

FORMING A COMPANY IN THE NETHERLANDS

THE NETHERLANDS IS A PERFECT BUSINESS LOCATION FOR FOREIGN ENTREPRENEURS (2,000 SUBSIDIARIES IN AMSTERDAM, 140,000 JOBS).

Incorporating a Dutch entity

The most common business entities in the Netherlands are the Besloten Vennootschap (BV: private company with limited liability) and the Naamloze Vennootschap (NV: public limited company). Both entities have legal personality, issue shares and provide limited liability for their shareholders. The main difference between NVs and BVs is that a BV can only issue registered shares, whereas as NV can issue both registered and (freely transferable) bearer shares. For this reason, only the shares of an NV can be listed on a stock exchange. Another important difference is the paid-in capital: a BV can be incorporated with a paid-in capital of only EUR 0.01. The incorporation of a NV requires a paid-in capital of EUR 45,000.

The first step in the incorporation process of a BV or NV is to draw up a deed of incorporation. The deed of incorporation is drawn up by a civil notary and includes the (initial) articles of association. The (minimum) costs for these deeds are approximately EUR 900 – EUR 1,050 (excluding 19 percent VAT and dues) for a standard entity and depending on the number of shareholders. The articles of association contain the regulations regarding the (internal) organization of the company and, among other things, the name and the purpose of the company.

After the execution of the deed of incorporation and the fulfilment of the abovementioned minimum capital requirements, the BV or NV can be registered with the Chamber of Commerce. This registration finalizes the incorporation procedure.

It is the gateway to densely populated Western Europe and has a well-developed logistic and technical infrastructure. The highly skilled, multilingual and flexible work force, its favorable tax regulations for businesses, its stable political climate and its high standard of living make the Netherlands the ideal place to start a business.

Dutch law is based on the continental European civil law tradition and is – the Netherlands being a founding member of the European Union – highly influenced by the laws of the European Union. This means that the law is mostly written, but one should not underestimate the relevance of case law. Since the Dutch Civil Code dates from 1992 and is updated frequently with new case law, the Dutch law has an advanced legal system.

Before the incorporation procedure is finalized however, a BV or NV can already do business independently. In that case, the BV or NV has to register with the Chamber of Commerce as a “company in the process of incorporation.” After the incorporation procedure has been finalized, the BV or NV will be able to confirm the transactions made during the process of incorporation. Without that confirmation the founders or the first directors appointed in the articles of the BV or NV are jointly and severally liable for potential damage arising from these transactions.

Finally, it is recommended to conduct a trade name search before the final registration of the new BV or NV. Because of intellectual property regulations, an earlier registration of the same or a similar trade name could result in having to change the name of the newly established company. This, of course, would not be a good start.

Structure of BVs and NVs

BVs and NVs have similar structures. However, the rules on BVs are less complex and provide more flexibility. In this paragraph, the main powers and responsibilities of the different bodies within a BV or NV will be discussed.

Shareholders and the general meeting of shareholders

The shareholders are the owners of the company. For that reason all major decisions regarding the NV have to be taken or approved by the general meeting of shareholders (hereinafter: general meeting). Major decisions include, for example: amendments to the articles of association or issuing new shares. Shareholders have the right to vote in the general meeting. If they own at least 1 percent of the shares, they have the right to put items on the agenda of the general meeting. Other important rights of the general meeting include approving or dismissing of the company’s financial statements and having the power to

appoint and dismiss directors of the management board.

The articles of a BV may stipulate that a body of the company (for instance, the general meeting of shareholders) has the power to bindingly instruct the management board. However, if the aforementioned instruction conflicts with the interests of the BV, the management board may decide otherwise.

Management board

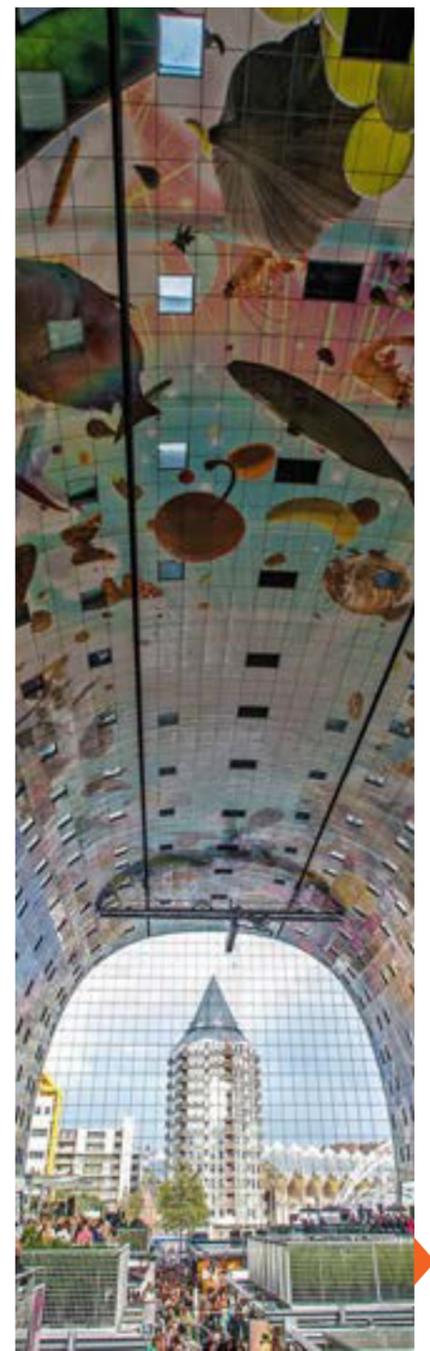
The primary responsibilities of the management board of both BV and NV are: the proper management of the company and the timely and accurate drawing up of its financial statements. The management board is in charge of determining the strategy and the (external) representation of the company. In this capacity, the management board and its individual members are authorized to bind the company. To what extent they are collectively or individually authorized to do so is often specified in the articles of association. Therefore, it is recommended to verify, prior to a transaction, whether a particular member is actually authorized to bind the company.

If a member of the management board has a conflict of interest with respect to a certain transaction, he or she is not allowed to participate in the decision-making process. In case the entire management board has a conflict of interest, the decision has to be taken by the general meeting, or, if existing, by the supervisory board or the non-executive directors, unless otherwise stipulated in the articles of association.

Supervisory board and non-executive directors

Dutch corporate law is known for its two-tier management system wherein supervisory directors take seat in a separate body, the supervisory board.

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Although BVs and NVs are only obliged in specific cases (i.e. when the BV or NV qualifies as a structuurvennootschap) to install a supervisory board, many entities do (voluntarily) have one. The supervisory board oversees and advises the management board independently and actively. The supervisory board is usually appointed by the general meeting of shareholders. Nowadays, a BV or NV can also opt for a "one-tier board model" consisting of only one board (thus no supervisory board) with both executive and non-executive directors.

Participation of employees

An entrepreneur who has 50 or more employees is obliged to establish a works council. The employees can participate in the decision-making process of the company through this works council. According to the law it has, depending on the subject at issue, the following rights: 1. the right to render advice, 2. the right of approval, and, 3. the right of information, consultation and initiative.

Financial statements and annual report

Every year, both BV and NV have to disclose their financial statements (jaarrekening). The financial statements of big and medium-sized companies are presented to the shareholders in an annual report (jaarverslag). Small companies only have to present their financial statements; they are not obliged to draw up an annual report.

Liability at BV/NV

After finalizing the incorporation, the shareholders are only liable for their share in the company. The managing directors are in principle not liable for debts of the company. They will only be liable if serious negligence by the managing directors has been proven. Then, directors may be held jointly and severally liable for the damage the company suffers. In case of bankruptcy, this may also apply to the damage the creditors of the company suffer.

Other options

Foreign entrepreneurs can also establish a branch office in the Netherlands without having to incorporate a Dutch legal entity. Or they can enter the Dutch market by appointing a distributor, an agent or a franchisee.

Other important issues

As a foreign employer in the Netherlands, it is important to know that there are many legal provisions that protect the employee both Dutch and foreign. Employees are also protected if the company they work for is transferred to another company.

Moreover, a foreign entrepreneur might want to lease business accommodation in the Netherlands. Generally, the lease period is five years with an option to renew the lease for another term of five years. As this is a complex matter, it is not possible to provide all the specific legal lease pitfalls within the scope of this article.

Conclusion

Although Dutch law can sometimes be far-reaching, the Netherlands is an appealing place to conduct business, particularly with a qualified lawyer steering you through the rules and regulations of Dutch law.

One stop shop

Russell Advocaten deals with all that is needed to set up a company in the Netherlands.

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