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PLASBOSSINADE ADVOCATEN NOTARISSEN ESTABLISHING A BUSINESS ENTITY IN THE NETHERLANDS

ILN CORPORATE GROUP

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"Establishing a Business Entity in the Netherlands"

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INTRODUCTION

PlasBossinade Advocaten Notarissen is a Dutch full-service law firm at which lawyers, civil law notaries and tax lawyers practice the law in all of the commercial areas. This contribution is a brief summary of the subject and our specialists on request are ready to give more information trimmed for the purpose.

TYPES OF BUSINESS ENTITIES

In the Netherlands, we distinguish business entities which are by law acknowledged to be legal persons ("rechtspersonen") and entities which do not have the status of a legal person. The latter category may be regarded as types of co-operation between entrepreneurs, which co-operations will mainly be transparent for tax purposes. Income tax will be levied at the level of the partners of the co-operation entity, not at the level of the entity itself. For more information about some items of Dutch tax law in relation to enterprises, see hereafter under Tax Issues. Legal persons are subjects of law and as such carriers of rights and obligations like individual persons are. The rights and obligations of non-legal persons in principle are carried by the persons or legal persons for whose account the non-legal entity is carrying on its business activities.

> *For example: A Dutch person and a German company form a Dutch resident partnership in marketing and selling electronic equipment. According to Dutch law the partnership is not a legal person. The Dutch person and the German company in principle are each fully liable towards third parties for the obligations of the partnership. Should the partners incorporate a Dutch company, the latter will be a legal person and exclusively liable. The partners, as shareholders and/or managing directors will not be liable, unless they bind themselves pursuant to a surety or in the event that they may have acted negligently.*

Legal persons

The most common type of legal persons in the Netherlands is the limited liability company ("**besloten vennootschap met beperkte aansprakelijkheid**", or "B.V."). The other type of legal persons is the public company ("**naamloze vennootschap**", or "N.V."). The Societas Europea (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.

The B.V. is as a type of company comparable with the N.V., from which it stems since 1975. In 2012 the law on B.V.'s was fundamentally changed. The most characteristic differences between the N.V. and the B.V. were always the fact that shares in an N.V. may be freely traded (on a stock exchange or otherwise) whereas the transfer of shares in a B.V. was blocked by either pre-emption rights of the other shareholders or a right of approval by the management of the company or another body within the company. Also, the minimum capital requirements (EUR 45.000, -- for the N.V. and EUR 18.000, -- for the

B.V.) were relevant distinctions between the two types of companies. As per October 2012, a change in the law turned the B.V. into a far more flexible type of company by way of striking the minimum capital requirements, making it possible to transfer shares freely and liberating the possibilities to contribute on shares and to distribute dividends.

Since October 2012 it is very easy to establish a B.V. in the Netherlands and to trim it to the specific needs one has. The popularity of the B.V. as most used corporate type in the Netherlands is not to be beaten. Some of the most important elements concerning the B.V. are the following (this applies in principle to the N.V. as well, unless stated otherwise):

Name

The incorporator is free in choosing a name, provided that in doing so it will not violate an existing trade name or trademark of third parties. The name of the company is also the trade name under which the B.V. operates, with the letters "B.V." added thereto. The B.V. may use more trade names, and may file these at the Dutch trade registry, but the addition "B.V." is reserved for the formal, 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 of the B.V. needs to be minimal EUR 0,01 (N.V.: minimal EUR 45,000; SE minimal EUR 120,000).

Types of shares

Ordinary shares have voting rights and dividend rights. It is possible to create non-voting shares (not in the N.V.), which then still do have dividend rights. Other types of shares are (i) preferred shares, which do have a preference over the profits, for instance a fixed percentage of the par value of the preferred shares and a right to receive the profits in later years with respect to earlier years in which no profits were made (cumulative preferred shares); and (ii) priority shares, which may entitle the holder to a right of approval in respect of certain management board and/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 further than paying up the issued shares, for instance the obligation to enter into a joint venture agreement with the B.V. 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 to third parties.

Transfer of shares

The transfer of shares requires a notarial deed of transfer, unless shares are listed at a stock exchange. The articles of association may contain a blocking clause which provides for 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 the organisation of a B.V. or N.V. and in principle decides on all issues which do not belong to the competence of other bodies. Issues which are to be resolved by the shareholders meeting are, amongst others, establishing the annual accounts, amending the articles of association, appointment and dismissal of managing directors and supervisory directors, winding up, etc.

Management Board

The management board consists of one or more managing directors. Their appointment and remuneration in principle is being decided by the shareholders meeting. There are no restrictions on nationality or place of residence of managing directors. Legal entities may also be appointed as managing director. It is not required to appoint a natural person.

The company may be represented by each managing director, the management board jointly or two or more managing directors jointly, depending on the system elected. The power to represent is unlimited. If one would like to limit such powers one should elect the system that the company can only be represented by two managing directors jointly or by the full management board, with a power of attorney to one or more managing directors specifically prescribing their authority. In acting they will then act as proxy, not as managing director.

Supervisory Board

A supervisory board is optional, unless the company may be regarded as a "large company" (see hereafter).

The supervisory board will be appointed and dismissed by the shareholders meeting and may consist of one or more members. The task of the supervisory board is to supervise the functioning of the managing director(s) and to advise the same.

Large companies are companies with an equity (issued and paid up share capital plus reserves) of EUR 16 million, a works council and at least 100 employees working in the Netherlands. Large companies are obliged to have a supervisory board of at least three members and some powers which in the normal B.V. or N.V. are the exclusive domain of the shareholders meeting become powers of the supervisory board, such as the appointment and dismissal of managing directors and the approval of certain board resolutions with large impact, such as doing mergers or acquisitions of a certain scale, amendment of the articles of association, winding up etc.

Since 2012 the B.V. may be organized with a one tier board, consisting of one or more executive and one or more non-executive directors, headed by a non-executive director.

Shareholders resolutions

Shareholders resolutions in principle are to be 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 of the dismissal of managing directors the law provides that the requested majority may not be more than two-thirds of the votes representing a maximum of half of the issued share capital. Should the articles of association contain higher levels of majority or quorum on this issue, such provision will be null and void.

Other legal persons

Other types of legal persons which are being used commercially are the cooperation ("**coöperatie**") and the mutual society ("**Onderlinge waarborgmaatschappij**") which are both species of the association ("**vereniging**"), which is a kind of association or union. The coöperatie originally was a form of organization of farmers, being the members, who traded their produce with a central producing unit owned by the coöperatie, which producing unit (a milk or cheese factory, for instance) sold the end product to the market, 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 being chosen by organisations of 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 perform such activities also 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 ("**stichting**"). A foundation is an entity in itself, governed by a board which, depending on the organisational statute, may be supervised by another body. Typical of the foundation is that it does not issue shares nor membership rights and that the equity of the foundation will be solely available to further the statutory objects of the foundation, which objects may not consist of making distributions to its incorporators or to third parties, unless (as to the latter category) the distributions will have an idealistic or social purpose. Foundations most commonly are used in the field of cultural, social and healthcare institutions, but may 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 the dividend rights attached to shares from the voting rights. This is called "certification of shares". A foundation can be used for the purpose of holding shares in an N.V. or B.V. whereby the voting rights attached to the shares will be exercised by the board of the foundation whereas the dividend rights attached to the same shares will accrue to certificates to be issued to third parties. In doing so the holders of the certificates in fact will own shares without voting rights. This practice is generally used in the Netherlands, mainly in structuring ownership of family businesses. One or more family members who are involved in the business will then hold ordinary shares and the board position(s) in the foundation, whereas the other family members will only hold certificates with dividend rights. Since the creation of shares without voting rights in the B.V., in 2012, other solutions are available to trim the right structure. Certification of shares is also used as a shield for N.V.'s listed on the Dutch stock exchanges. A sizeable part of the shares may be held by the foundation and brought to the market in the form of certificates, whereby voting rights attached to the shares will be exercised by a board which aims to protect the interests of the company against raiders and the certificates are entitled only to the dividends.

Non-legal entities

The non-legal entities which are available in the Netherlands are listed hereunder. These entities in principle are transparent for (corporate) income tax purposes, meaning that this tax is levied at the level of the partners, not at the level of the entity itself:

Sole proprietorship ("**eenmanszaak**"): strictly speaking this is no form of organisation. An individual which is taking up a business and who acts in the course of that business without choosing some sort of company form or co-operation with other entrepreneurs, is acting as a sole proprietor. Rights and obligations of the business are by operation of law rights and obligations of the individual. Please note that such an entrepreneur may also employ people working in the business. Those employees are employed by the entrepreneur himself and may claim their

wages from him personally and may execute his private belongings in pursuing their claim.

Partnership ("**maatschap**" or "**vennootschap onder firma**"): in the Netherlands there are two types of partnerships, being the maatschap intended for co-operating professionals, such as lawyers, dentists, doctors, architects and accountants, and the vennootschap onder firma intended for any other business type. Characteristic for both types is that the partners have contributed monies or goods and provide their labour and skills 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.

Limited Partnership ("**commanditaire vennootschap**" or "**C.V.**": the limited partnership is in fact a sole proprietorship or partnership with one or more silent ("stille") partners added. The silent partners contribute money or goods to the C.V. but are not visible for the public and they may not perform any acts on behalf of the C.V. They may, however, participate in decision making at the level of the partners meeting. The silent partners are not filed at the trade registry (only the number of silent partners and the amount of the capital they paid in has to be filed). The business is conducted on behalf of C.V., so the revenues are to be split between all partners in a way to be determined by the deed of partnership. Losses will be 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. Such liability towards third parties will be triggered as a kind of penalty in case a silent partner did perform an act on behalf of the C.V. Whether this will be a liability for any and all existing liabilities of the C.V. and whether the liability will only be towards the party with whom the silent partner acted, or will be a liability towards the generality of creditors of the C.V. is undecided. Given the available case law on the subject it is safe to assume that the penalty will be full liability towards all creditors.

STEPS AND TIMING TO ESTABLISH

Legal persons

Legal persons will be incorporated by a notarial deed to be passed by a civil law notary in the Netherlands. The notarial deed contains the Articles of Association, which provide for name, corporate objects, number and type of shares, authorized and paid in capital, number and authority of the managing directors, whether a supervisory board will be formed and any and all other regulations concerning the governance and operation of the entity.

Apart from the incorporation of a coöperatie or onderlinge waarbormaatschappij, being a special type of society and as such assuming at least two members, all legal entities may be incorporated by one single incorporator.

It should be noted that the effect of bringing rights and obligations within the shell of a legal entity will only be realised upon incorporation of the legal entity and filing the entity in the trade registry in the Netherlands. Acts performed on behalf of the entity in the stage prior to incorporation and/or registration will only become acts of the entity once such acts will be ratified by the management board after the registration has taken place. If such ratification does not take place, or is done prior to registration, the persons acting on behalf of the entity are and remain personally liable towards

third parties. For the N.V. and the B.V. the law provides that such ratification, if done by the management board whilst the board knows or reasonably should know that the N.V. or B.V. will not be able to meet the obligations resulting from the acts ratified, the personal liability of the persons who acted will revive and the board members who ratified the acts may also be held personally liable.

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

1. A civil law notary will have to be instructed to make a draft deed of incorporation;
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, provided that their identity is confirmed through an apostilled legalization. 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);
3. In the deed of incorporation, the initial management board member(s) and (if applicable) the first supervisory board member(s) will be appointed;
4. If an N.V. or B.V. is incorporated the share capital needs to be paid in forthwith upon incorporation;
5. For the N.V. and B.V. contribution in kind is possible but in principle requires a description of the goods (an existing enterprise, other assets and liabilities etc.) and a valuation. For the N.V. an additional requirement for the contribution in kind is a statement of a certified public accountant which confirms that the value of the contribution at least equals the amount of the payment obligation on the shares issued. These rules also apply to the acquisition by the N.V. in the period from incorporation until two years thereafter of goods which did belong to incorporators or shareholders ("Nachgründung").
6. The notary will file the entity at the trade registry, in principle on the same day as the incorporation, and an extract showing the entry can be obtained immediately.

The timeframe will for the greater part be influenced by the time involved in providing the notary the proper instructions and documentation. Incorporation and registration itself do not take more than one day in the Netherlands.

Non-legal entities

Non-legal entities are being 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 these entities will have to be filed at the trade registry upon their 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. Silent partners of a C.V. will not be recorded; only the amount of the paid in capital and the number of the silent partners need to be filed.

GOVERNANCE AND ONGOING MAINTENANCE

Legal Persons

Governance

With respect to governance issues we refer to what is being written on the specifics of the N.V. and the B.V. above.

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 needs to draft the annual accounts and to present these to the general meeting of shareholders. The shareholders have to establish 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 three following criteria, it will be required to have the annual accounts audited by a certified public accountant: (1) turnover of more than EUR 8,800,000; (2) balance sheet total of more than EUR 4,400,000; (3) 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 that the company goes into bankruptcy and the non-compliance has taken place in the three years prior to the bankruptcy, it is a legal fact that the management acted improperly and by operation of law it is assumed that the improper performance of the management tasks 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.

Non-legal entities

Goverance

With respect to governance issues we refer to what is being written on the specifics of the non-legal entities above.

Maintenance

Pursuant to Dutch tax law, non-legal entities 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 do have the company form (N.V. or B.V.) such companies do have to publish their accounts in accordance with what has been stated above.

Non-legal entities need to file timely tax returns concerning all taxes, such as for instance wage tax, value added tax (VAT) and income tax.

TAX ISSUES: PARTICIPATION EXEMPTION/THIN CAPITALISATION/WITHHOLDING TAX

Participation Exemption

A legal person established in the Netherlands is subject to Dutch taxes. The foreign company investing in a legal person in the Netherlands will therefore also be confronted with Dutch tax law. In case transactions between affiliated companies take place, such as financing, 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 have negotiated tax treaties with many countries. Furthermore, EU law and regulations may apply, such as the Parent-Subsidiary Directive which provides for tax exemption for cross-border dividends paid between related companies located in different EU member states. Another example is 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. or B.V. – which N.V. or B.V. is not an investment company – can apply the participation exemption for corporate income tax purposes. The profit of a Dutch subsidiary is principally only taxed once with corporate income tax. Dividends paid to the parent company are in principle not taxable, so no double taxation arises.

Thin Capitalisation

Due to erosion of the tax base profit in the Netherlands, 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 person in the Netherlands to foreign companies are not subject to Dutch withholding tax. A withholding tax will be introduced as of January 1st, 2021, which will apply 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%. 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 and 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 alien”) perform work in the Netherlands. An exception is made for employers who are established outside of the Netherlands and who wish to have an alien perform work that is of a temporary nature. Companies (hereinafter “the service provider”) who have an assignment agreement with a client established in the Netherlands 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 conditions enumerated hereafter are met:

- it must concern an alien 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 alien 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 an alien 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 alien 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, an indication of 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 alien will carry out his activities and the identity data of the alien.

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 alien must return to the country of his employer.

Occasional work

A work permit is not required in the event that the alien 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.