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COÖPERATIVE C-VPP LOENEN

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Table of Contents

1	Cooperative c-VPP Loenen	4
1.1	Introduction	4
2	Overview of possible organizational entities in the Netherlands.....	5
2.1	Eenmanszaak (sole proprietorship)	5
2.2	Maatschap (partnership)	5
2.3	Vennootschap onder firma (partnership of companies)	6
2.4	Besloten vennootschap (private company)	6
2.5	Naamloze vennootschap (limited liability company).....	7
2.6	Stichting (foundation)	7
2.7	Vereniging (association).....	8
2.8	Coöperatie/Onderlinge waarborgmaatschappij (cooperative)	10
3	Evaluation of options	13
4	Preferable option elaborated for cVPP Loenen	15
4.1	Articles of association	15
4.2	Founding process	15
5	Appendix.....	17

1 COOPERATIVE C-VPP LOENEN

1.1 INTRODUCTION

To set up, implement and operate a community based Virtual Power Plant (“c-VPP”) it is necessary to have a suitable organizational entity. This is needed to facilitate and invest, commercially operate and maintain the c-VPP in a professional way, providing continuity and limited risks. In this document, the potential organizational set-ups according to the Dutch law are elaborated and evaluated for the situation in Loenen. A preferred set-up is substantiated.

2 OVERVIEW OF POSSIBLE ORGANIZATIONAL ENTITIES IN THE NETHERLANDS

In the Netherlands, there is a difference between a legal person based entity and a natural person based organizational form. The latter means that the concerned persons are liable themselves which means a financial risk when things go wrong. The forms described in 2.1, 2.2 and 2.3 are natural person based. In paragraph 2.4 to 2.7 legal entities are described.

2.1 EENMANSZAAK (SOLE PROPRIETORSHIP)

A sole proprietorship is a business form in which one person is responsible for the company in all respects. The sole proprietorship is an economic activity of the natural person who drives the business. Even though the business form is a sole proprietorship, it can employ personnel.

The regulations regarding the rights and obligations of the sole proprietorship vary from country to country. Often it concerns directives that regulate the tax system of the business form, the legal liability and independence of the company in relation to the individual concerned and his personal ties with third parties.

In the Netherlands, this business form with 100% personal liability, with some tax and administrative advantages is very broadly used by self-employed people delivering services.

2.2 MAATSCHAP (PARTNERSHIP)

A partnership is one of the forms of a company without legal personality, in which two or more persons or legal persons (the partners) enter into a certain partnership. The partners bring something in, with the aim to share the benefit that results. They can contribute labour, money, goods or goodwill. Many partnerships are set up by people with a liberal profession, such as doctors, dentists, accountants and physiotherapists. Farmers are also sometimes practiced as a partnership, for example from a father and son, brothers or a couple.

The mutual agreements are laid down in a partnership contract. In this contract, agreements are made about the contribution of the partners, the distribution of profits and the division of powers. There are some limitations to this contract: for example, it is not possible to exclude one of the partners from the profit distribution; this is possible with the loss distribution. When the partners have not made any agreements about the profit and loss distribution, they are divided according to the value of their contribution.

In the Netherlands, there are two different forms of a partnership: a silent partnership and a public partnership. In the silent partnership, the partners work in their own practice and under their name, but can take on joint staff or purchase specialized equipment. Such partnership means that every partner is

more profitable. When the partners in a partnership take part in legal transactions under a common name, they speak of a public partnership. A public partnership then acquires a number of characteristics of a partnership.

No special formal requirements apply for the establishment of a partnership. The partnership must be registered with the Chamber of Commerce.

2.3 VENNOOTSCHAP ONDER FIRMA (PARTNERSHIP OF COMPANIES)

A Partnership of companies is a simple way in which two or more people can jointly set up a company. In fact, it means they act under a joint name or company. As a rule, they make decisions for each other, but on the other hand, they are also liable for each other's management; there is therefore no limited liability.

A company can be established by natural persons or by legal entities. Legal persons sometimes use a VOF as part of a special project, such as a large construction project.

Before the founding of a VOF article 22 from the Commercial Code stipulates that this must be entered into by authentic or by private deed, notarial intervention is therefore not necessarily required.

It is recommended that the partners agree on the division of labour, the distribution of profits and so on.

The VOF is legally regulated in Book 1, Title 3 of the Commercial Code. Article 18 provides that " each of the companies is jointly and severally liable, because of the company's affiliation." This is a difference with the partnership.

A property of a VOF is therefore that the partners are jointly and severally liable for the debts incurred. This stems from the fact that the VOF in the Netherlands is not an independent legal subject, not a so-called legal person. The VOF is an agreement between the partners. This is in contradiction to the situation at a private company, where the directors are only severally liable in case of genuine mismanagement.

2.4 BESLOTEN VENNOOTSCHAP (PRIVATE COMPANY)

The private company with limited liability or in short private limited company (abbreviated in the Netherlands to B.V.) is a legal entity whose share capital is divided into shares that are not freely transferable; the shares are registered.

The private limited company is "closed" because the shares are not freely transferable, in contrast to the limited liability company whose shares are in principle freely transferable, for example on the stock exchange. Limited transferability is regulated by law, but the articles of association of the company may relax this closed character or subject to stricter rules. One speaks of accession arrangements or blocking arrangements, depending on the viewpoint. The scheme usually means that the existing shareholders must approve the entry of a new shareholder, even if it takes over the shares of another shareholder, for example through inheritance or purchase.

The private limited company shall keep a register of shareholders: a register showing which persons participate in the capital of the private limited company for how many shares. Another important feature is the limited liability of the shareholders for debts of the private limited company.

A B.V. is legally obliged to contain at least two bodies: a general meeting and a board. The 'highest' body of the B.V. is the general assembly (GA) which meets at least once a year. It should be kept in mind that the GA does not have the last word at all times. This follows from the law, which uses a negative wording: the general meeting belongs to all powers that are not assigned to the board or others by law or by articles of association.

The day-to-day management of the B.V. rests with the board, often referred to as management. The board is generally appointed and dismissed by the General Assembly. The articles of association of the B.V. may stipulate that a supervisory board (SB) must be appointed to supervise the management on behalf of the General Meeting of Shareholders.

2.5 NAAMLOZE VENNOOTSCHAP (LIMITED LIABILITY COMPANY)

The limited liability company (abbreviated to N.V.) is a legal entity whose share capital is divided into shares that are in principle freely transferable.

The public limited company is 'unnamed' because there is no obligation on the N.V. to hold a register of shareholders. The partners remain as it were out of the picture; they are anonymous. The N.V. is the most suitable company for the large shareholding of partners who do not need to know each other.

The highest body of the N.V. is the General Meeting of Shareholders (GMS), which meets at least once a year. The day-to-day management of the N.V. rests with the Executive Board (also known as the management). The Executive Board is appointed and dismissed by the GMS. However, it may be stipulated in the articles of association of the N.V. that a Supervisory Board (SB) is appointed by the General Meeting of Shareholders, which also supervises the Executive Board on behalf of the GMS. For larger limited companies (two-tier company), a Supervisory Board is obliged.

When all the requirements are met, the shareholders are only liable to the amount for which they participate in the N.V.: in the event of a bankruptcy, shares become worthless, but the shareholders cannot retain any residual debt (only when shares are bought with borrowed money).

2.6 STICHTING (FOUNDATION)

A foundation is an organization that aims to achieve a specific goal. A foundation can make a profit, but the benefit of this must have an idealistic or social meaning.

A foundation is also a legal entity in the Netherlands that is established by notarial deed, by one or more natural or legal persons. Someone can also arrange the foundation of a foundation after his death.

As a rule, a foundation has a board consisting of one or more directors (for example a chairman, secretary and a treasurer). The board is the only mandatory body of a foundation. In addition, a supervisory board can be appointed, which supervises the foundation's management.

The articles of association mention at least:

- the name (of which the word foundation should be part)
- the target; this may not include making payments to founders or associated structures - in the latter case with the exception of those having an idealistic or social meaning
- method of appointment and dismissal of the directors
- the municipality of settlement in the Netherlands
- the destination of the surplus after liquidation of the foundation in case of dissolution.

A notarial deed is also required for the amendment of the articles of association.

As long as the foundation is not registered in the trade register, every director is personally liable.

The foundation is an independent bearer of rights and obligations. The directors are not liable for debts of the foundation, unless there is improper management. Directors and founders of the foundation are also not in paid employment and are not covered by employee insurance. The foundation can employ employees.

A foundation has no members or shareholders and can therefore not receive any contribution or share capital. The only three ways to finance a foundation are therefore:

- input to the will (inherits)
- donations
- loans

Depending on the status of the foundation and the donor, a donation can be tax-facilitated or tax-free.

The dissolution of the foundation is proceeded if this is required according to the articles of association; as a result of a bankruptcy or a decision of the court. The board can also decide to dissolve; the conditions for this are usually regulated in the articles of association.

In contrast to an association, a foundation does not have members. She can have donors; however, they have no control. A foundation can also have volunteers.

2.7 VERENIGING (ASSOCIATION)

An association is a legal entity for the Dutch law. The rights and obligations of an association are regulated in the Civil Code, book 2, article 26 up to and including 52. An association is a legal personality by law. There are two basic types of associations: an association with limited or with full legal capacity.

An association with limited legal capacity (in the Netherlands also called 'Informal association') cannot obtain registered property and cannot be an heir. The directors are jointly and severally liable. The association can have statutes, but it does not have to.

An association with full legal capacity can acquire registered property and be an heir. The directors are not jointly and severally liable; the association has statutes; the association must also be registered in the Trade Register.

An association with limited legal capacity can be set up informally, therefore solely by the persons concerned. An association with full legal capacity must be established by a notary. The articles of association are then included in an authentic paper.

An association with limited legal capacity can be converted into an association with full legal capacity by registration of the additional requirements at the notary.

Statutes

The statutes of an association state at least the name and seat of the association, the purpose of the association, the obligations of the members, the manner of convening the general (members) meeting and the manner of appointment/dismissal of the directors. It must also be determined what happens to a positive balance of the association in the event of dissolution, or a manner has to be described how the destination of a credit balance will be determined. Furthermore, Dutch law leaves room to lay down other matters in the statutes.

Goal

An association has a goal that is being pursued. However, this goal may not be the distribution of profits among the members. This does not mean that no profit can be made, but this must be used for a specific purpose, such as the purpose of the association, knowledge sharing or charity.

Meeting of members

An association is formed by its members. These can be natural persons (people) or legal entities (for example companies). They are members because they support the goal or at least one of the goals. The members usually pay a contribution to keep the association running. Members influence the policy of the association through the general (members) meeting (GMM). This is usually held at least once a year; each member is summoned by convocation and is entitled to vote at the meeting. At this GMM the board presents the results of the association and new plans. The management board also reports on the financial management and the board is discharged in this matter after audit (by an accountant or a cash committee).

A GMM is also held during a management change or a proposal to amend the articles of association. The board usually convenes the members' meeting, but that is also possible by a part of the members (ten percent, or a lower percentage if the articles of association determine this). With (very) large associations, keeping a GMM is inconvenient or even impossible, because the number of members at the meeting would become too large. In such a case, the statutes usually provide for a stepped representation: the members elect representatives from among themselves who together form the highest body of the association. Such representation is often called the Council of Members or the Federal Council.

The board generally determines the meeting agenda and can, to a large extent, manage the meeting in these way. Members can only raise issues by submitting a motion or by requesting the board in writing prior to the meeting to put a topic on the agenda. The articles of association or the rules of procedure may stipulate that a certain minimum of members must submit such a request. Consequently, the item must be included in the agenda.

Board

An association has a board. The board is often chosen from among the members and these boards represent the association (in and out of court). They are charged with the daily routine. The board consists at least of a chairman, a secretary and a treasurer. The board has its rights and obligations in relation to the meeting. The board is exclusively authorized to determine the day-to-day policy of the association. In principle, the board chairs the meeting and the board determines the agenda of the meeting, however, a different provision can be included in the articles of association.

2.8 COÖPERATIE/ONDERLINGE WAARBORGMAATSCHAPPIJ (COOPERATIVE)

A cooperative is a special form of an association. The cooperative (co-op) is a form of self-organization of producers or consumers, aimed at increasing economic power and achieving economies of scale. The law in the Netherlands and other countries allows the existence of a 'cooperative association'.

Co-operatives have played an important role in the economic emancipation of large groups of the population, especially around the turn of the century from the 19th to the 20th century. Through the cooperative, producers (especially farmers) and consumers could unite and achieve goals that would have been unattainable for every individual, especially in the field of investments. Worldwide, many cooperatives are active.

The cooperative is a British invention. In 1760 co-operative flour mills were already opened in Woolwich and Chatham. The workers were owners of the factory and were able to buy not only flour but also bread, butter, and even tea and sugar from the factory. The idea inspired Robert Owen (1771-1858). In 1816 he proposed to the British parliament to set up cooperative communities. This, in turn, led to the creation of the magazine "The Co-operator", which contained instructions for establishing and managing a cooperative community. The followers of the idea organized a number of congresses in the years 1831-1835 where slowly the idea of cooperative communities made way for cooperative stores.

The Netherlands has a large cooperative history, especially in the agricultural sector. Many dairy cooperatives have been set up, some of which still exist - like the largest dairy company FrieslandCampina formed by merger from several smaller ones. From about 1980, and certainly after 2000, energy cooperatives have been established in the Netherlands in the form of sustainable energy, such as windmills.

In the case of cooperative companies, the members-owners are also important business partners of the cooperative and are therefore closely involved in the strategy. Their role is to supervise and co-determine the investments. In the Netherlands, almost all cooperative companies in agriculture and the cooperative Rabobank and mutual insurance companies are members of the National Cooperative Council for agriculture and horticulture, in short, the NCR. This promotes collective entrepreneurship. Among other things, there is a chair of 'cooperative law' at the University of Tilburg.

The cooperative is an association that defends the material interests of its members by concluding agreements with them. A profit may be paid to the members of the cooperative. There are several types of cooperatives, with a distinction being made between the cooperative and the members:

- Entrepreneurs' cooperatives or sales cooperatives, whereby entrepreneurs (natural or legal persons) sell their products or services through the cooperative.

- Purchasing cooperatives, where the members purchase goods from the cooperative, which they jointly purchased for the members. These can be consumer cooperatives, but also cooperatives of companies.
- Investment cooperatives, in which the members are primarily associated with the cooperative as the owner of the enterprise in the cooperative. These can have a transferable membership, making them the same characteristic as a private company (B.V.), but are more flexible. An important application is for energy cooperatives, where members invest in joint solar panels or windmills.
- The employee production cooperative, which concludes employment agreements with the members, and the members jointly provide a product or service.
- Government cooperatives, where the members consist exclusively of governments or government-dominated legal entities.

Benefits of the cooperative

There are several advantages associated with establishing a Dutch cooperative:

- Good protection of the private assets of the members, the liability of the members can be excluded at a cooperative U.A. This is a difference with the joint and entire liability as with a Company Partnership (VOF) or a partnership.
- The cooperative U.A. offers similar protection as a BV or NV, but is more flexible in design.
- Entering, cancelling or transferring the membership share is easy. The Cooperative is, therefore, a suitable alternative for the partnership.
- The cooperative offers the possibility to pay the so-called "extension profit" to its members without first having to pay corporation tax. The distributed profits to members who are natural persons will, in that case, be deducted from the taxable profit (for corporation tax).
- The cooperative may make a profit distribution to its members. The association, on the other hand, is not allowed to do this.

Legal

The cooperative is an association set up by a notarial deed as a cooperative and is therefore also called a cooperative association. In this variant of the association, the co-operation principle in trade is paramount. For example, you can jointly purchase or jointly sell. Originally, the cooperative idea also contained the principle of "one person, one voice". In that case, each member has an equal vote, irrespective of the contribution, wherein the capital companies the voting rights are linked to the number of shares. Nowadays - under the influence of the EU - more is opted for voting rights that are linked to the contribution.

Formation requirements

A cooperative must be established by at least two people. A deed must be drawn up by the notary for this. The cooperative must be registered in the Trade Register. Every cooperative is obliged to draw up annual documents. The trading name of the cooperative must include the word 'cooperative' or 'coöperatieve' and the letters W.A. must also be affixed at the end of the name. (civil liability), B.A. (limited liability) or U.A. (excluded liability). About 1000 cooperatives are set up every year, of which less than 10 a cooperative W.A. or B.A.

Companies that mistakenly use the word 'cooperative' in their name are in violation and each cooperative can, on pain of a penalty to be determined by the court, demand that this company refrain from using the word 'cooperative' in its name.

General Members Meeting

The highest authority lies with the General Members' Meeting. This meeting appoints the board. Members contribute to the costs of setting up and maintaining the cooperative. For example, profit can be divided by the work that a member has carried out for the cooperative. Members can make agreements about this themselves.

Members

Since the cooperative has to conclude certain agreements with its members, member contracts are required. These are often agreements of a certain time with the need to change them unilaterally. With membership there is no compulsion: every member is free to terminate his / her membership. However, when all members do this, this can mean the end and bankruptcy of the cooperative. That is why it is often regulated in the articles of association of the cooperative when and under what conditions a membership can be terminated.

Power of attorney

The cooperative must conclude certain agreements with its members and may reach agreements with third parties under certain circumstances. This must be stated in the articles of association if this is permitted and it may not go so far as to make the agreements with the members of minor importance. The cooperative should, as it were, represent the economic interests of its members.

Where the association is not allowed to distribute profits to its members, the cooperative may do so.

Liability

The cooperative is a legal entity and therefore itself responsible for its actions. The members of the cooperative are each responsible for the deficits of the cooperative in case of dissolution and debts. In an entrepreneurial cooperative, the members who take part in a project are liable for the proper execution of that project.

This statutory liability (WA) can be deviated from by limiting or excluding the liability of the members in the articles of association. The cooperative with limited liability (BA) limits the liability to a certain maximum. In the cooperative with excluded liability (UA), there is no recourse against the members. The articles of association may also regulate the distribution of liability among the members in a different way. Furthermore, the rules of the anti-abuse legislation also apply to the directors of cooperatives.

Taxes

On the profit of the cooperative, corporation tax is levied. Members who are employees of the cooperative at the same time are subject to payroll tax. A profit distribution by the cooperative to its members is in principle not subject to dividend tax unless there is an abuse situation. The cooperative is therefore increasingly used as a 'planning tool' in international organizations' tax structures.

3 EVALUATION OF OPTIONS

As described in chapter 2, there are many possible ways to raise and settle an energy company or more specific a cVPP. Now the questions to be answered is "what is the best type of organizational structure for the cVPP in Loenen". In this chapter, the pluses and minuses for the various options for this purpose are elaborated and weighted.

In the table below an overview of the typical characteristics is given:

	Sole proprietorship	Partnership	Partnership of companies	Private company	Limited liability company	Foundation	Association	Cooperative
Founding	Free	Free, preferable for a contract	Free, preference for a contract	Notarial deed	Notarial deed	Notarial deed	Notarial deed	Notarial deed
Capital requirement	None	None	None	EUR 0,01	EUR 45.000	None	None	None
Management	Owner	Partners	Partners	Board of directors	Board of directors	Board	Board	Board
Liability	Privately 100%	Privately according share	Privately for 100%	Board if inappropriate management	Board if inappropriate management	Board if inappropriate management	Board if inappropriate management	In U.A. members not liable. Board when inappropriate management
Taxes	Income tax	Income tax	Income tax	Corporation tax, dividend tax	Corporation tax, dividend tax	Limited corporation tax	Limited corporation tax	Corporation tax and profit sharing tax
Profit sharing	n/a	Yes	Yes	Yes	Yes	None	None	Yes
Members/shareholders	None	None	None	Shareholders	Shareholders	None	Members	Members council
Legal person	No	No	No	Yes	Yes	Yes	Yes	Yes

For an organizational form of a cVPP or extended, an energy company, the following characteristics are essential, desirable or even inevitable:

- No liability for the management and cVPP members, as these are generally private persons (inhabitants)
- Sharing of the financial benefits of the cVPP as this will be a driver
- Influence of the participants on the policy of the cVPP to create and keep involvement following the “community based” bottom-up approach.
- The possibility to extend the portfolio to increase the renewable energy base, also in commercial projects (energy company).

Given those characteristics, there is one optimum form that fulfils these criteria: the Cooperative with excluded liability (U.A.).

There is a remark though: this exclusion of liability for members could cause major difficulties in obtaining loans from banks for investments in RES projects. When there is a reasonable liability opposed to the members, banks may be more willing. This dilemma is important to consider.

4 PREFERABLE OPTION ELABORATED FOR cVPP LOENEN

4.1 ARTICLES OF ASSOCIATION

The cooperative is a preferable form for a cVPP or even extended, a local energy company. The strength of a cooperative is the involvement of the members. This is also what is essential for a bottom-up organized cVPP being one of the goals of this project. However, such form of organization can also become a pitfall for decisive action.

The administrative structure largely determines how decisively a cooperative can operate. It is not practical for all members to vote on choices in day-to-day operations, for example when buying a print paper. Of course, you want to involve them in the policy of the cooperative and large investments that have to be made, such as the realization of windmills.

In the articles of association of a cooperative, it can be determined which legal capacity the board has before the members have to be consulted. It is also important to have a sense of what is going on among the members. Even though the board formally has the authority to make a decision independently, where but it is a subject that lives among the members, then it is still wise to consult the members.

It is also possible to delegate activities to a separate BV, which the cooperative fully owns. Within the mandate that this BV has, it can then operate freely to give substance to the BV delegated activities. This could e.g. be for a project like a PV-park.

The statutes of your local energy company describe, just as with any association, what the rights and duties of the participants are. It also specifies who can become a member and whether members and non-members, products or services can be provided. When it comes to drafting and declaring valid articles of association, you cannot ignore a notary.

A local energy company can have both members and customers. A customer is someone who buys a product from you, and a member subscribes to the company's objectives. A whole family can be a member of a cooperative, but not everyone in that family takes energy. It is up to the local energy company if membership is obligatory or there are benefits for members towards non-members.

A useful document helping to make choices in these considerations is "Sterke statuten" from "Hier opgewekt" (www.hieropgewekt.nl).

4.2 FOUNDING PROCESS

To found a cooperative formally, at least two initiating persons are required. These persons need to go to that notary to settle the statutes, as required by law. There are also people needed to form the board of the cooperative. These persons do not necessarily need to be the same as the initiating people. It is

beneficial to extend the group of involved people already in the beginning, as there is a lot of work to do. After the founding, the acquisition of the members is one of the priorities.. To achieve this, it is of great help to have a well structured communication strategy and planned way of communication (by speech, house-to-house, a local newspaper, social media, etc.). As soon as there are sufficient members on board, the wheels can be set in motion - a first general assembly or other meetings can be planned, and the work can commence

5 APPENDIX

Sources and references:

1. *Dutch Chamber of Commerce ("Kamer van Koophandel") (website)*
2. *Organisation "Hier op gewekt" (www.hieropgewekt.nl) (website)*
3. *Wikipedia*
4. *Book "Een lokaal energiebedrijf, hoe doe ik dat?"; authors Paul van Bree, Brendan de Graaf, Johan Boekema*