

Private Equity & COVID-19



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1. Introduction

As the outbreak of COVID-19 continues to develop, unprecedented issues are affecting the private equity industry. We have identified certain challenges both on a fund and portfolio company level, and measures that will be implemented by the Dutch government that can help you and your portfolio companies to survive the COVID-19 crisis.

2. Fund raising, investor relations and compliance

2.1 Fundraising

If you are currently fundraising, we suggest that you consider your current disclosure materials (e.g. PPM and risk factors set forth therein as well as asset descriptions) and assess whether and how they could be updated to reflect COVID-19 related risks and their impact on the valuations of current investments. This will mitigate potential prospectus liability exposure in the future.

2.2 Defaulting investors

The impact of COVID-19 on the global economy is likely to result in an increase of investors defaulting on capital calls. To be prepared for any such funding defaults, it is recommended to already now consider the options available under your fund documentation and how such funding shortage may best be mitigated (e.g. by attracting other sources of capital as is further set out below).

2.3 Valuation of portfolio companies

Invest Europe has received many questions as to how the consequences of the unprecedented crisis caused by the COVID-19 outbreak should be addressed in portfolio company valuations. In an effort to tackle valuation issues, the IPEV Board has developed special guidance ([click here](#)) on estimating fair value at 31 March 2020.

2.4 Regulatory

Please be aware that the Dutch Authority for the Financial Markets (**AFM**), among many other regulatory institutions, has implemented a work from home policy. This can cause a significant delay in their response and handling of (approval) procedures.

If you have obtained a full AIFMD license pursuant to section 2:65 of the Dutch Act on Financial Supervision (*Wet op het financieel toezicht*) you are required to have internal operational risk management procedures and an adequate business continuity policy aimed at ensuring, in the event of an interruption to your systems and procedures, the preservation of essential data and functions, and the maintenance of services and activities, or, where that is not possible, the timely recovery of such data and functions and the timely resumption of your services and activities. It is important that you (as licensed AIFMD manager) are ready to apply your operational risk management procedures and business continuity policy to ensure operational continuity in times of distress as a result of COVID-19.

Also, you should monitor the ability to continue to repay bridge financing by the AIF (if any) in order to identify, measure, manage and monitor at any time the risks to which the AIFs under management are exposed and to ensure compliance with the risk limits.

The AFM is closely monitoring the impact of COVID-19 on the financial markets and liquidity in the markets. [Click here](#) for the AFM newsflash on applicable information obligations for example in relation to investments in certain liquidity instruments or if determination of the NAV is postponed. The AFM also announced that it will suspend any outstanding information requests (subject to certain exemptions, for example in relation to requests regarding compliance with the Dutch Anti-Money Laundering and Anti-Terrorist Financing Act). [Click here](#) to read the AFM newsflash on this topic.

3. Liquidity & financing

3.1 Managing and monitoring liquidity

As a pressing matter, portfolio companies may have an increased need for liquidity. You and your portfolio companies have to be extra keen on managing liquidity and monitoring cash flow forecast. Additional financing lines may be required to cover any short term deficit, due to decrease of cash in-flow. Financing lines may become subject to cancellation or draw stops due to (potential) defaults which have occurred.

You need to analyse the possibilities to raise additional liquidity. For instance:

- a. is there a possibility to raise additional financing e.g. with the credit support of unencumbered assets or with factoring of receivables or additional equity;
- b. is there a possibility to sell assets (with potential lease back);
- c. is there a possibility to extend the payments term under the contracts or alternatively, can contracts be cancelled;
- d. is there a possibility to implement cost reducing measures;
- e. is there a possibility to postpone or cancel (scheduled) dividend payments;
- f. are wage aid programmes applicable;¹
- g. are tax aid deferral programmes applicable;² or
- h. is specific financing aid applicable.

3.2 Financing aid

As to financing aid by the Dutch state and Dutch banks, the most relevant programmes in place are the following:

- a. certain Dutch banks introduced extra breathing space for Dutch SMEs by postponing scheduled repayments with 6 months, although the application of the measure announced is restricted to credit not exceeding EUR 2.5 million. Multiple Dutch banks announced that they will consider to extent application of this measure, were ABN AMRO already applies such postponing measure to credit for a principal amount up to EUR 50 million;³ and
- b. the Dutch government implemented a substantial increase of its so-called GO-arrangements (*Garantie Ondernemingsfinanciering-regeling*). Under the GO-arrangements the Dutch state guarantees 50 per cent. of the credit lines (term loan and guarantee facilities) granted by banks. Only Dutch medium and large sized companies with substantial activities in the Netherlands are eligible for GO-arrangements, provided that such companies have a satisfactory outlook on profitability and continuity and have not made extraordinary capital distributions in the 12 months period prior to the date of application or granting of credit lines. GO-financing may not be applied towards

refinancing of existing financial indebtedness (nor entail an increase of existing commitments by any lender) and should directly serve the business of the relevant company. The minimum amount for GO-financing is EUR 1.5 million (and EUR 250,000 for a guarantee facility) and the maximum amount is EUR 150 million. For more information on this topic and a list of participating financial instructions [click here](#).

3.3 Third party financing

If you or any of your portfolio companies have committed credit facilities in place, drawing on such facilities is the most likely source of additional liquidity. You need to be aware of both (i) drawing conditions and (ii) the effect of drawings on any financial covenants as they determine whether and when to draw on the credit facilities. The conditions to borrowing may be impacted by the effects of COVID-19. The impact on customary financing arrangements will consist of: (i) breach of financial covenants, (ii) draw stops under (revolving) credit facilities and (iii) other potential events of default and misrepresentations.

3.3.1 Impact on financing arrangements

For most companies EBITDA will be negatively impacted which might result in a financial covenant breach. The calculation of the financial covenants needs to be closely analysed to check, for example, whether there is an ability to disregard, off-set or addback in this context (a) extraordinary, unusual or non-recurring losses, or (b) one-time costs or expenses in response to COVID-19, including costs to enable employees to work remotely or other costs related to alternate suppliers, products or materials.

If provided for in the documentation, you may be required or allowed to fund an equity cure.

Apart from financial covenants breaches, other breaches might result in an event of default and consequently trigger potential cancellation of the credit lines or a draw stop.

The following are typically imminent during a down turn:

- a. **MAC clauses** – Any event that has (or is reasonably likely to have) a material adverse effect on the

¹ As set out in more detail in paragraph 4.1.

² As set out in more detail in paragraph 5.

³ <https://www.nvb.nl/english/corona-banks-offer-smes-extra-breathing-space-six-months-postponement-of-repayments/>

business. The wording is always heavily negotiated so needs to be carefully analysed. Whether the COVID-19 pandemic will trigger a MAC will depend in any case on the nature of the business. For most portfolio companies it remains too soon to tell whether the impact of COVID-19 is material in a durational-significant manner. In addition, seldom a lender will rely on a MAC clause to trigger an event of default.

- b. Insolvency** – If the portfolio company becomes unable to pay its creditors or starts negotiations due to financial difficulties with its creditors, an event of default is usually triggered.
- c. Non-payment** – Unless there is a grace period, non payment under the financing agreements triggers an event of default.
- d. Cross-default** – Predominately relevant if several financing arrangements are in place. If the company defaults under one, it defaults under all.
- e. Audit-qualification** – A qualification by an auditor for instance in respect of the going concern status typically triggers an event of default.

However obvious, you should be cautious and monitor potential breaches under your financing arrangements.

3.3.2 Impact on credit markets

Dutch banks are currently considered constructive as proven by the announced measures, which includes temporary suspension of repayment obligations. Lenders will most likely review their portfolio to identify which credit may suffer long-term value degradation. Moreover, as credit markets have tightened, reference rates and margin spreads are going up.

3.3.3 Proactive approach

For a substantial part of (LMA type) financing agreements, financial covenants are tested on the last day of a calendar quarter and representations and warranties are to be repeated on that day. Depending on the type of business and current headroom in covenants probably a majority of borrowers will still be able to report compliance with their financial covenants for Q1. Impact will most likely materialize in Q2.

It is advisable that you monitor liquidity needs and the impact on financial covenants on a daily basis. We would also advise to document all decisions and considerations on a frequent (if needed, daily) basis.

Finally, you need to act proactively. As credit markets tighten it is expected that your lender will be sensitive for

well prepared requests for additional financing or waivers which are accompanied with sufficient details such as detailed cash flow forecasts and adjusted business plans. A lender deems it important that you can show that the additional credit lines (or waivers) are sufficient, that you have taken action (e.g. no dividend, costs reductions etc.) and that cash is not used other than in the ordinary course of business (no acquisitions or other investments).

3.4 Additional funding of portfolio companies by the fund

If it is not feasible to further utilise your committed debt financing at portfolio level, companies will need to consider other available sources of capital. Those other sources could include financing secured by unencumbered assets, second or other junior debt, mezzanine debt or equity. Please be aware that if new equity funding is required, Dutch statutory law does not require a shareholder to provide additional equity funding. However, such might be different due to existing contractual arrangements in respect of additional and emergency equity funding. Therefore, you should be familiar with the (emergency) funding provisions of the shareholders' agreements relating to your portfolio companies, fund documents and co-investment arrangements.

If additional funding will need to be provided to a portfolio company by the fund, we recommend to carefully assess which instrument is most effective. The following examples of instruments could, among others, be considered:

- a. Ordinary shares – ordinary shares are the equity shares of the company and usually bear voting rights. A consequence of the issuance of ordinary shares is that the other shareholders (most likely being management) will dilute in terms of economic entitlement and voting rights, if they will not use their pre-emption rights. In addition, you should be aware that such issuance will most likely also (negatively) impact the 'envy-ratio' that applies to the sweet equity investment of management and hence may send the wrong signal to management. Furthermore, the issuance of ordinary shares may lead to valuation discussions between the shareholders as one could argue that the value of the company as per the date of issuance does not represent the real value.
- b. (Cumulative) preferred shares – in order to avoid discussions on the current valuation of the company and (disproportionate) dilution of the other shareholders

(including management), it could be considered to issue preference shares. Preference shares have both equity and debt characteristics. Like ordinary shares, preference shares represent an ownership stake in a company, but often do not provide any voting rights. Preference shares have a priority claim over the company's assets and earnings, since these shares are more senior than ordinary shares, but more junior in terms of claim on assets. Furthermore, the preference shareholder is entitled to a fixed dividend that has preference over any dividend (in relation to cumulative preference shares, including such fixed dividend that was omitted in the past).

In the event short term - or bridge - financing is required, it could be considered to issue redeemable preference shares, on the condition that the company will repay the amount of share capital to the holders of this category of shares after the fixed period or even earlier at the discretion of the company. Preference shares can also be used to postpone the company valuation discussions by means of the issuance of so called convertible preference shares. Convertible preference shares are preference shares which are issued with the right or option to convert to ordinary shares in the future.

- c. Convertible loan (equity like debt) – a convertible loan is a debt instrument that can be converted into (ordinary) shares after a fixed period or upon certain conditions being met. The use of a convertible loan can help companies minimize negative investor sentiment that would surround equity issuance. In principle, a convertible loan ranks behind any equity instruments but can be structured fully subordinated to any third party debt. However, convertible loans can help provide investors with some security in the event of default and allow them to participate in the upside should the underlying company succeed.

In addition, we recommend to carefully look at the options to finance such additional funding requirements under the fund documents. For instance: can you still make follow-on investments under your fund documentation (e.g. is that permitted under the concentration limits and does the fund have remaining commitments available). Other possible alternatives are applying short-term financing by the fund (longer term financing may not be feasible due to regulatory restrictions) or applying recycling provisions allowing you to increase your investable amount. Depending on what is permitted under the

fund documentation and taking into account the liquidity position of your investors, it may even be advisable to see whether you can establish a co-investment program or “top-up fund” (in which certain investors - in short - increase their remaining commitments in a separate arrangement).

If funding issues may occur, it is advisable to reach out to your investors and/or advisory committee at an early stage, especially if the proposed solution would require approval or an amendment of the fund documentation. It goes without saying that it makes sense to investigate your possibilities to finance (be it through debt or equity) any additional funding needs of your portfolio companies at an early stage as it may be expected that liquidity demands will rise throughout the economy over time.

4. Operational risks for funds and portfolio companies

4.1 Employees of portfolio companies

If one of your portfolio companies expects a severe loss of turnover, the newly implemented regulation (*Tijdelijke Noodmaatregel Overbrugging voor Werkbehoud*) allowing the reduction of working hours for employees will be relevant. If the expected loss of turnover is at least 20% with effect per 1 March 2020 you can apply to the Uitvoeringsinstituut Werknemersverzekeringen (**UWV**) for a wage allowance (the **Wage Subsidy**) that compensates wage costs (up to a maximum of 90% of the wage costs, the actual percentage depending on the loss of turnover, whereas the max wage to be compensated is capped at a gross monthly salary of € 9,538 per employee) for a period of three months (the **Subsidy Period**).

The loss of turnover shall – in principle – be calculated at group level by comparing the expected turnover for the initial Subsidy Period with 25% of the 2019 turnover. Group for the purposes of this measure, includes both (i) the customary Dutch law definition of group as defined in section 2:24b of the Dutch Civil Code (*Burgerlijk Wetboek*; **DCC**) (entities and partnerships that are both in an economic unit (*economische eenheid*) and organizationally interconnected) and (ii) each parent-subsidiary relation as defined in section 2:24a DCC. If separated portfolio companies are held by the same (ultimate) parent company (which may be the fund or a holding company

of the fund), an argument may arise that such portfolio companies are deemed to form one group with such parent company; i.e. they will be under common control which only for the purposes of this measure may qualify as a group. From our point of view it seems not intended by the regulator for funds to consolidate the turnover of separated portfolio companies that are otherwise not in one economic unit nor organisationally interconnected. Nevertheless, we do recommend to carefully consider to what extent portfolio companies may form a group in order to determine the eligibility of your portfolio companies for the Wage Subsidy.

The Wage Subsidy is related to the expected loss of turnover. The following examples have been provided:

- a. loss of turnover 100% → Wage Subsidy: max 90% of the wage costs.
- b. loss of turnover 50% → Wage Subsidy: max 45% of the wage costs.
- c. loss of turnover 25% → Wage Subsidy: max 22.5% of the wage costs.

The UWV will provide an advance payment of 80% of the requested Wage Subsidy which enables you to continue the salary payments of employees, subject to your confirmation that no employees will be dismissed for economic reasons during the Subsidy Period.

[Click here](#) for more details on the Wage Subsidy. And [click here](#) for a Q&A covering practical questions as to what you can and cannot ask from your employees.

4.2 Breach of commercial contracts by portfolio companies

COVID-19 may have the effect that your portfolio companies cannot, or cannot timely, perform their contractual obligations. Contracting parties could argue that they are entitled to compensation due to a breach of the obligations under the contract. Question is whether your portfolio companies can be held liable for these costs?

Briefly stated, pursuant to Dutch law, a party cannot be held liable in case of ‘force majeure’ (see section 6:75 DCC). Force majeure is considered present if the breach is not the result of a fault of the party, nor the result of circumstances that are for the risk of this party. In general, the bar to successfully invoke ‘force majeure’

is high. In case the agreement itself contains a clause specifying in which case force majeure is present and what the consequences thereof are, the relevant provisions of the agreement will prevail. In case your contracting party claims compensation arguing that you have breached your contractual obligations, first check the agreement on force majeure clauses. Whether a plea of force majeure (based on the consequences of COVID-19 and the measures taken in respect thereof) will be successful highly depends on the circumstances concerned. It could for example be relevant whether there were other possibilities to perform, as in general a plea of force majeure fails if performance is possible, even against higher costs. If you foresee that you will not be able to perform obligations under a contract, entering into discussion with contractual counterparties to mitigate potential litigation risks is advisable.

4.3 Directors' duties: insolvency and liability

If you serve as a member of the board of one of your portfolio companies, directors' duties should be taken into account. The impact of COVID-19 may impose substantial risks on the continuity of the business. The room for such businesses to continue trading in their ordinary course may be limited and directors may bear the risk of being imposed to personal liability. A specific ground for liability arises when a director continues trading while the company is technically insolvent. In times of financial distress, directors should also exercise caution when making selective payments.

Unlike other jurisdictions no relaxation for directors is expected to be imposed by law in the Netherlands. However, courts will take all relevant circumstances into account so arguably the unprecedented circumstances a director encounters might give some degree of relief.

There is no statutory obligation to file for insolvency. For a more extensive description of relevant proceedings and grounds for director liability, [click here](#).

4.4 Completion of signed portfolio investments

If you have entered into a share purchase agreement (**SPA**) prior to the COVID-19 crisis and are awaiting completion and are wondering whether you can (partially) rescind such SPA due to the effects of the COVID-19 crisis, please

review the SPA carefully to check whether you have agreed upon any material adverse change (**MAC**) clauses. Whilst MAC-clauses are present in the vast majority of US deals, such provisions are less common in European SPA's. Sample studies show that in recent European transactions (which were entered into in a period where most sellers had a lot of bargaining power) in 20-30% of the SPA's a MAC is included). MAC provisions can be included in the form of a "stand-alone MAC-condition" (i.e. a condition precedent that since the date of the acquisition agreement no MAC (as such term may be defined in the agreement) has occurred). MAC provisions can also be catered for in the form of a "back-door MAC", i.e. a warranty that no MAC has occurred since the balance sheet date which is accompanied by a condition precedent that all warranties are true and correct on completion. In case MAC provisions are included these are mostly heavily negotiated and many MAC definitions also contain certain exceptions. These exceptions could include material adverse changes as a result of items generally affecting the industry of the target, force majeure, "acts of god", natural disasters and/or general downturn of financial markets or economic conditions. Sometimes a MAC exception favoring the seller only applies if the target is not disproportionately impacted as compared to its industry peers by the event purportedly. Therefore, if a MAC provision is included in your SPA it is important to carefully assess the relevant wording and the potential impact thereof. It is generally difficult to successfully enforce termination on the basis of a generally worded MAC condition. Case law on MAC provisions is scarce in the Netherlands. However, relevant case law is interpreted in such a manner that it is required that the relevant facts have a material negative impact on the business, financial condition, or results of operations of the business as a whole in a durational-significant manner. While the ramifications of COVID-19 continue to shake out, it remains too soon to tell whether the result will be a momentary downturn or whether it will have a long-term significant impact.

In case no MAC provision is included, you may still be able to rely on certain provisions of the DCC which provide statutory protection for a buyer in an SPA. If the object sold is not in conformity with the purchase contract, because it does not have the characteristics which the buyer was entitled to expect under the contract, the buyer may claim, amongst others, termination of the transaction.

However, these provisions of the DCC (i.e. Title 1 of Book 7 DCC) are mostly excluded by parties in an SPA.

The DCC (section 6:258 DCC) provides for another statutory protection: "upon the request of one of the parties, a court may modify the effects of a contract or it may set it aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form". The modification or setting aside may be given retroactive effect. This provision may not be contracted out of by the parties. In case the SPA does not contain a MAC condition, the question arises as to whether the COVID-19 pandemic could be used for successfully claiming termination or amendment on the basis of unforeseen circumstances. Case law in connection with unforeseen circumstances shows that in practice it will be a very difficult hurdle to successfully claim termination, or an amendment, of a contract on the basis of unforeseen circumstances.

5. Tax

5.1 Tax measures

The Dutch government has published significant tax measures. The following measures can be relevant for you and in particular your portfolio companies:

- a. Special deferral of payment obligations:
 - i. Companies facing liquidity issues as a result of COVID-19 can request three months deferral of tax payment obligations for, amongst others, the corporate income tax, personal income tax, wage tax and value added tax.
 - ii. The tax authorities specifically ask companies to refrain from a request until an assessment has been imposed. The request can be made [online](#) or by letter. In a letter reference should be made to COVID-19 as the reason for the payment inability. The first request of a company will apply to each tax assessment that will be imposed during the three months deferral period.
 - iii. The deferral will be granted automatically for three months; no specific information and/or expert statements shall be required. The tax authorities also allow companies to request for deferral beyond the three months period. This request can

- only be made by letter (not online). In case of a request for prolonged deferral the company should provide the tax authorities with evidence of the decline in turnover as a result of COVID-19. For tax liabilities in excess of EUR 20,000 the prolonged deferral will also be subject to an expert statement.
- iv. The tax authorities cannot exclude that regular late payment fines will be imposed through the operations of their IT systems. They ask companies to refrain from objecting against and/or the payment of such fines. The fines shall be reversed automatically.
 - v. Last but not least, companies must continue to file their tax returns in a timely manner.
- b. Revision of provisional 2020 corporate income tax or personal income tax assessments. If a provisional corporate income tax assessment (or personal income tax assessment) for 2020 has been imposed and a lower profit (or income) is expected as a result of COVID-19, a request can be submitted to amend the provisional assessment. More generally:
- i. We recommend companies to reassess their profit (estimations) for corporate income tax purposes, for example, by investigating possibilities to (i) form tax deductible provisions; or (ii) claim tax deductible write offs in relation to bad debtors, inventory or other assets.
 - ii. If a company realises a loss for corporate income tax purposes in 2020, it may consider to file its corporate income tax return as quickly as possible to qualify for a provisional carry back of the tax loss to 2019 (i.e. it is not (yet) possible to request for a provisional carry back before the tax return has been filed). Such a provisional carry back will be allowed for 80% of the tax loss.
- c. Temporary reduction of recovery interest (invorderingsrente) having regard to taxes that are due and payable from 4% to 0.01%. This reduction will apply as from 23 March 2020.
- d. A temporary reduction of tax interest (belastingrente) having regard to tax claims for which no (provisional) tax assessment has been imposed yet, from respectively 8% (corporate income tax) and 4% (other taxes) to 0.01%. This reduction will apply as from 1 June 2020, except for the personal income tax where the reduction will apply as from 1 July 2020.
- e. Temporary deferral of payment for energy tax and renewable energy surcharge for certain enterprises. The levy of energy tax and renewable energy surcharge will be temporarily deferred for with a usage of more than 10,000 kWh in electricity or 5,000 m3 in natural gas on a yearly basis. This measure is aimed at creating more liquidity for companies that use substantial amounts of electricity or gas, such as the floricultural industry. As energy tax and the surcharge are levied from the electricity sector (who on-charge it to the users), the government has reached an agreement with the electricity sector that they will not increase their tariffs with these tax related surcharges for users who receive a monthly invoice on the basis of their actual use for the period from April until June 2020.
- f. Relief of certain conditions for lower unemployment insurance contributions. As per 1 January 2020, lower unemployment insurance contributions are due by the employer for employees with a duly signed employment contract for an indefinite period. With regard to employees that were already employed for an indefinite period on 31 December 2019, but without a duly signed employment contract, the deadline to formalise the employment contract will be extended from 1 April 2020 to 1 July 2020. Additionally, the government will grant relief for employees with an employment contract for an indefinite period who will make more than 30% overtime due to COVID-19.

5.2 Further actions and guidance

We see and expect other governments taking comparable emergency tax measures. Such measures may help portfolio companies to survive these difficult times. It is recommended to make sure that the portfolio companies are aware of these measures and that they have adequate assistance to make the necessary applications with the competent authorities.

For practical questions we refer to our Q&A's in which many frequently asked questions are addressed regarding (i) [click here \(Dutch or English\)](#) for the tax relief measures, (ii) [click here](#) for VAT issues COVID-19 crisis and (iii) [click here](#) for our EUTA Special Edition in which we provide an up-to-date overview of the most important measures in our home countries (Luxembourg, Belgium, Switzerland and the Netherlands) as well as measures in other EU Member States that have been adopted by the European Commission.

6. Any further questions?

We can imagine that you have further questions regarding the impact of COVID-19 on your funds and portfolio companies. To further discuss any of the above or any legal requirements in this context generally, please contact any member of our dedicated private equity team listed below.

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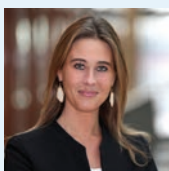
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