



Tips

for managing financial risks
as a result of COVID-19

Schaap Advocaten Notarissen
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Schaap Advocaten Notarissen | P.O. box 23052 | 3001 KB Rotterdam | Parklaan 17 | 3016 BA Rotterdam | +31 (0)10 277 03 00 | www.schaap.eu

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Introduction

This document has been drawn up to help your company and yourself in managing possible financial risks due to the corona crisis. Our specialists provide tips on how to prepare your company and yourself legally for a potentially difficult financial situation. Feel free to contact us if you have any questions.

Tax and Customs Administration

→ **Ask the Tax and Customs Administration for special deferment of payment**

Entrepreneurs may ask the Tax and Customs Administration for a special deferment of payment for the duration of three months (in principle). The application can be made for the payment of income tax, corporation tax, turnover tax and payroll taxes.

→ **Report any inability to pay to the Tax and Customs Administration in time**

It is still unclear how the Tax and Customs Administration deals with the existing rules for payment problems. To reduce the risk of directors' and officers' liability, it is wise to report any inability to pay in time. This applies to both tax assessments and the payment of pension contributions. 'In time' means within two weeks after the payment deadline.

Reporting an inability to pay can be done by completing a report form to be found on the Tax and Customs Administration's website ([link](#) (webpage in Dutch only)). Be aware that you must receive a written confirmation

from the Tax and Customs Administration stating that the notification of inability to pay is valid.

Sometimes, the Tax and Customs Administration wishes to receive further information first. Make sure that you provide this information, because a notification is only valid once the procedure for the notification has been completed and the Tax and Customs Administration has confirmed to you in writing that the notification is accepted.

Decision-making

→ **Record the decision-making carefully**

If financial difficulties arise, it is all the more important that the internal decision-making within the company is properly recorded. After all, it is possible that at a later stage (e.g. to a trustee in bankruptcy) you will have to justify why certain decisions have been made.

Of course, the more the decision has or can have more influence on the company's finances, the greater the need to properly record the decision-making. Examples are resolutions of the meeting of shareholders, such as resolutions to adopt the financial statements and to discharge the board of directors from liability in respect of its management (discharge).

Send those involved in the decision-making process a confirmation of the decision. Also ensure that a signed hardcopy is kept of the minutes and resolutions.

Directors' and officer's liability

→ **Beware of distributing dividends**

In financial dire straits, or if financial dire straits are to be expected (e.g. drop in turnover due to the corona crisis), caution should be exercised when distributing dividends. This applies both to the board of directors granting its approval and to the recipients of the distribution (often the shareholders). Furthermore, the advice to carefully record the decision-making also applies here.

The shareholders decide whether or not to distribute dividend on the basis of the adopted financial statements. Dividend distribution is possible to the extent that the shareholders' equity on the balance sheet exceeds the obligatory reserves (the 'balance sheet test').

Subsequently, dividend distribution may only take place if the board of directors grants its approval. The board of directors must not grant approval if it knows or should reasonably foresee that the company will be unable to keep up with its debt payments (the 'distribution test'). This concerns not only debts payable at the time of the dividend distribution, but also debts that become payable within a reasonable period thereafter (normally one year).

For the distribution test, the board of directors needs insight into the company's current and expected finances. The moment at which the dividend is actually paid is decisive for whether or not approval is granted. If the shareholders took the decision to pay a dividend before the corona crisis broke out, the board of directors must include the current situation –

therefore also any consequences of the corona crisis - in the distribution test.

In the event of financial uncertainty, the board of directors would be well advised to be cautious about granting approval for dividend distribution. If the company is no longer able to meet its financial obligations and the board of directors has wrongly granted its approval, it runs the risk of liability for the shortfall caused by the wrongly approved dividend distribution.

In addition to the board of directors, also the recipients (often the shareholders) of the wrongly distributed dividend may be required to repay the amount received.

→ **Be prepared for selective and unlawful payments**

Normally, it is up to the board of directors to decide when which creditor will be paid. This freedom is less so if the board of directors knows or should know that the company does not have sufficient resources to pay all creditors. In that situation, there must be a sufficient justification for the payments that the board of directors still makes. For example, a payment that is necessary in an attempt to save the company.

For some payments, a sufficient justification does not quickly exist. Examples are payments to the board of directors in so far as these exceed the management fees already in force, payments to shareholders and payments to affiliated companies. This also applies to (other) payments in which the board of directors has a personal interest. For example, payments to a creditor who has ties to the board of directors (a family

member, close friend, etc.). This type of payment is quickly regarded as unlawful and can lead to liability of the board of directors.

→ **Beware of entering into new obligations**

If the board of directors enters into a new obligation on behalf of the company when the board of directors knows or should know that the company is unable to fulfil this obligation and does not offer any recourse, this could result in the board of directors being liable to the relevant creditor.

→ **Investigate whether the accounting obligation has been met and whether the financial statements have been filed in time**

In short, the accounting obligation is about keeping the company's books in order so that the rights and obligations of the company can be derived from them at any time. There must therefore be a reasonable understanding of the company's financial position.

If there are arrears in the books regarding purchase or sales invoices, for example, or if it is not sufficiently clear to which agreements the company is currently a party, this may be the time to catch up.

The specific deadlines for determining and filing the financial statements differ per type of legal entity. In the case of limited liability companies, the point of attention is that if you are a director and sole shareholder, the period is short (10 months and 8 days after the end of the financial year).

If the trustee in bankruptcy establishes that the accounting obligation or the obligation to file the financial statements in time has not been met, it is assumed – under the law - that the director has not fulfilled his/her duties

properly. In that case, the trustee in bankruptcy will have the benefit of assumption in any proceedings concerning directors' and officer's liability.

Even if, due to circumstances, the financial statements have not yet been adopted by the shareholders, filing these unadopted financial statements is better than not filing them at all.

Financing

→ **Make an inventory of financing agreements: is there suretyship or joint and several liability?**

It often happens that, when entering into a financing agreement, a third party (a director in private or an affiliated company) has declared itself jointly and severally liable to a lender for the fulfilment of the obligations arising from the financing agreement. If the company to which the loan has been granted is no longer able to meet its obligations or goes bankrupt, the lender may call on this third party to pay.

It is therefore important, when considering, for example, filing for bankruptcy, to also consider the financial consequences this may have for third parties. Again, it is essential to have an overview of the agreements to which the company is a party.

Important registrations

→ **Check that your pledges are properly established/registered**

If you believe you have rights of pledge, check that all the formalities have been fulfilled. If these requirements have not been met, the right of pledge has not been established.

It often happens that a director in private or an affiliated party has granted a loan to the company. If it is agreed that the company must provide security, the lender could have a right of pledge on parts of the company's assets. The lender with a right of pledge has a preferential status in relation to other creditors in the event of bankruptcy. This requires, however, that the right of pledge has been properly established. The formalities for this differ per object.

Establishing a right of pledge on 'movable' property (such as inventory, equipment and stock) requires, for example, a notarial deed or a registration of a private deed (agreement between the parties) with the Tax and Customs Administration ([link](#) (webpage in Dutch only)). Please note that the Tax and Customs Administration does not keep a copy of the registered document, unlike in the case of a notarial deed.

In addition, there are specific requirements, including registration requirements, for certain matters. For example, a right of pledge on a domain name must be registered with the SIDN (Foundation for Internet Domain Registration in the Netherlands) and a pledge on a trademark or design right with the BOIP (Benelux Office for Intellectual Property).

→ **Investigate the consequences of bankruptcy for the company's intellectual property**

A bankruptcy can affect a company's intellectual property, such as trade names, domain names, websites and their texts and designs, trademark rights and patent rights.

If, for example, group companies make use of the intellectual property rights of the bankrupt company, they are not allowed to continue to do so (free of charge) after the bankruptcy. After all, the trustee in bankruptcy may sell assets of the company (which includes the intellectual property) to a third party. This can be prevented by, for example, placing the intellectual property in a separate holding company and by granting licences.

Wage costs

→ **Consider the Temporary Emergency Bridging Measure to Preserve Employment (NOW) (contribution to wage costs)**

Under this emergency measure, employers may claim an allowance for the payment of wage costs in the period from 1 March up to and including 31 May 2020. Check [this](#) website for information in English about the Temporary Emergency Bridging Measure to Preserve Employment (NOW).

→ **Consultation with employees if necessary**

If necessary, enter into consultation with employees to postpone or waive periodic increases or bonuses that have already been agreed. Make sure that agreements made are clearly and in writing.

Contracts

→ Review and discuss ongoing contracts

If the corona crisis affects ongoing contracts, first check what is agreed in the contract itself. If that does not provide clarity, it can be examined whether contracting parties can invoke 'force majeure', and when modification or dissolution can be claimed on the basis of changed circumstances.

Of course, you can also talk to your suppliers and customers about how the pain can be shared as fairly as possible. However, it is wise to clearly lay down the agreements about this, so that no discussion arises at a later stage.

To conclude

We are and remain available for questions about the possible consequences for your company. Feel free to contact us for any questions about the tips, but also for brainstorming (without any obligation). You can count on us.

Kind regards,
Schaap Advocaten Notarissen

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Feel free to contact:



Roel Slotboom
+31 (0)10 277 0465
slotboom@schaap.eu
lawyer



Martijn Janssen
+31 (0)10 277 0465
janssen@schaap.eu
lawyer



Jos Pennings
+31 (0)10 277 0311
pennings@schaap.eu
lawyer



Dennis Spek
+31(0)10 277 0311
spek@schaap.eu
lawyer