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**Commission II**

**National Report – Rapport national – Landesbericht  
The Netherlands**

Legal forms for farm enterprises, taking into account traditional and industrial farming – Les formes légales de l'exploitation agricole, en tenant compte des entreprises traditionnelles et industrielles – Rechtsformen des landwirtschaftlichen Unternehmens, unter Berücksichtigung von traditionellen und industriellen Betrieben

**Tea Mellema-Kranenburg**

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**Commission II**

**National Report for the Netherlands**

Tea Mellema-Kranenburg

1. Introduction

In this report the principal co-operative arrangements in the Dutch agricultural sector will be discussed. A description will be given of the manner in which the agricultural world is organized in the field of private law.

Attention will first be given to the different forms of co-operation under private law that are used by farmers and agricultural businesses.

In addition some attention will be given to different legal aspects that are associated with the termination of agricultural businesses. In this connection aspects of inheritance law and tax law will be dealt with. Furthermore co-operative societies will be discussed as a special form of co-operation that is precisely very significant in agriculture.

2. The co-operative arrangements versus the one-man business

In the Netherlands agricultural businesses are organized on the one hand as one-man businesses, on the other hand as co-operative arrangements. In view of the increasing scale of businesses the number of one-man businesses is declining. In this report no special attention will be given to this.

The co-operative arrangements may be distinguished into: the basic partnership, the limited partnership, the general partnership, the private company with limited liability (B.V.)<sup>1</sup> and finally the co-operative society.

In the choice of the one or the other legal form not only the size of the business but also the financing possibilities, liability and possibility of business succession will play a part.

3.1. The basic partnership and the general partnership

The Dutch basic partnership is viewed as the basis of all legal arrangements of partnerships of persons.

The contract for a basic partnership concerns a multilateral agreement for co-operation between two or more persons, aimed at the division of the proprietary advantage gained with the co-operation, for the achievement of which object they undertake to contribute something<sup>2</sup> to the

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<sup>1</sup> and in exceptional cases the company limited by shares (N.V.), which I shall not discuss any further in view of the fact that it is rare in the agricultural sector

<sup>2</sup> for instance money, goods and/or labour

community (section 7A:1655 of the Civil Code). Under current law there are two<sup>3</sup> different types of "genuine" basic partnerships: the public and the silent basic partnerships. The public basic partnership is a partnership in which a profession is carried on in a manner knowable to third parties under a common name.

The silent basic partnership is a form of partnership in which, without the use of a common name, a profession or business is carried on or professional or business acts are performed. A special form of the basic partnership is the general partnership (v.o.f.). Every basic partnership in which a business<sup>4</sup> is carried on under a common name is regarded as a general partnership. In the agricultural sector business is often done under the family name, especially in the case of businesses that are not very big.

A basic partnership therefore entails the performance of a profession or business, whether or not under a common name.

A big difference between the two different forms of co-operation is liability. In a basic partnership the partners are liable for equal, proportionate parts, while in a general partnership each of the partners is liable for the whole ("joint and several liability").

To obtain credit the general partnership is therefore preferable in view of the better possibilities of recovery for the lenders.

Another important difference is found in the presence of separate property in the general partnership. This means that, apart from the property of the individual partners, the general partnership also has its own property, which private creditors cannot touch.

No special requirements are imposed on the agreement of formation. In the case of the general partnership a document is required to prove the existence of the firm among the partners.

Naturally it is practical and useful to lay down the partnership agreement in writing. In practice that is usually done by an accountant. In view of the many legal aspects that are linked to the partnership contract it would be desirable to engage a lawyer in this as well.

### 3.2. The contribution to the basic partnership and the general partnership

As already discussed above with the definition of the basic partnership, a contribution to the community is required to arrive at the form of the basic partnership.

In principle a partner is completely free to contribute to the partnership whatever the partner wishes: goods, labour, knowledge etc.

In the event of contribution of goods a further distinction is made between contribution of ownership (creating co-ownership), contribution of beneficial ownership (depreciation, costs and changes in value are for account of the partnership) and contribution of enjoyment (no transfer of ownership is created (for instance a long lease)).

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<sup>3</sup> section 7A:1655 up to and including 1688 of the Civil Code

<sup>4</sup> The question whether it is a matter of a profession or business has already played a part regularly in the case law of the Supreme Court, for instance HR 22 November 1989, NJ 1990, 674 (Muramatsu). Here the Supreme Court held that according to general opinion the practice of a profession concerns personalized work of an intellectual or artistic nature, without large investments having been made. Therefore work in the agricultural sector will readily be classified as "business".

Especially in the case of business succession the method of contribution is of great importance. In the Netherlands business succession still takes place frequently within a family context. In that case a number of methods (not listed exhaustively) may be distinguished:

- Legal transfer to the fellow partner followed by joint contribution.

In this case the parent transfers the ownership of the undivided half to the child, after which both contribute their half share into the partnership. Legally this is the purest solution but fiscally it is not very attractive. Disinvestment payments, income tax and (sometimes) transfer tax must be paid.

- Legal contribution by the parent to the partnership. In this case all the partners are made co-owners direct by the contributor. The first step, of transfer of ownership to the child, is omitted here. If, however, it is not possible to report a loss to the tax authorities, this is also an unattractive option for fiscal reasons.

- Beneficial contribution. Within the framework of saving costs the transfer of purely beneficial ownership instead of legal ownership may be chosen. The distinctive difference is that in the event of the acquisition of legal ownership the other, not contributing partners enter a relationship under property law in respect of the asset, contrary to the beneficial contribution, when a relationship is entered into with only the vendor purely under the law of obligations. A disadvantage is that the vendor-owner has almost everything to say about the asset. Moreover, in the event of for instance death of the vendor-owner transfer will still have to be made to the continuing partners.

- Contribution at book value. Contribution at the book value and not the actual value, subject to silent reserves, is a very attractive alternative and has the result that the business transfer may already be anticipated, price increases will already benefit the business successor in part, many things can be arranged at will, and (for the time being) the tax authorities can be kept at bay. For inheritance law (statutory share) this may lead to unpleasant consequences, however.

- Contribution of use and enjoyment. It is also possible to contribute only the user rights of an object to a partnership and leave both the legal and the beneficial ownership with the parent. This has no fiscal consequences. This method of contribution is especially advisable during the starting-up phase of the partnership. A variant of this method is letting the objects on a long lease to the partnership, which is entered into for the purpose by the parent with one or more children. The tax authorities seem to deal more leniently with lessor's advantages than with user's advantages.

- Partnership and leased business. The transfer of a business on leased land may also progress gradually by concluding a partnership agreement with contribution of the ownership of the movable property and with continuation and retention clauses for the benefit of the child and/or the surviving widow. In this way the parents retain an acceptable share in the net business profit and obtain life-long socioeconomic security as long as the business continues to operate reasonably well. Naturally the statutory provisions of the long lease must also be observed by the son in the event of continuation ("substitution").

### 3.3. Other substantial aspects of the partnership contract

Other matters must also be regulated in the partnership contract. Here thought may be given to control, responsibility and liquidation. It is a question of control in the case of acts that may be considered part of the ordinary, everyday course of business of the partnership. Everything that does not comply with this description is considered "disposal".

The partners can only dispose of matters jointly.

Besides a profit and loss account must be included. Furthermore the partnership agreement may include provisions about a partner's incapacity for work.

Apart from the statements made about contribution the contract will also have to include provisions about business succession.

Very important provisions in the agreement for business succession will be the continuation clauses, regulating what is to be done if the partnership is ended. A continuation clause may *inter alia* be very useful in the following case: if during the first phase in which a child and a parent enter into the partnership, the parent dies unexpectedly, brothers and sisters of the child may become entitled to the parent's capital with conflicting interests and thus threaten the continuation of the enterprise. A continuation clause may then offer a solution in combination with a retention clause or a take-over clause. A retention clause refers to goods that are already joint property of the partners as a result of contribution. As a result of the retention clause the whole ownership will be retained, after resignation of the partner, by the other partner. The goods must then yet be delivered. The take-over clause applies to goods that are not joint property of the partners but have only been contributed by the parent in beneficial ownership or for use and enjoyment. Legal delivery will then have to be made as yet. In some situations a joining clause may be desirable, for instance if a father-partner wants his widow to join the partnership after his death or if the partners wish to state extensively that they will accept new partners, such as other children if they feel attracted to the business. Furthermore when provisions are included in the partnership contract, thought may be given to an alienation or surplus value clause, which refers to the situation after termination of the partnership or resignation of one of the partners. As a result of this clause the possibility may be created for the successor to take over the real estate at the agricultural or profitability value or the value in a leased state. Finally it is wise to include a proper arrangement for the settlement of disputes in the partnership contract, in which for instance it is laid down that disputes will not be submitted to the court but to an expert (advice and arbitration).

#### 3.4. Termination of the partnership

If everything goes as expected, the partnership will end if the time has come that the successor takes over the agricultural business entirely. Unfortunately this is not always the case and regularly the partnership ends prematurely. The partnership may end as a result of a resolution passed by the partners jointly or as a result of an event occurring within the partnership, such as death, notice of termination etc. The community created as a result of the partnership must be liquidated and therefore divided. Besides the take-over or retention clauses already discussed above must be carried out if they have been included in the partnership contract.

#### 3.5. The limited partnership

The limited partnership is a variant of the basic partnership and the general partnership. It is distinguished from the basic partnership and the general partnership by the existence of limited partners. The limited partners are also called silent partners. They are partners who have contributed capital but do not perform acts of control. Legally this fact is very important, mainly because the liability of the limited partner is limited to his contribution and moreover only has an internal effect. Furthermore he is not jointly and severally liable provided that he refrains from every kind of control. Especially when it is a matter of a retiring managing partner, as in the case of a gradual business transfer in an agricultural context, a limited partnership may be a good solution. After all, the continuity of the enterprise is guaranteed (at any rate financially) if the outgoing partner's share in the community of the partnership remains available for the conduct of business without its capital value having to be paid out.

In this case the parents of a business successor may, for instance, lend the take-over amount to the successor, make their capital contribution in the form of a limited partnership and still obtain a fiscal advantage in this way.

### 3.6. The partnership of persons under future law

For many years a bill has been discussed in the Netherlands<sup>5</sup>, in which the above-mentioned partnerships of persons are included in an arrangement in the Dutch Civil Code (title 7.13). The implementation of the bill is constantly being postponed, partly as a result of other legislation that is given priority. It is very possible that at the time that the Congress is held, the Act has meanwhile come into force, but there is no certainty on the subject. Nevertheless some remarks will be made about the bill.

The bill follows a different system than the present statutory arrangement.

The above-mentioned distinction between profession and business will no longer entail different legal consequences.

Instead there will be a distinction between "silent" and "public" partnerships.

The silent partnership, i.e. the non-public partnership, is comparable with the basic partnership. The public corporation will be the successor of the general partnership and the limited partnership.

In the case of the public partnership juristic personality may be chosen and, after the choice of juristic personality, conversion into a private company with limited liability (B.V.).

The principal difference between a public partnership with juristic personality and a B.V. is that in the case of a public partnership with juristic personality the partners in principle are jointly and severally liable for the obligations of the partnership. In the B.V. such a joint and several liability does not exist.

In the following I shall discuss the different intended partnerships of persons.

#### 3.6.1. The non-public partnership

The basis of the law of partnerships of persons will remain the present basic partnership, which is defined in the bill as a "non-public partnership" (section 7:801(2) of the Civil Code). The criteria for it are (section 7:800(1) of the Civil Code):

- an agreement for co-operation;
- for joint account;
- aimed at achieving a proprietary advantage;
- for the benefit of all the partners;
- by means of contribution.

The difference with the basic partnership under current law is not great. It has, however, been put beyond doubt – as is actually now the prevailing doctrine but not based on the law – that the basic partnership has a "corporate community", separate property that offers recovery for business creditors.

The partners of a basic partnership are each bound for an equal share for the obligations of the partnership that concern a divisible performance. The agreement with a third party may provide differently, however, for instance that there is commitment for unequal shares or joint and several commitment (see section 7:813 of the Civil Code). If it is a question of an indivisible

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<sup>5</sup> TK (no. 28746)

performance there is joint and several commitment on the strength of section 6:6(2) of the Civil Code .

### 3.6.2. The public partnership

The non-public partnership can become a public one if alongside the requirements of section 7:800 of the Civil Code the following requirements are also met (section 7:801(1)):

- the partnership is aimed at performing a profession or business;
- acts externally in a manner that is clearly knowable to third parties;
- under a name carried by it as such.

The public partnership constitutes the core of the new arrangements .

Section 7:813(1) of the Civil Code provides that partners of a public partnership are jointly and severally bound for the obligations of the partnership.

The term obligation constitutes a wide concept. It not only covers agreements but for instance also obligations following from a wrongful act and tax debts relating to the performance of a profession or business.

### 3.6.3. The limited partnership

The bill describes the limited partnership as a public partnership, which has one or more limited partners alongside one or more ordinary partners. Section 7:836 (2) of the Civil Code describes the limited partner as follows:

- a partner who
- does not only contribute labour;
- is excluded from the power to perform legal acts for account of the partnership;
- need not share in the partnership's loss beyond the amount of his contribution.

Under certain circumstances the limited partner is bound jointly and severally. This is the case if one of the following circumstances occurs:

- the limited partner acts in the name of the partnership
- or as a result of his acting exercises a decisive influence on the conduct by the managing partners on behalf of the partnership;
- or his name is mentioned in the partnership name unless he was an ordinary partner first and becomes a limited partner later (section 7:837(3) of the Civil Code).

### 3.6.4. The public partnership with juristic personality

The most important, actually the only important, innovation in the bill is that public partnerships and limited partnerships can become juristic persons if this has been provided in the agreement of the partnership and the agreement has been laid down in a notarial deed.

Such a partnership must mention name and domicile on all documents to which it is a party or that originate with it (with the exception of telegrams and advertising!), while adding to the name: Public or Limited Partnership with Juristic Personality (OVR and CVR).

A requirement is that according to the notarial deed all the goods that are part of the corporate community are contributed to the juristic person.

The partnership of persons is not a juristic person in the sense of Book 2 of the Civil Code (in which the Dutch B.V. is regulated).

The significance of the juristic personality is very limited.

Differently than in the B.V. the liability of the partners is not limited, the joint and several liability of the partners continues to exist.

What is ended is the situation that a community under corporate law exists among the partners in connection with the parts of the community under property law. On the other hand the partners get an obligatory claim equal to their beneficial co-ownership.

### 3.6.5. Beneficial co-ownership

In section 7:808 of the Civil Code it is determined that the claims of a partner under property law do not become part of the community of matrimonial property. In the Netherlands the statutory system of matrimonial property is the whole community of property. Without section 7:808 of the Civil Code any claims in a partnership under property law would consequently be included therein. Especially for agricultural businesses this may produce a great many problems. Section 7:808 of the Civil Code provides, however, that only the beneficial co-ownership, therefore a value claim, is included in the community.

Beneficial co-ownership is an important concept in the bill. It plays a key part in the event of resignation of partners, dissolution of the juristic person and also conversion of an OVR or CVR into a B.V.

The beneficial co-ownership is the standard on the basis of which the financial claims of the partners under property law are measured. The beneficial co-ownership is determined primarily by the agreement. If no arrangement is made in the agreement, attention will also have to be given to the contribution, but also to the co-ownership in profit and loss.

## 4. The Private Companies with Limited Liability

The Private Company with Limited Liability (B.V.) is mainly used in the Netherlands by large-scale businesses, for instance by poultry and pig feeding businesses but also by horticulture under glass.

The principal difference with the partnerships of persons discussed above is that in the partnership of persons the entrepreneur himself is entirely (or for a proportionate part) liable for the business debts, contrary to the exercise of the business in a B.V. form, when the B.V. is considered the legal entrepreneur and therefore the B.V. itself is liable for the business debts that have been entered into in the name of the company. Its own liability follows from the juristic personality. Otherwise than with the above-mentioned partnerships of persons no joint and several liability of partners is involved in this juristic personality.

The incorporation of a B.V. requires a notarial deed, and also a ministerial certificate of no objection from the Ministry of Justice. One of the statutory requirements that is imposed by the law on the incorporation of a B.V. is (under current legislation)<sup>6</sup> the presence of authorized capital to the amount of at least € 18,000.00.

This authorized capital can be provided by the incorporators of the B.V. by means of contribution of a certain amount or certain goods to the property of the B.V., which at least constitute the equivalent of the subscribed capital in the deed of incorporation. Mostly the contribution constitutes a transfer of ownership of goods or a whole enterprise to the B.V., in return for which shares are issued to the contributor. The method of conducting business is performed via the shares and/or the management contrary to the personal enterprise, in which the conduct of business proceeds via the private ownership under current law. The acquisition of

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<sup>6</sup> A bill is also pending in connection with the B.V., which will be discussed below.

profit proceeds via distribution of dividend and/or the managing director's salary, contrary to the partnerships of persons in which the profit is acquired direct from the business.

A possible loss suffered by B.V.s can be charged against the property of the B.V. and the share capital invested therein. In the case of partnerships of persons any loss will be for account of the entrepreneur(s) himself/themselves via the business property. Finally the manner of transfer of the enterprise is entirely different. In the case of a B.V. it is performed by means of transfer of the shares and in the case of a partnership of persons by means of all the goods forming part of the enterprise separately. The principal reasons for using a B.V. as legal form are the limitation of liability, a reduction of tax pressure and the guarantee of the continuity of the enterprise.

Legal authors do assert that both in the Netherlands and on a European level the law on private companies with limited liability should make greater allowance for the typical characteristics of the small family businesses, including those in the agricultural sector.

#### 4.1. Transfer via an existing B.V.

The starting-point of this method of business transfer is that the existing enterprise is already a B.V. In principle the agricultural business to be transferred may then end up with the business successor in two ways. The first method is that the B.V. itself transfers the whole business to the successor. The transferor (father) in that case keeps the B.V., in which the purchase price is present instead of an agricultural business. The son making the take-over subsequently decides himself whether he will also continue the business in a B.V. form. Another possibility is that the father sells the shares in the agricultural B.V. to his son. The choice for one or the other option may be inspired in particular by fiscal reasons.

#### 4.2. Transfer by incorporation of a B.V.

It is conceivable, if the agricultural enterprise to be transferred has not yet been lodged in a B.V., that a B.V. is incorporated in anticipation of the transfer, purely with the object to have the transfer proceed in a fiscally friendly manner.

#### 4.3. The bill: The Flex-B.V.

Before long – no date can be predicted here either – the law on the private company with limited liability will be revised.

The principal reasons for the revision of the law on the private company with limited liability (B.V.) are the creation of a distinction with the law on the company limited by shares (N.V.), which is largely based on European Regulations, more freedom for shareholders to give the enterprise form according to their own views and wishes, therefore also with less coercive and more regulatory law, and in particular for alleviation of capital and property protection, which are viewed as serious bottlenecks.

The immediate occasion for the change in the law is formed by the developments in other European countries where flexible company forms have been or will be introduced (United Kingdom, Spain, Germany, France, Sweden and Finland).

In the bill preservation of the present dual structure of a B.V. with a general meeting of shareholders and a management board alongside it has been chosen.

Flexibility has been applied to the method of passing resolutions but also the appointment and dismissal of managing directors and supervisory directors.

New in the bill is that the articles of association may determine that no right to vote is attached to shares. If a right to vote is attached to a share, a differentiation is possible in the sense that the link between the right to vote and the capital has been abandoned.

Specific for the present nature of the B.V. is that the shares must be registered and that it has a mandatory restrictive clause (section 2:195 of the Civil Code), as a result of which the private nature of the B.V. remains guaranteed. The mandatory restrictive clause will be abolished. There will be a statutory offer scheme but this may be deviated from.

A key theme in the bill is the search for a balance between on the one hand more freedom of arrangement for the shareholders and on the other hand the protection of interests of other parties, in particular the minority shareholders.

The profit right will also be made flexible. Under current law shareholders may not be excluded from profit sharing (section 2:216 of the Civil Code).

In the bill the possibility is suggested to determine in the articles of association that the shares of a special class or designation give no or only a limited right to sharing in the profit or the reserves of the company.

Apart from shares without a right to vote shares without a right to profit may also be created. But it is either the one or the other, no right to vote or no right to profit.

Shares without a right to profit may play an important part, especially in the event of business succession. In this way a parent may transfer shares from the B.V., while he does retain control but has no right to profit (naturally it may also be the other way round).

The capital protection scheme will be revised drastically, for instance: no minimum capital (at present EUR 18,000.00) will be necessary anymore. A bank statement or accountant's opinion about the contribution of the B.V. will no longer be required either. It may be agreed that the normal amount or part of it need only be paid after the lapse of a certain period.

From the above the conclusion may be drawn that B.V. law will change drastically.

##### 5. The co-operative society

The co-operative society as a co-operative arrangement was created on the one hand as a society-reforming tool (idealistic objective) on the other hand as a form of economic co-operation<sup>7</sup>. In the Netherlands the co-operative society has been used most in the agricultural sector.

In that connection the co-operative society is approached from an angle of economic analysis. Characteristic for the approach from an angle of economic analysis is that non-economic factors and influences are kept outside the analysis of the phenomenon of the co-operative society, because, however important they may be, they have an obscuring effect on obtaining a pure result of the analysis<sup>8</sup>.

The co-operative society constitutes a separate juristic person. Many statutory provisions concerning the association apply to the co-operative society. The legislator also views the co-operative society as a special type of association.

It is formed by notarial deed and according to the articles it must have as its object to provide for certain material needs of its members by the conclusion of agreements, other than for insurance, in the business that it carries or has others carry on.

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<sup>7</sup> Asser-Meijer 2-II, Vertegenwoordiging en rechtspersoon [Representation and juristic person], Zwolle 1997

<sup>8</sup> See J.H. Lunshof, Reeks Agrarisch Recht [Series on Agricultural Law], The Hague 2003, p. 61

In practice various kinds of co-operative societies are found, one of which is the agricultural co-operative society. The aspect of material needs is often realized in agricultural co-operative societies in the sense that the co-operative society performs certain business functions of the affiliated members/businesses.

Examples of co-operative societies are: purchasing and selling associations of cattle feed, sowing and planting material, crop protection agents. In addition there are co-operative auctions that look after the interests of members in the field of vegetables and flowers. Dairy co-operative societies run a dairy enterprise in order to sell the milk of the members/dairy farmers at a certain price.

Both natural persons and juristic persons may be members of a co-operative society. But co-operative arrangements without juristic personality, such as the basic partnership and the general partnership, may also be members. It is presumed that in that case the partners are members.

Most co-operative societies only have members/natural persons. They are also referred to as primary co-operative societies. Primary co-operative societies sometimes also have members/juristic persons, for instance agricultural businesses that have been lodged in a private company with limited liability. If a co-operative society only has juristic persons as members, it is called a top co-operative society. An example of this is Rabobank Nederland.

It is not entirely clear whether members are always obliged to do business with the co-operative society.

In the articles a weakened obligation is often found, namely that "as a rule the members (must) obtain their agricultural and horticultural needs in the widest sense from the co-operative society as much as possible and must deliver the products from their agricultural and horticultural businesses to the co-operative society as much as possible".

A greater number of obligations exist on the selling side. Large investments must often be made for the selling of for instance milk. It goes without saying that this is only possible if the members only offer their products to the co-operative society for processing. Such an obligation is included in the articles (section 2:60 of the Civil Code). They mostly provide that if a member leaves in a non-regular manner, he has to pay compensation to the co-operative society. In this connection account must be taken of the fact that the European Commission regards a combination of a supply obligation and resignation fee (compensation) as contrary to European competition law (article 85 of the EC Treaty) because in practice members of a co-operative society who transfer to another buyer will often balk at the high penalty amount<sup>9</sup>. Apart from the articles that determine the relationship between the co-operative society and the member, agreements are concluded between the members and the co-operative society. Examples of those are agreements concerning the supply of products or provision of credit.

### 5.1. Liability of the members

Starting-point of the law is that the members of the co-operative society are liable for a possible deficit. Unless the articles provide differently, all the members are liable for equal shares (section 2:55 of the Civil Code).

The articles may limit (B.A.) or exclude (U.A.) the liability of the members.

Besides the articles may contain an arrangement that obliges the members for instance to cover an operating deficit for any financial year in the co-operative society by virtue of a

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<sup>9</sup> According to the Commission in a case against the dairy co-operative society Campina

resolution of the meeting of members in accordance with an apportionment formula under the articles.

#### 5.2. Special requirements for creation and termination of membership

If the co-operative society has not excluded the obligation of its members to contribute to a deficit, an application for membership must be made in writing.

Unless the articles provide differently, the board decides about the admission of a member and in the event of a negative decision the general meeting may resolve on admission as yet (section 2:33 of the Civil Code).

Often capacity requirements are imposed on the members in the articles, for instance "to carry on the agricultural and horticultural business in the widest sense of the word".

#### 5.3. Right to vote

The members of the co-operative society are entitled to attend the general meeting. In principle each member has one vote. The articles may grant a member several votes, however.

Mostly co-operative societies have elaborated the multiple right to vote in such a manner that in principle it is proportional to the volume of the commercial transactions. The reason for this is that in this manner it can be prevented that a majority of the members who represent the minority of the sales of the co-operative society are in control.

In that connection it is true, however, that a ceiling has mostly been set for the number of votes.

#### 5.4. The board of the co-operative society

The board is appointed from the members but the articles may provide differently, even in such a manner that the board consists entirely of non-members.

The appointment is made by the general meeting (section 2:37(2) of the Civil Code), but the articles may provide that members of the board, but only less than half, are appointed by third parties.

Most co-operative societies not only have a board but also a management, which performs executive tasks under responsibility of the board.

The management's space for policies depends on the space that the board gives. A practical solution in this connection is that the board of the co-operative society moves in the direction of the supervisor, but with retention of responsibility for the conduct in the activities of the co-operative society. The management is then called "Board of Control".

### 6. Facilities in business succession

Business succession has already been discussed a number of times in the above. To guarantee the continuity of a business a good arrangement of the business succession is necessary. In inheritance law and fiscal law the Dutch legislator has offered the business successor a number of facilities that will be discussed below.

#### 6.1. Business succession and inheritance law

Until 2003 no attention whatsoever was devoted in statutory inheritance law to business succession in the event of death. If no arrangements had been made during the life of the entrepreneur, this could lead to much uncertainty and unrest after his death.

In the new inheritance law that came into force on 1 January 2003 a number of facilities have been included for the business successor, which will be touched upon below.

#### 6.2. The salaire differé (section 4:36 of the Civil Code)

In a family business, especially in the agricultural sector, it happens quite regularly that the son or daughter works in the business of the parent(s) without receiving an adequate remuneration for it.

The law now provides in section 4:36 of the Civil Code that if a (step)child, foster child, child-in-law or grandchild has not received a suitable remuneration for work done in the testator's profession or business, that child may as yet claim a suitable remuneration after the testator's death in the form of a lump sum to be paid out of the estate. This must concern work done during majority (therefore from the age of 18).

It is also possible to set off this amount at once with the take-over amount that the relevant child will have to pay if it takes over the business. In that way its financing possibilities will increase.

#### 6.3. Taking over business property at a reasonable price (section 4:38 of the Civil Code)

If a (step)child wants to continue the business of his parent(s) but that continuation has not or not correctly been arranged, it may ask the Sub-district Court to compel the party entitled to the goods forming part of the estate or community of matrimonial property that served a profession or business carried on by the testator to transfer them to the party making the request or its spouse for payment of a reasonable price.

In this way it may be realized that the prospective business successor can acquire the property of the enterprise as yet. Naturally this case will only occur if the other heirs do not want to co-operate in the business transfer voluntarily.

#### 6.4 Business succession and statutory share (section 4:74 of the Civil Code)

In the Netherlands the statutory share played a prominent part in business succession until 2003.

Until then a child could make a claim under coercive law on part of the property of the estate of the deceased parent. Certainly in agricultural businesses, where considerable amounts are involved, this may create a big problem for the business successor: in the worst case a brother or sister may claim part of the business.

Since 2003 the statutory heir is only entitled to a money claim, in which connection the statutory shares may never exceed half the total estate. Still this may lead to financing problems for the business successor. The legislator has come to the aid of the business successor in section 4:74 of the Civil Code. The testator (father and/or mother) may determine in the last will and testament that the inheritance received by the statutory heir not succeeding will not be claimable immediately after death, but that the business successor will only get his specific legacy or share in the inheritance paid in instalments. In this way financing problems for the business successor who must make payments to the other heirs may be alleviated.

The legislator does impose the condition for this facility that "without this decision (TM: i.e. the testamentary disposition) the continuation of a profession or business of the testator would be seriously hampered"<sup>10</sup>.

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<sup>10</sup> See extensively on the subject: W. Burgerhart, Preadvies Bedrijfsopvolging [Prior Advice on Business Succession] KNB, The Hague 2007, p. 380 et seq.,

### 6.5. Business succession and tax matters

The levy of gift and inheritance taxes may endanger the continuity of enterprises. That is why in the late nineties a business succession scheme was created by the Ministry of Finance, initially via an interest-free payments scheme, subsequently combined with a remission scheme.

With effect from 2002 a partial exemption scheme has been included in the Inheritance Tax Act, which is now subject to attempts to make it more convenient and simpler.

The facilities for business succession break down into three parts: two conditional exemptions and a postponement scheme. The business succession scheme imposes the condition that the enterprise is continued by the acquirer for five years

The size of the facility means that inheritance tax is levied only on 10% of the acquired property of the enterprise. In the family sphere – in which sphere agricultural succession usually takes place – this amounts to a levy on the property of the enterprise to a maximum of 2%<sup>11</sup>.

The facility applies to all enterprises that comply with the requirements of the law (there must be no question of an investment company for instance), the legal form of co-operation is not relevant in that connection.

The facility not only applies to property acquired by virtue of inheritance law but also property of the enterprise granted during life. Unfortunately the tax position is less favourable in the event of gifts because of other fiscal levies than in the event of inheritance.

## 7. Conclusion

Dutch law has a rich tapestry of legal co-operative arrangements that are suitable for application to the agricultural business.

The choice of one form or another will be inspired mainly by reasons like:

- scale of the business;
- type of business activity;
- most favourable financing possibilities;
- the external presentation of the business;
- co-operation with others desired or not;
- risk-bearing nature of the business and related liability;
- business succession wishes.

In this report an attempt has been made to represent the "high lights" of Dutch possibilities in this field, especially for the agricultural sector.

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<sup>11</sup> Presuming that with effect from 1 January 2010 the rates within the family context will be lowered to a maximum of 20% (at present 27%)