

REQUIREMENTS FOR INCORPORATING A PRIVATE COMPANY IN THE NETHERLANDS

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LEGAL | TAX | NOTARY

Are you considering doing business in the Netherlands? Setting up a company in the Netherlands is easy. This flyer gives some basic guidance on which steps to take, which rules apply and a brief overview of the incorporation procedure.

The main characteristics

A private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid*, hereinafter: “**BV**”) is a legal entity (and therefore being an independent carrier of rights and obligations) which is the most common legal entity in the Netherlands.

A BV is established by a notarial deed, to be executed in front of a Dutch civil law notary, and can be incorporated by one incorporator/shareholder or more. Both natural persons and legal entities can be incorporator/shareholder. Foreign natural persons and legal entities can also be incorporator/shareholder.

The objects of a BV can actually include anything, as far as the objects are not in contrary with the public order and/or morality.

Profits can be realized with the objects of the BV by carrying out business, such as the entering into agreements, contracts, partnerships, joint ventures, etc.

Shares

The BV has a (share) capital divided into one or more shares. The incorporation of the BV does not require a minimum share capital; therefore the minimum capital could be EUR 0.01.

Furthermore, it is not required to pay-up the share capital of the BV at the time of incorporation. It can also be paid-up later upon request of the BV. As long as it is not paid-up, the obligation to pay up these shares in principle remains. The liability for shareholder(s) in a BV is in principal limited to the funds invested by the shareholder(s).

The rights attached to the shares, such as voting rights and profit rights, can be excluded or limited, albeit that a share cannot be excluded from both the voting rights and profit rights.

The transfer of shares in a BV is in principle free and not restricted, however it is common to include a so called blocking provision (*blokkeringsregeling*) in the articles of association. This can either be the obligation to acquire the prior approval of the general meeting (approval procedure; *goedkeuringsregeling*)

or the obligation to first offer the shares to the other shareholders (offer procedure; *aanbiedingsregeling*). Like the establishment of a BV, the transfer of shares in a BV requires a notarial deed of transfer, executed before a Dutch civil law notary.

The board

The board represents the BV and is appointed by the general meeting. The board shall consist of at least one director who can either be a natural person or a legal entity. Also foreign persons and/or legal entities can be appointed as director.

The BV may have either a one-tier or a two-tier board. In case of a one-tier board, the board of directors consists of executive (*uitvoerende*) directors and non-executive (*niet-uitvoerende*) directors. The executive directors carry out the daily business of the BV and the non-executive directors control the executive directors. The non-executive directors always have to be natural persons. In case of a two-tier board, a supervisory board is installed and this supervisory board supervises the board of directors. The members of the supervisory board always have to be natural persons and may also be foreign persons.



Profits

In a BV, the profits of the company are at the disposal of the shareholders. The BV may make distributions to the shareholders and other persons entitled to distributable profits only to the extent that its equity exceeds the reserves which must be maintained under the law or the articles of association of the BV.

Before the profits can be distributed to the shareholder(s), the board has to perform a 'balance test' (*balanstest*) and a 'distribution test' (*uitkeringstest*). The board should refrain from giving its consent to a distribution if the board knows or could reasonably foresee that as a result of the distribution the BV will not be able to continue to pay its due and payable debts. In this perspective it should also be noted that the board of the BV can be held liable (jointly and severally) in case the BV will not be able to continue to pay its due and payable debts.

Tax

Both at the incorporation of a BV and during its existence, the Dutch tax treatment should be carefully monitored. For instance, tax residency is crucial for the application of tax treaties. Tax residency may be determined by the place of effective management and control, for which the directors are relevant.

Dividend distributions may lead to Dutch dividend with-holding tax. For each Dutch BV in principle a Dutch corporate income tax return should be filed each year. The BV may also be an entrepreneur for Dutch VAT purposes. We can advise on the tax aspects of the setup of the structure as well as provide tax compliance services.

Incorporation procedure

- The incorporation of a BV requires the execution of a notarial deed of incorporation, which includes the articles of association.
- The deed of incorporation needs to be prepared and executed in Dutch language; if preferred an English translation can be provided.
- The notarial deed of incorporation can be executed by means of (a) power(s) of attorney, granted by the incorporator(s).
- Upon execution of the notarial deed, the BV shall be registered at the Dutch trade register of the Chamber of Commerce. Simultaneously the BV will have to register its (pseudo-)UBO('s) (ultimate beneficial owner) with the public UBO Register.

- A shareholders' register shall be prepared, from which the shareholder(s) appear(s) and the respective shareholding.

Incorporation requirements (incorporators/shareholders)

For each incorporation:

- All incorporators/shareholders of a BV need to be identified in person by a valid identification document (passport/identity card/Dutch driver's license). In case identification is done by a notary outside the Netherlands, an Apostille must be provided.
- The signatures of all incorporators/shareholders need to be legalized. In case legalization is done by a notary outside the Netherlands, an Apostille must be provided.
- The aforesaid requirements also apply in case a foreign legal person incorporates the BV and documents need to be signed on behalf of this foreign legal person.

For incorporation by a Dutch natural person (i.e. residing in the Netherlands):

- All incorporators/shareholders of a BV need to disclose their marital state.

For incorporation by a foreign natural person (i.e. residing outside the Netherlands):

- All incorporators/shareholders of a BV need to provide a recent utility bill to evidence the home address.
- All incorporators/shareholders of a BV need to disclose their marital state.

For incorporation by a Dutch legal person:

- The Chamber of Commerce registration number needs to be provided.
- The current articles of association of the Dutch legal person need to be provided.
- A structure chart with an overview of the group.
- An ultimate beneficial owner (UBO) statement to disclose information regarding the shareholders.

For incorporation by a foreign legal person:

- The current articles of association/by-laws of the foreign legal person need to be provided.
- A recent extract of the trade registry where the foreign legal person is registered needs to be provided.
- A confirmation letter regarding the authority to represent the foreign legal person needs to be provided.
- An ultimate beneficial owner (UBO) statement to disclose information regarding the shareholders.

Incorporation requirements (directors)

Documents and information to provide:

- The first to be appointed managing directors need to provide the same documents/information as applicable to the incorporators/shareholders.

Incorporation requirements (deed of incorporation)

To prepare the deed of incorporation, including the articles of association of the BV the following key-information is required:

- Proposed name of the BV;
- Envisaged statutory seat and office address of the BV;
- Description of the envisaged activities of the BV;
- Nominal value of the shares (min. EUR 0.01) and number of shares to be issued at incorporation;
- Whether the transfer of shares will be free or that a share transfer restriction clause shall be included (see above under “Shares”);
- Financial year (calendar year or other);
- Representation authority of the managing directors of the BV (e.g. solely or jointly authorised).

The articles of association can be tailored in accordance with your wishes, but the above information is required for each incorporation.

Buren can accommodate and guide all the abovementioned processes. Should you want any more information about incorporating and operating a Dutch BV, please don't hesitate to contact us.

Explanations to definitions

Identification:

A notary must convince himself that the identity of a party to a notarial deed is known to him. For this reason identification must take place by meeting a party in person and during which meeting said party must show a valid identification document (passport/identity card/Dutch driver's license) to the notary. The process of identification can also be done in another jurisdiction, in which case the requirements of legalization and Apostille (see below) are applicable.

Legalization:

A notary must convince himself that the signature on a document is the real signature of the person who states that he/she had placed that signature. During the identification process a party must place his/her

signature on a copy of a valid identification document, so that the signature of this person is known to the notary. In jurisdictions other than the Netherlands it depends on local law which authority can legalize signatures on documents (i.e. a notary, notary public, solicitor or lawyer).

Apostille:

A notary must convince himself that the person/authority who did the legalization is authorized to do so. For this reason in 1961 a treaty has been concluded which is known as the 'The Hague Apostille Treaty'. In each jurisdiction that is party to this treaty a stamp can be obtained (mostly issued by the district courts) which proves that the legalization validly occurred.

Confirmation letter:

In case a BV is incorporated by a foreign legal person, the notary must convince himself that the foreign legal person is duly represented by a representative/director under the laws of the jurisdiction of the foreign legal person. A lawyer/notary in said jurisdiction must confirm that the foreign legal person is duly represented.

UBO statement:

Based on Directives of the European Union, currently implemented in Dutch legislation (Act against Money Laundering and Financing of Terrorism (*Wet ter voorkoming van witwassen en financieren van terrorisme*), each ultimate beneficial owner (UBO) of a legal person must be known to a Dutch notary and registered with the UBO-Register.

Ultimate beneficial owner (UBO):

A natural person who is entitled to more than 25% of the property on the winding up of the legal person, is entitled to more than 25% of the profits, can exercise more than 25% of the voting rights or can exercise effective control of the legal person.

Key contacts



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