

Legal Alert

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New Dutch Legislation on Partnerships

January 8, 2010

Introduction

1. On 15 December 2009, a supplemental bill was approved by the Second Chamber of the Dutch Parliament, which relates to statutory regulations for fields of law adjacent to new title 13 of Book 7 Dutch Civil Code (*Burgerlijk Wetboek*, "DCC"). Title 7.13 DCC regards Dutch partnerships (*personenvennootschappen*) and was approved in 2005.

Coming into force. Transitional provisions

2. Title 7.13 and the supplemental bill are expected to come into force in the course of 2010. Although transitional provisions facilitate the enactment of this new legislation, it is advisable to review your current partnership agreement well in advance to determine if preparatory actions are desired or needed. In any case provisions regarding profit and loss entitlement, representation authority, continuation of the partnership and, for a limited partnership (*commanditaire vennootschap*, "CV"), the partnership structure, merit re-consideration.

Non-mandatory law

3. Title 7.13 will in principle be of a non-mandatory nature (*geen dwingendrechtelijk karakter*). This means that deviations from the provisions of the law are possible, unless deviations are explicitly prohibited in title 7.13 or deviations are not possible because of the nature of the provisions included in title 7.13. In practice, title 7.13 contains various explicit prohibitions on deviations from the law.

New definition of partnership

4. Under the new legislation a partnership is defined as an agreement between two or more persons - the partners - to co-operate for joint account. The co-operation must be aimed at obtaining benefits for all partners by means of contributions made by each of the partners.
5. Title 7.13 recognises two types of partnerships:
 - a. the "silent" partnership (*stille vennootschap*); and
 - b. the "public" partnership (*openbare vennootschap*).
6. The current "public" partnership (*openbare maatschap*) and the current general

partnership (*vennootschap onder firma*, "VOF") will be public partnerships. The current limited partnership will be a species of the public partnership. The CV will have one or more limited partners in addition to one or more managing partners.

7. A public partnership is a partnership to practise a profession or undertake a business or to perform professional or business acts. The partnership must present itself externally as a public partnership in such manner as easily recognisable for third parties.
8. A silent partnership is defined as any partnership that is not a public partnership. The current "non public" partnership (*stille maatschap*) will be a silent partnership.

Scope of this Legal Alert

9. This Legal Alert addresses only the public partnership and all references to a partnership should be read as references to a public partnership. If in this Legal Alert reference is made to a (public) partnership, the CV is included unless specifically indicated otherwise. Partners of a partnership can be legal entities or individuals. This Legal Alert addresses only partners-legal entities.

Legal personality

10. One of the main deviations from current legislation is that under title 7.13 a partnership can obtain, or can be created with, legal personality. Legal personality requires:
 - a. a partnership agreement which stipulates that the partnership has legal personality;
 - b. a notarial deed executed in the Dutch language before a civil law notary in the Netherlands, which incorporates the partnership agreement or at least those provisions of the partnership agreement described in paragraph 11; and

- c. if an existing partnership without legal personality converts into a partnership with legal personality, confirmation of the contribution of assets to the partnership-legal entity.

11. The notarial deed of a partnership-legal entity must in any case include provisions regarding its legal personality, name, seat - which must be in the Netherlands - and objects.
12. The name of the partnership-legal entity must include the words "*Openbare Vennootschap met rechtspersoonlijkheid*" or the abbreviation "OVR", which means public partnership with legal personality. In the case of a CV-legal entity, this should be "*Commanditaire Vennootschap met rechtspersoonlijkheid*" or "CVR".
13. The consequences of legal personality are limited. There is no impact on the liability of the partners; the partnership-legal entity is liable for partnership debts but the partners (also) remain jointly and severally liable for partnership debts (see also paragraph 23). The main advantage of legal personality relates to the possibility for the partnership to acquire legal title to assets in its own name. This simplifies both the acquisition and transfer of assets as well as admission and withdrawal of partners. Furthermore, a partnership-legal entity can convert into a BV (reference is made to paragraph 42).
14. A partnership-legal entity can opt to give up legal personality and continue to exist as a partnership-non legal entity. At such time the assets and liabilities of the partnership-legal entity will have to be contributed to the joint ownership of the partners. Giving up legal personality does not affect security rights vested on (future) assets of the partnership securing (future) claims on the partnership
15. Specific provisions have been included to safeguard that a conversion of a partnership into a partnership-legal entity or vice versa

does not affect security rights granted by the partnership.

Registration with the Trade Register

16. Business enterprises in the Netherlands must be registered with the Trade Register of the Chamber of Commerce. A partnership that practises a profession or performs professional acts must (also) be registered with the Trade Register. The registration requirement includes specific information on the partnership and the partners, such as the name and objects of the partnership and details on the managing partners and their representation authority. There is no obligation to make the partnership agreement public. These principles do not change under the proposed legislation.

Bookkeeping and publication of accounts

17. The managing partners must at least annually prepare a balance sheet and a profit and loss account (jointly "**annual accounts**"). If all fully liable partners of a public partnership are companies with a capital divided into shares (*kapitaalvennootschappen*) under foreign law, title 9 of Book 2 DCC is applicable to the preparation of the annual accounts. Title 9 includes audit and publication obligations. Certain statutory exemptions from those obligations may apply due to the (limited) size of the partnership. This also applies under current law.

18. In principle, the annual accounts are to be adopted by all partners jointly. Adoption by a majority, or by one or more third parties, is possible if the partnership agreement so stipulates. In case of adoption by a majority all partners are to be involved in the decision-making process.

Management and external representation (*vertegenwoordiging*)

19. Except for limited partners in CVs, every partner is managing partner and is obliged to duly perform its management task. It is

possible to exclusively assign the management of the partnership to one or more third parties.

20. Under the new legislation, each managing partner may represent the partnership without limitation in acts that may be conducive to the realisation of the objects of the partnership. The partnership agreement can provide otherwise. The rules under current legislation are similar.

21. Both current and new legislation further provide that as long as a partnership is not registered with the Trade Register of the Chamber of Commerce in accordance with applicable requirements, third parties may assume that the partnership has been entered into for an indefinite period, for any purpose and without representation limitations for (legal) acts for any of the managing partners. However, unlimited representation authority may not be assumed by a third party if the third party (nevertheless) knows about exclusion or limitations contained in the partnership agreement.

Profit entitlement and internal liability (*draagplicht*)

22. Under title 7.13 as a premise all partners are equally entitled to profits and are internally equally liable for any losses of the partnership, regardless of their respective contribution to the partnership. The partnership agreement can provide otherwise. Under current legislation the reverse applies: the entitlement to profits and the internal liability of partners is determined based on the amount of the respective contributions unless otherwise agreed in the partnership agreement.

External liability: general

23. As a premise, the partners of a partnership are jointly and severally liable (*hoofdelijk aansprakelijk*) for obligations of the partnership.

24. An important exception to the premise of joint and several liability of partners as referred to in paragraph 23 is that if a partnership has received a commission (*opdracht*), each of the partners - except limited partners of a CV - is fully liable for any shortcoming in the performance, unless the shortcoming cannot be attributed to such partner.
25. In relation to external liability of a withdrawing partner, title 7.13 provides that claims against a partner to perform obligations of the partnership that exist at the time of the withdrawal, lapse at the moment that the claims against the partnership lapse, and in any case after a five-year period, starting the day after the withdrawal is filed with the Trade Register of the Chamber of Commerce. If a claim only becomes due and payable after filing of the withdrawal then the period referred to above starts at such time. This will be the case for claims relating to performance under a durable agreement (*duurovereenkomst*).
26. Title 7.13 specifically provides that as a starting point new partners are only liable for obligations of the partnership that are created after their accession or succession. However, a succeeding partner can accept rights and obligations from the moment of withdrawal of its predecessor.
27. Title 7.13 provides that if, after dissolution of the partnership, the assets of the partnership are insufficient to pay off the partnership debts, the liquidator(s) can demand payment into the liquidation account from each of the former partners in the proportion that each is to share in the losses of the partnership. As indicated in paragraph 22, the partnership agreement may contain a deviation from the premise of an equal share in the profits and losses of the partnership.

External liability: CV

28. In the case of a CV, a limited partner is not, but can become, jointly and severally liable for obligations of the CV. This extension of

liability will apply if the limited partner acts in the name of the CV, or if the limited partner through its acts exercises a decisive influence on the performance of the managing partner(s). All of this applies unless an act does not justify the extension.

29. The liability of a limited partner will, however, be limited to the obligations that are created as from the moment the decisive influence arises or as from the moment a limited partner has acted in the name of the CV. The explanatory notes to title 7.13 explicitly state that if a limited partner is managing director/sole shareholder of a managing partner, it is assumed that the limited partner exercises a decisive influence on the performance of such managing partner.

Separate partnership equity (afgescheiden vermogen)

30. Both under current law and pursuant to title 7.13, private creditors of a partner can only recover claims from the assets of a partner to the extent such assets do not form part of the separate partnership equity. Only creditors of the partnership can recover claims from the assets of the partnership.

Withdrawal

31. Upon withdrawal of a partner, an amount will be distributed to such partner equal to the value of its economic entitlement to the assets of the partnership as such entitlement may be further stipulated in or pursuant to the partnership agreement. The partnership agreement can provide that the distribution will be made in one or more terms or will be subject to occurrence of a future event.
32. If a partnership is not a legal entity, the interest of the withdrawing partner in the partnership equity is attributed (*toegedeeld*) to the remaining partners. This attribution must be effected by transferring all partnership assets with due observance of the required transfer formalities.

Dissolution. Continuation (voortzetting)

33. Title 7.13 provides that the partnership is dissolved in its entirety:
- in such circumstances as provided in the partnership agreement;
 - pursuant to an agreement of the partners to that extent;
 - if one or more partners withdraw and not at least two partners remain - in the case of a CV, at least one managing partner and one limited partner -; or
 - in case of bankruptcy of the partnership.

In addition, a court may decide that the partnership is dissolved in such circumstances as provided for in the law.

34. If the partners tacitly continue a partnership after the term for which it was entered into has expired, the partnership is extended for an indefinite period.
35. In deviation from current law, title 7.13 stipulates that under certain circumstances the partnership agreement is dissolved with respect to a certain withdrawing partner only. The partnership will automatically be continued between the remaining partners. This applies if the withdrawal of the partner is the consequence of:
- an agreement between the partners for that purpose;
 - the partner going bankrupt, or ceasing to exist;
 - the partnership agreement providing for a withdrawal time which is reached; or
 - a termination notification (*opzegging*) to the other partners, unless the partnership agreement provides otherwise, or a termination notification by one or more of the other partners, if provided for in the partnership agreement.

In addition in such circumstances as provided for in the law, a court may dissolve the partnership with respect to a certain partner.

36. A termination notification will be voidable (*vernietigbaar*) if such notification is unacceptable according to the principles of reasonableness and fairness (*redelijkheid en billijkheid*).
37. Under current law, the premise is that a partnership is a personal relationship between the partners. Consequently, if a partner withdraws, the partnership agreement is dissolved unless the partners have agreed on continuation prior to the withdrawal.

Bankruptcy

38. As set out under the preceding heading, under the new legislation bankruptcy of the partnership will result in the dissolution of the partnership. The partnership can be continued if the bankruptcy ends because of court approval of a settlement (*homologatie van een akkoord*). In deviation from current legislation, bankruptcy of one of the partners will not result in dissolution of the partnership, unless because of the bankruptcy fewer than two partners remain.

Liquidation process

39. Title 7.13 provides for a statutory liquidation process (*vereffeningsprocedure*). After dissolution all known creditors of the partnership must be notified by letter. In addition a notification must be placed in the official gazette (*Staatscourant*) pursuant to which creditors are requested to submit their claims on the partnership within two months after the publication in the official gazette. If the assets of the partnership are insufficient to pay off the creditors of the partnership, the liquidator(s) can demand payment into the liquidation account from each of the former partners in the proportion that each is obliged to share in the losses. Reference is made to paragraph 27.
40. Title 7.13 provides that the former managing partners jointly liquidate the partnership unless provided otherwise in or pursuant to the partnership agreement. After liquidation,

the managing partners must keep the books and records of the partnership for seven years.

41. Title 7.13 provides for an exception from the mandatory liquidation process if the (former) partners so agree in writing and the business undertaking or profession of the partnership is continued by an entity that is appointed by the partners in writing and the entity has accepted this appointment in writing. This entity can be a former partner of the partnership or a third party. The partnership assets must be transferred to the entity that continues the business undertaking or profession. Liabilities of the partnership transfer by operation of law to the entity that continues the business. Partnership creditors that risk non- or unreasonable late payment because of application of the exception can request a court to appoint a liquidator.

Conversion into a private company with limited liability (a "BV") or vice versa

42. Pursuant to title 7.13, a partnership-legal entity can convert into a BV and vice versa. Claims against partners of the partnership existing at the moment of conversion lapse after a five-year period, starting the day after the conversion is filed with the Trade Register of the Chamber of Commerce. If a claim only becomes due and payable after registration of the conversion - which will be the case for claims under durable agreements - then the period referred to above starts at such time. Conversion does not terminate the existence of the legal entity. After the partnership-legal entity is converted into a BV, it can subsequently be converted into another legal entity.

Tax treatment

43. Under current Dutch tax laws, a partnership is generally considered fully transparent for corporate income tax and dividend withholding tax purposes. As a result, the partnership itself is not subject to corporate income tax at all whereas a partner may be subject to Dutch corporate income tax with

respect to its proportionate interest in the results of the partnership. A partner's tax position depends on its country of residence, its legal form and certain other characteristics. Furthermore, distributions of profits by a partnership are generally not subject to withholding tax. However, an "open CV" is subject to corporate income tax insofar as its profits are attributable to its limited partner(s), furthermore, distributions by an "open CV" to a limited partner are generally subject to 15% withholding tax. A CV's tax qualification as an "open CV" is based on its contractual provisions regarding the admission and transfer of limited partners, a CV that is not an open CV" is generally referred to as a "closed CV".

44. While under title 7.13 a partnership may elect to be or become an OVR or CVR, this election will not have any consequences for the fiscal transparency of an OVR or a CVR that meets the requirements of a "closed CV". For purposes of the corporate income tax and dividend withholding tax legislation, a CVR that meets the requirements for an "open CV" will be opaque insofar as the profits accrue to its limited partners.
45. In contrast, for purposes of the 6% ad valorem Real Estate Transfer Tax, due by a transferee in case of a transfer of real estate situated in the Netherlands, an OVR and CVR will be treated as entities separate from their partners as opposed to a partnership without legal personality, which will be treated as one with its partners. Consequently, the acquisition of Dutch real estate by an OVR or CVR may result in a transfer tax liability for the OVR or CVR.

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