Establishing a Business in the Netherlands

by Dr. Mustafa Yaylalı

The Netherlands is known for its liberal climate surrounding the incorporation of companies and for its liberal taxing system with regard to establishment of businesses on its territory. Because of tax advantages and liberal incorporation polices, the Netherlands has led many foreign investors to incorporate their businesses there. Many large companies are incorporated in the Netherlands, even though their headquarters are in another country.[1]

Another incentive for foreigners to establish a company in the Netherlands is that it is known for its solid political and economical environment. It has entered vast amounts of international treaties, attracts foreign investors, and its membership to the European Union has made it a desirable place to establish the seat of the company. All of these factors lead many foreign companies to want to base their company out of the Netherlands and secure a place in the European market.

The Netherlands also provides a variety of attractive business products and services. For example, Special Purposes Vehicle (SPV) is a corporate structure which is widely used in the Netherlands and designed to evade taxes. Because of the special tax relationship the Netherlands holds with its Caribbean colony the Netherlands (Dutch) Antilles, the Netherlands has become attractive to set up SPV's. The so-called Double-Dutch system, which refers to a special tax system, is what makes the Dutch SPV attractive for investors and will be further elaborated below.

Incorporation of a Firm in the Netherlands

Compared with other advanced countries, relaxed incorporation rules make the Netherlands quite attractive for foreign investors to invest and establish their seats[2] in. This is to say that in order to be accepted as a Dutch company, one is not required to have their real business in the Netherlands, just a legal incorporation of the company is sufficient.

In the past, the Netherlands was adopting a "real seat" theory instead of the "incorporation rule," which required that companies have their real seat, or principal place of business in the Netherlands. This meant they had to be physically present and to commence business in Dutch Territory. Gradually, the Netherlands departed from this theory around 1959. From that time, any company who has been incorporated in the Netherlands is considered to be a Dutch company. However, this has also led to abuse of the system for reasons other than just fair business practices. Many originally Dutch companies have incorporated their firms in the United Kingdom in order to circumvent the minimum capital requirement expected of them. This explains why the Dutch government has recently tightened some of the rules of incorporation.

Generally, if a foreign company wants to incorporate a firm in the Netherlands, it has to fulfill the following requirements:

1) A notarial deed of incorporation,
2) Registration details of the corporation at its domestic commercial register,
3) Information about the shareholders,
4) A statement of the registered accountant.

Besloten Vennootschap -Private Limited Company

A Besloten Vennootschap **(BV)** is similar to a Private

1 An example is Dolce & Gabbana (D&G), an Italian company with its main headquarters in Italy, but that is incorporated in the Netherlands.

2 Seat means headquarters or principle place of business

Limited Liability Company and limits the risk of joint and several liabilities for stakeholders of the company. A BV is commonly used as a legal entity to do business in the Netherlands. During registration of the BV, one is required to have assets of 18,000.00 Euros before one can register itself as a BV. One of the characteristics of a BV is that the shares are registered by name and can therefore not be freely transferred. One of the reasons why it is often used is because of the rather limited amount of share capital needed for registration at the chamber of commerce. Another reason is that BV is mainly used for holding structures with one foot in the Netherlands (for tax reasons) and the other foot in another country. A BV also allows an individual or several persons to run a business with limited liability.

On the other hand, a BV can attract capital or raise public funding by issuing shares since the shares are registered by name. Because of this, shares of a BV cannot easily be transferred to others, which results in a closely held company.

What does one need for the incorporation of a Private (privately held) Limited company?

Before one starts the procedures for the incorporation of a BV, the Ministry of Justice has to accept or agree with the content of the deed of incorporation by issuing a "statement of no objection", which will take approximately four weeks. After having received the "statement of no objection", one should start drafting a deed of incorporation, with the original drafted in Dutch, at a Dutch Notary. For this deed of incorporation, one is required to submit the following information/documents:

- Articles of association
- Amounts as to the issued and paid up capital
- The names of managing and supervisory directors

After having drawn up the deed of incorporation, one has to register the company at the Chamber of Commerce (Kamer van Koophandel) in the Netherlands. Each city has an affiliated branch of the Chamber of Commerce where one can register the company.

What would one need in order to register their BV successfully at the Chamber of Commerce?

In addition to having paid up/issued capital of 18,000.00 Euros, one should submit the articles of association in which the business objectives, the financial structure, and the location of the seat of the company are described. One has to take into consideration that until the BV is registered, the individuals are held jointly and personally liable for the acts of the presupposed company. In other words, one may act on behalf of the company, but until it is ratified by the chamber of commerce, the individuals have to bear the liability for the legal acts of the BV.

Once the BV is legally registered, any liability for the shareholders that arises out of the action of the BV will make the shareholders only liable for the amount of the issued shares. Other obligations of a BV include filing of its annual financial statement and arranging shareholders' meetings six months after the end of each financial year. These are essential prerequisites of a BV once it is installed. One should also note that in the Netherlands, it is compulsory by law to establish a supervisory board next to a managerial board. Also, if the company contains a share capital of approximately 11 million Euros and employs more than 100 people, it is obliged to set up a work council. A work council is a council comprised of employees that have to be consulted when an important decision is to be taken.

Naamloze Vennootschap (NV) - Public Limited Liability Company

A public limited liability company (Naamloze Vennootschap) shares almost the same features as the above described BV or private limited company. However, it does differ on crucial issues like the amount of paid up capital, which amounts to 45,000.00 Euros. Another essential difference is that the shares do not only have to be issued on name, but can also allow bearer shares depending on whether or not it is regulated in the articles of association. Therefore, with an NV, one can trade on the stock exchange with bearer shares and go public, while with a BV on the other hand, one can only employ when there is a need to control the shares with a specific circuit or family. Therefore, the trading of shares in a BV is only limited to a select number of people specified in the articles of association.

Purchasing Shelf Companies

If establishing a private limited company or a public incorporation is too burdensome, one can also choose to buy a ready-made or "shell company." A shell company is a full- fledged company that is often desirable when the investor is pressed for time. It has already been registered, the incorporation fee

has been paid, and all other necessary obligations to incorporate a company can be complied with. However, one should be aware of and check whether the company is free from any debt or obligations that the previous owner may have left behind. Therefore, it is advisable to consult a lawyer or a notary to guide and lead you through the procedures of buying a shell company without any trouble.

If one decides or opts to buy a shell company, what are the procedures and costs that go along with buying a 'shell company' and how will the procedure be carried out?

First, it is advisable to consult a law firm knowledgeable in this area of the Dutch legal system before proceeding. Since many Dutch lawyers will have some shell companies at their disposal, they can provide better guarantees and predictions about the nature of the shell company. In order to buy a shell company, one has to make sure that the transfer of it is being processed properly. Therefore, one has to also contact a notary who will draft all notarial deeds of transfer. Additionally, the notary has to redraw the articles of association, and will therefore need the name(s) of the shareholder, their place of birth and a copy of their passport, the field they are operating in, and the percentage they plan to hold in the company.

The total cost that goes along with the transfer and management of the company usually ranges from 2,000.00 Euros to 7,000.00 Euros (excluding VAT). The registration of the article of association at the chamber of commerce in the Netherlands will require an additional amount of 2.000,00 Euros.

Special Purpose Vehicle (SPV) and the Double-Dutch Structure

A Special Purpose Vehicle (SPV) or Special Purpose Entity (SPE) is as one would call it, a securitization product. With an SPV, a corporation can safeguard the assets of its company for a certain purpose, which may be an investment or for other personal reasons. In other words, it is a safety mechanism that will protect or guarantee investments in the event that a parent company goes bankrupt. In case of bankruptcy, the asset will remain off charge and cannot be confiscated by other government or private collection authorities. This enables the investor to guarantee the finance of a project abroad or in their home country.

The Netherlands have paved the way for SPV's because of its advantageous tax climate. The advantage of the tax results from the ties that the Netherlands has with its colony the Dutch Antilles. This is one of the important reasons why an SPV in the Netherlands is preferred over other countries. It is also preferred because it is a stable and trustworthy country, has a big economy, and is a member of the European Union.

Since the Netherlands has historical ties with the Dutch Antilles, a popular system called the 'Double-Dutch Structure' is in place. The Double-Dutch structure is the advantageous result of a treaty the Netherlands had with its former colony the Dutch Antilles. This Treaty is called 'Belastingregeleing voor her Koninkrijk.' Because of this tax treaty, a company established in the Netherlands Antilles would hardly be taxed when doing business in the Netherlands with a parent or subsidiary company. In practice, this attracts many foreign companies. For example, Canadian companies used to establish their companies in the Netherlands and transfer their capital to the Dutch Antilles in order to commence business with the USA. Using this structure, the Canadian companies earned a tax reduction from about 15% to 5%. Although the practice mentioned in this example has been banned, there are still other ways in which tax advantages can be gained by employing the 'Double-Dutch' system.

Conclusion

The Netherlands is a very attractive place to do business, especially because of its liberal policies regarding tax and incorporation rules. The reason for this policy lies in the trade oriented culture and mentality of the Netherlands. Being a member of the European Union and maintaining close business ties with the rest of the world puts the Netherlands high on a list of countries to do business in.

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(Banks are entitled to provide insurance services by acting as an agency of an insurance company). As per Article 1 of the Decree Regarding the International Activities in Insurance Sector numbered 2007/12467 foreign insurance companies and reinsurance companies may only provide insurance services through establishing branches within the boundaries of Turkey. However, Article 15.2 of the Insurance Law numbered 5684 allows life insurance services to be provided through foreign insurance companies which do not have any branches in Turkey. Yet, as for the insurance categories other than life insurance, the Board may bind the registration of the foreign Instruments to the condition that the insurance company, which provides such insurance to investors, to open a branch in Turkey. This option will require a financially and bureaucratically demanding process.

In light of the above-outlined concerns, if the Board may require amendments to be made for the Instruments before registering them whereas such amendments may disqualify even the issuance of depository receipts themselves. Under Article 4/b of the Foreign Instruments Communiqué, such Instruments are required to provide "identical rights" to their holders. Hence, if the Board does not allow such Instruments to have distribution of prizes through draws and/or offer its investors the option to provide insurance other than life insurance on the terms and conditions reserved for the holders of such Instruments, the original Instruments issued in the foreign country may become different products with different rights and thus their issuance may be invalidated.

Issuing Instruments Arranged in Accordance with the Applicable Legislation in Turkey

Issuance of Profit and Loss Sharing Certificates

Profit and loss sharing certificates ("PLSC") regulated under Communiqué on Principles Regarding Registration of Profit and Loss Sharing Certificates with the Board (Serial: III, No: 27) (the "Profit Sharing Communiqué). Accordingly, it functions on the principle that investors finance the issuer through purchasing PLSC and in return, the issuer undertakes to reflect its profits and losses on the investors without providing them with shareholding rights. Nevertheless, as per Article 4 of the Profit Sharing Communiqué, companies whose field of operation is to buy and sell securities are not allowed to issue PLSC. If the company which will issue such has an authorization certificate to intermediate in exchange trading, for instance, such activities shall be considered as buying/selling securities and thus, it will not be permitted to issue PLSC. In order to be able to issue PLSC, such company having such authorization license may establish a special purpose company in Turkey which does not own intermediation license, and may issue PLSC by means of that special purpose company.

Issuance of Asset Backed Securities

As per Article 3 of Communiqué on Principles Regarding Asset Finance Funds and Asset Backed Securities (Serial: III, No: 35) (the "Asset Securities Communiqué"), banks, leasing and consumer finance institutions, mortgage finance corporations and intermediary institutions are entitled to issue asset backed securities. As per Article 20 of the Asset Securities Communiqué, asset backed securities may be issued backed by an assets fund essentially comprising receivables arising from loans, lease agreements and cash equivalent short term investments. However, under several articles of the Asset Securities Communiqué such as articles 16 and 18, asset backed securities are regulated as to pay out interest to its investors while paying out profit shares has not been set forth under the Asset Securities Communiqué. Therefore, the possibility that asset backed securities are issued on the basis of paying out profit shares instead of interest is subject to further discussions with the Board.

Issuance of Lease Certificates

The system regulated under Communiqué on the Principles Regarding Lease Certificates and Asset Lease Companies (Serial: III, No: 43) ("Lease Certificate Communiqué") is the equivalent of the capital market institution known as "lease sukuk". Accordingly, an asset lease company shall be incorporated with the purpose of leasing out the assets back to issuer whom the assets are acquired from either through purchase or lease, and issue lease certificates backed by the returns from lease incomes of the aforementioned assets. As per Article 4 of the Lease Certificate Communiqué, incorporation of an asset lease company is subject to approval of the Board and of Banking Regulation and Supervision Agency in case the founder is a bank.

Issuing Instruments by Means of an Off-Shore Company

Despite presence of legislation on lease sukuk in Turkey, it is widely observed that participation banks,

which concern themselves with distributing profit shares to its investors instead of interest, have been issuing sukuk through off-shore companies incorporated in jurisdictions which are commonly referred to as "tax havens", without registering with the Board in order to utilize several advantages such as tax exemption. In case this method is implemented, provisions with regard to Asset Lease Companies and/or joint-stock companies in general which are subject to capital market legislation as well as Turkish Commercial Code in Turkey which set forth various procedures and principles with respect to accounting, auditing, taxation, public disclosure etc. will not be applicable. However, in this option, sale/distribution of Instruments in Turkey may remain limited, as any kind of publicity of such certificates in Turkey will not be allowed under Article 3/c of the Capital Market Law.

Conclusion

Various procedures are applicable to the sale of foreign Instruments, which are compliant with the Islamic principles, in Turkey while several concerns and reservations may arise from the applicable legislation with respect to each option described above. Thus, legal counseling stands nearly as important as the commercial acumen in choosing the path which will best serve the purpose of issuing Instruments.

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