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because we prepared

NEW PUBLICATION OF THE MINISTRY BONUS AND DIVIDEND PROHIBITION RELATED TO NOW: BE ALERT, TREAT WITH CAUTION!

Recently, the Ministry of Social Affairs and Employment (hereinafter: SZW) has published on its website its position on which companies, within a group, the so-called bonus and dividend prohibition applies, as well as the prohibition of share buy back schemes. Such prohibitions generally apply to applicants for NOW and/or (nonapplicant) group companies. This in response to questions from the The Royal Netherlands Institute of Chartered Accountants (hereinafter: NBA).

The NBA has published the possible consequences of the SZW's point of view in an overview. This overview is included as an attachment to this newsletter. The attachment also includes two examples.

Point of view SZW

Briefly stated, the recent position of the SZW implies that if a company files a request for NOW, and within this request the company makes use of the option to calculate the decrease of turnover on an operating company level, no bonus and/or dividend may be paid over 2020. This is also applicable for the repurchase of own shares and/or other actions which can be equated with repurchasing own shares. Therefore, if somewhere within the group dividend and/or bonus has been paid, this immediately leads to rejection of the NOW allowance and the obligation to repay the already received amounts. It is remarkable that the position of SZW also pertains to the aforementioned prohibited acts by group companies who have not applied for NOW themselves. Its position even pertains to group companies based outside the Netherlands and are not a NOW applicant.

We quote a part of SZW's position: *"The entire group of companies must then comply with this prohibition. Even by business units that do not apply themselves and the business units that do not have a social security wage in the Netherlands. The background of this is that when there is one operating company that needs NOW while the rest of the group is still economically doing well, the group itself should bear losses of that operating company (s) first and therefore from a social responsibility perspective does not distribute bonuses and/or dividends"*.

The question is whether SZW's position (as responsible executor of the NOW regulation) holds under the statutory NOW regulations. These regulations seem to offer some room for another, less stringent, interpretation. However as this is currently the SZW's point of view, it must be taken into account with every NOW application.



And now?

If you have filed a request for NOW and you are thinking (within the group) about paying bonuses and/or dividend over 2020, please contact immediately your RSM advisor before you formalize the decision.

This applies in a general terms if you have used the operating company approach, but also in case you have used or will use the NOW 2.0 and /or NOW 3.0 under the main rule (group arrangement).

More information?

Do you have questions or would you like to know the possible consequences of the above in view of your situation? Please contact your trusted RSM advisor or send an e-mail to one of our NOW experts within the coronavirus crisisteam: maatregelencorona@rsmnl.nl.

ATTACHMENT

Schematic overview NBA

The NBA has elaborated SZW's point of view in a table (NBA table). It should be noted that changes are still possible, partly on the basis of answers to questions submitted by the NBA to SZW and the interpretation of the statutory regulation. Based on the NBA table, the following can be concluded:

- First of all a clear distinction must be made as whether (obliged) use is made of the so-called group arrangement (main rule) or operating company approach (exception) if the group revenue's decrease is less than 20 percent.
- In addition, it is relevant which NOW regulation applies.

When applying the **group arrangement** (main rule), the prohibitions relate to:

Group arrangement (or individual applicant which is not part of a group)	NOW 1.0	NOW 2.0	NOW 3.0
Applicant NOW		X	X
Ultimate NL parent company / head of group or foreign parent company with Dutch SV wages, also applicant for NOW regulation		X	X
Every other NL company within the group or foreign company with Dutch SV wages, also applicant for NOW regulation		X	X
Every other NL company within the group or foreign company with Dutch SV wages, no applicant for NOW regulation			
Ultimate foreign parent company / head of group, no applicant for NOW regulation			
Every other foreign company within the group, no applicant for NOW regulation			

When applying the **operating company approach** (exception), the prohibitions for all schemes (NOW 1.0 / 2.0 / 3.0) apply for all of the above mentioned situations, according to the publication of the NBA. This can be summarized as follows:

Operating company approach	NOW 1.0	NOW 2.0	NOW 3.0
Applicant NOW	X	X	X
Ultimate NL parent company / head of group or foreign parent company with Dutch SV wages, also applicant for NOW regulation	X	X	X
Every other NL company within the group or foreign company with Dutch SV wages, also applicant for NOW regulation	X	X	X
Every other NL company within the group or foreign company with Dutch SV wages, no applicant for NOW regulation	X	X	X
Ultimate foreign parent company / head of group, no applicant for NOW regulation	X	X	X
Every other foreign company within the group, no applicant for NOW regulation	X	X	X



Examples

The NBA table provides insight into situations based on SZW's point of view, of which the question is whether this point of view is in accordance with the applicable regulations. We briefly describe two common situations.

Example 1

Holding company X holds shares in two operating companies. Operating company A operates in the catering industry en operating company B produces non-medical face masks. On a group level there is no decrease in turnover. Operating company A has stand alone a decrease in turnover of 70 percent and makes use of the exemption within the NOW regulation. Based on the application, operating company A receives a prepayment of € 500.000.

Logically the 2020 turnover of operating company B increases (producing non-medical face masks) and holding company X decides to distribute dividend from operating company B to holding company X. Holding company X uses this dividend to support operating company A in these difficult times.

Although no dividend is paid at the highest level (holding company X), the dividend distribution by operating company B to holding company X does have adverse consequences for the NOW, requested by operating company A. Despite the good intentions of the concern, the distribution of the dividend means that operating company A will have to repay the entire prepayments and that its application for the final determination of the NOW will be set at nil.

Example 2

The situation is similar to example 1, but holding company X has also, beside operating companies A and B, a holding company based outside the Netherlands which holds operating company Z (also based outside the Netherlands).

Over 2020, foreign operating company Z distributes dividend to the foreign holding company. Although the entire transaction takes place outside the Dutch borders, the distribution of dividend between the foreign companies has the same effect as mentioned under example 1. Briefly, in this case, operating company A will also have to repay the entire prepayments and its application for the final determination of the NOW will be set at nil.