



# Your gateway to business in the EU

Holla legal & tax, October 2021

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**If you are a UK company looking for a gateway into the EU under new third country regulations, then establishing a subsidiary in the Netherlands is a flexible, competitive and tax-effective solution that could even open up new business opportunities.**

On 24 December 2020, the UK officially left the European Union and, under the Brexit agreement, is now a third country to the EU, outside both the single market and customs union. The change means that UK-EU cross-border business activities are now subject to a number of trade barriers, including adjusted and strengthened border controls and additional administrative work.

With relations between the UK and the EU changing radically, the impact on your business could be considerable. Establishing a Dutch resident company, such as the limited liability company (Dutch “BV”), or a permanent establishment in the Netherlands, can provide you with a simple and effective gateway to the EU, allowing you to continue to trade smoothly and successfully post Brexit.

In 2020 TLT and Holla legal & tax became strategic alliance partners, joining forces to deliver international cross-border services for business. From an established network of offices in the UK, the Netherlands and beyond, TLT and Holla legal & tax actively share knowledge, expertise and innovation to provide our clients with seamless cross-border advisory, disputes and transactional services.



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We have created the European Access Plan (EAP) to give you a simple and straightforward way to continue doing business with or within Europe by opening a subsidiary in the Netherlands. This document gives you a summary of the plan’s key benefits, how Holla legal & tax will work with you, and the important issues you’ll need to consider.



# Introducing the European Access Plan (EAP)

**The Netherlands has a strong European business climate. The EAP helps companies that are established in the UK to start or continue trading with the EU through establishing (a part of) your business in the Netherlands, as a gateway into the EU.**

## The advantages:

- A legal entity under Dutch law provides your business with flexibility; a BV may be set up in a week.
- In many cases Dutch and European nationals prefer dealing with a Dutch subsidiary which is incorporated under EU-law.
- Shareholders are only liable to the extent of their contribution to the capital.
- No tax on dividends, royalties and interest.
- The possibility of separating risks and assets in a Dutch holding structure.
- A participation exemption applies in case a holding company holds > 5% of a subsidiary.
- The parent company is not liable for the Dutch subsidiary.
- Intangible assets can be written off for Dutch tax purposes.

## Setting up a private limited company in the Netherlands

To set up a private limited company under Dutch law you will need to:

- Establish the company by notarial deed.
- Agree articles of association.
- Register the company with the Chamber of Commerce.

Opening a business bank account is not required but highly recommended.

Please click [here](#) for more general information about the main points under Dutch Corporate Law.

## How can we help?

To help you establish a subsidiary in the Netherlands we can:

- Analyse your business's specific requirements.
- Prepare and execute all the necessary notarial deeds (including the articles of association) in the presence of a Dutch civil-law notary.
- Advise on the suitable legal structure and on the implementation of the articles of association under Dutch law.
- Advise on certain benefits from a tax perspective.
- Assist with opening a business account with a Dutch bank.
- Advise on Dutch employment matters.
- Carry out corporate housekeeping work such as the registration of your new company or subsidiary and its board members with the Dutch Chamber of Commerce.

## What does the EAP cost?

The standard cost for the EAP is GBP 5000 (excl. VAT and disbursements) per entity, which includes executed notarial deeds and the articles of association.

Please note that the EAP will be customised to your business and as such the costs may be subject to possible modifications, such as tailored advice on tax and/or employment matters. Some general information and points to consider regarding tax issues and employment issues can be found below.

In this case, we will of course advise you in advance.

Holla legal & tax would be delighted to discuss our EAP with you and to help with the customisation, integration or establishment of your business in the Netherlands

## Need more information?

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# Ten important points to consider under Dutch corporate law

## 1. NV and BV are the most commonly used legal forms

There are various legal forms available under Dutch law, but by far the most commonly used are:

- the public limited liability company (*naamloze vennootschap* or *NV*), and
- the private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid* or *BV*).

## 2. Incorporation

A company is incorporated by the execution of a notarial deed of incorporation (*akte van oprichting*) in the presence of a Dutch civil law notary (*notaris*). This deed of incorporation contains the articles of association (*statuten*).

The articles of association contain the provisions under which the company will be governed after incorporation. The articles of association of a BV, as well as of an NV, must be drawn up in the Dutch language. It is, however, common practice to provide an English translation. Once incorporated, the articles of association can only be amended by a notarial deed of amendment.

## 3. Minimum capital

- The minimum capital of an NV is EUR 45,000 (GBP 40,000).
- There is no requirement for a minimum paid-in capital for a BV.

## 4. Registration

The company must be registered within eight days of incorporation in the Trade Register of the Chamber of Commerce (*Handelsregister*) in the district of the company's office address (i.e. its principal place of business).

A company is required to register details of all its managing directors (*bestuurders*), supervisory board (*commissarissen*), and proxy holders (*gevolmachtigden*), if any. Details of proxyholders must include the scope of their powers. If all issued and outstanding shares in the company are held by one individual or legal entity, certain data regarding this sole shareholder must also be registered.

## 5. Shareholders' Register

If the company's shares are in registered form (which is always the case for a BV and may be the case for an NV), the company must keep a shareholders' register (*aandeelhoudersregister*), confirming each shareholder's identity.

## 6. Types of shares

Different types and classes of shares may be provided for in the articles of association:

- **ordinary shares**, which normally provide equal rights to each shareholder (although the ordinary shares may be subdivided into different classes with different corporate rights, such as special reserves, voting rights and separate redemption rights)
- **preference shares**, which have preference over other types of shares with respect to distribution of dividends (preference shares may be cumulative or non-cumulative with regard to distribution rights)
- **priority shares**, which may confer a specific authority on the holders, such as the authority to make binding recommendations with respect to appointment of supervisory board or managing directors

A BV is entitled to issue shares either without any voting rights or without any financial rights. However, it is not possible to create shares in a BV that lack both voting and financial rights.

## 7. Transferability of the shares

Shares in an NV are freely transferable. However, the articles of association may provide restrictions on the transfer of shares in the capital of an NV.

In a BV, shares are not freely transferable, since the other shareholders in principle enjoy a right of first refusal. The articles of association may, however, provide otherwise and may, for example, determine that no transfer restrictions apply or impose different restrictions (such as a right of approval).

In a BV, the articles of association may also restrict the transferability of shares for a certain limited period of time (a lock-up period). However, such lock-up provisions may not be imposed on a shareholder against his/her will.

## 8. Corporate bodies

Dutch corporate law requires that an NV or a BV must have at least two corporate bodies, (i) the managing board (*bestuur*) consisting of managing directors, and (ii) the general meeting of shareholders (*algemene vergadering van aandeelhouders*). The managing board is the executive body of the company and is responsible for its day-to-day management.

The managing board may consist of only one managing director, which may be an individual or a legal entity. There are no requirements as to the nationality or residence of managing directors from a corporate law perspective, but for tax purposes, residency of directors is a highly relevant issue (click [here](#) for more tax information). Dutch companies may also have a supervisory board (*raad van commissarissen*), but this is not often required.

## 9. Authorities of the corporate bodies

The managing directors are appointed and dismissed by the general meeting of shareholders (except for the first members of the managing board, who are appointed by the incorporators and identified in the deed of incorporation). In a BV, the authority to appoint and dismiss a managing director may also be granted to the meeting of holders of a specific class of shares, provided that each shareholder with voting rights has the right to participate in the decision-making process for (the appointment and dismissal of) at least one managing director.

## 10. Liability of the shareholder

The main rule is that a shareholder is not liable for acts performed in the name of the company and that the shareholder is under no obligation to contribute in the losses of the company in excess of the amount to be paid on their shares.

An exception applies in the event that a shareholder received distributions from the company, whilst aware that as consequence of this distribution the company could not continue to meet its outstanding obligations, or in the case that the shareholder voluntarily agrees (e.g. by contracts, guarantees or otherwise) to liability for the debts of the company.

# Five important aspects of Dutch employment law

## 1. Mandatory law

When a UK company establishes a Dutch resident company in the Netherlands and hires staff, it is important to be aware that Dutch employment law will apply. Dutch employment law is in large mandatory law: the legislature deemed it undesirable to enact statutes to correct the power imbalance only to then allow employer and employee to make individual arrangements that, under pressure from the employer, could restore that imbalance.

From a comparative international perspective, Dutch employment law is generally considered fairly restrictive to employers whereas Dutch employees are well protected against arbitrary decisions.

## 2. Employment contract

Private law matters, which include employment related matters, are governed by the Dutch Civil Code (hereinafter: 'DCC', or 'statute'). Section 7:610 DCC contains the definition of an employment contract: 'a contract by which a party, the employee, commits himself or herself to perform work for another party, the employer, for a certain period of time in exchange for remuneration'.

Section 7:610 DCC is the gateway to employment law protection. As soon as it is established that a working relationship between two parties meets the definition above, rules of Dutch employment law apply in full.

## Types and duration of employment

Permanent (or indefinite) contracts are contracts that have theoretically been entered into for an infinite period of time. They do not terminate by operation of the law.

Fixed-term employment contracts do not automatically terminate after the fixed term has lapsed. No further action by the employer is required to terminate any fixed-term employment contract. There are statutory restrictions that govern and limit the repeated use of fixed-term contracts.

## Duty of notification

Employers are required by Dutch law (s. 7:668(2) DCC) to notify employees on a fixed-term contract (with a contractual running time of six months or more) in writing whether or not their contract will be extended and if so, what the conditions for extension will be.

The notification must take place one month before the end date of the contract at a minimum. If the employer breaches this duty, the statute stipulates that the employer must pay a penalty equalling the salary over the period during which the employer failed to notify the employee of termination or extension (up to a maximum of one month's salary).



### 3. Important clauses in an employment contract

#### Probation period

An employment contract can include a clause regarding a probationary period in employment relationships that are intended to run and have been entered into for more than six months. The use of the probationary period is limited by Dutch law.

#### Restrictive covenants (non-competition/non-soliciting clause)

Dutch law allows for employers to protect their business interests by restricting the employee's freedom in a number of ways after termination of the employment contract.

S. 7:653 DCC allows the employer to include non-competition and non-soliciting type clauses into employment contracts, which prohibit employees from:

- finding new employment with the employer's competitors,
- starting or having a (financial) interest in a (potentially) competing enterprise, or
- having the employee contacting the employer's clients to prevent them from establishing (commercial) relationships.

Please note that the use of restrictive covenants as described above are in principle only allowed in contracts that have been entered into for an indefinite period of time.

### 4. Working conditions and benefits

#### Sickness, disability, and unemployment benefit

In the Netherlands, employers are obliged to pay a minimum of 70% of the employee's wage during sickness, up to a maximum of 104 weeks. During this period, employers are also co-responsible for the employee's recovery process.

As well as the significant financial obligations set out above, employers are obliged to pay for employee insurance premiums. The premiums are levied by the tax authorities and the insurance schemes are managed by the Employee Insurance Agency.

#### Pension and retirement benefits

Old-age pensions are provided through the Old Age State Pension Act (*Algemene ouderdomswet*). Dutch law grants an old-age state pension and provides a pension to those who live (or have lived) or work (or have worked) in the Netherlands and have reached the legal retirement age. Premiums are collected from employers by the tax authorities. The statutory retirement age is subject to increase, year-over-year, and will be 67 in 2024.

There is no statutory obligation for employers to offer employees any (additional) occupational pension scheme. However, some industries in the Netherlands do have mandatory pension funds with pension schemes in place that employers and employees are obliged to partake in.

#### Vacation and holiday payments

Under Dutch law, full-time employees are entitled to a minimum of 20 days' holiday per year. The vast majority of employers grant their employees a number of above-statutory days' holiday.

### 5. End of employment

#### Statutory severance fee

A unilateral termination of employment, instigated by the employer (excluding termination following reaching the statutory retirement age or dismissal for urgent cause, but including termination as a result of non-extension of a fixed-term contract), obliges employers to pay the departing employee a severance fee (in Dutch: *transitievergoeding*).

The amount of the fee payable is based on a fixed formula and is equal to 1/6th of the employee's last-earned month's pay for every half-year of service.

#### Notice period

When an employment contract is not terminated by operation of the law or due to a provision in the employment contract, the employer and employee will have to give the other notice of termination. The duration of the notice period depends on the period that the employment agreement has lasted. Please note that parties can contractually agree to change longer notice periods.

#### Ways to terminate employment

In addition to the expiry of a fixed-term contract, an employee's resignation, an employee reaching the statutory retirement age, an employee's death or dismissal during the probationary period, Dutch law defines another five ways to terminate an employment contract:

1. A mutual consent termination agreement.
2. With employee permission.
3. Permission by the Employee Insurance Agency.
4. Through court.
5. Instant dismissal.

## Termination agreement

In case of a conflict deemed irreparable by both employer and employee, parties tend to negotiate the terms of termination of employment. Should they find common ground, parties put the details of their negotiation in a settlement agreement. Two advantages of reaching agreement, as opposed to unilateral dismissal, is that there is no 'winner' or 'loser' and parties reach final and full settlement of their dispute.

## Termination with Employee Insurance Agency permission

Termination of employment with permission from the Employee Insurance Agency is the mandatory route for all collective dismissals (redundancy) and termination of employment for employees on long-term sick leave (s. 7:671a DCC). In order to be granted permission, the employer has to submit a formal written request to the Employee Insurance Agency.

## Termination through the court

Termination of employment through a Dutch court is the mandatory route for individual dismissals and, in practice, comes into play when employer and employee were not able to reach common ground to terminate the employment by settlement.

The courts will look into and weigh the employer's reasons for its decision to proceed towards dismissal. The courts will only rule in favour of the employer's request for dismissal if they find that what is presented to them (i) is considered a reasonable ground for dismissal under s. 7:669(3) DCC and (ii) there is no possibility of offering the employee a suitable alternative position (redeployment requirement) (s. 7:669(1) DCC).

The requirement to investigate redeployment does not apply in cases of culpable behaviour or omissions by the employee. The exhaustive reasonable grounds labelled in s. 7:669(3)(c-h) DCC and for the court to consider are:

- Frequent and disruptive sickness absence.
- Incapacity to perform the contractual work other than for a medical reason (e.g. and most commonly, underperformance).
- Culpable behaviour or omissions by the employee.
- Refusal to perform contractual tasks for reasons of conscience (conscientious objections).
- A disruption in the working relationship provided the disruption is so grave that the employer cannot reasonably be required to continue the working relationship.
- Other reasons that are of such a nature that it cannot reasonably be expected that the employer should continue the employment relationship.
- Accumulation of circumstances (cocktail).

## Termination by instant dismissal

The final statutory ground for termination, and also the most drastic measure known in dismissal law, is 'instant dismissal'. Instant dismissal is to be taken literally; it means that the employee's employment contract is terminated from the second the dismissal is given onwards. No notice period or prior approval from any authority applies.

Given the big impact of an instant dismissal for both sides, instant dismissal is subject to a stringent set of rules. According to s. 7:677 DCC instant dismissal is only justified when an employee's actions or omissions constitute an

'urgent cause' for dismissal. A non-exhaustive list of 'urgent causes' can be found in s. 7:678 DCC<sup>1</sup>, however most notable and leading is the case law on this subject.

If an employer considers the employee's action to constitute 'urgent cause' and contemplates instant dismissal, he is obliged to act promptly and share his decision to dismiss for urgent cause immediately, while also detailing the reasons for the instant dismissal. Instant dismissal is one of few exceptions to an employee's right to the severance fee following a unilateral decision by the employer to terminate the employment contract.

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<sup>1</sup> the list includes instances of theft, uttering threats, intentional reckless behaviour



# Tax

## Tax aspects under Dutch law

If you do business within the EU, it could be highly beneficial to create a gateway to the EU by setting up a subsidiary company in an EU territory. With a Dutch tax-resident entity, a company ensures having access to the EU internal market and profits from the application of EU law, in terms of VAT and customs-related matters. Creating your EU gateway entity in the Netherlands – as the country of residence – could also provide more advantages, such as:

- Access to 100+ double tax treaties.
- Dutch tax authorities will issue residency certificates; the entity is considered a Dutch resident for purposes of all tax treaties.
- No Dutch corporate income tax on any capital gains/dividends received from subsidiaries, if any, under the participation exemption rules.
- No withholding tax on interest and royalty payments in the Netherlands.
- Advance certainty regarding Dutch tax considerations with an Advance Tax Ruling (“ATR”).
- Conducting business in a flexible way from a legal perspective (see above).

Below we set out how to become a Dutch resident from a tax perspective, including how to request this with legal certainty, and the VAT and customs-related consequences of Brexit. We also provide an alternative for the Dutch tax resident entity scenario.

### Residency

A company incorporated under Dutch law – such as the Dutch BV – is not formally bound by minimum substance requirements for it to be considered a Dutch tax resident. Irrespective of where the Dutch BV is managed or where business activities are carried out, it is deemed to be a corporate income tax resident of the Netherlands.

However, in relation to other countries such as the UK, not only the Dutch perspective but also the other state’s perspective and the relevant tax treaty is relevant.

In this sense, and in particular in view of Brexit and an EU gateway approach, it is advisable to have a minimum substance in the Netherlands to prevent the UK Tax Authorities treating the Dutch BV as a UK tax resident and/or to ensure that the company can utilise the benefits of the tax treaty concluded between the Netherlands and the UK.



In a cross-border situation between the Netherlands and the UK, various criteria will be used to determine the tax treaty-residency of the company, including:

- The place where senior management is exercised.
- The place where board meetings take place.
- The place where the head office is located.
- The degree and nature of the company's economic connection with each of the two states.
- Whether the fact that the company is deemed to be a resident of one of the states and not of the other state creates the risk that the tax treaty will be abused or that the national law of one of the states is applied incorrectly.

The place where senior management is exercised is one of the factors determining the residency of the company, i.e. the location where the company's most important business decisions, both administrative and commercial, take place. In other words, it is important that the day-to-day management rests with the Dutch BV itself without the continued involvement of persons in the UK.

### **Advance tax ruling by the Dutch tax authorities**

If you would prefer more certainty on your company's tax position from a Dutch tax perspective, you can opt for an 'advance tax ruling' (ATR) from the Dutch Tax Authorities. An ATR provides a taxpayer with certainty about the tax consequences of its corporate structure and residency, and can be granted if the following requirements are met:

- At least half of the board members with decision-making powers must be resident in the Netherlands.
- The board members must have the necessary professional knowledge and be sufficiently competent and qualified to perform their tasks.

- The board has decision-making powers.
- The most important decisions of the board must be physically taken in the Netherlands.
- The company has qualified staff for an adequate execution and registration of the transactions to be concluded by the company.
- The (main) bank account(s) of the Dutch company is maintained in the Netherlands.
- The accounts of the company are kept in the Netherlands.
- The company complies with its tax return obligations.
- The registered address of the company is in the Netherlands, whereby the legal entity is not considered a tax resident in another country.
- The company must have an appropriate level of equity in relation to its activities.
- The company incurs at least EUR 100,000 wage expenses.
- The company has an office space at its disposal for a period of at least 24 months.

Please note that the UK Tax Authorities may also require the relevant company to meet certain requirements which may differ from the Dutch substance requirements.

### **Consequences related to VAT and customs**

An important consequence of Brexit is the different approach to VAT and customs matters that UK companies will face. With the UK becoming a third country, customs duties will be applicable in relation to the supply of goods. Establishing a Dutch resident company as part of your corporate structure could be a solution to help you remain competitive.

Please note further obligations in relation to VAT and customs, such as the relevant registrations, application for the EORI-number, and possibly a customs permit, need to be considered.

The main advantage of such a structure is to have a gateway to the EU for VAT and customs purposes. This way, the supply of goods through the Dutch resident company allows you to avoid paying duties in many different EU member states on goods supplied from the UK company and warehouse.

The Netherlands operates a scheme where VAT upon import may be declared in your VAT return, rather than paying at Customs. You must apply in writing for an 'Article 23 permit' from the Dutch Tax Authorities.

### **Alternative: A permanent establishment**

In principle, the consequences of Brexit as regards VAT and customs have a similar effect whether you choose to set up a Dutch company or permanently establishment your UK company in the Netherlands. A permanent establishment may be simpler and still cost-effective.

However, the permanent establishment must have an office space at its disposal and cannot be granted an ATR concerning the activities to be performed. In addition, some tax benefits relating to various bilateral tax treaties concluded by the Netherlands may not be available to you.

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