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| From | Meijburg Legal/Meijburg Tax |
| Copy to |  |
| Date | March 2020 |
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| **Subject:** | **Governance during the Coronavirus** |

Introduction

The rapid outbreak of the Coronavirus (COVID-19) presents an alarming health crisis that the world is grappling with. In addition to the human impact, there is also a significant commercial impact being felt globally and at country local level.

This memorandum addresses certain governance aspects that managing directors and supervisory directors of Dutch companies are currently facing in their daily tasks of managing or supervising such companies. We address some high level tax considerations that may be of importance to you and your company, which you will find in paragraph 4.

This memorandum is for general information purposes only, and is intended to provide a summary of practical legal solutions that can be considered in these challenging times. This memorandum does not purport to be comprehensive or to give legal or tax advice and applicable facts and circumstances should always be considered.

We are available to provide Dutch (corporate and tax) law advice resulting in and assistance with tailor-made solutions for managing directors and supervisory directors of Dutch companies that are confronted with governance issues that have been triggered by the Coronavirus.

The management board

The management board is responsible for the day-to-day management of the company. The management board should always act in the best interest of the company and the business connected with it. If the management board consists of more than one member, the managing directors are collectively responsible.

The Dutch Civil Code is silent on the convocation and process of management board meetings. This means that from a Dutch corporate law perspective the management board has flexibility and room to manoeuvre in organising its meetings. As a principle, the management board should meet at regular intervals and at least once per year. The management board may hold its meetings whenever and wherever it deems appropriate.

Meetings are typically held in a physical assembly of managing directors. Due to Corona measures, physical meetings may no longer be possible or preferred. The below paragraphs provide for alternative manners to, nevertheless, conclude formal decision-making. A combination of these alternatives is of course also possible.

For all described alternatives, it is important to verify the tax implications in the given case and whether the articles of association of the company, management/supervisory board regulations (if any) or any other (contractual) arrangements provide for (deviating) provisions that should be taken into account (e.g. limitation or restriction of meeting possibilities, quorum and qualified majorities).

**Cancellation or postponement of meetings**

The Dutch Civil Code is also silent on the cancellation or postponement of management board meetings that have already been convened. It is generally accepted that meetings can be cancelled or postponed provided that all managing directors are timely notified thereof, explaining the reasons and asking managing directors whether there are any matters that should be addressed in a different manner.

Cancellation or postponement notifications are ordinarily sent by the person(s) that initially convened the meeting.

**Tele-meetings**

Meetings of the management board may be held by means of an assembly of the managing directors in person at a formal meeting but can also be held differently; alternative options would be the use of online communication tools like conference calls, video conference calls (e.g. Skype, Google Hangout, Zoom, Microsoft Teams) or by any other means of communication. In most cases, such meetings are allowed provided that all managing directors participating in such meeting are able to communicate with each other simultaneously. Participation in a meeting held in any of the aforementioned manners shall in principle constitute presence at such meeting and will qualify for quorum requirements.

**Powers of attorney**

In absence of a managing director, either physically or through one of the alternatives mentioned above, managing directors may grant a power of attorney to another managing director in order to represent them at the relevant management board meeting. Such power of attorney is only granted to co-managing directors, in acknowledgement that only persons that are part of the board will be in a position to resolve on matters designated to the managing board of the company.

It is generally advised to lay down a meeting power of attorney in writing (this may include by e-mail) and to specify that such power of attorney is revocable, and limited to a specific meeting and/or specific topics. The power of attorney may include voting instructions or can be blank for that specific meeting. Continuous blank powers of attorney are considered not to be possible.

The Meijburg Legal team is more than happy to assist with more detailed advice on the scope of such powers of attorney, taking specific circumstances of the company into account.

**Allocation of tasks**

The general principle of collective responsibility of managing directors does not prevent the possibility for a management board to allocate specific management tasks to one or more of its members or to (designated) board committees in particular. It is even possible to grant such managing director(s) or (designated) board committees the power to adopt corporate resolutions on these tasks on behalf of the entire management board. However, the final responsibility for specific allocated tasks will, as part of the collective responsibility, remain with the management board as a whole. The management board can adopt resolutions to revoke the allocation of tasks or the powers of a (designated) board committee at all times.

The allocation of tasks needs careful alignment to the articles of association of the company as well as potential existing board rules. The expertise to run this exercise is very well represented within Meijburg Legal and will enable management boards to have the necessary flexibility when challenges, like the ones triggered by the Coronavirus, increase.

**Written resolutions**

Resolutions of the management board may also be adopted in writing. As a principle, the proposed resolution has to be submitted to all managing directors in office. All of the managing directors should agree with this manner of decision-making, which is evidenced by their written statements.

‘In writing’ can be a broad term and may include a countersigned, wet signature, piece of paper, but may also include an email or other electronic means of communication (e.g. electronic signatures, by using specially developed software programs), provided the relevant message is legible and reproducible.

**Conflict of interest**

It is important to note that, even in challenging times, a managing director may (still) not take part in the discussions and decision-making by the management board if that managing director has a direct or indirect personal interest on that topic that conflicts with the interests of the company or the business connected with it. Acting in deviation of this rule may lead to liability of the managing director concerned. It is therefore advised to contact Meijburg Legal, or your in-house legal counsel, to establish the correct approach if such a conflict of interest scenario occurs.

**Vacancies or inability to act**

The articles of association of a Dutch company will provide for a fall-back scenario in the event that seats on the management board become vacant or managing directors are no longer able to perform their task.

Typically, the articles of association will provide that the remaining managing directors are charged with the management of the company and that the management board will remain fully authorised. If all seats on the management board are vacant or if all managing directors, or the sole managing director, as the case may be, are unable to perform their duties, the articles of association will typically provide that the shareholder(s) may appoint one or more persons who will be temporarily entrusted with the management of the company.

If the company has a supervisory board, the articles of association will typically provide that the supervisory directors are entrusted with the management and that the supervisory board may appoint one or more persons that will be temporarily entrusted with the management of the company. If all seats of the supervisory board are vacant or no supervisory directors are able to perform their duties, the shareholder(s) shall typically be authorised to appoint one or more persons who will be temporarily entrusted with the management of the company.

It is important to check the articles of association to ensure that this mechanism is in play and provides the company with the necessary flexibility in times of crisis.

**Representation**

The management board as a whole (i.e. all managing directors) is authorised to represent and bind the company towards third parties. Often the articles of association also provide that one managing director acting solely, or two or more managing directors acting jointly, are authorised to represent the company.

If, due to the Corona measures or otherwise, the company has a need to grant more persons with the authority to represent the company, the management board can appoint one or more proxy-holders for that purpose. The management board may appoint any person (also third parties, not related to the management of the company), even a managing director that ordinarily would be jointly authorised to represent the company. This managing director then acts in capacity as proxy-holder instead of managing director. The responsibility for the legal act performed by the proxy-holder, will remain with the managing director(s) granting such powers of attorney. The power of attorney granted can be registered with the Dutch trade register.

The supervisory board

The supervisory board supervises the management board of the company and provides advice. Although beyond the scope of this memorandum, it is important to mention that the supervisory board needs information from the management board in order to fulfil its duties, especially in distressed situations. The supervisory board should actively ensure that it receives such information and is required to take action when necessary. Upon request, Meijburg Legal is happy to provide you with further guidance in respect of duties and liabilities of managing and supervisory directors.

The paragraphs describing cancellation and postponements of meetings, tele-meetings, powers of attorney, allocation of tasks, written resolutions, conflicts of interest and vacancies or inability to act apply *mutatis mutandis* to meetings of the supervisory board of a company.

The supervisory board and supervisory directors are in principle not allowed to represent and bind the company towards third parties. This may be different in the event that supervisory directors have been appointed as persons that temporarily manage the company pursuant to the absence or inability to act of managing directors (see paragraph 2.11). It is advised to contact Meijburg Legal if this scenario occurs.

Tax

The governance of companies may have an impact on tax matters too. First of all, governance may be relevant for determining the country of residence of a company for tax purposes. A distinction must be made between the place of residence under domestic law (see paragraph 4.4), and the place of residence for tax treaty purposes (see paragraph 4.5). Should a company cease to be resident in the Netherlands (or another jurisdiction) due to, for example governance changes, this may have an impact on corporate income tax (for example because of exit taxes or the non-eligibility to tax treaty benefits). It is therefore advised to consult with Meijburg Tax as well if governance is discussed and considered.

Due to changes in governance, it may be that tax substance requirements are no longer met. These substance criteria are relevant for several issues, such as dividend withholding tax exemptions and the international exchange of information (see paragraph 4.6). Finally, where an advance tax ruling is based upon facts relating to the governance, the change in governance could potentially cast doubt upon the validity of the ruling.

Typically, a temporary lack of substance in the Netherlands (or abroad) will not result in a deemed migration of the company. Should the lack of substance continue for a longer period, this is however something to address. Application of substance criteria is typically assessed on a continuous basis. Therefore, these issues should be closely monitored. Meijburg Tax is available to assist you in these matters.

**Domestic resident**

Pursuant to Dutch tax laws, a company incorporated under the laws of the Netherlands is deemed to be resident in the Netherlands. For other companies (not incorporated under the laws of the Netherlands), the place of residence is determined on the basis of a factual test. According to case law, a company is in principle considered to be resident in the Netherlands if the members of the management board take the relevant decisions (i.e. decisions as a senior executive, not day-to-day management) primarily in the Netherlands. This is not limited to management board meetings; all relevant decisions by the members of the management board are taken into account.

**Residence for tax treaty purposes**

Under tax treaties, a company is considered a resident of a Contracting State if it is liable to tax in that Contracting State on the basis of residence or any similar criterion. Should a company be a resident of both Contracting States under their domestic law, a so-called tie-breaker will typically resolve this conflict. Under the majority of tax treaties the tie is broken by the place of effective management of the company. ‘Effective management’ is decided on the basis of various factors, such as where the meetings of the management board are usually held, where the chief executive officer and other senior executives usually carry on their activities, where the senior day-to-day management of the company is carried on, where the company’s headquarters are located, et cetera. In case of persisting disagreement between the company (as tax payer) and the tax authorities, a court may decide on the treaty residence of the company. However, other (more modern) tax treaties refer to a mutual agreement procedure in order to break the tie. In that case, the competent authorities would be expected to take account of abovementioned factors and decide on the treaty residence. In some of these tax treaties such a decision may be subjected to arbitration.

**Substance criteria**

Substance criteria are relevant for the application of dividend withholding tax exemptions in cross-border situations. An exemption may be applicable if the parent company of a Dutch subsidiary is resident in another EU or EEA Member State or a Contracting State that has concluded a tax treaty with the Netherlands. If a list of substance criteria is not met, the holding may be considered to be part of a tax avoidance structure resulting in the denial of the exemption on the basis of abuse of law.

Also, if substance criteria are not met, this may result in the spontaneous exchange of information by the Dutch tax authorities with their foreign counterpart. For intra‑group service companies (Dutch corporate income taxpayers of which the activities primarily consist of *de jure* or *de facto* directly or indirectly receiving and paying interest, royalties, rental or lease terms within the group) there is a list of substance criteria, and if any criterion on this list is not met at any time in a year this should be reported to the Dutch tax authorities. On this basis, the Dutch tax authorities may decide to spontaneously exchange information on (the substance of) the company with foreign (tax) authorities. Such exchange of information may lead to questions (or even audits) from foreign tax authorities.

The abovementioned substance criteria include the criterion whether the management board resolutions of the tax payer are adopted in the state of residence. This may temporarily not be feasible because physical management board meetings may not be possible due to the Corona measures. Another typical criterion is that the taxpayer has immovable property located in the state of residence at its disposal for a period of at least 24 months, with an office in that immovable property, and that relevant activities are actually performed in that office. For similar reasons, this may not be possible either. In a letter to the Dutch Government, the Dutch Association of Tax Advisers have suggested to temporarily relax the monitoring of the place of residence and the substance criteria. No formal response to this suggestion is yet published.

Finally…

Meijburg Legal is able to assist you in analysing which of the abovementioned legal solutions works best for you and your company and we are happy to assist you in drafting, executing and performing the best governance solution for your business now and going forward.

Meijburg Tax is able to assist you with the assessment of the tax side of governance topics. It is important to consider tax related consequences, as tax consequences may be complex to reverse or even irreversible after a change in governance took place.

This memorandum briefly described practical and legal solutions to increase flexibility for the management board and supervisory board when tackling governance matters in times of crisis. If you are interested in governance aspects at shareholder meetings, or what the duties and liabilities of managing directors and supervisory directors are in financially distressed companies, please reach out to your Meijburg Legal contact person.

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