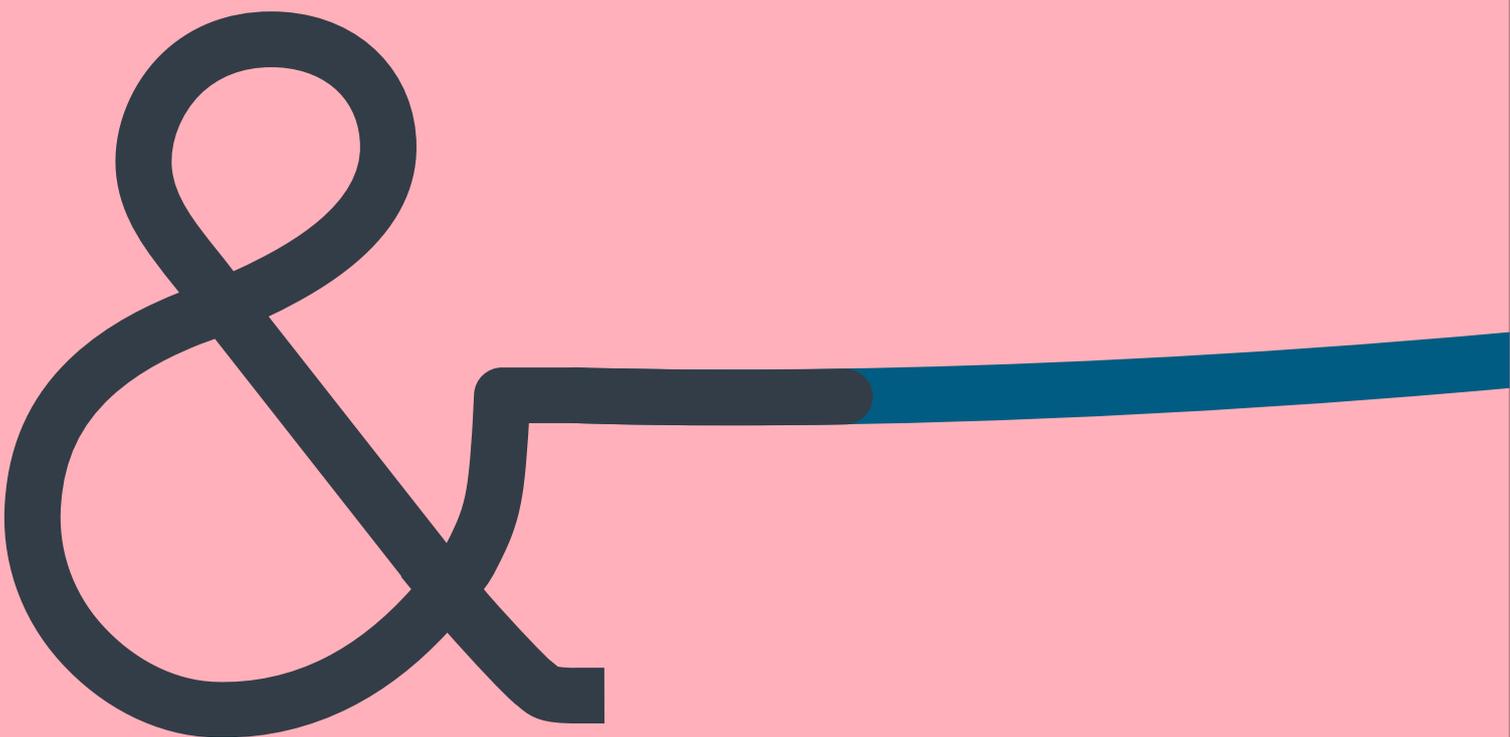


Bird & Bird

Setting up a business in the Netherlands

2022





‘The team is deal driven which shows in proactiveness in finding solutions for problems that could potentially derail the deal, good communication while maintaining a good eye for the interests of all including the hiring company.’

Chambers Europe 2022, Netherlands

Setting up a business in the Netherlands

Investing in or through the Netherlands is attractive for several reasons:

- 1 flexible company law;
- 2 the Dutch tax system has a number of features that may be very beneficial in international tax optimization;
- 3 it has an international business environment;
- 4 it has superior logistics and technology infrastructure (the Netherlands is classified as one of the most 'wired' countries in the world) and the Port of Rotterdam is the world's third largest seaport, while Schiphol Airport is recognised as one of Europe's major business hubs;
- 5 its strategic location allows it to serve markets within Europe, the Middle East and Africa;
- 6 a highly educated, flexible, multilingual and motivated workforce;
- 7 member of the EU and the Euro group; and
- 8 a high standard of living, maintaining an affordable life for its residents.





Bird & Bird is a “very knowledgeable firm, not only on the legal content but also on market dynamics.”

Chambers Europe 2022, Netherlands

Choice of legal entity

A foreign company can carry on a business in the Netherlands either by incorporating a Netherlands legal entity or by registering a Netherlands establishment or branch, which is considered an extension of the foreign company. If a legal entity is incorporated, the legal form of choice is often (depending on a number of aspects) a private company with limited liability (besloten vennootschap met beperkte aansprakelijkheid (BV)).

	Subsidiary	Branch
Liability	Limited liability at subsidiary level.	Parent company retains direct liability.
Authority	Separate legal entity to contract in its own name and on its own behalf.	Branch office acts on behalf of the parent company.
Notarial deed	Incorporation of a BV requires a notarial deed.	No notarial deed required in connection with registration of a branch.
Capital	The capital of a BV can be any positive amount, i.e., a share capital of €0.01 or more. It is allowed to denominate share capital in currency other than euro.	No minimum capital requirements.
Duration of incorporation process	In general, incorporation and registration process of a BV can be completed in approximately 2-4 business days (Bird & Bird can provide all related services thereto).	Registration process takes approximately 2-4 business days upon receipt of duly signed and legalised registration forms.
Residency requirements	Managing directors do not need to be Dutch nationals (for tax reasons it is generally advised that at least half of the managing board are Dutch residents).	No need for managing directors to reside in the Netherlands.
Meetings	Meetings can be held outside the Netherlands (for tax reasons it is generally advised that management board meetings are held in the Netherlands).	No need for meetings to be held in the Netherlands.
Filing	Higher annual filing and accounting costs.	Parent company accounts may need to be filed. Changes related to the parent company, such as change of managing directors, should be registered with the Dutch trade register. In principle, lower operational costs.

Tax	Subsidiary	Branch
Corporate income tax	Corporate income tax on worldwide profits and gains as calculated based on Dutch tax accounting principles (for 2022: 15% on the first EUR 395,000 of profit and 25.8% on the excess). As discussed below, there is a 9% tax rate for profits that relate to innovative activities.	Corporate income tax (for 2022: 15% on the first EUR 395,000 of profit and 25.8% on the excess) on profits that should be allocated to the branch if the branch constitutes a permanent establishment/representative from a Dutch tax and (if applicable) double tax treaty perspective. Allocation of profits should be done as if the branch is a separate entity.
Profits	Repatriation of profits normally subject to dividend withholding tax (2022 rate: 15%). Often reduced to 0% because of application of a domestic exemption, double tax treaty or EU parent/subsidiary directive.	Repatriation of profits not subject to (dividend) withholding tax.
Intra-group	Intra-group transactions must be carried out at an "arm's length" basis.	
NOLs	Net operating losses (NOLs) can be off-set against the profits for the accounting period (there is a difference in mechanism for off-setting NOLs between branches (of foreign corporations) and BVs if NOLs are to be carried forward and/or backward). NOLs can be carried forward indefinitely. To the extent that the taxable profit for a year exceeds EUR 1 million, only 50% of that taxable profit in excess of EUR 1 million can be used to offset losses from previous years.	
VAT	Value added tax (VAT) is largely neutral for businesses that make VATable supplies (branches must register with the Dutch tax authorities only if they carry out VATable transactions in the Netherlands). Special rulings exist that avoid the pre-financing of VAT charges.	
Salaries	Employers are obliged to withhold wage tax and premiums on salaries and subsequently pay such wage tax and premiums to the Dutch tax authorities (for branches this is only mandatory if the branch qualifies as permanent establishment for payroll tax purposes). Incentives for foreign employees exist (see below for more detail).	
New Conditional Withholding taxes	As of 1 January 2021, a new withholding tax has been introduced on intragroup interest and royalty payments to related companies, resident in low-taxed jurisdictions and/or in cases of artificial arrangements.	

Setting up a business in the Netherlands

General Remarks

In addition to the corporate information displayed in the foregoing table, the following information might be relevant for those interested in setting up a business in the Netherlands.

- Restrictions on the payment of dividends and the distribution of reserves are based on the principle that a decision to make a distribution must be approved by the management board, which must refuse to give its approval if it knows or should reasonably foresee that, after making the distribution, (i) the BV will be unable to continue paying its due and payable debts (the “liquidity- test”) or (ii) the equity capital of the BV, reduced by the legal and statutory reserves, will become negative (the “balance sheet-test”).
- It is inter alia possible to issue shares without voting rights or without a right to share in the profits of the B.V.
- The articles of association may provide for a one-tier board, consisting of executive directors (responsible for the BV’s day-to-day management) and non-executive directors (who supervise the executive directors). The tasks of the executive and non-executive directors in a one-tier board may be allocated under or pursuant to the articles of association, if there are certain limitations to such allocation of duties.
- The duties of the management board are of a collective nature, meaning that if the management board has more than one member, the board members must decide collectively what the main lines of their management policy will be. Collective responsibility results, as a general rule, in joint and several liability of each board member. The principle of collective responsibility continues to apply in a one-tier board and each board member (executive and non-executive) will remain responsible for the performance of the board’s duties and can, in principle, be held liable for mismanagement if those duties are not performed properly.
- A conflict of interest does not affect a board member’s representative authority; it does, however, restrict that board member’s

participation in the decision-making process involving a matter in relation to which he/she has a direct or indirect interest which conflicts with the interest of the company.

Tax

The Netherlands has a beneficial tax climate, making it an attractive and popular jurisdiction to invest in (or through).

The Netherlands allows for a so-called participation exemption to dividends and capital gains derived from qualifying subsidiaries, effectively exempting such income from Dutch corporate income tax. Unlike similar regimes in other countries, the Dutch participation exemption allows for a full exemption of Dutch corporate income tax and the shareholding threshold for the exemption to apply is at least 5%.

The Netherlands also allows for a so-called object exemption in relation to income from foreign branches, effectively exempting (active) income from Dutch corporate income tax. Because of the Netherlands’ widespread tax treaty network, foreign withholding taxes are often mitigated, and double taxation is prevented. As a member of the European Union, the Netherlands has access to EU Directives.

Those Directives, inter alia, result in absence of intra-EU withholding taxes on interest, royalties, and dividends (subject to anti-abuse rules).

Innovative companies involved in research & development (R&D) activities may benefit from certain R&D related tax incentives. The Dutch innovation box allows for an effective corporate income tax rate of 9% (2022 rate) on certain benefits derived from self-produced, qualifying intangible assets.

Additionally, under the so-called “WBSO” regime, an amount equal to a percentage of the investment and employment costs relating to R&D activities may be deducted from wage tax that the employer would have to withhold and pay to the tax authorities on behalf of his employees. The amount comes to the benefit of the employer.

The Dutch tax authorities are generally regarded as accessible and it is often possible to obtain

advance certainty by means of a tax ruling on a variety of tax issues, e.g., on holding activities, interest deductibility and IP treatment.

Please note that (per 1 July 2019) certain restrictions apply to international rulings regarding corporate taxes, such as corporate income tax and dividend withholding tax. The applicant of such ruling must avail of sufficient economic nexus with the Netherlands to obtain such ruling. Also, to obtain such ruling the avoidance of Dutch or foreign tax may not be the sole or decisive reason for the transaction or business activity and no ruling can be obtained for transactions with a country that is included in the Dutch list for low tax countries.

Finally, should one want to hire foreign employees, those employees may benefit from the 30% allowance rule.

Under that rule, a Dutch employer may pay foreign employees up to 30% of their salary wage tax free, provided they meet the requirements of the rule.

Employment

From an employment law perspective, it is irrelevant whether a BV is set up in the Netherlands or a branch is registered.

Dutch employees have minimum statutory rights including notice periods, hourly rates of pay and the right to a pro- active test by a government agency and/or in court of the alleged grounds for any attempted unilateral termination of employment. Dutch employees may furthermore, upon termination at the initiative of the company, be entitled to a severance payment based on a statutory formula. In addition, in case of gross misconduct on the part of the employer a judge may award a so-called fair sum. Collective bargaining agreements are quite common in the Netherlands and may include rights and benefits beyond the statutory minimum. Employees are protected against discrimination (age, race, sex, disability, religion, belief, sexual orientation, part-time/ full-time and permanent/fixed term).

If the company will exercise supervision and control over the individual, employers cannot contract out of the statutory requirements or avoid them by categorising the employee as a consultant, as the courts will look at the factual relationship.

Restrictive covenants, such as a confidentiality clause or a non- compete clause, are allowed under Dutch law. In a fixed-term employment contract, however, a non-compete clause is in principle not allowed. Only under strict conditions can such a clause be included in a fixed-term employment contract.

Non-European nationals will generally require a work and resident permit.

Employers are not legally obliged to provide a pension scheme for employees. However, in certain sectors of industry a legally obligatory pension scheme applies.

Commercial Contracts

The Netherlands has a civil law system. There is considerable freedom in the Netherlands for all types of collaboration, licensing, and distribution agreements. The principle of reasonableness and fairness applies to all agreements.

This may have the result that certain contractual provisions remain without effect or must be supplemented if the provisions would otherwise contravene this principle.

The consequences of this principle will vary according to the circumstances at hand.

EU legislation applies in the Netherlands and regulates consumer protection, sales agents, distance selling, government procurement, direct marketing, and the privacy of personal data. Dutch law restricts certain consumer contract terms, including limits on liability.

Dutch and EU competition law prohibits anti-competitive behaviour (e.g., price fixing) where there is an appreciable effect on trade in the Netherlands and/or between EU Member States.

Overseas companies should be aware of any industry specific laws that apply to their businesses, e.g., WEEE regulation (electrical goods), REACH Regulations (chemical products) and the Act on Financial Services (financial products). Often, these laws are based on EU legislation and are relatively consistent across the EU.

Real Estate

Most companies setting up in the Netherlands will rent serviced offices or lease their premises rather than buy them.

Serviced offices are more flexible. They are ready-to-go and can be rented for short periods (the minimum period is usually 12 months, but shorter periods can usually be agreed). There is no capital outlay.

Leases are usually for 5-10 years, often with a renewal period of 5 or 10 years. Pursuant to (semi) mandatory law which applies to leases of premises in the small-firm sector, the lease period – including the renewal period – has a minimum term of 10 years.

Parties are free to agree on rent reviews; the most common rent reviews are indexation based on inflation or adjustment in accordance with the market price. If the lease is a lease of premises in the small-firm sector, parties may demand that the court specify the rent where it does not correspond to that of comparable local commercial premises: (i) at the expiry of the agreed term, where the contract applies for a fixed period; (ii) in all other cases, on expiry of the 5 years period after the last adjustment of the rent.

Leased premises usually require fitting-out by the tenant at its own cost although typically the landlord will contribute by allowing a rent-free period. The tenant will be responsible for reinstating the premises at the end of the lease.

The landlord will usually require collateral security, including a cash deposit of 6 to 12 months' rent and/or a bank or parent company guarantee.

Setting up a business in the Netherlands

Data Protection/Privacy

The main data protection rules in the Netherlands are the EU General Data Protection Directive (GDPR) and the GDPR Implementation Act. In addition to that, specific rules on spam, cookies and telemarketing are included in the Dutch Telecommunication Act.

Organisations processing personal data (which includes employee data, consumer data and business contact data) will need to comply with these data protection laws.

Organisations must ensure their use of personal data complies with the European data protection principles. These impose obligations of transparency, data security (including notification duties for data breaches) and data quality. The transfer of data out of the European Economic Area is restricted unless prescribed compliance measures are taken.

Intellectual Property

Business is about creating new and improved goods and services, about innovating, building on branding strategies and most of all about differentiating. Intellectual Property Rights are there to protect these valuable investments from being copied by others.

IP management is crucial for a business when acquiring and keeping a strong position on the market and is therefore an essential component in setting up a successful business. Even though in the Netherlands trade name rights may result from the use of a company name in the course of business and copyright may provide protection for certain works, one must consider which rights need to be registered to obtain sufficient protection.

Company names and brands can be registered as trademarks. This can be done on a Europe-wide basis at the EUIPO or for the Benelux at the Benelux Office for Intellectual Property.

Depending on the type of business, patents (for technical inventions) and designs rights could be considered as well.

Furthermore, the protection of trade secrets requires you to take the right precautionary measures to preserve the confidentiality of those trade secrets.

Business Model Design

Alongside legal challenges, whatever the nature of your international ambitions the planning process requires some key questions to be addressed:

- Is internationalisation a feasible option, and are you ready for it?
- What is your internationalisation strategy, and how will you prioritise which markets to target?
- What business model will be most effective for driving profitable growth?
- Will you require business partners, and how do you plan to find them?
- What will your penetration strategy be for your selected markets?
- How will you build the infrastructure and operating model required to support your move into the new markets?
- How will you execute the plan and implement the business model?

Wherever your starting point, our consultancy arm OXYGY can help you answer these questions and create a fit-for-purpose roadmap to guide your business through its internationalisation journey.

Contact Us

If you would like further information on setting up business in the Netherlands, please e-mail our Set up Desk at new.company@twobirds.com and we will contact you within 24 hours.

This summary gives general information only as of June 2022 and is not intended to give a comprehensive analysis. It should not be used as a substitute for legal or other professional advice, which should be obtained in specific circumstances.



Bird & Bird “could answer all our questions, even the very specific ones. This helped us a lot to progress our negotiations. The firm has a very thorough understanding of the Dutch energy market.”

Chambers Europe 2022, Netherlands



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