

ENTERING THE DUTCH EUROPEAN MARKET DISTRIBUTION, AGENCY OR FRANCHISE

The Netherlands is a perfect business location for foreign entrepreneurs. It is the gateway to densely populated Western Europe and has a well-developed logistic and technical infrastructure to do business all around Europe. The highly skilled, multilingual and flexible work force, the easy way to start a business, the favourable tax regulations for businesses, a stable political climate and a high standard of living makes the Netherlands the ideal place to start a business (www.startingabusinessnl.com).

There are three options to start your business in The Netherlands:

- 1- Incorporating a Dutch legal entity
- 2- Establishing a branch office
- 3- Appointing a distributor, agent or franchisee

INCORPORATING A DUTCH LEGAL ENTITY

The most common business entities in the Netherlands are the "Besloten Vennootschap" ("BV": private company with limited liability) and the Naamloze Vennootschap ("NV": public limited company). Both entities have legal personality, issue shares and provide limited liability for their shareholders. The main difference between NVs and BVs is that a BV can

only issue registered shares, whereas an NV can issue both registered and (freely transferable) bearer shares. For this reason, only the shares of an NV can be listed on a stock exchange. Another important difference is the paid-in capital: a BV can be incorporated with a paid-in capital of only EUR 0.01. The incorporation of a NV requires a paid-in capital of EUR 45,000.

ESTABLISHING A BRANCH OFFICE

Although it's easy to incorporate a Dutch entity, it may be easier for foreign entrepreneurs to establish a branch office in the Netherlands without having to incorporate a Dutch legal entity. A branch office can also be established as a Brazilian Ltda. For entities outside of the European Economic Area (the 28 countries of the European Union plus Norway, Iceland and Liechtenstein) there are specific regulations to meet the levels of Dutch corporate law. Among others, they also need to file their annual financial reports (with approval of an accountant) and meet minimum capital requirements. All branch offices have to be registered at the Chamber of Commerce.

APPOINTING A DISTRIBUTOR, AGENT OR FRANCHISEE

The benefit of appointing a distributor, agent or franchisee is that you don't have to travel from Brazil to the Netherlands but that you can choose a person or a company in the Netherlands that is already familiar with the Dutch market. In addition, you can shift part

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of the entrepreneurial risk to another party. A downside of these forms of business is that you have less direct control and not the tax advantages of a Dutch branch.

Here is how to enter the Dutch and European market by appointing a distributor, an agent or a franchisee:

DISTRIBUTION AGREEMENTS

A distributor is a separate entity which will buy goods or services from the foreign entrepreneur and will sell them at its own risk to clients in the Netherlands. The foreign entrepreneur will only agree upon a distribution agreement with the distributor. There is ample freedom in concluding these agreements.

There are no legal regulations for distribution agreements. Specific rules for termination are based on case law. As a general rule, contracts with duration of two years have a notice period of three months. For a contract with duration of two to four years a notice period of eight to twelve months is reasonable. For contracts lasting longer than 10 years the notice period should be one to two years. The distributor must be able to recoup the investment made.

AGENCY AGREEMENTS

A foreign company can also choose to appoint an agent in the Netherlands. This agent will mediate between the Brazilian company and possible new clients in the Netherlands. The agent will normally receive a commission for each new client he gains for the entrepreneur. If the entrepreneur agrees with the new client, there will be a written contract between these parties.

The Dutch Civil Code contains specific rules for the termination of agency agreements. The notice period of an agency agreement of indefinite duration is at least one month in the first year of the

agreement and at least two months in the second year. In the third and following years the notice period is at least three months. Termination of the agency agreement can create an obligation for the principal to compensate a customer fee to the commercial agent. In addition, the commercial agent can claim damages before the court.

Both parties, principal and commercial agent, can request the District Court to set aside the agency agreement due to a change in circumstances or to an urgent cause (for example bankruptcy of the commercial agent, infringement of the agreement, appointment of a second commercial agent or refusal by the principal to use the service of the commercial agent).

If either the principal or the commercial agent does not comply with the contractual or statutory provisions, the party terminating the contract will be liable for compensation, unless the reason for termination is an urgent cause and the urgent cause is immediately communicated to the other party.

FRANCHISE AGREEMENTS

Lastly, one can choose for a franchise agreement with a company based in the Netherlands. This company will be allowed to use the logo of the foreign franchisor to sell the products or goods in the Netherlands. The foreign entrepreneur will receive compensation from the Dutch company, which also bears the economic risk.

In franchising, the business owner (franchisee) concludes an agreement with the owner of a trade formula (franchisor). This type of agreement is not provided for by legislation. The franchisee obtains against payment the right to use the franchise formula and to offer services or products to clients in accordance with the franchisor's formula. Other characteristic features of a franchise agreement are that

the franchisor makes available expertise, takes care of staff training and assists the franchisee in exploiting the formula. In return, the franchisor gets compensation (royalties) from the franchisee. The franchisee uses the trade name (trademark) of the franchisor and thus takes advantage from the franchisor's marketing activities.

Generally, upon concluding a franchise agreement, the feasibility of a business will first be assessed. It has to be checked what kind of products the franchisee will have to offer, what the market potential is and what expenses, turnover and profit are to be expected. Prior to concluding a franchise agreement, franchisors commonly provide a potential franchisee with operational forecasts, though this is not mandatory. If operational forecasts are given, their content must be correct and based on a proper market survey. If this is not the case, the franchisor may be liable for the damage the franchisee suffers as a consequence of the improper survey.

There are many different types of franchise. The franchisor can, for instance, provide a "total business concept" (hard franchise) whereby parties have agreed on all business operations which they may not deviate from. Occasionally, this is also used in the "shop-in-shop" formula, when part of the retail space is provided for franchising. In addition, there is soft franchising whereby the business owner has more freedom in establishing a company and agreements are, for instance, limited to using the common trademark or logo (usually within the context of an association or cooperation).

HOT TOPICS

E-commerce

Buying and selling products and services over the internet is increasingly important. This e-commerce also has consequences for the way a



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Brazilian company can do business in Europe, especially if you have already appointed a European distributor, agent or franchisee. Under Dutch law, the manufacturer is allowed to sell its products in the market of the distributor, agent or franchisee. However, manufacturers, distributors, franchisees, or agents can make other arrangements in their contracts, such as, for example, agreeing that a manufacturer is not allowed to actively sell products in the agreed upon territory.

In the distribution agreement parties can agree that distributors, franchisees, or agents are not allowed to start an online shop to sell the products of the manufacturer or only under certain conditions. A typical condition is that distributors, franchisees, or agents should take technical precautions so that active sale of products outside the agreed upon territory is prevented.

Geo-blocking

As from 3 December of 2018, it is no longer be allowed to prevent the sale of products to persons in other EU Member States (geo-blocking). However, delivery abroad may be prohibited, so customers will have to pick up their products. This is another move forward towards a "Digital Single Market", free movement in e-commerce, without borders. Geo-blocking does not apply to:

- Copyright protected products, such as e-books, music and films
- Financial and audio-visual services
- Transport and healthcare services
- Social services.

Pricing arrangements

Distribution agreements often contain arrangements about the price the distributor has to pay for the purchase of the products or services of the supplier. These arrangements are not unlawful pricing agreements and therefore can be made.

Sometimes a supplier, distributor or franchisee also makes arrangements regarding the resale price. This is

the price at which the distributors or franchisees sell their products or services to their buyers. For arrangements regarding the resale price strict requirements are in place. The supplier is allowed to impose a maximum resale price or give a recommended price for resale. However arrangements made on minimum prices or fixed resale prices are considered to be unlawful pricing agreements.

Conclusion

There are many options for selling your products in the Netherlands and the European Union without you having to take all risks in an unknown market and culture. Especially the conclusion of a distribution, agency or franchise agreement may be a good alternative to establishing a company in the EU. Would you like to start doing business in The Netherlands, update your distribution, agency or franchise contract? Or do you have any questions concerning online sales via online shops?

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