

CORPORATE LAW

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Introduction

If you do business with a Dutch company, set up a company in the Netherlands or merge with a Dutch company, you will have to deal with corporate law issues such as what legal entity suits your company, how companies in the Netherlands are legally structured, how the powers are divided within companies and what legal means there are to manage a company.

This article gives an overview of Dutch corporate law as laid down in the Dutch Civil Code, and a short review of the Corporate Governance Code and the *SER* Merger Code. The following topics will be discussed: (the incorporation of) legal entities under Dutch corporate law, corporate bodies and their powers, the rules applying to mergers and arbitration between shareholders.

The incorporation of a *BV* and a *NV*

The most important legal entities constituted by Dutch Law are the *Besloten Vennootschap* (*BV*; Private Company with limited liability); the *Naamloze Vennootschap* (*NV*; Public Limited Company); the *Vereniging* (Association) and the *Stichting* (Foundation). In this chapter we will focus on the most common legal entities *BV* and *NV* because they are most relevant to international commercial trade.

In general they share basic characteristics, but there are also important differences between them:

- The *BV* can only issue registered shares whereas the *NV* can issue both registered and bearer shares.
- The articles of association of the *BV* must contain share transfer restrictions, this is not compulsory for the *NV*.
- Different minimum capital requirements are applicable (see below).
- Only the *NV* can be listed on the Euronext stock exchange.

The incorporation procedure of a *BV/NV* requires involvement of a Dutch civil-law notary.

Together with the founders of a company, the civil-law notary will draft a deed of incorporation (articles of association) in the Dutch language. The articles of association contain, among others, the name of the company, the company's registered office, the authorised capital of the company and, in case of a *BV*, share transfer restrictions. The articles of association are important because they contain the initial regulations regarding the statutory organization of the company.

The civil-law notary examines whether the company meets the minimum capital requirement, which is € 18.000,- for the *BV* and € 45.000,- for the *NV*. Usually, it is sufficient to present a bank statement indicating that these funds are available to the company. At least 20% of the authorized capital of the *BV/NV* must be issued during incorporation. In addition, a declaration of no-objection needs to be obtained from the Ministry of Justice. This declaration will be provided as soon as the credentials of the founder have been verified. It is also recommended to conduct a trade name search in order to find out whether the intended company name or a similar name has already been registered at the Chamber of Commerce. Because of intellectual property regulations, prior registrations of a similar trade name could result in an obligation to change the company name. After execution of the deed of incorporation, the company can be registered at the Dutch Chamber of Commerce, which finalizes the incorporation procedure.

BV in stage of incorporation

It usually takes several weeks to complete the incorporation procedure. However, as soon as the incorporation procedure has been initiated, the company can already do business. The *BV* then has to be registered at the Chamber of Commerce as a *BV in oprichting*, (*BV i.o.*; *BV* in stage of incorporation). After completion of the incorporation, the *BV* can ratify all the transactions realized during the incorporation period. As long as ratification does not take place, founders or directors are bound jointly and severally to these transactions on behalf of the *BV*. Only ratified transactions are considered to be transactions of the *BV*.

Company organization

General Meeting

The General Meeting of Shareholders meets at least once a year and is the most powerful body within the *BV* and *NV*. Any powers not conferred upon the management (or other persons) will be vested by the General Meeting. Furthermore, the General Meeting is entitled to appoint, suspend and remove the directors of the company and to change the articles of association.

Board of Directors

Each *BV* and *NV* has a Board of Directors. The Board is charged with the management of the company and represents the company. Unless the articles of association or law provide otherwise, the power to represent the company is unlimited and each individual managing director is authorised to represent the company. The articles often determine that the company can only be represented by a particular number of directors. Usually the articles also prescribe that certain major management decisions are subject to the prior approval of the General Meeting or the Supervisory Board.

Dual-board system

Corporate law in the Netherlands is well-known for its dual-board system. Non-executive board members can take a seat in a separate body, the Supervisory Board. Although *BVs* and *NVs* are only obliged in specific cases to install a Supervisory Board, many *BVs* and *NVs* do have one. The Supervisory Board supervises and advises the Board of Directors independently and actively.

Dual-board regime

Important to the company organization of the *BV* and the *NV* is the so-called *structuurregime* (dual-board regime). A company is subject to the dual-board regime if it has more than one hundred employees in the Netherlands, a works council and the amount of issued capital exceeds € 16 million. The dual-board regime was established because the Dutch legislator did not consider the control of the General Meeting very effective in a large company with many shareholders. As a result, the Supervisory Board has more powers within dual-board companies.

The dual-board regime has important consequences for the corporate governance of the company. In a dual-board company, the Supervisory Board members do not only supervise and advise the Board of Directors, they also appoint, suspend and remove the directors of the company. Furthermore, the Supervisory Board is responsible for adopting the annual accounts and it has to approve beforehand major management solutions such as acquisitions, (de-) listings, major investments and decisions to terminate the employment contract of a considerable number of employees.

Within dual-board companies, the General Meeting appoints the Supervisory Board members. The Supervisory Board itself however, is entitled to make recommendations. The works council of the company is entitled to make recommendations with respect to one-third of the Supervisory Board members.

Corporate governance in the Netherlands

As from December 9, 2003, Dutch corporate law also includes a Corporate Governance Code. This Corporate Governance Code (also known as the *Code Tabaksblat*) presents principles of good governance.

The Code applies to companies that are listed on a stock exchange and have their seat in the Netherlands. However, the code is also relevant to non-listed companies. In case of a dispute, the corporate governance of non-listed companies will most probably also be examined in accordance with the purpose of the Corporate Governance Code.

Comply or explain

The corporate governance code is divided in basic principles of good governance, which Principles are explained in best practice provisions. A company is not allowed to deviate from the Principles in the Code. Deviations from the best practice provisions in the corporate governance structure of the company are only allowed as long as the company explains these deviations in its annual report. This is the so-called ‘comply-or-explain’ rule.

Important aspects of the Code

The Code increases the powers of the Supervisory Board and the General Meeting of the company, mainly in order to improve accountability of the Board of Directors for its management and it improves the monitoring possibilities of the Supervisory Board. Important measures are among others:

- With respect to the remuneration of the Board of Directors, the Code determines that the General Meeting must have the possibility to accept or refuse the proposals for remuneration. Granting stock options to the Board is bound by conditions. Awarding these options depends on pre-determined performance criteria. The severance payment for the Board is also pre-fixed and must be published in the annual report.
- Important strategy decisions such as the acquisition or sale of participations require the prior approval of the General Meeting. In addition, the reserve and dividend policy of the company must be discussed during the General Meeting.
- The Board of Directors is responsible for the quality and completeness of the public financial statements of the company. The General Meeting appoints the external accountant of the company. This accountant attends the annual general meeting. The General Meeting is allowed to ask the accountant questions for clarification.
- For a proper performance of their duty, the Supervisory Board and the Supervisory Board members separately are responsible for collecting all relevant information from the external accountant and the Board of Directors.
- Certification of shares as anti-takeover measure is no longer accepted.

Dutch *BVs* and *NVs* are strongly recommended to compare their corporate governance structure with the Principles and (if applicable) best practice provisions of the Dutch Corporate Governance Code.

Annual accounts and annual report

Every year a company has to present its financial results and economic policy to the shareholders of the company. This information is laid down in the *jaarrekening* (annual accounts) and the *jaarverslag* (annual report).

Annual accounts

According to Dutch law, annual accounts include the balance sheet and the profit and loss account with notes thereon. The Board of Directors is responsible for drafting the annual accounts in accordance with generally accepted accounting principles (Dutch GAAP). The annual accounts have to be drawn up within five months after the end of the financial year, which is usually the same as a calendar year. In addition, the Board of Directors gives instructions to a registered accountant for the audit of the annual accounts. The accountant presents his findings in his *accountantsverklaring* (audit report), indicating whether or not the annual accounts give a true and fair view of the financial results of the company. After presentation of the annual accounts and the audit report to the General Meeting, the General Meeting can adopt the annual accounts. After adoption, the company will have to deposit its annual accounts within eight days at the Commercial Registry of the Chamber of Commerce.

Annual report

Although the annual report is not part of the annual accounts, the company must present both documents at the same time. Except for small companies, each *BV* and *NV* must draft an annual report. According to Dutch law, a company is small when it meets at least two of the following three requirements:

1. The value of its assets on the balance sheet does not exceed € 3,5 million.
2. The net turnover during the financial year does not exceed € 7 million.
3. The average number of employees during the financial year is less than 50.

Under certain circumstances however, a company, which is part of a group of companies, can be excluded from the obligation to present an annual report. Like the annual accounts, the annual report has to be made public.

In the annual report, the company has to present a true and fair view of its position on the balance sheet date and the course of the business during the financial year. This obligation also sees to the (daughter) companies of which the financial results have been included (consolidated) in the annual accounts. In addition, the annual report includes a paragraph on the business expectations of the company, such as on-going investments, financing, number of employees, future turnover and research and development.

Mergers

To protect the interests of employees during mergers, Dutch law provides a specific merger “law”: the *SER Fusiegedragsregels* (the Merger Code of the *SER*). The *Sociaal-Economische Raad* (the Social and Economic Council) is the main advisory body to the Dutch government on national and international social and economic policy.

The *SER* Merger Code is not a law. It provides rules of conduct which are relevant to the preparation and realization of a merger or a public offer for shares. The *SER* Merger Code is applicable in case of a merger involving an enterprise that is established in the Netherlands and that (regularly) employs at least fifty employees. The *SER* Merger Code also applies to mergers involving enterprises in the Netherlands that are part of a group of enterprises, which group regularly employs at least 50 employees in the Netherlands. The Merger Code refers to “enterprise” and not to company. The legal entity (form) of the enterprise is not relevant. A transfer of a branch for example, is also subject to the *SER* Merger Code.

Before the parties involved agree on a merger, they will have to notify the relevant trade unions (associations of employees) about the preparation, the consideration for and the consequences of the merger. The union must be able to present its opinion on the proposed merger from the viewpoint of the interests of the employees, in such a way that this opinion can have substantial influence on the effectuation of the merger and/or on the stipulations thereof. Informing the unions is often considered a problem, because the parties involved usually aim on maximum confidentiality. If (one of) the merger parties or the union(s) are of the opinion that the preparation of the (proposed) merger is not in accordance with the *SER* Merger Code, they can submit a complaint with the *SER* Committee for Merger Affairs. This Committee can decide that merger proceedings are not in line with the *SER* Merger Code. Moreover, the Committee can qualify this as “seriously imputable”, which can result in claims based on non-performance in case the *SER* Merger Code is part of a collective labour agreement, or unlawful act.

Corporate litigation

Dutch law provides specific legal proceedings in case of disputes of a corporate law nature, such as shareholders’ disputes, “internal” disputes (such as disputes between shareholders and the Board of Directors), directors’ liability and anti-takeover measures. In this paragraph some of these legal proceedings will be outlined.

Shareholders’ disputes

In case the conduct of a shareholder harms the interests of the company in such way that the other shareholder(s), solely or jointly representing at least one-third of the issued capital of the company, reasonably cannot maintain his shareholding, the other shareholders can claim an obliged transfer

of the shares of the shareholder who allegedly harms the interests of the company. This claim has to be submitted to the district court.

When the interests of a shareholder are harmed because of the conduct of one or more other shareholders, in such a way that the shareholder cannot be expected to maintain his shareholding, the shareholder can demand an obliged transfer of his shares to the other shareholders. This claim also has to be submitted to the district court.

Inquiry proceedings

If one or more shareholders have valid reasons to doubt the policy of the company, they can file an application for an *enquête* (inquiry) at the Enterprise Section of the Amsterdam Court of Appeal. To file such an application, the shareholder(s) solely or jointly has to represent at least 10% of the issued capital of the company or has to be entitled to an amount in shares/depository receipts with a nominal value of € 225.000,-. If the Enterprise Section acknowledges the doubts, it will allow the application and appoint an investigator who will make an inquiry into the policy of the company. The inquiry can sometimes be limited to a specific part of the company policy or to a specific period. After his inquiry, the investigator will submit his report to the Enterprise Section, which finalizes the first stage of the inquiry proceedings. The investigator must conclude whether or not misconduct can be established.

In case of misconduct, the second stage of the inquiry proceedings becomes relevant. In this stage, the applicant in the first stage as well as other parties to whom the investigator's report is available, can ask the Enterprise Section to take appropriate measures, such as suspension of a decision of the Board of Directors, dismissal of one or more directors and/or Supervisory Board members, and the temporary appointment of directors/supervisors.

If the situation of the company and/or the interests of the inquiry require *voorlopige voorzieningen* (preliminary injunctions), the Enterprise Section can take these at any stage of the proceedings, for as long as the inquiry proceedings are pending. It is important to note that Dutch law does not limit the possibilities of the Enterprise Section in this regard. In principle, the Enterprise Section can take all measures it considers necessary. Inquiry proceedings before the Enterprise Section are considered to be very effective, because the Enterprise Section is specialized in company law issues and it is allowed to take all necessary (urgent) measures during the inquiry proceedings.

Squeeze-out proceedings

A shareholder, representing at least 95% of the issued capital of a company, can file a claim against the other shareholders, demanding an obliged transfer of shares to the claimant. Like inquiry proceedings, the squeeze-out (or buying out) proceedings take place before the Enterprise Section.

In case parties do not agree on the value of the shares, the Enterprise Section usually appoints one or more experts to determine the value of the shares.

Conclusion

If you set up a company in the Netherlands you will have to deal with corporate issues. First of all you will have to choose what legal entity would be most suitable with respect to the business to run. To make that choice, knowledge of the different corporate entities is required as well as knowledge of the rules applicable to these different corporate entities. Furthermore, it is important to realize that the Dutch corporate system is quite different from the Anglo-Saxon system. According to the latter a company is managed by executives and *non*-executives. Dutch companies by contrast, can opt for a dual-board system in which the management board is supervised by the supervisory board. For large companies this dual-board system is mandatory. Finally, Dutch corporate law is characterized by detailed rules regarding, among others, good governance, dispute resolution, responsibilities and powers of the different bodies of a company and annual accounts.