

## The current NOW and the anticipated changes in the new/extended NOW (NOW 2.0).



# NOW

Temporary emergency bridging measure work retention

7 May 2020

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# I. The Dutch Temporary emergency bridging measure for the purpose of work retention (“NOW”)



## The NOW – an initial evaluation

On 1 April 2020, the **Dutch Temporary emergency bridging measure for the purpose of work retention** (“NOW”) was published. The UWV helpdesk has been open since 6 April 2020 for employers’ applications for wage costs subsidies under the NOW. By 30 April 2020, some 114,000 applications had been filed with the UWV.

The first weeks from the moment the NOW entered into force have passed: a good time to take stock and, in anticipation of a possible extension of the NOW (on which the government is expected to make a decision before 1 June 2020), to list the main developments.

## Changes from the current NOW

The NOW has been **changed** in three significant aspects. The first regards the introduction of a subsidy applicant’s automatic consent to public disclosure of the NOW data. In addition, the issues concerning the foreign bank account number have been solved. The third and greatest change pertains to the extension of the application of the NOW to groups.

The scheme providing these changes was published in the Government Gazette (*Staatscourant*) on 4 May 2020 and entered into effect on 5 May 2020. This means that from that moment on, employers were able to use the exception for groups with a less than 20% decline in turnover and that employers without a Dutch bank account number could apply for the NOW after all. As to the automatic consent, this also applies to applications made prior to the changes’ entry into effect.

## Automatic consent

Since state funds are used for the NOW, transparency about the use of those funds is of great importance. Automatic consent has been added to the NOW in the context of the administrative burden on the government expected to result from applications pursuant to the Dutch Government Information (Public Access) Act (*Wet openbaarheid van bestuur Wob*). Article 8 (9) NOW provides that by submitting a subsidy application, the applicant automatically consents to the possible public disclosure of the information provided to the UWV. According to the explanations to the NOW, this ‘automatic consent’ pertains only to the data most significant for the transparency regarding the spending of public means. According to the minister, those data will not reveal any company-sensitive information.

## Foreign bank account number

The NOW provided that employers applying for a subsidy based on the NOW could only do so if they had a Dutch bank account number. If they did not have this on time, they could not apply for the subsidy. In practice, it has turned out that in many cases, it was impossible to supply a Dutch bank account number within four weeks. As a result of the change, employers wishing to apply for a subsidy based on the NOW no longer need a Dutch bank account number.





## Application of the NOW to groups

### What change has been made in the NOW for groups?

From 5 May 2020, an individual operating company that is part of a group experiencing a less than 20% decline in turnover may apply for a wage cost subsidy based on its own decline in turnover. This is an exception to the NOW's principal rule that, if an employer is part of a group, the decline in turnover is determined at group level. For further information on that principal rule please consult the [e-book](#) of 7 April 2020. Prior to this change, individual operating companies of a group could not rely on the NOW if their group did not experience a decline in turnover of at least 20%. The government has **recognised** that a lack of solidarity in a group may result in harmful consequences for employment and as such, may prejudice the objectives of the NOW. Accordingly, an individual loss-making operating company experiencing at least a 20% decline in turnover, which is part of a group experiencing a lesser a decline in turnover or even making a profit, can file a NOW application.

### Can all individual operating companies file NOW applications based on their own decline in turnover?

No, the exception does not apply for individual operating companies in groups experiencing a decline in turnover of at least 20%: the principal rule remains unchanged. Accordingly, for groups with a decline in turnover of at least 20%, the point of departure remains unchanged: the decline in turnover at group level is considered, for the group composition as at 1 March 2020.

In addition, the operating companies in question must have their own corporate personality. Parts of legal entities, such as parts autonomously participating in economic transactions, business locations or business units, are not eligible.

### Can a group with a personnel company use this group exception?

No, in principle, an operating company that is part of a group using a personnel company cannot use this exception. A personnel company is the operating company that formally employs all the employees working for the different operating companies in the group. Operating companies that are part of a group with a personnel company must always take the decline in turnover at group level as their point of departure, therefore. After all, in a group with a personnel company, the (decline in) turnover and the wage costs come together at group level; accordingly, a decline in turnover of at least 20% must be suffered at that level.

A single exception to this is where a group has a personnel company for the management. That personnel company cannot apply for a wage cost subsidy of its own; however, individual operating companies in the group can apply for a subsidy, based on the group exception, provided that they satisfy the requirements.

**For groups with a decline in turnover of at least 20%, the point of departure remains unchanged: the decline in turnover at group level is considered, for the group composition as at 1 March 2020.**

### What additional conditions does the NOW set for employers wishing to use this group exception?

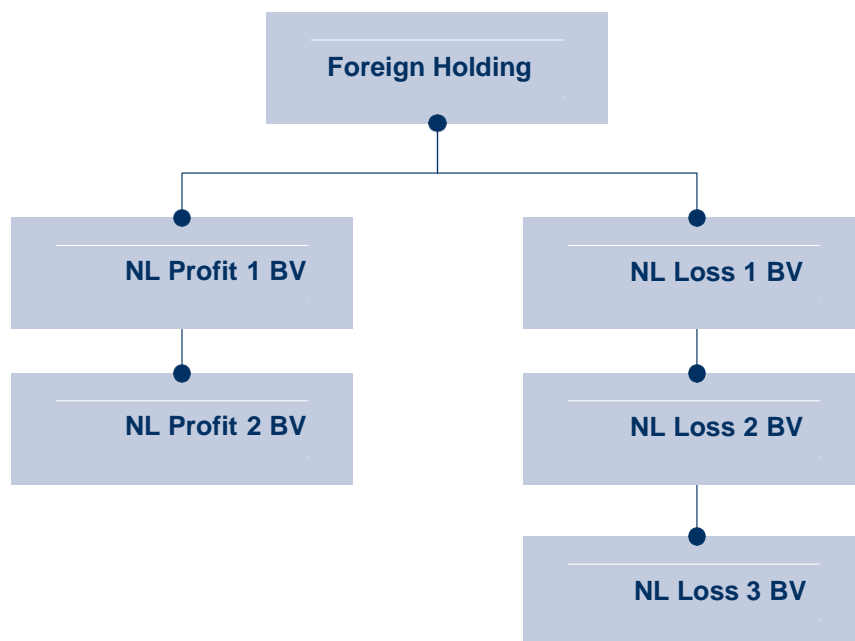
If an operating company uses this group exception, the entire group to which the operating company belongs is obliged to refrain from distributing dividends or paying bonuses for 2020. In addition, it is under an obligation not to repurchase any of its own shares up to and including the date of the AGM during which the 2020 financial statements are adopted. When filing a NOW application invoking this group exception, groups must declare having satisfied these obligations, in addition to filing the statement applicants must supply about to their compliance with the obligations in Article 13(a) and (c)-(j) NOW.

### What companies are targeted in the injunction of Article 6a NOW?

Article 6a NOW imposes on the group head as referred to in Article 2:406 (1) DCC, or on the parent company referred to in Article 2:24a DCC, the duty to declare that the additional obligations applicable to this exception will be observed. These entail is that no dividends will be distributed to shareholders, or bonuses paid to the Board of Management (MB) and the board of the group and the legal entity or company to which this article is applied; this includes profit shares. In view of the objective of this obligation, it may be assumed that the intended scope of the MB and the board is limited to all statutory directors of both parent and operating company. In addition, legal entities in the group should not repurchase any of their own shares up to and including the date of the AGM in 2021 at which the financial accounts for 2020 are adopted.

The question is how broadly the group concept of Article 6a NOW should be interpreted. The measure is multi-interpretable and not entirely clear in this respect. The explanations to the NOW provide that one should act in line with the (practice of the) annual audit where possible. This link is sought to ensure that the arrangement is robust and auditable; as such, the usual audit must be adhered to where possible. We deem defensible that this regards (the practice of) the financial statements audit in a general sense.

In any case, the has legislator introduced this injunction to make sure that, in cases where operating companies in a group use the NOW, no monies leave the group as a result of dividend distributions to shareholders and/or bonus payments to directors; this simple model shows how the group concept can be interpreted:



If, based on the group exception, **NL Loss 3 BV** files an application under the NOW, applying Article 6a (1) (d) NOW raises the following two questions:

1. Which legal entities should issue the statements mentioned in this article?
2. Which legal entities in the group cannot distribute dividends and/or pay bonuses to directors?

### Which legal entities should issue the statements mentioned in Article 6a (1)(d) NOW?

Article 6a (1)(d) NOW provides that only the group head in the meaning of Article 2:406 (1) DCC (**NL Loss 2 BV** and **NL Loss 1 BV**) or the parent company (**NL Loss 2 BV**) need submit a statement. However, the NOW's purport is that the monies (profits) from a profit-making branch should not leave the group. This is clear from, e.g., the letter to the Dutch house of representatives (*Kamerbrief*). In view of that purport, it seems obvious that beside the group head of the parent company, also the top holding (**Foreign Holding**) should issue a consolidated statement on behalf of all its subsidiaries (i.e. also **NL Profit 2 BV** and **NL Profit 1 BV**) that no dividends are distributed or bonuses paid that would cause monies to leave the group. In the example shown here, in any case statements would have to be issued by **NL Loss 2 BV**, **NL Loss 1 BV** and **Foreign Holding**, with **Foreign Holding** issuing a consolidated statement on behalf of all its subsidiaries.

### Which legal entities in the group should refrain from distributing dividends and/or paying bonuses to directors?

Article 6a (1) (d) NOW provides that *"over 2020, no dividends should be distributed to shareholders or bonuses paid to the Board of Management and the board of the group and the legal entity or company to which this Article is applied."*

It follows that in any case the legal entity or company using the NOW should not distribute dividends or pay bonuses. In addition, no dividends should be distributed to shareholders, or bonuses paid to the MB and board of the group. This means that no monies can be withdrawn from the group through dividend distribution or bonus payments. Dividend distributions inside the group, with the exception of the operating company using the NOW, should still be possible to prevent that for example also other companies end up in trouble.

In the example given above, therefore, it should still be possible for **Profit 2 BV** to distribute dividends to **Profit 1 BV** (with the monies remaining in the group). However, Profit 2 BV should not pay bonuses to its directors (causing monies to leave the group). The legal entities should also still be able to pay bonuses to their 'normal' employees.

For the sake of completeness, it should be noted that the NOW and the explanations thereto are not clear on this issue. As such, these expectations of how the NOW should be applied in this regard are mainly based on the NOW's purport.

**In any case the legal entity or company using the NOW should not distribute dividends or pay bonuses**

### In what way are the various employee representative bodies involved?

Pursuant to the NOW's principal rule, employers are obliged to inform the works council, the employee representative body or, for lack thereof, the employees on the subsidy granted. Based on that principal rule, the trade unions have no part to play. By contrast, an individual operating company using the group exception must reach an

agreement about work retention with the relevant trade unions. This only applies for operating companies with 20 or more employees.

The trade union concept should be interpreted in line with the concept 'associations of interested employees' in the meaning of the Dutch Collective Redundancy (Notification) Act (*Wet melding collectief ontslag*). Usually, this regards the trade unions with which the cba was agreed (either on company or sector level).

For operating companies with fewer than 20 employees, the agreement of an employee representative body suffices; there, the condition of an agreement with the trade unions does not apply, therefore.

### What safeguards are included in the NOW?

Initially, the NOW provided no exception for individual operating companies, since this might supposedly promote strategic conduct of groups. Strategic conduct is taken to mean *inter alia* the shifting of turnover of or staff with the purpose of becoming eligible for the NOW. To limit that risk entailed in the group exception, additional audit safeguards apply, which are yet to be defined in yet to be detailed audit standards. In rough outline, the following safeguards are concerned:

- Other operating companies can perform no contracts or projects to the detriment of the entity applying for a subsidy, in any case no contracts or projects which normally, the entity itself would perform.
- If, in the period over which the subsidy is received, employees of the subsidy-seeking entity carry out activities for another entity, in determining the subsidy the decline in turnover of the subsidy-seeking entity is reduced by the (theoretical) turnover generated by those activities. This results in a lesser decline in turnover for the operating company using the group exception.
- The transfer pricing system (a method to calculate mutual transactions) as used in the financial accounts for 2019 or the last adopted financial accounts is leading for the measurement period 2020, and should not be amended. This will partly prevent turnover shifts resulting from an additional increase or decrease of intergroup charges.
- Updated stocks of finished products are attributed to the turnover. If a group's production company produces goods that it normally sells directly to a sales company, but which in the context of the NOW it now retains to reduce turnover, turnover for the NOW will be calculated as though the goods were sold nevertheless, to reduce the risk of 'stock shifting'.

### Exception for companies largely dependent on seasonal labour?

In the past period, the government has also explored the option of adjusting the NOW for companies with seasonal turnover or wage cost patterns. However, the government **holds** that such a change is not possible because the NOW is a 'robust scheme', putting the fast support of companies first, whereby there is not always scope to consider business-specific features or include more detailed conditions. Addressing seasonal labour issues will require bespoke arrangements and a separate measure. At present, the government urgently seeks to find a solution. For a number of urgent cases, such as the ornamentals and cultural sectors, existing information or flows of subsidies have already been tied in with.

### What provisions are made for the ornamentals and comparable sectors?

On 15 April 2020 the Dutch minister for Agriculture, Nature and Food Quality (*Landbouw, Natuur en Voedselkwaliteit LNV*) **announced** additional measures for the agricultural sector. Companies (i) where production continues although hardly any turnover is generated; (ii) whose products have limited shelf life and will spoil, and for which there are no or limited alternative application options; and (iii) for which generally, there is a seasonal peak in the period March, April, May, in terms of production, staffing and turnover, can claim support from an emergency fund that is separate from the NOW. The companies in question, which in the period March, April, May 2020 as compared to the average turnover for the same period in the three preceding years 2017-2019 have incurred a hefty loss of turnover are eligible for financial compensation, to be able to continue to pay *inter alia* unavoidable seasonal wage costs. The point of departure is that the first 30% of turnover loss belong to the entrepreneurial risk and that the state compensates a considerable part of the remaining 70% of the loss.





## Extension of the NOW and anticipated additional conditions

In the period up to 31 May 2020, employers may apply for wage cost subsidies under the current NOW (“**NOW 1.0**”). Before 31 May 2020, the government will announce the conditions for the extension. The conditions for the NOW 1.0 are likely to apply in full to the extended NOW (“**NOW 2.0**”). In anticipation of this and based on recent parliamentary debates and motions carried, a discussion of the possible additional conditions follows below.

### Relationship with the NOW 1.0

At this time, it is still unknown whether the NOW 2.0 is really going to take effect as an extension of the NOW 1.0. Another three-month term will likely be concerned, from 1 June to 1 September 2020. It is also imaginable that also employers who did not apply for a subsidy based on the NOW 1.0 will be eligible to receive a subsidy under the NOW 2.0, with this being the first time they apply.

**The conditions for the NOW 1.0 are likely to apply in full to the NOW 2.0**

**Bonuses and dividends** On 22 April 2020, the Dutch house of representatives adopted a **motion** requesting the government where possible to include as a condition for the NOW 2.0 that employers using the NOW cannot distribute dividends, pay bonuses or repurchase their own shares during the current year and next year.

The scope of this injunction is not yet clear at this time but is likely to be the same as for the group exception in the NOW 1.0, which would mean, for example, that dividend distributions inside the group remain possible. Also here, monies cannot be ‘taken’ out of the group, however. In addition, it is easy to imagine that the injunction on distributing bonuses will only apply to companies receiving a specific subsidy amount. Such a threshold applies in Denmark, for example. This condition mirrors the NOW group exception for individual operating companies. **Prime Minister Rutte** has announced that this condition will be introduced for the NOW 2.0 as a matter of course.

### Retaining employees

The condition that a company claiming a subsidy under the NOW 2.0 cannot terminate any employment contracts was discussed in the parliamentary debate of 22 April 2020. Prime Minister Rutte took the view that such a hard condition is not desirable. He believes that also under the flag of the NOW, it should be possible to make a start with a restructuring process, because it is undesirable that, as a consequence of still employing all its employees, a company might collapse immediately upon termination of the NOW. It rather seems, therefore, that the condition of keeping the wage sum the same where possible, and the sanction on applying for leave to dismiss employees for commercial reasons (i.e. the penalty imposed by deducting from the subsidy 150% of the wage sum of employees in whose regard such leave has been requested from the UWV after all) will not be extended.

### Conditions for employees?

To date, all the conditions of the NOW 1.0 and the additional conditions of the NOW 2.0 target employers. For the additional conditions in the NOW 2.0, *inter alia* MPs have frequently referred to the measures in Denmark, in which the state subsidy for wage costs has already been linked to more conditions, one of which being that employees should take five days of holidays. At this point, it is unlikely that such conditions will also be made to apply to employees in the Netherlands, however,



### **Other possible conditions**

As part of said **motion** of 22 April 2020, the Dutch house of representatives asked the government to consider a threshold for the NOW 2.0, making a comparison with Denmark. According to those who tabled this motion, Denmark has set a threshold for SMEs; in any case, specific, stricter rules in Denmark (for example, the injunction on dividend distributions) only apply to companies receiving a specific sum in subsidies; the Danish threshold is 60 million Danish Crowns (around 8 million Euros).

During the parliamentary debate on 22 April 2020, Prime Minister Rutte also spoke of additional conditions in the area of employee training courses. In addition, in a postponed motion a request was tabled to take into account companies registered in a 'tax haven'. Again, a comparison can be made with Denmark, where state support is ruled out for companies registered in countries on the EU's list of 'non-cooperative tax jurisdictions'. Since to date, there have been only limited discussions about these other conditions, it is still uncertain which of them will be made to apply for the NOW 2.0.

## II. Support measures for the self-employed



### Extension of the Dutch Temporary Bridging Measure for Self-Employed Persons (“Tozo”)

On 22 April 2020, the Dutch Temporary Bridging Measure for Self-Employed Persons (“**Tozo**”) took effect. After it had entered into force, it turned out that specific groups of self-employed persons were at risk of falling between two stools through not being eligible for financial support under the Tozo as well as being unable to rely on other support measures. The government **announced** an investigation to see whether the category of entitled persons might be extended in specific areas, which led to an amendment of the measure that was **published** on 1 May 2020. The changes in question are discussed here; for a discussion of other significant elements of the Tozo, please see the **e-book** of 7 April 2020.

#### **What changes were made for self-employed persons in borderline situations?**

Before, a self-employed person could only claim financial support under the Tozo if they were living in the Netherlands, with a company established in the Netherlands. Borderline situations may occur, however: think of a self-employed person residing in the Netherlands but with a company in Germany or Belgium. The government has **recognised** that also these self-employed persons may need financial support and has extended the Tozo to include them.

#### **How about self-employed persons living in the Netherlands while having a company or independent profession outside the Netherlands?**

Under the amended Tozo, also self-employed persons living in the Netherlands, but dependent for their income on a company in another EU member state, in another country of the European Economic Area (EEA) or in Switzerland, can receive maintenance support if their income has fallen below the social minimum, on condition that their company was registered in the commercial register of the country in question on 17 March 2020. If said country does not impose the obligation to register a company, these self-employed persons should show in some other way that on 17 March 2020, they were working in their own company or an independent profession. Naturally, they must satisfy also the other conditions of the Tozo.

For financial support of their company, self-employed persons must continue to rely on the measures taken in the member state in the country of establishment.

#### **How about self-employed persons living outside the Netherlands but having a company or independent profession in the Netherlands?**

Under the amended Tozo, self-employed persons living in a different EU member state, in a different country in the EEA or in Switzerland may also receive support to provide them with working capital. They must be compulsorily covered by the national insurance schemes, paying contributions pursuant to

the Dutch Social Insurance (Funding) Act (*Wet financiering sociale verzekeringen*). Self-employed persons living abroad and claiming Tozo support must also satisfy the other conditions of the Tozo. They can apply to the municipality of Maastricht, which has been assigned to deal with support applications from abroad.

These self-employed persons must remain dependent on social support in their country of residence for maintenance support.

**Self-employed persons living abroad and claiming support under the Tozo must also satisfy the other conditions of the Tozo.**

### Can self-employed persons who have reached state pension age claim working capital under the Tozo?

To date, persons who had reached state pension age were excluded from the scope of application of the Tozo; accordingly, self-employed persons with a company of their own, who had reached state pension age, were not eligible for financial support of their company. Since the corona crisis should be considered an abnormal entrepreneurial risk also for this group, the government **deems** justified to support also those who have reached state pension age and are confronted with liquidity problems. Accordingly, the category of persons entitled to receive Tozo support has been extended to include self-employed persons who have reached state pension age: they are also eligible to receive working capital under the Tozo, again on condition that also the other conditions of the Tozo are satisfied.

Those who have reached state pension age and are still active as self-employed persons, but are facing a loss of income as a consequence of the corona crisis, must rely on their state pension and where necessary, on additional income support for people having reached state pension age. As such, they are not eligible for maintenance support under the Tozo.

### Effective date of the changes

The extension of the Tozo for self-employed persons living in the Netherlands who have a company in another EU member state, another EEA country or Switzerland, and the extension for those who have reached state pension age, take effect on 8 May 2020. The extension for self-employed persons living in another EU member state, another EEA country or Switzerland, who have a company in the Netherlands enters into force on 18 May 2020.

The number of months of entitlement to support under the Tozo remains unchanged, because the extensions are introduced with retroactive effect from 1 March 2020. This means that applications must be filed no later than 1 June 2020, also by self-employed persons wishing to use the extension.

### Other changes

#### What forms of income can be set off against the Tozo payments?

Under the Tozo, self-employed persons can be eligible for maintenance support, supplementing their income to the social minimum (€ 1,500 for people living together and € 1,050 for singles). The amount in support is decided in line with the self-employed person's anticipated income. The actual income enjoyed by the self-employed person, and as such, the additional support to which they were entitled, are determined in retrospect.

The government has **announced** that the Tozo will be amended in such a way that only income related to the period over which financial support under the Tozo is requested will be considered,

i.e., income in the period March, April and May 2020. For earned income, the period to which the income relates is the period in which the work in question was done. In other words, payment of an invoice received in March 2020, for work done in February 2020, is not included in determining the amount of Tozo support. This change is yet to be implemented in the Tozo.

**Applications must be filed no later than 1 June 2020, also by self-employed persons wishing to use the extension**



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