

Eversheds Sutherland's insights series: Corporate Alert – the Netherlands

Digital Incorporation of Dutch B.V.



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Executive summary

A new option for the **digital incorporation** of a Dutch B.V. is expected to become effective in the Netherlands in the summer of 2023. The new process (in addition to the already existing incorporation process) will constitute a fully online executed incorporation of a B.V.

Whereas an incorporation of a B.V. is currently only possible when a person (directly or by way of power of attorney) physically appears before a Dutch civil-law notary and signs the notarial deed of incorporation on physical notarial paper, it is now proposed that the execution of the notarial deed can also be effectuated digitally.

A newly designed online platform will be made available for the incorporator(s) and the Dutch civil law notary for meeting and digital execution of the deed of incorporation. The online incorporation platform is safeguarded by the highest possible standards for digital access to the platform as well as the digital identification of and digital signing by the parties.

The proposed legislation will furthermore provide for the option to execute the digital deed of incorporation (including the articles of association) in the **English language**. Any subsequent amendments to the articles of association may (based on current proposal) also be executed in the English language, provided the B.V. was digitally incorporated in the English language and the language of the articles of association has not been amended since.

The current (physical) incorporation process, in practice, regularly involves written powers of attorney granted to employees of the Dutch civil-law notary office (to avoid having to appear before the notary at the time of execution). This common practice can be continued for the digital process since the proposed legislation will also cater for the granting of a digital power of attorney.

The proposed legislation is expected to be adopted in the summer of 2023 and we will be monitoring any updates and/or changes closely.

Background

On 21 April 2022 a legislative proposal (the "**Proposal**") for online incorporation of Dutch limited liability companies (*besloten vennootschappen* or *B.V.'s*) was submitted to the Dutch House of Representatives (*Tweede Kamer*) in order to implement EU Directive 2019/1151 (the "**Directive**") amending EU Directive 2017/1132. Pursuant to the Directive, EU Member States should allow certain B.V.'s to be incorporated online, via a digitally executed notarial deed, by means of digital identification and digital signature.

Pursuant to the Proposal, the digital incorporation is reserved for:

- residents (natural or legal persons) of the European Union; and
- the incorporation of a Dutch private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid*) of which the shares will be paid up in cash (in kind payments on shares will not be available for digital incorporations).

The possibility to digitally incorporate a Dutch B.V. is in addition to the existing physical (paper) process and does not replace the current incorporation process.

The Proposal will have to pass both the House and the Senate (*Eerste Kamer*) before it is implemented into Dutch national legislation. Implementation is expected in the summer of 2023.

Online tool for digital incorporation

The Royal Dutch Association of Civil-law Notaries (KNB) has developed an online platform allowing a B.V. to be incorporated digitally without physical attendance of the parties concerned. The platform provides for a virtual meeting room accessible to the parties involved and the Dutch civil-law notary. The virtual meeting room has the purpose to (i) verify the identity of the parties involved, (ii) inform them, answer questions and explain the contents of the deed of incorporation and (iii) ensure the parties understand the consequences of the incorporation.

Execution in English

Dutch law currently states that the deed of incorporation containing the articles of association (*statuten*) has to be executed in the Dutch language. An unofficial or certified English translation of the deed is often provided. The Proposal will introduce the possibility of having the deed of incorporation executed in the English language only.

Any subsequent amendment to the English articles of association of a digitally incorporated B.V. may be executed in the English language as well. The Dutch government has recently amended the Proposal after parliamentary questions. The Proposal now states that any subsequent amendments to the articles of association may be executed in the English language provided the B.V. was digitally incorporated in the English language and the language of the articles of association has not been amended since. The amendment to the articles of association has to be executed by a physical notarial deed.

After its digital incorporation, the B.V. is registered with the Dutch Trade Register by the Dutch civil-law notary. The parties will receive an electronic certified copy of the deed of incorporation. Upon request, the parties may receive a printed copy.

Identification requirements

To meet the identification requirements, the parties need to:

- attend the virtual meeting room and identify themselves using a valid electronic IDentification (eIDAS) service with 'High' level qualification of assurance. In the Netherlands 'DigiD Hoog' serves as such valid eIDAS identification service; and
- share a scan copy of a valid identification card or passport using a secure QR-code provided by the online platform.

The Dutch civil-law notary may at any time request a hard copy of the identification card or passport or identification in person, if deemed necessary in order to continue with the execution of the deed.

The proposed director(s) or supervisory director(s) of the B.V. should furthermore declare whether he/she has been banned from management in any other EU Member State on grounds similar to the Dutch law grounds for imposing an administrative ban (such as, for example, in case a director was involved in the bankruptcy of a legal entity). If this is the case, the intended director or supervisory director cannot be appointed.

Incorporation by way of a power of attorney

The possibility to issue a power of attorney to (an employee of) the Dutch civil-law notary office will also be supported by the digital incorporation process. Such power of attorney will have to:

- be issued to an employee working directly under supervision of the involved civil-law notary; and
- be executed digitally, using the aforementioned online platform and applying the aforementioned identification procedure.


Key contacts

Should you have any questions please do not hesitate to contact us.



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