

Dutch law limited liability companies

The main types of legal entities which are used for commercial activities in the Netherlands are the private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid*, hereafter "BV") and the public company with limited liability (*naamloze vennootschap*, hereafter "NV"). Both are limited liability companies, which means that in principle shareholders and incorporators are normally not liable for liabilities of the company. The two types of companies are similar in their organisation and structure and identical in their tax treatment. Conversion of a BV into an NV and vice versa is possible. The vast majority of companies incorporated in the Netherlands are BVs. The legal regime regarding BVs has recently been overhauled. These rules came into force on 1 October 2012.

Principal characteristics of the BV and the NV

The principal characteristics of the BV and the NV are:

- On incorporation of an NV a bank statement and, in case of a non-monetary contribution, an auditor's statement must be provided. These documents are not required for the incorporation of a BV.
- The minimum issued share capital for an NV is €45,000. BVs have no minimum issued share capital.
- A BV can only issue registered shares; an NV can issue both registered shares and bearer shares.
- The issue and the transfer of registered shares in a BV (and in a non-listed NV) must be effected by a deed executed by a civil law notary (*notaris*); this requirement does not apply to bearer shares or registered shares of a listed NV. In all cases, the company must be notified.
- The BV can denominate its share capital in a currency other than the euro. The NV has to denominate its share capital in euro.
- The regime prohibiting financial assistance in the acquisition of its own shares does apply to the NV (with an exception for loans), but does not apply to the BV.
- To protect its creditors, a BV can distribute dividends and reserves if it has freely distributable reserves and if it has checked whether there is enough equity in the BV after the distribution to fulfil its financial obligations. If the BV does not perform this test, the members of the management board and the recipients of the distribution can be held liable for compensation when they did not act in good faith. Formally, an NV has a different regime. There, the only formal check for making

Key points

- The main types of legal entities which are used for commercial activities are the private limited liability company ("BV") and the public limited liability company ("NV")
- The vast majority of the companies are BVs
- Shareholders of the NV and BV are in principle not liable for liabilities of the company
- Only the NV can currently be used for listed companies

distributions is if there are freely distributable reserves. Given the responsibility of the board to ensure that a company is able to discharge its obligations, however, the difference is limited in practice.

- The articles of association of BV can determine that shares without voting rights or profit entitlement are issued. The NV cannot issue shares without voting right or profit entitlement.

Incorporation and registration

The incorporation of an NV or BV requires a deed of incorporation executed by a civil law notary (*notaris*).

The deed of incorporation is then registered by the notary with the Chamber of Commerce and the Dutch tax authorities.

More key points

- BVs have to perform a test on the merits of a distribution before it can distribute dividends and reserves
- Only a BV can issue shares without voting rights or profit entitlement
- Only a BV can denominate its share capital in a currency other than the euro
- The NV and BV are both incorporated by execution of a Dutch notarial deed

Management board

The management of an NV or BV and its business is performed by a management board (*bestuur*). Members of the management board are in principle not required to be Dutch nationals or residents of the Netherlands and can be individuals or legal entities. However, tax considerations may require that, at least 50% of the members of the

management board are residents of the Netherlands and that board meetings are held (or written board resolutions are signed) in the Netherlands, in order to qualify as a Dutch resident for foreign tax or treaty purposes. As the applicable tax regulations are very much dependent on the factual circumstances of the case, advice on these matters should be sought from case to case.

Unless the Large Company Regime (see below) applies, the members of the management board are appointed and dismissed by the general meeting of shareholders. In case of a BV, the articles of association may also provide that members of the board are appointed and dismissed by holders of specific classes of shares.

The management represents the company. The articles of association may also vest this authority in one or more members of the management board (acting either alone or acting jointly).

Supervisory board

NVs and BVs may also have a supervisory board (*raad van commissarissen*) consisting of non-executive directors.

Alternatively, an NV or BV may choose to have non-executive directors together in a unitary board.

The main duty of the non-executive directors is to supervise and to advise the management board. In principle, it has no authority to represent the company vis-à-vis third parties. Only natural persons can become members of a supervisory board.

Having a supervisory board or non-executive directors on the board is mandatory for a company in the event that the Large Company Regime applies (see below).

Large Company Regime

When a company meets all of the three criteria below, it needs to register with the Dutch Trade Register as a "Large Company". When this registration continues for three consecutive years, such a company becomes subject to the Large Company Regime:

- The company has an issued share capital plus reserves of at least €16 million.
- The company (or any of its subsidiaries in which it owns, directly or indirectly at least 50% of the shares) has established a works council (*ondernemingsraad*) pursuant to a statutory requirement.
- The company (together with the subsidiaries in which it owns, directly or indirectly, at least 50% of the shares) has 100 or more employees in the Netherlands,

Under the Large Company Regime, it is mandatory to have at least three non-executive directors.

If an NV or a BV is a subsidiary of a company that complies with the provisions of the Large Company Regime, such NV or BV does not have to comply with these provisions, although it meets the criteria set out above.

Clifford Chance has also produced a more detailed [M&A Toolkit memorandum](#) in December 2012 about the applicability and requirements of and exemptions from the Large Company Regime, Supervisory boards under the Large Company Regime (December 2012).

Shares

Share capital

Shares of an NV must be denominated in euro. Payment for the shares can, however, be made in other currencies, subject to certain formalities. Shares of a BV can be denominated in any currency.

Payment for shares by a contribution in kind is possible. For an NV an auditor's statement is required. The issue price may not be below par value (except in the case of professional issuers).

Different classes of shares with different par values and different rights may be created. It is possible to create preference shares (carrying financial benefits) and priority shares (conferring special voting rights).

With NVs, each share, in principle, entitles the shareholder to one vote. For BVs it is possible to create a special class of shares carrying multiple votes or no votes at all. It is also possible to create shares carrying no right to share in profit.

Authority to issue shares

As a general rule, the general meeting of shareholders is authorised to issue new shares. However, this authority can also be vested in or delegated to the management board, the supervisory board or a meeting of holders of a particular class of shares. For NVs this is for a maximum period of five years, renewable annually.

Preferential subscription rights (*voorkeursrecht*)

The general principle is that to protect existing shareholders from dilution they have a preferential subscription right if new shares are issued other than in respect of shares issued to employees of the company or its affiliates. The articles may also

stipulate that there are no preferential subscription rights attached to preferred shares.

In an NV, the articles of association cannot exclude such preferential subscription rights in case of issues of ordinary shares for cash. No preferential subscription rights exist if shares are paid-up by a contribution in kind, unless the articles of association provide otherwise.

The general meeting of shareholders of an NV may however limit or exclude the preferential subscription rights. The authority to do so may be delegated for periods of up to five years, renewable annually, to the corporate body (such as the board) which has been delegated the authority to issue shares.

In a BV the articles of association may exclude or limit preferential subscription rights. The general meeting of shareholders may only limit or exclude preferential subscription rights in respect of a specific issue of shares (unless the articles of association provide otherwise). Shares without voting rights are in principle excluded from the preferential subscription rights regime. Shares without profit entitlement are always excluded from the preferential subscription rights regime, unless the articles of association provide otherwise.

Depository receipts

Shares can also be issued or transferred to a trust foundation (*stichting administratiekantoor*). The trust foundation then issues (registered or bearer) depository receipts in relation to such shares to the beneficiaries. The trust foundation is the legal owner of the shares, whereas the holders of the depository receipts have the beneficial ownership. The trust foundation exercises the voting rights in respect of the shares and passes any dividends received from the company on to them. Although BVs can have non-voting shares, this mechanism remains relevant. Given the fact that a transfer of shares in a BV will still require a notarial deed, the use of a trust foundation controlled by the relevant shareholder(s) is helpful to enforcing drag-along arrangements.

Publicly available information on Dutch companies

Under the Commercial Register Act, a company incorporated under the laws of the Netherlands is required to file extensive information with the relevant Chamber of Commerce, such as the company's annual accounts, the articles of association, the issued and paid-up share capital, identity and address details of members of the management board and the supervisory board, identity of holders of shares that are not fully paid-up and the identity of any sole shareholder.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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