



THE DUTCH FOUNDATION (WITH EMPHASIS ON THE STAK FOUNDATION AND WITH FAQ)

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I Introduction

Dutch law, like many other sophisticated legal systems, provides a rich variety of legal instruments in which to mould one's business or other activities. In principle one is free to choose one's instrument. People therefore also have the freedom to opt for the ancient instrument foundation for a certain species of this genus and to decide its proper organisation and administration. Of course this should be done in accordance with the general legal framework. The Dutch foundation (stichting) is primarily governed by the Dutch Civil Code in Book 2, title 6: articles 285-304. The foundation is an entity with legal personality not owned by anyone. So far, Dutch law knows at least the following species of the genus of Dutch law foundations: a. foundations with a general charitable object, fiscally qualifying as charitable objects foundations ("ANBI"); b. foundations with a general social object, fiscally qualifying as social objects foundations ("SBBI"); c. Stichting Administratiekantoor, usually fiscally deemed as "transparent", because the foundation is not economically entitled to the assets entrusted to it ("STAK"); d. other foundations which do not qualify as any of the above. These foundations may be running a business activity to realize their objects. This category also comprises mixed foundations, who do not qualify (anymore) as ANBI or as foundations with "old" assets, or with assets from abroad.

The foundation is immediately created - without prior Dutch central or local government approval being required - and immediately acquires its full legal personality and limited liability by the Dutch notarial deed of formation. Without prejudice to sometimes time consuming due diligence procedures, the formation and registration in the trade register of the Chamber of Commerce can be done in one day. The promoter can be anyone of age having legal capacity, irrespective of his/her nationality. Usually a Dutch licensed trust office acts as such. The notarial deed of formation establishes the formation and mentions the statutes or articles governing its activities and mentions its first director(s). The director can also be anyone of age having legal capacity, irrespective of his/her nationality. For tax reasons it will be prudent to go for a professional Dutch resident director. Only Dutch central bank licensed trustees can act as such. Special care should be devoted to whom to appoint and under which conditions, laid down in the statutes and in the management agreement.

The articles of the foundation must be in Dutch. There may also be bylaws, which are in Dutch or any other language and do not have to be laid down in a Dutch notarial deed or published with the Chamber of Commerce and therefore remain confidential in principle. Pursuant to article 2:289 of the Dutch Civil Code, the foundation will be registered as such with the Dutch Trade Register. The foundation must register the surname, the full first names and the residence or latest residence of the founder, or founders, accompanied by an authentic copy or authentic excerpt of the deed of incorporation, containing the articles of association.² If this is neglected, the legal liability of the foundation also becomes a personal liability of the directors.³

² Article 5 sub a Handelsregisterwet 2007.

³ Article 2:289 paragraph 1, Dutch Civil Code.

The articles of association must contain the name of the foundation with the word “Stichting” as part of the name, the objects of the foundation; the manner in which directors are appointed and dismissed; the municipality in the Netherlands where the foundation has its statutory seat which will as a rule remain in The Netherlands, because it applies the incorporation system and the destination of any surplus after dissolution of the foundation or the manner in which this destination shall be determined.⁴ In case of an ANBI foundation this has to be another similar foundation. The notary has to take care of these requirements on penalty of personal liability towards the founders / directors.⁵

A foundation may serve a charitable or another, even commercial, purpose.⁶ Commercial activities will in principle be taxed with corporate income tax. The law does not allow distributions to the promoter or directors or anyone except for charitable purposes. We will see below with the STAK foundation how one deals with this latter aspect in practice. The director(s), with a minimum of at least one, administer(s) and represent(s) the foundation. Being a legal person, a foundation may open bank accounts.

There is no obligation for auditing or filing tax returns, except when running a business. Acting as one’s own wealth manager is not deemed to be running a business. However, under Dutch law every foundation is obliged to prepare a “status of income and burdens” (“staat van baten en lasten”) within six months after the end of each financial year. There is no publication obligation. Foundations running one or more businesses, or those foundations which also have a supervisory board, or an annual turnover of EUR 4.4 million or more during two subsequent financial years, need to publish and file annual accounts, in accordance with the requirements of Book 2, Section 9 of the Dutch Civil Code, containing a number of demands to be met, among which the following:

- a balance sheet has to have been composed within 6 months after the end of each financial year;
- a profit and loss statement has to be composed for all businesses;
- an explanatory report has to be included with the statements above;
- every member of the board and of an eventual supervisory board, has to sign the balance sheet.⁷

The annual accounts must be submitted to the Chamber of Commerce of the applicable region within 8 days after the annual accounts have been ascertained. This has to take place within 2 months after presentation of the annual accounts to the board.

⁴ Special attention here with respect to the ANBI.

⁵ Article 2:286 paragraph 1, Dutch Civil Code.

⁶ The Dutch tax authorities may declare a foundation with a charitable purpose is an ANBI, an "institution for general benefit" with gift and succession tax benefits.

⁷ Article 2:10 paragraph 2 Dutch Civil Code. Article 2:360 paragraph 3 juncto 2:300 Dutch Civil Code. 3

Effectively, this means that every July (assuming the financial year of the foundation ends in December) annual accounts have to be published. An extension of this period is possible under certain circumstances.

At the moment, a proposal for a new bill (“Concept wetsvoorstel publicatieplicht stichtingen”, 15-07-2010) has been prepared and is now under discussion in the Dutch Parliament. This bill, if accepted by Parliament, will impose a publication obligation on all foundations, along the lines of the more complicated rules of Section 9 of Book 2 of the Dutch Civil Code described above. The suggested effective date of this bill is 01 January 2016.

Furthermore, a foundation also has the obligation to keep such administration of its financial position and its books that at every moment its rights and duties are clear.⁸ This administration has to be kept available for a period of seven years.

II Some reasons to opt for the Netherlands

We distinguish between opting for the Netherlands and opting for other jurisdictions. There are of course a number of other countries with a sophisticated foundation regime. Why go for a Dutch foundation while one might also go for a Swiss or a Liechtenstein foundation? The answer is that in each case the decision depends on the specific circumstances of the client and on the developments in the respective jurisdictions involved. The following observations plead for the Dutch foundation. The Netherlands is a high-tech country, has a strategic location and is considered as the, or one of the main entry points to Western Europe. It has a clear international business environment. It is a stable country with a good legal system. It has a favourable tax regime, especially for holding, financing and licensing companies and foundations. The Netherlands has an extensive network of bilateral double tax treaties. It has the participation exemption, exempting profits received from qualifying subsidiaries. Profits, if taxed, are taxed at a corporate income tax rate of 25% (profits below EUR 200,000 are subject to 20%). There is no withholding tax on outgoing interest and royalty payments. However, interest payments to a foreign corporate or individual shareholder may become subject to Dutch income tax (and sometimes Dutch dividend withholding tax), but in many cases Dutch double tax treaties prevent (or limit) the Netherlands to exercise this right on taxation. The domestic dividend withholding tax rate of 15% may be reduced under certain conditions to 10, 5 or even zero % under a double tax treaty. The Netherlands also has an extensive network of bilateral investment protection treaties (BIT's). Dutch BIT's are a factor one should also take into account when considering setting up an entity in the Netherlands. The Netherlands has a good reputation.

III Some reasons to opt for a Dutch foundation

Within the Dutch jurisdiction we distinguish between the *Stichting* and other instruments of Dutch corporate and tax law. The *Stichting* instrument is extremely flexible compared with the other - also rather flexible - instruments of Dutch corporate and tax

⁸ Article 52 General Tax Code (AWR).

law, such as the new Flex BV, the NV, the Dutch co-op and the Dutch Limited partnership, etc. Secondly, its formation, domicile, management and administration costs are usually more reasonable. Thirdly, it provides more privacy than the other instruments and it is very well suited for holding activities, as will become clear in IV below. It is not subject to any CFC rules.⁹ It can be used as an almost ideal instrument of asset protection and tax planning. We realize of course there are also other jurisdictions with such a favourable foundation regime.

As mentioned, only if the foundation is deemed by the Dutch Tax Authorities to have a business, will it be taxed with Dutch corporate income tax. It is considered anyway as a Dutch tax resident under double tax treaties. A Dutch tax residence certificate may be issued. If one combines it with a Dutch BV - which is possible as will be explained below - there is in principle no Dutch dividend withholding tax on dividend distributions (no tax treaty required), because it is deemed transparent. Tax consolidation is possible between the Dutch foundation and the Dutch BV. Dividends received through any capital gains realised by a Dutch intermediate BV/ Dutch Foundation combination should be exempt from Dutch corporate income tax.

IV Certification or the STAK foundation

The law does not provide a description or a legal framework for the STAK. A proper legal framework would not be possible in view of the many variants of certification.¹⁰ One cannot exceed the boundaries of the instrument foundation as laid down in the law governing the foundation generally. One can also not exceed the boundaries of the general law of obligations, or the requirements of “reasonableness and equitability” (“redelijkheid en billijkheid”), permeating Dutch law. Certification however is an old and traditional instrument. It has been in existence already long before the BV was introduced as legal instrument in 1971. It already came into being under the old NV law, existing since 1838.

As to the STAK, one can at any rate distinguish between two forms of appearance in practice, which forms are what we would like to call the “Simple STAK” and the “BV STAK”. A Simple STAK in our view is a Dutch foundation without a BV or another limited company under it, but which issued “certificates”, also called “depository rights” (“d.r.”) for the assets fiduciarily held by the STAK foundation. The BV STAK is a Dutch foundation with a Dutch BV under it, normally, and which foundation has issued depository rights for the shares of the BV it fiduciarily owns and which are administrated by the foundation. The foundation acts as administration office (“administratiekantoor”, hence the name “Stichting Administratiekantoor”, abbreviated as “STAK”).¹¹ The issue of certificates is registered by the foundation in a register of certificate holders. We have also seen constructions whereby the STAK concept was used for a foreign law foundation with a Dutch BV under it.

⁹ CFC regimes eliminate the deferral of income earned by a CFC. They tax residents currently on their proportionate share of a CFC's income.

¹⁰ Kamerstukken I, 1984/85, nr.18 905, nr. 3, p. 15.

¹¹ The administration office may also be an NV or a BV or an association.

We do not see why this would not be feasible also. There may also be a Dutch foundation with a foreign company under it. Certificate holders may be private persons or companies, either onshore or offshore. The BV STAK foundation therefore is a species of the genus foundation holding investments or shares in a company (BV or any other) as legal owner, while the economic interest in these shares lies with another.

The purpose and the effect of the Dutch STAK construction therefore are a separation of the economic ownership of the assets or shares from the legal ownership. This is useful in various situations, such as a need for asset protection, or keeping out certificate holders from the general meeting of shareholders in case of a family business or as firewall against hostile takeovers or against undesirable workers participation. Certificate holders only have meeting rights if this was explicitly stipulated and these rights can also be taken away from them again.¹² Only in case this was explicitly stipulated, certificate holders will be entitled to a dispute resolution arrangement.

How does it work technically? The Stak Foundation needs to become owner of the assets or shares. The Stak foundation therefore enters into an agreement with the legal owner (s) of such assets or shares, stipulating that the assets or shares will be transferred into the legal ownership of the Stak foundation to administer these assets or shares for the benefit of the transferor and against the simultaneous issuance of – abstract - depositary receipts (also called certificates) by the Stak foundation. This is the obligatory agreement.

This obligatory agreement has to be followed under Dutch law (which applies the causal system), by a transfer of the legal ownership of the assets or shares, by Dutch notarial deed if the shares concerned are shares in a Dutch BV. Transfer of certificates issued theoretically does not require a notarial deed. Finally, the administration terms and conditions binding the foundation and the transferor, are also laid down in a deed. There are therefore at least three deeds. The transactions are then also recorded in the shareholders register of the BV and in the register of depositary receipts held by the Stak. The details of the depositary receipt holders are not made public.

The foundation is registered in the trade register as sole owner of the BV shares, where the BV has only one shareholder. The STAK has become the legal owner of the assets or shares and will exercise the ownership or voting rights, while the depositary receipt holders will receive income or dividends.

V Taxation of the Stak foundation

The STAK instrument exists already for a long time. Therefore, also the STAK instrument's tax status is well developed and clear. Holding investments or shares is not deemed a business activity. Fiscally, what is happening does not qualify as a sale and it does not qualify as a gift. The Stak is deemed transparent for Dutch tax purposes.

¹² Article 2: 227, para 4 BW.

The Stak is therefore not subject to Dutch corporate income and the depositary receipt holders are in principle not liable for Dutch income or wealth tax (the Dutch Income tax act comprises a disguised wealth tax: box III). Any profits or capital gains made will normally be taxed only at the level of the beneficiary's country of fiscal residence. Assuming the depositary receipt holders are not resident in The Netherlands and do not trade or conduct a business and do not have a permanent establishment or a permanent representative in the Netherlands and the investment is not located in The Netherlands, there will in principle be no Dutch corporate income tax or any other tax liability. We point however to what is often forgotten: the capital gains tax of 25 % on any sale of shares in a Dutch BV by anyone irrespective his or her nationality who as a private person is holding 5 % or more in such BV ("aanmerkelijk belang" or "substantial interest"). Therefore things have to be structured carefully and in conformity with the conditions required by the Dutch Ministry of Finance to prevent this levy in box 2 of the income tax act.¹³

VI Conclusions

A Dutch foundation is cheap to form and manage and a very flexible and so far anonymous instrument. By issuing depositary receipts through a Stak foundation, voting and economic rights become separated. The Stak foundation becomes an asset protection vehicle, limits disclosure of ownership and also functions as an inheritance planning vehicle.

VII FAQ

1. How can I obtain a Dutch Stak structure?

Answer: You can contact Arcanum Management & Company Services B.V., trust@arcanum.amsterdam and instruct them to form a Stak. They may accept this instruction or not, but if accepted, they will accept it only under applicability of their standard terms on www.arcanum.amsterdam.

2. Why should I go for a Dutch foundation or Dutch Stak structure?

Because the Dutch foundation and the Dutch Stak structure are flexible, confidential and have stability and continuity. You should preferably combine it with residence of yourself and the family in an offshore center or a country with a remittance base system.

3. Why do I need a BV under the foundation?

You do not have to but the BV can profit from Dutch double taxation treaties and Dutch bilateral investment protection treaties. It may also be a foreign entity.

4. To whom will the invoices be charged?

The invoices will be charged to the BV, increased with Dutch VAT which may in principle be reclaimed. The beneficiary remains jointly and severally liable for the payment. You can pay this claim for the BV if the BV itself has no funds yet, in which case you have a claim on the BV or fund the BV with issued and paid up share capital or with a loan. There is no minimum share capital requirement and no capital tax.

¹³ See ab-verzamelbesluit of 04 September 2012/101, para 4.5)

5. What will be the standard costs of a Dutch Stak-structure?

Category	Price EUR	VAT 21% EUR	Sub Total	Remarks
Formation of Foundation and BV and all necessary other deeds	3.500	735	4.235	Fixed
Bank account(s) for Foundation and for BV	2 x 1.000 (Bank) 2 x 500 (Arcanum)	- 210	3.210	Depends on bank
Domiciliation & Management of Foundation and BV	7.500	1.575	9.075	Fixed. Additional director EUR 3.000, plus VAT.
Administration of Foundation and B.V.	7.500	1.575	9.075	Fixed
TOTAL first year	19.500 (Arcanum) + 2.000 (Bank)	4.095 (21% over EUR 19.000)	23.595 + 2.000 (Bank)	
TOTAL next year	15.000	3.150	18.150	Indexed

6. When am I a beneficiary?

If you have a 25 % or more say.

7. Will the trust company listen to my instructions?

Under the domicile & management agreement they will listen to your instructions except if these are illegal.

8. Can I remove them any time?

Yes, you can but under observance of a period of notice normally (3 months).

9. How long does the formation take?

The formation can be done in a couple of days, provide all due diligence requirements have been duly fulfilled and the invoice for the formation, domiciliation, management and administration has been paid.

10. Is it possible to appoint a protector (like an Anglo American trust) of the Stak Foundation?

The Protector as such is a figure not known normally with the Dutch foundation. It is a figure under Anglosaxon or other trust law and Holland recognizes foreign trusts by virtue of a treaty but does not know the trust as an instrument regulated in Dutch law itself. Holland has no formal trust law. We can however appoint a Protector similar figure in the bylaws of the Stak.

11. Are the Bylaws of the Stak secret?

In principle: yes. They are not published in the trade register.

12. Are the due diligence documents secret?

In principle: yes. They remain confidential to us.

13. Can we alter or skip the due diligence?

No, we cannot because these are requirements from the Dutch central bank which need to be duly fulfilled.

14. Is it always necessary to meet?

It is recommended to always meet but in certain cases we may be satisfied with a proper due diligence carried out by a reputable foreign attorney or notary.

15. Is it possible to appoint a co-director in the Stak?

One or more co-director(s) can be appointed at the same time as the Dutch director which would be in the deed of incorporation or later, if client so desires. All directors are published in the trade register.

16. Will I or my representatives be solely authorised?

No, because the trust company will want to know and is obliged to know and control what is going on. Therefore there can only be joint signatory powers and specific powers of attorney. The professional director is not passive.

17. Do we pay separately for every signature?

No, you do not. Unless a number of signatures which was agreed, is exceeded.

18. Can the foundation have its own bank account?

Yes. Either in the Netherlands or abroad or in the Netherlands and abroad. The banks have their own due diligence and foreign bank due diligence fees are not included.

19. How do we bring in assets into the Stak?

You bring them in as gift or as capital contribution or as the result of any other valid transaction. Dutch gift tax or capital tax will not be due. Dutch transfer tax on bringing in Dutch real property is due. This may be 2 or 6 % depending on the nature of the building and its use. Watch out for any foreign tax.

20. Is there a need for a minimum amount of capital?

The foundation or BV needs to have a paid up minimum capital of EUR 1.

21. Should my company be restructured in case its ownership is transferred to a Stak?

It depends on the specific circumstances.

22. How are dividends divided between holders of depositary receipts?

Dividend will either be in legal tender in which case you need a bank account or in kind. Then additional depositary receipts might be issued.

23. Can depositary rights be issued without notarial deed?

That is possible if the text of the statutes of the BV and the administration conditions allow this. Normally they do not.

24. Can they be transferred other than by notarial deed?

See above. If it is possible, the transfer will have no effect if done without prior approval by the trust company as required under the domicile & management agreement.

25. Are depositary receipts anonymous or personalized?

They are always personalized. They are abstract and not physical. The names of the holders are registered in a confidential private register of depositary notes holders. Under new Dutch law, expected to be applicable in 2016, several specific Dutch governmental organisations will have access to a shareholders-register in which the details of the shareholders of a BV / NV shall also need to be mentioned.

26. How can holders of depositary receipts know their rights?

In the administration conditions applicable to the depositary receipts, the rights and duties of the Stak and the depositary receipt holders towards each other are laid down. These can be tailor made.

If you have any other questions, please contact us.

Amsterdam, 19 November 2015.

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