

# COVID-19 Topics

## How can we help you?



### *Transactions*

- Legislation has been introduced to allow for virtual shareholder meetings.
- Contract documentation should be reviewed to understand legal position.
- Disputes may arise where one party wants to complete a transaction and the other wants to put the brakes on, or where an earn-out depends on financial performance which has deteriorated.
- Banks and lenders may be willing to be flexible on covenants and defaults.



### *Force majeure*

- In case of (supply chain) problems (loss of demand, government measures, lack of supply of raw materials and semi-finished products) make an assessment on your legal position (rights, obligations and possible remedies to breach of contract). A proper understanding of your legal position under specific agreements and/or general terms and conditions is key.
- The party relying on force majeure is required to argue and prove that the failure in performance was caused by an event of force majeure. In the parliamentary history of Section 6:75 of the Dutch Civil Code, the legislator noted that the force majeure defence must only be allowed in extraordinary circumstances. Dutch courts have observed this guideline, ensuring that force majeure arguments have been allowed in a handful of cases only. The court assessing the force majeure arguments will have to consider all circumstances of the case and judge (i) which precautionary measures, given the circumstances, should normally have been taken in order to avoid the event causing damage, and (ii) whether in this specific case such (adequate) measures were in fact taken.
- Parties should report complaints timely and in writing and seek for dialogue to identify the optimal outcome for both parties taking into account the contractual risk allocation and remedies.
- Litigation should be the last resort, due to the suboptimal outcome for the parties (also due to the additional (transaction) costs), due to the breach in the commercial relationship and due to the current partial lock down of the court system in the Netherlands.



### *Financing*

- It is advisable to monitor the financial situation within your company more closely. Weekly updates of liquidity forecasts (and comparisons with actual results) should be made.
- Check all relevant contracts (financing documents, commercial and rent agreements) for possibilities to create financial space. This for example by invoking the possibility to delay payments, force majeure and unforeseen circumstances.
- Consider using existing credit (in full).
- The Dutch government has adopted various economic (support) measures. Check whether your company can apply for support.
- In addition, various Dutch banks have jointly adopted certain measures which can create more financial headroom for their clients. Consult your bank if required. Being well prepared (including a liquidity forecast, etc.) is essential when doing so.



### *How your business can weather the storm*

- We recommend that you perform a risk analysis and map out possible scenarios. If identified early enough, risks can be managed or - best case - averted.
- It is important to properly document every step of the decision-making process. Officers and supervisory directors alike are required by law to account for their decisions, it is advisable to supplement documentation with specialist advice, and minutes of meetings and adopted resolutions must be kept and recorded fastidiously.
- If necessary, draft a rescue plan considering the necessity of restructuring the companies, reorganizing staff composition, operational improvements, cash management, etc.
- In times of stormy financial weather, company officers need to be alert to the risk of personal liability.
- In some cases, suspension of payment or insolvency is a necessary evil in order to continue a viable enterprise.



### *Emergency bylaws and administrative enforcement*

- For each security region, there are different emergency bylaws re COVID-19 in place.
- The basic rules are the same everywhere, with regional differences.
- The basic rules are: hospitality industry closed doors, no public events or gatherings and groups of three or more people must keep a distance of at least 1.5m from each other.
- In force since 24 April, the temporary COVID-19 Act has given the chairs of the security regions administrative enforcement powers.
- An emergency Act is being drafted to convert the emergency bylaws into an official Act of Parliament.



### *Tenants/landlords*

- No emergency legislation implemented or being discussed.
- Tenants can possibly invoke statutory provision regarding “unforeseen circumstances”.
- Non-binding deal has been made by representative organizations of landlord, retailers and banks to allow for partial suspension of rent payments in case of fall in turnover of 20% or more. Rent relief to be discussed once the full impact of COVID-19 is clearer.
- Non-binding deal suggests tailor-made arrangement should be made for retailers with international operations or shareholders.
- Tenants not directly hit by COVID-19 measures but by general downturn in the economy less likely to be able to invoke unforeseen circumstances.



### *Construction projects*

- COVID-19 and force majeure: the question is whether performance is impeded by an absolute or relative impossibility.
- For reliance on unforeseen circumstances to be successful, the circumstances in question must not be provided for in the contract and they must be in the future.
- Government guidelines and protocols still subject to change.
- At what point do circumstances become cost-increasing circumstances?
- Parties should stay in contact and have awareness of mutual interests.



## *Tax*

- See if making use of the COVID-19 emergency measures, such as deferral of payment and / or a reduction in the provisional Dutch corporate income tax assessment, could be applied;
- Assess whether a COVID-19 tax reserve can be formed when determining the 2019 taxable profit Dutch corporate income tax purposes. This COVID-19 loss reserve can be formed in fully or partly of the COVID-19 loss expected in fiscal year 2020. Pay also attention to the realization of unrealized tax losses. (Such as valuing assets at a lower value or realizing latent exchange losses).
- If you are a director of a major shareholder, you may be able to enjoy a lower normative salary in 2020 if COVID-19 causes your company to decline in turnover. If this is the case than the normative salary could be less than EUR 46,000, 75% of the salary of the most comparable employment or the salary of the highest-earning employee.
- Assess to what extent the transfer pricing methods used are still correct. Companies that perform routine functions for related parties are often rewarded on the basis of an expense allowance plus a profit margin. The latter component could possibly be adapted.
- Physical presence of directors of your company in the Netherlands may be relevant to prevent unwanted foreign tax liability. Now that shareholders' meetings (at least temporarily) are taking place online, the tax consequences of a limited physical presence in the Netherlands of directors and / or shareholders of a company established in the Netherlands must be taken into account where relevant.



## *State aid*

- Not all government measures qualify as State aid.
- Not all government measures qualifying as State aid must be notified to the European Commission.
- The European Commission can approve State aid when it is compatible with the internal market.
- Aid to make good the damage caused by exceptional occurrences, as well as aid to remedy a serious disturbance in the economy of a Member State (albeit under the temporary framework), can be approved.
- If the notification contains all relevant information, the European Commission can decide quickly (measures have been approved within 24 hours after notification).



## *Public Procurement*

- Latest development: European Commission publishes Communication giving guidance on the public procurement framework related to COVID-19.
- Tender procedures still to be published: postponement is in many cases not necessary and requires an assessment of whether the ongoing contract can be prolonged (or not with a risk of unlawful extension). Include revision clauses.
- Ongoing procedures: analyze whether the (conditions of the) contract need to be amended as a result of COVID-19 (revision clauses) and do so (where possible) through the Q&A, extend deadlines where necessary.
- Postponement or cancelling procedures: in principle, postponement is possible without major consequences, this is not the case for cancellation. In the latter case, the contract should, in principle, be procured again containing a substantial modification.
- Ongoing contracts: modifications resulting from COVID-19 may constitute a substantial modification. It might be possible to rely on the justification ground 'unforeseen circumstances', but this should be published on TenderNed/TED.



### *Commercial Contracting (SCM)*

- Act reasonably and fairly towards your commercial relations and do not breach contractual obligations before making a risk assessment and an assessment of your legal position (rights, obligations and possible remedies for breach of contract). A proper understanding of your legal position under specific agreements and/or general terms and conditions is key.
- Identify possible (current and expected) supply chain problems (loss of demand, government measures, lack of supply of raw materials and semi-finished products).
- In case of supply chain problems, report complaints timely and in writing and the dialogue to identify the optimal outcome for both parties taking into account the contractual risk allocation and remedies.
- Litigation should be the last resort, due to the suboptimal outcome for the parties (also due to the additional (transaction) costs), damage for the commercial relationship and due to the current partial lock down of the court system.
- Anticipate for situation where parameters for full contractual performance will be restored. Incorporate lessons learned into your contract documentation and re-evaluate key issues like delivery conditions, dependency on contractual counterparts, flexibility in terms of duration and termination, vulnerability of logistics, and alternative markets and sources of supply.



### *Temporary Emergency Measure Job Security (NOW)*

- The NOW is essentially a subsidy scheme, under which employers can apply for an allowance to cover wage costs. The allowance will cover up to 90% of the wage sum, depending on the drop in turnover suffered by the employer as a result of the coronavirus outbreak. Eligibility for the allowance begins at a turnover loss of at least 20%.
- Applications for the allowance are valid for a three-month period, starting retroactively on 1 March 2020. If an application is granted, the Employee Insurance Agency (UWV) will provide an advance payment of 80% of the projected allowance. The actual turnover loss will be determined retroactively, whereupon the final allowance will be established. The UWV imposed the condition that the turnover loss must be caused by loss of activity due to extraordinary circumstances, such as the coronavirus outbreak.
- Employers applying for the NOW allowance will receive compensation for the total wage sum payable throughout the period during which the coronavirus outbreak causes a drop in the turnover during a three-month period, but may be extended by another three months if that proves necessary. The terms for the extension may differ from those applicable to the initial subsidy period.
- The amount of the wage cost allowance depends on the turnover loss and will be up to 90% of the total wage sum.
- Employers are expected to continue to pay the full wages of all employees, including flexible employees. In consequence, employees having applied for an NOW allowance are not allowed - in principle - to dismiss employees for economic reasons. Commitment to this policy will be a precondition for receiving the NOW allowance.



## Healthcare & Life Sciences

- Falling revenue and rising costs: those are the issues facing healthcare institutions. Although the government has set up schemes providing financial aid to get them through these testing times, uncertainty about the future remains. It is safe to predict that the application of the schemes will stir up debate. In addition, the schemes will require individual arrangements to be made within each institution. Healthcare providers active in the social domain will also need to make agreements with their municipal financiers.
- The pandemic has caused a monumental shift in administrative relations, with collaboration replacing - at least for now - free market processes, such as there were. What has not changed, though, is the responsibility individual institutions have. This raises questions as to what is best for the institution proper and what demands this pandemic places on healthcare as a whole.
- The pandemic has affected the provider's regular cycle of legally impacting moments. As a result, healthcare procurement will be phased differently; the date for adopting annual accounts has been postponed until 1 October 2020, for example.
- Changes in operations present challenges, such as availability of resources, adequate protection of care staff, safe communications through video conferencing tools, and the proper transfer of patients and their personal data.



## Competition

- Latest development: On 8 April 2020, the European Commission published a temporary framework on the application of the antitrust rules at the time of Corona.
- This [Communication](#) 'Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency mood from the current COVID-19' is aimed at companies that cooperate in so-called 'situations of urgency' that are related to the outbreak of the coronavirus.
- This Communication shows that under certain conditions, companies producing products currently in high demand are allowed to cooperate more extensively than is normally permitted under competition law.
- On 18 March 2020, the Netherlands Authority for Consumers and Markets (ACM) issued a similar [statement](#), namely that in these exceptional times competition law offers scope for companies to cooperate.
- The ACM warns, however, that companies should not abuse the current crisis situation to do things that they normally were not allowed to do.