidden by the court to be a director. It is not required to appoint a natural person. Legal entities may also be appointed as director.

The company is represented by the board, each director, or two or more directors jointly (dependent on the provisions of the Articles of

Association). In principal representation is fully and unconditional but can be limited and/or made conditional in the Articles of Association or in a Shareholder's Agreement. One can for example elect the system that the company can only be represented by two directors jointly or by the full board, with a power of attorney attributed to one or more directors specifically prescribing their authority. In acting they will then act as proxy for the board, not as director.

Supervisory Board

The supervisory board is appointed and dismissed by the shareholders meeting and may consist of one or more members. The task of the supervisory board is to review the functioning of the director(s) and to advise them.

Since 2013 it is possible to create a one tier board formed by executive directors and non-executive directors. This is a concept which is not commonly used in the Netherlands.

A supervisory board is optional unless the company has a certain size and therefore qualifies as a large company (a so-called *structuurvennootschap*). These companies are companies with an equity (issued and paid share capital plus reserves) of € 16 million, a works council and at least 100 employees working in the Netherlands. Their supervisory board needs to have at least three members.

In a *structuurvennootschap* the Supervisory Board has some powers which are otherwise the domain of the shareholders meeting, e.g., the appointment and dismissal of managing directors and the approval of certain board resolutions (amongst others: sizable mergers or acquisitions, amendment of the articles of association or winding up).

Other legal entities

Other types of legal entities which are being used commercially are the cooperative named

coöperatie and the mutual (insurance) company named *onderlinge waarborgmaatschappij*. Both are derived from another legal entity, the association, named *vereniging*.

The *coöperatie* traditionally is a form of agricultural organization where the members trade their produce with a central producing unit owned by the *coöperatie*. The *coöperatie* sells the end product on behalf of the *coöperatie*. The members receive a price for their produce and on top of that they share in the profit of the *coöperatie*.

Members may be fully liable, limited liable or not liable at all towards third parties, depending on the structure which is being implemented and as such registered with the trade registry. Although still in use in agricultural settings, nowadays the *coöperatie* is also chosen by professionals, such as lawyers or accountants, for reason of the possibility to limit liability and to steer clear from certain tax implications.

The *onderlinge waarborgmaatschappij* is in fact a *coöperatie* which undertakes insurance activities primarily for its members. It may also perform such activities for third parties, provided that the activities performed for the members form the greater part.

The last legal entity which one may encounter in the Netherlands in relation to corporate structures is the foundation named *stichting*. A foundation is an entity in itself, governed by a board which, depending on the organizational statute, may have a supervisory body. The foundation does not issue shares nor membership rights and the equity of the foundation will be solely available to further the statutory objectives of the foundation. The statutory objectives may not consist of making distributions to its incorporators or third parties unless the third-party distributions have an idealistic or social purpose. Foundations are

most commonly charities or institutions in the field of healthcare, social work, or culture.

Foundations can also serve as vehicle for undertaking commercial activities. Given the restrictions on making distributions such commercial activities mostly are in function of the idealistic objectives.

Another purpose for foundations is to serve as an instrument for separating share dividend rights from voting rights via so-called 'certification'. As a result of the certification of shares the voting rights attached will be exercised by the board and the dividend rights will accrue to depository receipts issued to third parties. In doing so the holders of the depository receipts will in fact own shares without voting rights. This practice is common in the Netherlands and mainly used for structuring ownership of (family) businesses. Typically, one or more (family) members who are involved in the business will hold ordinary shares and the board position(s) in the company as well as in the foundation, whereas the other (family) members will hold the depository receipts with dividend rights.

Another solution to trim the right structure is the creation of shares without voting rights.

Certification of shares can also be used as a shield by N.V.'s listed on the stock exchange. In that case a sizeable part of the shares are held by a foundation and listed in the form of certificates. The voting rights attached to the shares are exercised by a board, which aims to protect the interests of the company.

Sole proprietorship

An individual which is taking up a business and who acts in the course of that business without choosing a legal entity or partnership with other entrepreneurs, is acting as a sole proprietor. Rights and obligations of the business are of the

individual as are any liabilities. Nevertheless, such an entrepreneur may have employees. Those employees are employed by the entrepreneur himself.

Partnerships

The partnerships available in the Netherlands are listed hereunder. These entities are tax-transparent, meaning that tax is levied at the level of the partners, not at the level of the entity itself.

There are two types of partnerships: the *maatschap* and the *vennootschap onder firma*. The *maatschap* is intended for co-operating professionals, such as lawyers, dentists, doctors, architects, and accountants. The *vennootschap onder firma* or *v.o.f.* for short is intended for other business. Characteristic for both types is that the partners have contributed monies or goods and provide their (skilled) labour to the partnership. The main distinction between the *maatschap* and the *vennootschap onder firma* is that partners in the *maatschap* will be liable towards third parties in proportion to their number (with 3 partners every partner will be liable for 1/3), whereas partners in the *vennootschap onder firma* will be liable jointly and severally each for the full amount of the liability.

A special sub-type is the Limited Partnership called *commanditaire vennootschap* or *c.v.* for short. It is a partnership with one or more public partners and one or more so-called silent partners added. The silent partners contribute money or goods to the C.V. but are not known to the public and they may not perform acts on behalf of the C.V. They may participate in decision making. The silent partners are not registered at the trade registry. Only the number of silent partners and the amount of the capital they paid in has to be registered. Business is conducted on behalf of C.V. The profit is split

between all partners in a way determined by the deed of partnership. Losses are borne by the C.V. as such, but silent partners will not be liable to provide extra capital in such circumstances nor will they be liable towards third parties who may have a claim on the C.V. Liability of the silent partners towards third parties will be triggered when such silent partner performs an act on behalf of the C.V.

THE INCORPORATION PROCES

Legal entities

Articles of association

Legal entities are incorporated by notarial deed passed by a Dutch civil law notary. The notarial deed contains the articles of association, which provide for the name, objective, number and type of shares, authorized and paid in capital, number and authority of the directors and (optional) supervisory board and all other regulations concerning the governance and operation of the entity. Apart from the incorporation of a *coöperatie* or *onderlinge waarbormaatshappij*, all legal entities may be incorporated by a single incorporator.

Acts before incorporation

It should be noted that the vesting of rights and obligations in a legal entity will only be realized upon incorporation of the legal entity followed by filing the entity in the trade registry in the Netherlands.

Acts performed prior to incorporation or registration will only become acts of the entity once ratified by the board after the registration has taken place. If ratification does not take place, or is done prior to registration, the persons acting on behalf of the entity remain personally liable towards third parties.

For the N.V./B.V., if such ratification is done by the board whilst it knows or should have known that the N.V./B.V. will not be able to fully

comply, personal liability of the persons who acted will revive and the board members who ratified the acts may also be held liable.

Incorporation step-by-step

The steps to be taken in the course of incorporating a legal entity are the following.

Step 1: a civil law notary will have to be instructed to make a draft deed of incorporation.

Step 2: once the deed is in conformity with the requirements of the incorporator, incorporation can take place immediately. Incorporators do not have to attend the incorporation in person. They may be represented by local residents based on a legalized and apostilled power of attorney. In all cases the civil law notary will have to confirm the identity of the incorporators through an apostilled legalization. If an incorporator is a legal entity itself, also the authority of its representatives will have to be confirmed.

Persons incorporating a company in the Netherlands, as well as (foreign) companies acting as such will be screened pursuant to the Anti-Money Laundering and Counter-Terrorist Act (WWFT). For this reason some other formalities may have to be fulfilled.

Step 3: in the deed of incorporation, the initial board member(s) and (if applicable) the first supervisory board member(s) will be appointed;

Step 4: for the N.V./B.V. the share capital needs to be paid in forthwith upon incorporation. For the N.V./B.V. contribution in kind is possible but a description of the goods and a valuation are required. For the N.V. additionally a statement of a certified public accountant which confirms the sufficient value of the contribution is required. These rules also apply to acquisitions of goods which did belong to incorporators or shareholders by the N.V. in the period from

incorporation until two years thereafter. This is called *Nachgründung*.

Step 5: the civil law notary will register the entity at the trade registry held by the chamber of commerce, in principle on the same day as the incorporation. An extract showing the registration can be obtained immediately afterwards.

The time it takes to follow these five steps for incorporate will largely consist of the time it takes to provide the civil law notary with the proper instructions and documentation. Incorporation and registration itself only take one day or some days at the most.

Partnerships

Partnerships are established pursuant to a private agreement concluded between the parties becoming a partner to the entity. There are no formal requirements to be met, other than that the partnership has to be filed at the trade registry upon its establishment. The name and address of each partner will be recorded, as well as the address of the entity itself, which should be an address in the Netherlands.

GOVERNANCE AND ONGOING MAINTENANCE

Legal entities

Governance

Next to governance issues, which are previously mentioned, there is a noteworthy new law in effect per the 1st of July 2021 named *Wet bestuur en toezicht* (Act on governance and supervision). Following out of this new law governance of all legal entities will become more like the B.V./N.V. structure by opening up the possibility of a one-tier board, by standardizing conflict of interest provisions and by expanding the liability of the members of the management board and the supervisory board.

Maintenance

In this summary, we confine ourselves to the most common entities for commercial use, being the N.V. and the B.V. Pursuant to the Dutch Civil Code, the management needs to keep account of the rights and obligations of these companies on an ongoing basis, in order that at any given moment the financial status may be known. Books and documents need to be stored for at least 7 years. Furthermore, each year within 5 months from the financial year end (or 10 months if prolonged by the general meeting of shareholders), the management is obliged to prepare the annual accounts and to present these to the general meeting of shareholders. The shareholders have to adopt the annual accounts within two months upon the end of the 5- or 10-months' term. Within 8 days from establishment the annual accounts need to be filed at the trade registry.

If the company at least fulfils two of the following three criteria, it will be required to have the annual accounts audited by a certified public accountant: (1) a turnover of more than EUR 8,800,000, (2) a balance sheet total of more than EUR 4,400,000 and (3) an average number of full-time employees of 50 or more.

Non-compliance with these financial rules may give rise to criminal fines for the management. In the event of a bankruptcy this non-compliance in the three years prior to the bankruptcy form a irrefutable presumption that the management acted improperly, and it is assumed that the improper performance is a material cause for the bankruptcy. This may lead to personal liability of all board members for the total deficit in a bankruptcy of the company.

Companies need to file timely tax returns concerning all taxes, such as for instance wage tax, value added tax (VAT), corporate income tax and dividend tax.

Partnerships

Governance

With respect to governance issues, we refer to what is being written on the specifics of the partnerships above.

Maintenance

Pursuant to Dutch tax law, partnerships do have an obligation to keep account of their rights and obligations in a proper manner and to keep the books and documents for at least 7 years. There is no obligation to publish annual accounts, since the activities of the non-legal entity in principle are being conducted for the account of the participants. In the event that participants are legal entities (e.g., a N.V. or a B.V.) such legal entities do have to publish their accounts in accordance with what has been stated above.

TAX

Here a few issues regarding business taxation will be reviewed, namely the participation exemption, thin capitalization and withholding tax.

Participation Exemption

A legal entity is subject to taxation. The aforementioned businesses which are not a separate legal entity are not subject to taxation, because they will mainly be transparent for tax purposes. Tax will be levied at the level of the (income of) partners of the partnership, not at the entity itself.

Foreign companies investing in a legal entity in the Netherlands will also be confronted with Dutch tax law. If transactions between affiliated companies take place (e.g., financing and delivery of goods or services) parties should trade at arm's length in order to meet the requirements of the tax authorities of the countries involved (transfer pricing).

When cross border activities are performed, not only Dutch tax law may be relevant. The Netherlands has tax treaties with many countries. Furthermore, EU law and regulations may apply. Noteworthy are the Parent-Subsidiary Directive which prevents double taxation on the income of affiliated companies located in different EU member states and the Merger Directive, which facilitates cross-border mergers, divisions, transfers of assets or exchanges of shares in the EU.

A company which holds more than 5% of the shares in a N.V./B.V. – which is not an investment company – can apply for a participation exemption for corporate income tax purposes. Profits, for example dividends and profits on the sale of a participating interest, that have been taxed at a subsidiary will not be taxed again at the parent company if this exemption applies.

Thin Capitalisation

Due to erosion of the tax base profit the Corporate Income Tax Act holds a number of provisions with regard to the limitation of deductibility of interest payments to affiliates or third parties, instead of the (abolished) thin capitalization rules. For example, excessive interest cost of a parent company with regard to a subsidiary are limited deductible for corporate income tax. Financing schemes within a group of (international) affiliated companies may be confronted with limited deductibility of interest, for different situations.

Withholding tax

Interest and royalty payments from a legal entity in the Netherlands to foreign companies are not subject to Dutch withholding tax. A law on withholding tax named *Wet bronbelasting 2021* came into force on the 1st of January 2021 and applies to interest or royalty payments by a company established in the Netherlands to an

affiliate in a low-tax jurisdiction and in abuse situations.

Dividends may be subject to Dutch dividend withholding tax. The Dutch withholding tax rate for dividend is 15%. As mentioned before: in case the participation exemption of the Corporate Income Tax Act is applicable no dividend withholding tax is due. A lower tax rate than 15% can be applicable in case the participation exemption does not apply while The Netherlands and the country of the receiving parent company do have a tax treaty.

RESIDENCY AND MATERIAL VISA RESTRICTIONS

Work permit/duty to inform

The employer in principle must apply for a work permit or a single permit in the event that he wishes to have a non-EU citizen (hereinafter: 'the foreigner') perform work in the Netherlands. An exception is made for employers who are established outside of the Netherlands and who wish to have a foreigner perform work that is of a temporary nature. Companies who have an assignment agreement with a client established in the Netherlands (hereinafter 'the service provider') and who on that basis have their employees from third countries perform work in the Netherlands, are not required to apply for a work permit (which also includes the secondment of an employee), provided that the following conditions are met:

- it must concern a foreigner who is entitled to reside in the country of establishment of the service provider and who is allowed to perform the relevant work there;
- the alien must be employed with an employer who is established outside of the Netherlands, which means that the enterprise has its seat outside of the Netherlands and carries out effective and genuine economic activities that are not purely marginal and ancillary;

- the employer intends to temporarily provide services in the Netherlands (which implies that it performs economic activities for an economic consideration, other than paid employment);
- the enterprise is not established in the Netherlands; should the enterprise be established in the Netherlands, and in another member state of the European Union as well, the exemption scheme applies in the event that the foreigner is temporarily performing work in the Netherlands from the foreign branch within the scope of cross-border services.

Before the temporary provision of services by a foreigner in the Netherlands commences, the employer must inform the UWV (Employee Insurance Agency) thereof in writing and it must submit a statement and documents of proof (the duty to inform). This duty to inform applies each time the employee involved travels to the Netherlands.

The employer must submit documents of proof showing that the foreigner is entitled to reside in the country of establishment of the employer and that he has been granted permission to perform work there.

Moreover, a fully filled out E101 Declaration that is valid for the relevant work must be submitted, stating that the employee will carry out the activities in the Netherlands, or a truthful and written declaration made by the employer, drawn up in a form issued by UWV for that purpose, mentioning the name and the address of the employer, the nature of his enterprise and the registration data in the country of establishment, the name and address of the person on whose behalf the services are rendered, the nature of these services, where and when the foreigner will carry out his activities and the identity data of the foreigner.

Residence permit

In the event of a maximum stay of 90 days in the Netherlands, the employee requires a type C visa. Should the employee involved remain in the Netherlands for a period longer than 90 days, he is obligated to apply for a residence permit for cross-border services. The employee does not require a provisional residence permit to travel to the Netherlands.

The temporary provision of services cannot last any longer than two years. After that period the foreigner must return to the country of his employer.

Occasional work

A work permit is not required in the event that the foreigner has his main residence outside of the Netherlands and performs occasional work that exists of installing or repairing tools or machinery or installing and modifying software supplied by the employer or giving instructions as to the use thereof. Conducting business meetings or entering into agreements with companies and institutions also falls under the scope of 'occasional work'.

The occasional work may last for a maximum period of twelve consecutive weeks, within a time frame of 36 weeks.