

# Second amendment to the **NOW** scheme



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## Introduction

On 1 May 2020, the Minister made a number of changes to the NOW scheme. These changes entered into force on 5 May 2020. An important change is that if a group of companies as a whole suffers a loss of less than 20% of turnover, but an individual operating company that forms part of such group suffers a loss of turnover of 20% or more, this operating company will – under strict conditions - be able to apply for aid under the NOW. This also applies to a part of the group (*groepsdeel*). To this end, a new Article 6a was introduced in the NOW, and a number of other articles have been changed. Below we will elaborate on a number of key concepts and the new Article 6a.

## Key concepts

### What is meant by a 'group' (Article 6 lid 4)?

The term 'group' (*concern*) contains the Dutch or foreign top holding company with all its subsidiaries. Usually the top holding company draws up the consolidated annual accounts in which these subsidiaries are included in the consolidation.

Private equity firms and funds may have a parent-subsidary relationship with the top holding companies of the portfolios in which they invest. In our view the loss of turnover should also in this situation be established at the level of the relevant top holding companies and not at the level of the private equity firm or the fund. This explanation is in line with the principles of the NOW for groups, namely:

- the link between turnover and wage bill is monitored at the level of the portfolio company;
- consistent with the auditing practice whereby the consolidated annual accounts are drawn up at the level of the top holding of each portfolio company;

- there is no possibility for strategic allocation between portfolio companies because they operate completely separately (usually in different sectors) and there are other minority shareholders and debt financiers per portfolio company.

This explanation has been submitted to the Ministry. We hope to receive a response soon.

### Which turnover is relevant for calculating the loss of turnover?

As a main rule, the calculation of the loss of turnover is based on the consolidated net turnover of the group (adjusted for the change in 'work in progress' as taken into account in the profit and loss account). The consolidated net turnover of the foreign entities without insured wages for national insurance contributions purposes in the Netherlands (SV wages) is deducted therefrom (carve-out). From the explanatory notes to the NOW we deduce that there is no adjustment of net turnover on intra-group transactions in the context of the carve-out.

## Addition to the NOW - the new Article 6a

### Loss of turnover of an operating company or part of a group (new Article 6a)

Under the main rule, entities with SV wages in the Netherlands only qualify for aid if the entire group suffers at least 20% loss of turnover (where the turnover is calculated in the manner explained above). On this point the NOW scheme has been supplemented.

If the entire group suffers less than 20% loss of turnover, an individual operating company (with SV wages in the Netherlands) that forms part of such group and suffers a loss of turnover of at least 20% can apply for aid based

on its loss of turnover. The loss of turnover is calculated on the basis of the net turnover of this operating company (adjusted with (i) changes in 'work in progress' (ii) changes in finished goods (i.e. inventory) and (iii) revenue arising from work performed by employees of the operating company in other entities in the group). In addition, the turnover should be calculated on the basis of the transfer pricing system used in the last annual accounts adopted before 1 March 2020.

This new rule also applies to a part of the group, consisting of a subholding company (which may also be an operating company) and all its subsidiaries, if this part of the group is confronted with a loss of turnover of at least 20%.

From the wording of Article 6a we conclude that the turnover of a part of the group is calculated on a consolidated basis (i.e. with elimination of the turnover from transactions between the entities within the part of the group). Article 6a does not contain a reference to the carve-out provision in Article 6(4). It would seem logical that the turnover of the part of the group is calculated in the same manner as the turnover of the group as a whole i.e. (a) with the deduction of the consolidated net turnover of the foreign entities in the Netherlands without SV wages forming part of the part of the group and (b) without adjustment of the net turnover on transactions between the entities within the part of the group in the context of the carve-out.

### Additional conditions for loss of turnover at the level of the operating company or part of the group

In addition to the obligations laid down in Article 13 of the NOW, the following additional conditions apply to the operating company that wishes to apply for aid under Article 6a of the NOW:

- the application for aid is made after the entry into force of Article 6a;
- the operating company is no personnel company (i.e. a company which mainly second employees to other group companies);
- before applying for aid, the operating company (the employer) must conclude an agreement on job retention. The operating company with 20 or more employees must have an agreement with the representative trade unions concerned or, in absence thereof, a representation of employees, such as the works council. In the case of an operating company

with less than 20 employees, an agreement with the representation of employees, such as the works council, will suffice;

- prior to the NOW application, the group's top holding company must declare that it will not make any distributions to shareholders and other third parties outside the group or payments of bonuses to the management of the top holding company or the operating company for 2020 and that the operating company will not repurchase any of its own shares until the date of the shareholders' meeting during which the annual accounts for the financial year 2020 are adopted. Bonuses include both profit-sharing and other bonus payments. Please note that if there is a statutory obligation to pay dividends or an obligation that exists on the basis of a settlement agreement with the Dutch tax authorities, this remains permitted;
- orders or projects of the operating company may not be transferred to other entities within the group.

These conditions shall apply *mutatis mutandis* to the part of the group for which the aid is requested.

### Determination of aid and audit opinion

If not all the conditions as laid down in Article 6a of the NOW are met, this will have consequences for the determination of the aid; the aid will be set at nil. An employer who desires the application of Article 6a must send the documents showing that the conditions of Article 6a have been met with the application for the determination of aid. The employer must also submit a statement of the auditor that provides that these conditions have been met.

The Minister's letter of 1 May 2020 explicitly states that it is (still) not clear what threshold will be used for the obligation to submit an auditor's report.

Furthermore we note that the amended NOW scheme also states that employers applying for aid under the NOW no longer need to have a Dutch bank account number.

## Contact

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