

Corporate Aspects of Trading and Investing Netherlands

1. INTRODUCTION

Below please find a brief article on the different ways to enter the Dutch market, as well as the setting up of a Dutch subsidiary or holding company in The Netherlands. This article outlines the most commonly used profit-driven entities and the basic consequences thereof under Dutch corporate and tax law. This article is specifically not intended to deal with the entire range of Dutch entities and their legal consequences. Most emphasis will be put on the Dutch limited liability companies (B.V. and/or N.V.), as they are most frequently used when setting up a Dutch subsidiary or holding company. For a more detailed overview of all possibilities and consequences under Dutch law, please feel free to contact the persons mentioned in the contact details of PLG's member firm in The Netherlands.

2. METHODS OF MARKET ENTRY IN THE NETHERLANDS

2.1 DISTRIBUTION AND AGENCY

Both the distributor and agent distribute goods from a certain supplier/manufacturer, yet their legal positions differ. The distributor buys goods from the principal in order to resell them at his own account and risk. The agent acts as an intermediary at the conclusion of purchase agreements between his principal and the customers on a commission basis. Dutch law, based on an EU Directive, protects the agent. Generally, the agent is entitled to compensation for goodwill upon the termination of the agency agreement. There are no further specific statutory rules on distribution agreements, but distribution agreements are largely influenced by EU and Dutch competition law. Further, the Dutch legal principles of reasonableness and fairness apply. Although in general no severance compensation is due upon termination of a distribution agreement, based upon these principles damages may be claimed in case of fierce termination.

2.2 BRANCH

Establishing a business can also be done by opening a branch. Opening a branch does not require prior governmental approval. The branch must be registered with the Dutch trade register. Certain information has to be filed, *inter alia*, on the foreign head office and on the branch manager, who can be a foreign national as well.

2.3 PARTNERSHIPS

Partnerships under Dutch law are basically “contractual entities”, entitled to a partnership capital that is separated from the private capital of each of the partners. Partners' private creditors cannot recover private debts of partners from the partnership capital. There is however no limitation of liability of the partners for debts of the partnership, as creditors may hold each of the partners personally liable for debts of the partnership. Currently, Dutch law recognizes three separate types of partnerships: (i) *maatschap*, (ii) *vennootschap onder firm* (both general partnerships) and (iii) the *commanditaire vennootschap* (limited partnership).

The “*commanditaire vennootschap*” is akin to the “*vennootschap onder firma*”, with only addition that it includes a limited partner next to the “regular” partner(s). This limited partner is only obliged to contribute capital (for which he will receive his fair share in the profits of the partnership) but is not involved in business operations. The limited partner cannot be held personally liable for debts of the partnership (except when he actually did involve himself in business operations), as a consequence whereof his losses may be kept limited to the capital contributed.

With the exemption of the obligation to register certain data of the partnerships (that are jointly acting under the same business name) with the Dutch Trade Register, there are no formalities attached to setting up a partnership. As a Dutch partnership does not qualify as a separate legal entity, Dutch tax authorities will regard partnerships “transparent” and will tax the partners directly.

Finally, please be advised that at the time this article was written, the Dutch government has sent a draft bill to the Dutch parliament, which seeks to radically change Dutch law on partnerships, including the possibility to “incorporate” a partnership, therewith qualifying the partnership as a separate legal entity. Personal liability of the partners will nevertheless remain. It is envisaged that these amendments will enter into force as from 1 January 2010.

2.4 DUTCH LIMITED LIABILITY COMPANIES: B.V. AND N.V.

Foreign subjects, either individuals or companies, may incorporate and own shares in a Dutch limited liability company. There are two types of limited liability companies: public limited liability companies (“*Naamloze Vennootschap*” or N.V.) and private limited liability companies (“*Besloten Vennootschap*” or “B.V.”). The minimum subscribed share capital of the more popular of the two, the B.V., amounts to € 18,000.=, while its counterpart the N.V. is obliged to have a minimum subscribed capital of € 45,000.=. Liability of the shareholder(s) is limited to the amount of the issued and paid up capital.

3. FORMATION OF A LIMITED LIABILITY COMPANY

Both the B.V. and N.V. are to be incorporated by means of a notarial deed of incorporation, executed by a Dutch civil law notary. This deed will contain the articles of association and will also state, *inter alia*, the share capital, the number of shares issued and the names of the company’s first managing director(s). The incorporator(s)/shareholder(s) may be both (foreign and/or Dutch) individuals and/or companies, who will either have to appear before the civil law notary or grant a power of attorney to the notary’s staff. Under Dutch law it is perfectly possible to have a sole shareholder.

Furthermore, prior approval (the Certificate of no objection) of the Dutch Ministry of Justice is required. In order to apply for the certificate of no objection, certain information and/or documents will have to be submitted, including information on the incorporators and any other policymakers of the future B.V./N.V. If and when shares in a Dutch B.V. or N.V. are transferred within one year after incorporation, the Dutch Ministry of Justice has to be notified, but its permission is not required.

Contribution/payment on shares

Shares in the B.V. and N.V. may be funded both in cash and/or in kind. In case of a funding in cash a bank statement will have to be issued by an EU Bank, confirming that the minimum of € 18,000.= or € 45,000.= respectively is indeed deposited in a separate bank account in the name of the B.V./N.V. to be incorporated. On the other hand, contribution in kind requires an auditor's statement certifying the value of the contribution at least equals the minimum required share capital amount.

Registration Trade register // prior activities

The incorporation having taken place, the civil law notary shall see to it that the B.V. and/or N.V. (and certain of its data, e.g. managing directors, business address) are entered into the Dutch trade register. If it is desirable to have the activities of the B.V./N.V. (yet to be incorporated) already started, the entry into the trade register may already take place as a company "in process of being incorporated". However, each incorporator may be held personally liable for all acts carried out, during the period up till the moment of actual incorporation. These actions can be ratified by the B.V./N.V. after its incorporation, by which the personal liability of the incorporator(s) will erase.

It is important to note that third parties may fully trust and base themselves upon the filings in the Dutch trade register (such as the names of the managing directors and their powers to represent the B.V./N.V.).

Finally, both the B.V. and N.V. are obliged to (yearly) publicise their (simplified) annual accounts with the Dutch trade register. Not having this data filed may under circumstances lead to personal liability of the managing directors.

Main differences B.V./N.V.

Holding and financing companies usually adopt the B.V. form as it is less complicated. Next to the differences in minimum share capital as set out above, other differences between the B.V. and N.V. are that a B.V. can only have registered shares (while a N.V. may also have bearer shares) and that Dutch law requires the B.V. to lay down certain share transfer restrictions (either in the form of a corporate body of the B.V. being required to grant approval for a transfer of shares, or an obligation to grant the other shareholders a right of first refusal) - a N.V. is not required to have share transfer restrictions.

Furthermore, other differences boil down to the fact that a N.V. is usually more restricted when it comes down to topics regarding (i) share issue, (ii) the acquisition of shares in the N.V.'s own share capital, (iii) providing of security to third parties wishing to acquire shares in the N.V.'s share capital, and (iv) the distribution of interim dividends.

It is always possible, and relatively simple, to convert a B.V. into an N.V., and vice versa.

Envisaged amendments Dutch corporate law

Finally, as with the partnership previously discussed, at the time this article was written, the Dutch government has sent a draft bill to the Dutch parliament, which seeks to radically simplify rules regarding the Dutch B.V., amongst which are the abolishment of minimum required share capital and restrictions on share transfer as is currently still required. It is expected that these amendments will enter into force as from 1 January 2010.

4. MANAGEMENT OF A LIMITED LIABILITY COMPANY

Both the B.V. and N.V. are represented by a Board of Management, consisting of one or more managing directors, being either individuals or companies, either foreign or Dutch nationals. It may also be determined in the articles of association of the B.V./N.V. that a Supervisory Board will be appointed. Nevertheless, for tax c.q. “substance” reasons it may be advisable to have (part of the) management residing in The Netherlands. The articles of association may prescribe prior general meeting of shareholders’ and/or Supervisory Board’s approval for certain types of transactions.

Responsibilities

Whereas the Board of Management manages the Company on a day-to-day basis and provides for the determination and execution of corporate policy, the Supervisory Board’s task is to supervise and advise the Board of Management. The Supervisory Directors must let themselves be guided by the interests of the shareholders, as well as the interests of the Company and the undertaking connected with it. They have no executive function whatsoever. In that respect please note that under Dutch law, the Supervisory Board does not manage the Company. Dutch company law clearly distinguishes the Supervisory Board from the Board of Management. It is not permitted to be a member of both Boards at the same time.

Appointment and corporate accounts

Both the members of the Board of Management and the Supervisory Board are appointed, suspended and dismissed by the general meeting of shareholders. Supervisory Directors may only be natural persons, whereas members of a Board of Management may also be legal entities (whether foreign or not). The Board of Management must keep adequate records of the B.V./N.V.’s business, in particular the corporate books. It must prepare annual accounts and within six months after the end of the financial year submit them to the general meeting of shareholders for both approval and adoption. If applicable, these accounts need to be co-signed by the Supervisory Board.

Representation

The powers of representation of a B.V./N.V. will rest with the Board of Management (or, when stipulated in its articles of association, with each board member/two Board members acting jointly). When certain decisions of the Board of Management are made subject to approval of the Supervisory Board or general meeting of shareholders, the Board of Management will nevertheless be authorised to represent (and legally bind) the Company, despite the lack of required approval.

5. OFFICERS’ LIABILITY OF A LIMITED LIABILITY COMPANY

Each Managing Director and each Supervisory Director is obliged vis-à-vis the B.V./N.V. to properly fulfil his task (Article 2:9 of the Dutch Civil Code, hereinafter “DCC”). Failure to do so will make him liable towards the Company. Only if a Managing Director or a Supervisory Director has committed one or more serious mistakes or has been very negligent to the detriment of the Company will he be liable. An individual member of the Board of Management or Supervisory Board may exculpate himself and prove that he was not to blame for the wrongdoing and that he has not been remiss in taking measures to avert the consequences thereof. Only the B.V./N.V. itself can hold the director liable under Article 2:9 DCC (not a shareholder or creditor), hence why this type of liability is referred to as the “internal liability”.

Article 2:248 DCC provides for the “external liability” of Managing Directors, and in some cases of Supervisory Directors, in the event of bankruptcy of the Company. The trustee in bankruptcy can claim from each Managing Director and/or Supervisory Director compensation of the entire deficit upon liquidation if the Board of Management and/or Supervisory Board has fulfilled its task “obviously improper” and this is likely to be an important cause of the bankruptcy. Dutch law predetermines that failure to meet the book-keeping and filing obligations is “obviously improper” and such failure is a presumption of an important cause of the bankruptcy at hand.

As long as the book-keeping and filing obligations are met (even if there are minor omissions or deficiencies) in most cases it is relatively difficult for the trustee to prove that there has been obviously improper management. This will be the case if the Managing Directors and/or Supervisory Directors have acted irresponsibly or recklessly during the course of business activities.

Managing Directors and Supervisory Directors are generally not personally liable towards creditors for debts of the B.V./N.V.. However, they may be liable if they commit a tort in their capacity as Managing Director and/or Supervisory Director which would also be a tort if they acted for themselves. For instance, if they enter into a commitment on behalf of the Company knowing that it could not meet this commitment in due time, they may be liable themselves. In addition, where the annual accounts, interim accounts or the annual report give a misleading representation of the B.V./N.V.’s situation, the Managing Directors and Supervisory Directors are jointly and severally liable for the loss this has caused to third parties.

6. TAXATION OF PROFITS

Although the Netherlands has a sophisticated tax system, some aspects of its fiscal system are extremely attractive and make it the ideal location in which to base international trading operations. Attractive fiscal incentives are further enhanced by a complex network of double taxation treaties (few of which contain any anti avoidance provisions) and by the existence of a procedure of advance tax rulings whereby the tax authorities who are autonomous and approachable can at short notice specify the fiscal consequences of certain business structures provided that material financial interests are involved and the propositions are reasonable.

Dutch corporate income tax

Dutch corporate income tax distinguishes between residents (Dutch subsidiaries) and non-residents (branches of foreign companies). In principle, subsidiaries having a business address in the Netherlands are regarded as residents and are taxed on their world-wide income. The tax rate currently is 25,5%. Under the famous Dutch participation exemption, dividends received from qualifying subsidiaries and capital gains on the sale of shares in such subsidiaries are exempt from corporate income tax. Further, interest paid on loans and royalties is deductible under circumstances.

Tax unity between Dutch companies

When certain requirements have been met, The Netherlands allows for group companies to consolidate their accounts so that the profits of one company can be set off against the loss of another company thereby reducing the over all taxable profit. Since lower tax rates apply to lower rates of corporate profit the fiscal unit is a particularly attractive concession.

Dutch dividend withholding tax

A 15 % withholding tax rate applies to dividend distributions. However, this may be reduced, even to zero, by virtue of one of the numerous tax treaties against double taxation (almost 90 treaties are currently in place).

Branches

In principle, branches of non-resident companies are only taxed on their domestic source income. Dutch tax authorities are generally willing to provide certainty on the allocation of profits to the branch by entering into an "Advanced Pricing Agreement". Profits may be distributed to the headquarters free of withholding tax.

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