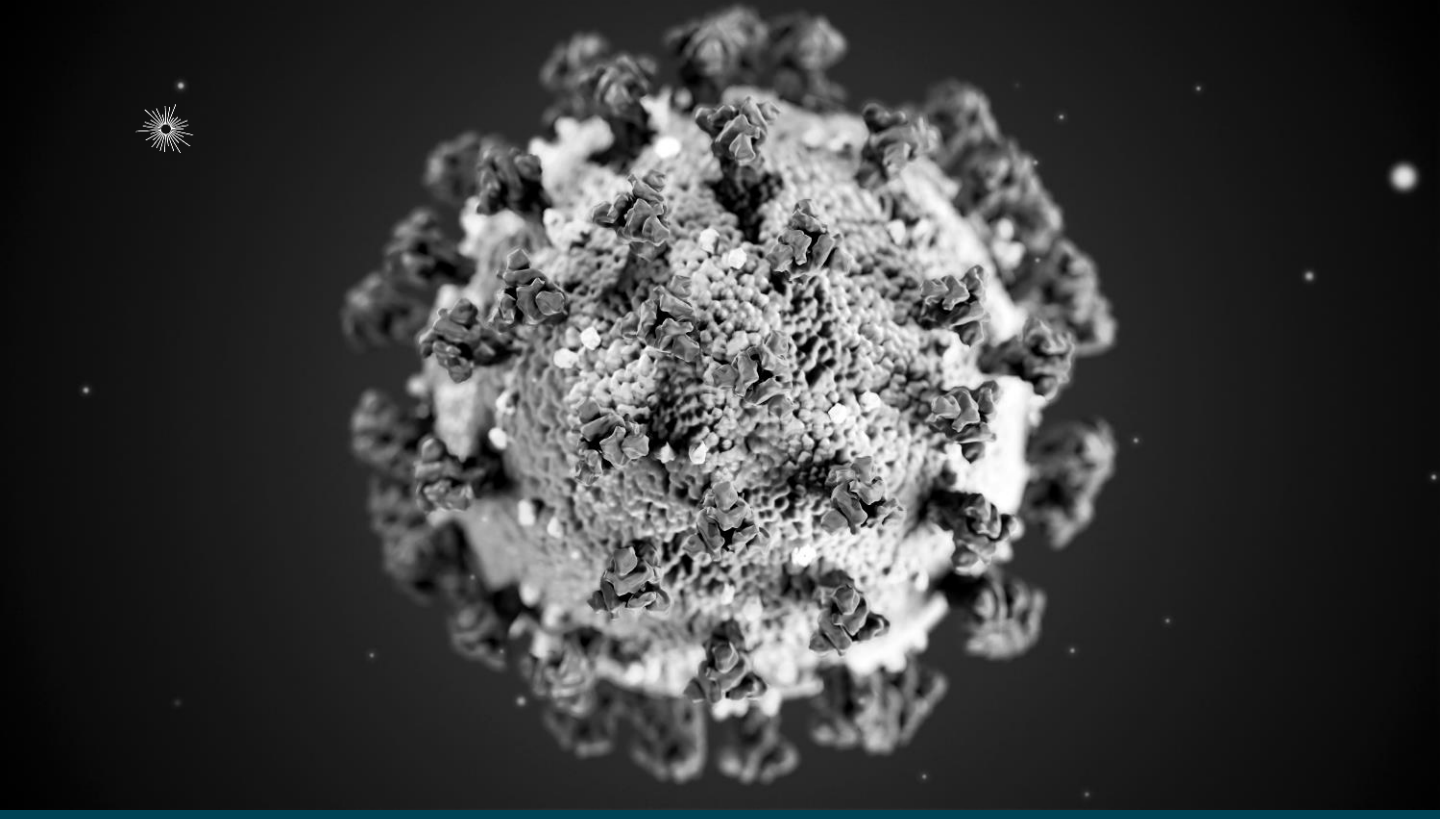

COVID-19 booklet

Collection of newsletters

Gorrissen Federspiel

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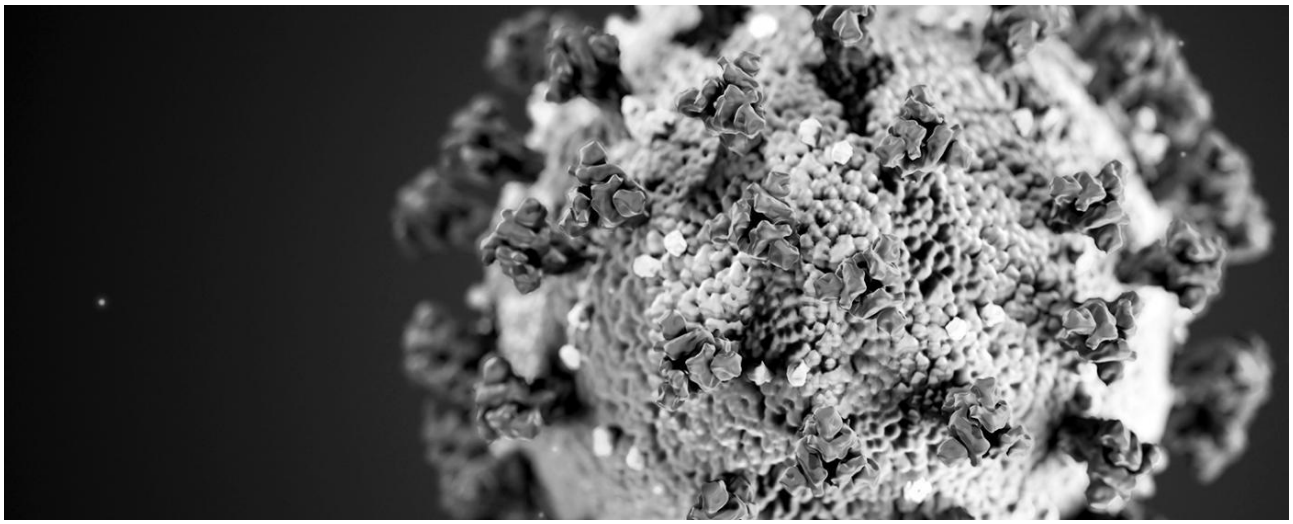


COVID-19: The Danish Epidemic Act

On 12 March 2020, the Danish Parliament adopted an amendment to the Danish Epidemic Act authorising the Minister for Health to take measures to combat the COVID-19 epidemic in Denmark. The Act may impose a large number of restrictions and orders on citizens, associations as well as private and public institutions etc. in respect of internal and external activities. The Act entered into force on 17 March 2020, and since then additional amendments imposing additional restrictions have been passed. The Act has been implemented in different ways in a number of executive orders.

This is an update to our newsletter of 13 March 2020. The newsletter was last updated on 3 April 2020 with a description of the latest bill passed on 31 March 2020 amending the Danish Epidemic Act.

The Government imposes radical restrictions on business and industry and on society in general

The Act forms the basis of the most comprehensive restrictions imposed by the Government to combat the COVID-19 epidemic in Denmark. In several amendments to the Act, the Government has authorised the Minister for Health to impose restrictions, prohibitions and orders that may follow the recommendations already issued by the Government. This applies to e.g. prohibitions against public assemblies, closing of stores, restaurants, etc. and restrictions on the use of public transport. In addition, the Government can issue orders to individuals and impose special restrictions on undertakings, e.g. transport companies, in order to secure the supply of goods and medical equipment. The Act authorises probably the most radical measures in peacetime and affects several constitutional rights, including the freedom of assembly and the right of ownership.

The rules relating to the COVID-19 have been imposed by amending the Danish Epidemic Act (Act no. 1026 of 1 October 2019) (cf. amendment act no. 208 of 17 March 2020). The Act is distinctly a framework act granting the Government, specifically the Minister for Health, the possibility of imposing special rules by issuing executive orders. These rules may subsequently enter into force immediately. It appears specifically that such rules will take precedence over all other national legislation (except the Constitution of Denmark). The rules may be very effective.

However, the restrictions must be temporary and proportional and may be restricted to specific areas based on specific assessments. As the Government operates based on a precautionary principle in respect of the spread of the disease, it is expected that the measures will be radical.

On 3 March 2020, the Government issued several executive orders imposing such restrictions, including (i) the executive order on the prohibition against large assemblies and the prohibition against access to and restrictions on certain facilities, etc. (no. 224 of 17 March 2020) (the "Prohibition against assembly order") (as amended) and (ii) the executive order on measures etc. in the transport sector (no. 220 of 17 March 2020) (the "Transport-related infection order") replacing a previous executive order. The executive orders entered into force at 10 am on 18 March 2020. The most significant provisions of these executive orders are described below.

The Danish Parliament has adopted an amendment to the Act (bill no. 158 of 31 March 2020), which is expected to enter into force shortly. The Act may grant the Government additional powers, including the prohibition against assemblies of less than 10 persons, if based on a recommendation from the health authorities.

The Government has stated that it expects to gradually reopen Denmark by relaxing some of the restrictions imposed under the Epidemic Act, if this is deemed safe in terms of health. This will take place as from 13 April 2020 at the earliest. If the restrictions are maintained, a number of the measures will have to be extended. This applies to, inter alia, the Prohibition against assembly order, which will otherwise expire on this date.

The Act is supplemented by a number of other Act and rules, which the Government has made use of. This is the case for, inter alia, the entry restrictions and the closing of the borders, which are initiated under the Schengen Agreement until initially 13 April 2020. Reference is made to our newsletter in this respect (link). The Government has prepared a guide for undertakings affected by the COVID-19 epidemic (www.virksomhedsguiden.dk) and a website containing news about COVID-19 (www.politi.dk/coronavirus-i-danmark). Also, we refer to our practice groups' newsletters and links on our COVID-19 website (link).

The most significant provisions from the business and industry's perspective:

Prohibition against access to business premises etc.

(latest update 3 April 2020)

The Government may prohibit or restrict access to facilities, which business owners (and other legal and physical persons) dispose of and to which there is general public access, cf. section 12b of the Act. According to the Government, this may be ferry terminals, airports, stations and meeting places such as fitness centres, restaurants, concert halls, tanning salons, etc. However, there are no specific restrictions in the legal framework and the Government may thus impose the restrictions on any type of facility. According to section 6 of the prohibition against assembly order, the following facilities must be closed to the public:

1. Places where food and beverages are served or where tobacco to be consumed at the point of sale is sold; however, selling food and beverages as takeaway is allowed.

2. Shopping centres, arcades and bazars; however, except convenience stores, pharmacies and specialist stores selling medical equipment.

3. Places where sports and recreational activities are practiced, including gambling halls, playlands and water parks, public swimming pools, fitness centres, theatres and cinemas; however, except for facilities used for necessary rehabilitation.

4. Tattoo and piercing salons, spas, personal care and beauty clinics, massage clinics, hairdressers and other facilities offering services that imply close physical contact with customers, and tanning salons.

The Government has announced that the latter implies, inter alia, that night clubs, discotheques, bars, pubs, water pipe cafés and similar establishments must remain closed.

With the latest amendment of the Act, the Government is granted powers to impose prohibitions against other institutions, including outdoor areas, cf. section 12b of the Act. This may for instance be outdoor areas in amusement parks, campgrounds, golf courses, etc. Such prohibitions have not yet been imposed.

Other restrictions on business premises etc.

(updated 3 April 2020)

The Government may pursuant to the Epidemic Act as an alternative to the above-mentioned prohibitions impose rules concerning maximum occupancy and other similar restrictions, e.g. allowing only a certain number of people compared to the capacity (e.g. allowing a maximum of one third of concert guests to be present), or impose requirements that in business facilities people should keep a certain distance. This may for instance be imposed in supermarkets, pharmacies and other critical businesses, where a prohibition is not desired, but other restrictions are necessary. In section 7 of the prohibition against assembly order, the Government has introduced a number of restrictions on all business owners with facilities with public access. These restrictions are thus not limited to certain types of facilities. The business owner must ensure that all these requirements are fulfilled:

1. Maximum 1 person per 4 square meters of floor area to which there is public access is allowed (the floor area is measured from wall to wall regardless of furniture and equipment, etc.).

2. The facilities must to the extent possible be organised in a manner that minimizes the risk of infection, including by making it possible for customers and visitors to keep a distance between each other.

3. In or near the facilities, information material must be posted to the effect that people, who have symptoms of COVID-19, should stay isolated at home, and on good hygiene and appropriate behaviour in the public space. The information material must comply with the Danish Health Authority's instructions (see link).

4. It must be ensured that all employees comply with the Health Authority's recommendations on good hygiene and appropriate behaviour (see link).

5. To the extent possible, water and soap or hand sanitizers must be available to customers and visitors.

6. Employees must use gloves when selling non-packaged foods.

If undertakings do not comply with the above-mentioned restrictions, or if there is no prospect of this happening, the police may order the facility to close for a specific period, cf. section 8 of the Prohibition against assembly order.

Corresponding rules on maximum occupancy and/or requirements for distance may be imposed in respect of social and cultural institutions and other public facilities.

Restrictions on assembly

(latest update 3 April 2020)

The Government wishes to avoid large assemblies that imply a large risk of spread of the disease. Therefore, the Government obtains the possibility of prohibiting the organization of and participation in large assemblies, arrangements, events, etc., cf. section 6(1) of the Act. This may include indoor as well as outdoor and public as well as private assemblies (however, except events in private residences). This may be any type of event, e.g. concerts, sports events, parties, general meetings and meetings in companies or associations.

The Prohibition against assembly order does not cover general presence in the workplace, i.e. presence that is natural or necessary for performing the work in question. The prohibition may, however, include assemblies at the workplace, e.g. joint meetings. This also renders it impossible to hold physical general meetings. Reference is made to our newsletter in this respect (link).

The Government originally announced mid-March 2020 that the limit for assemblies was 100 persons. Furthermore, it appeared that the limit could be increased or lowered depending on what was deemed necessary.

Now, there is a prohibition against organizing or participating in indoor and outdoor events, arrangements, activities etc. with more than 10 participants, cf. section 1 of the prohibition against assembly order. However, this does not apply to events etc. in private residences. The police may discretionarily impose prohibitions against the assembly of more than 10 people in other publicly accessible places; cf. section 2 of the prohibition against assembly order. The police must exercise this discretion based on the Danish Health Authority's general recommendations in respect of the risk of infection.

With the latest amendment of the Act, the Government may prohibit assemblies of less than 10 persons. However, this requires that this is based on the health authorities' recommendations, and only if less radical measures are deemed insufficient, cf. section 6(1), third sentence, of the Act. The memorandum to the bill presupposes that the prohibition will not apply to assemblies of people in the same residence or close relatives.

Closing off areas and prohibition against visiting certain places

(latest update 3 April 2020)

The Government obtains the possibility of closing off specific areas that are assessed to carry a special risk of infection, including in order to avoid spread to other areas, cf. section 7 of the Act. This may at the same time imply a complete prohibition against assemblies within the closed off area.

In addition, the police obtains the possibility of entirely prohibiting visits to certain places, to which the public normally has access due to the risk of spread of the disease. This applies to e.g. squares, parks, roads, beaches, amusement parks, railway stations, airports, shops and shipping centres for a specific period, cf.

section 6(1) of the Act. The prohibition will be a prohibition to visit, but not a curfew, as people are still allowed to use roads and e.g. walk through a park.

Measures against citizens and private individuals and the assistance of undertakings

Under the act, the Government can instruct anybody infected with COVID-19 or anybody presumed to be infected, to be examined by a health official, to submit to hospitalization or submit to isolation in a suitable facility. The Government may also initiate compulsory treatment. However, the Government cannot break into residences without a court order considering the constitutional protection of the inviolability of the home, section 72 of the Constitution of Denmark.

The Government has announced that initially the police and security firms that are appointed will manage this task. However, this also applies to private players, including small transporters and other undertakings. It appears from the act that private players may use force, including physical retention and the use of handcuffs if necessary. It is presumed that such assistance only takes place if specifically required.

The Government may prohibit infected persons from using public transport, cf. section 11(3) of the Act. This also applies to persons, who may be infected (based on e.g. obvious symptoms). This also means that force may be used on passengers, who do not cooperate. It is recommended that transporters contact the authorities in order to clarify, how to handle potentially infected passengers.

Prohibition against access to ports, including cruise ships, and against exiting airports

(updated 19 March 2020)

The Danish Minister of Health may prohibit access to means of transport, prevent disembarking and lay down restrictions on maximum occupancy, cf. section 12a of the Act. This could be, for instance, a prohibition against taking more passengers than one fourth of the usual capacity or no more passengers than there are seats.

The rules may be applied in respect of trains, buses, light rail, metro, airplanes and ferries. The rules cover public as well as private players.

The Government has also announced that this may translate into a general prohibition against disembarking from all ships, including cruise ships, in all Danish ports, if it is assessed that this is necessary in order to prevent the spread of the disease.

If during a ship journey it is established that somebody on board is infected, the transporter must upon arrival ensure that no passengers come into contact with persons ashore (“intercourse”), before the authorities allow it, cf. section 3(1) and section 4 of the Transport-related infection order. In respect of aircraft, crew and passengers are not allowed to leave the airport until a special permission is granted, cf. sections 6 and 7.

Duty of notification for undertakings and private individuals

(added on 3 April 2020)

The health authorities may with effect as of 4 April 2020 impose on undertakings to submit health information in order to prevent the spread of the disease, cf. executive order no. 347 of 30 March 2020, cf. section 1. It solely appears that the information must be "relevant" and it is therefore not specifically stated in the executive order, which information it specifically refers to. Physical persons may be subjected to the same orders in respect of information about the person's previous whereabouts at home and abroad, cf. section 2 of the executive order. The processing of personal data is subject to the General Data Protection Regulation (GDPR).

Disclosure of passenger information and transporters' duty of notification

(updated 3 April 2020)

The Government may demand that passenger information be disclosed by the transporter, cf. section 13(1) of the Act. In principle, this applies to all transport types, including aircraft, ships, trains and buses.

It may be considered adding in relation to the general data protection rules that information can be disclosed to authorities for this purpose.

Transporters may additionally be instructed to notify the authorities on the health conditions on board ships and aircraft, cf. section 13(2) of the Act. This must initially take place upon arrival at the destination. This requirement was imposed in sections 3 and 5 of the Transport-related infection order.

As for ships, notification must be provided by the shipmaster or the ship's doctor, if any. The shipmaster/ship's doctor must also answer all questions from the authorities, cf. section 3(2). The Danish Maritime Authority has stated that in the event of sickness among the crew, Radio Medical Danmark, which offers medical advice, should be via www.radio-medical.dk. As for aircraft, the pilot must initially inform air traffic service prior to landing, cf. section 6 of the executive order.

Measures to secure the supply of goods and medical equipment

(updated 3 April 2020)

The Government may issue specific rules to secure the supply of goods, cf. section 12f of the Act. This may include expropriation of important goods that private players dispose of. In the event of expropriation, the private player must be paid full compensation under section 73 of the Constitution of Denmark. The Government has issued separate executive orders relating to medical equipment, including export bans (e.g.

executive order no. 277 of 25 March 2020 on the supply of disinfectants). In addition, the EU has imposed restrictions on the export of medical equipment from the EU. Reference is made to our newsletter in this respect (link).

The Minister for Transport has (independently of the Danish Epidemic Act) taken certain emergency measures to ensure the supply of goods by land transport, including by relaxing training requirements and resting time rules, cf. press releases of 13 March 2020 (see link) and 22 March 2020 (see link). Some of these requirements are specified in the executive order on the temporary lapse of the prohibition against lending out drivers etc. (executive order no. 222 of 17 March 2020 (as amended).

Suspension of obligations towards the authorities

(latest update 3 April 2020)

The Government contemplates that private players may be exempted from certain obligations towards public authorities, cf. section 12e of the Act, and that public authorities may be exempted from obligations towards private players, cf. section 12d of the Act. This will apply to obligations that will be impossible or excessively difficult to fulfil during the epidemic.

So far, the Government has issued, among others, executive order on the suspension of obligations towards public authorities in the area of the Ministry of Industry, Business and Financial Affairs (no. 220 of 17 March 2020) and executive order on obligations of the public authorities and private individuals' rights towards public authorities in the area of the Ministry of Industry, Business and Financial Affairs etc. (no. 225 of 17 March 2020). For instance, the Government has extended the deadline for holding general meetings and submitting annual reports, cf. our newsletter in this respect (link).

However, the Government has specified that in any event this does not apply to obligations, which private players have towards public authorities or other private players under agreements. It depends on the agreements to which extent the parties can be exempted from fulfilling agreements due to the epidemic. As for the possibility of being exempted from fulfilling agreements due to COVID-19, we refer to our newsletter on force majeure (link).

The necessity criteria and the right to complain

(updated 3 April 2020)

The Government has announced that it is for the Minister of Health under the ministerial responsibility to assess whether he is authorised to issue the specific rules necessary. The issue is ultimately subject to judicial review, so that businesses may complain of any unnecessary or disproportional measures. However, it is contemplated that businesses to a great extent must follow the Government's instructions, so that the Government is responsible for the steps actually being necessary. The Government will later lay down special rules on the right to complain, cf. section 3(1) of the Act.

Compensation of loss due to restrictions

(latest update 3 April 2020)

In the amended act, section 27 of the Danish Epidemic Act is repealed, which granted compensation to businesses etc. by the initiation of legal remedies under the Danish Epidemic Act. The Government justifies this by the Government not believing that they would be able to assess the economic effects of the previous provisions, if they were to be activated. Instead, the Government has announced that it will prepare special compensation schemes and other bailout packages in cooperation with business and industry in order to ensure "reasonable compensation" for the consequences of the measures.

The Government has introduced a number of schemes to support trade and industry in the form of a compensation scheme for wages and salaries, a compensation scheme to cover fixed costs of undertakings and special guarantee schemes under the Danish Fund for Industrial Growth (Vækstfonden). In this respect, the Government has introduced industry-specific schemes covering, inter alia, organizers of large events and the media. For businesses, it is important to ensure documentation, to follow procedures and to apply within the deadlines. We refer to our newsletter in this respect, which will be updated on a current basis (link).

The Government's bailout packages to a great extent solely cover costs, not lost earnings. It is therefore important that undertakings are entitled to "full compensation", if the measures amount to expropriation under section 73 of the Constitution of Denmark. Initially, this may imply claims for compensation of lost net profits. However, in respect of most undertakings this will not be the case, if the measures are deemed to be general and not specific, which speaks in favour of this being a compensation free regulation. However, the measures may be so radical that for some undertakings they may be deemed as expropriation, which is a form of *de facto* surrender. The Government has indicated that this may be the case, if a prohibition is imposed on the public's access to the premises of business owners.

We therefore recommend that businesses – depending on the compensation, which the Government will grant – consider whether the measures may amount to expropriation, so that they may advance compensation claims against the State.

Coercive measures and punishment

(latest update 3 April 2020)

The police and the authorities obtain extended access to taking coercive measures without a court order in order to ensure compliance with the Act, cf. section 6(4) of the Act. This applies, inter alia, in respect of measures against assemblies, cf. section 4 of the Prohibition against assembly order. However, the Government revoked the proposed possibility of taking coercive measures in residences without a court order, considering section 72 of the Constitution of Denmark on the inviolability of the home. Therefore, the police can only access private residences without a court order, if the moment would otherwise be wasted in accordance with the general rules of the Danish Administration of Justice Act.

Violations of the rules are punishable by fine or, in serious circumstances, by imprisonment of up to six months, cf. section 29(2) of the Act. As for fines imposed on businesses, the number of employees in the company at the time of the offence must be considered, cf. section 29(3) of the Act.

The Government has in the memorandum of the bill fixed recommended fine levels, which are higher than the fines originally fixed. The new fine levels are:

- Violation of the prohibition against large assemblies, cf. section 1(1) of the Pprohibition against assembly order: Fine of DKK 2,500 (first offence).

- Businesses' failure to comply with the closing order for restaurants, shops, sports and leisure actitvities, etc., cf. section 6(1) of the Prohibition against assembly order: Fine of DKK 10,000 for small businesses (up to nine employees), DKK 20,000 for medium-sized businesses (10 to 49 employees) and DKK 40,000 for large businesses (50 or more employees). The fines may be increased by 100% and 150% for second and third offences, respectively.

- Undertakings' failure to comply with restrictions for certain premises, etc.; cf. section 7(1) of the Prohibition against assembly order: Fine of DKK 3,000 (first offence).

Violations of the other executive orders, including the Transport-related infections order, are punishable by fine and imprisonment of up to six months. To our knowledge, no recommended fine levels have been issues in this respect.

Application of the Act and implementation in executive orders

(updated 3 April 2020)

The Act will largely only have legal effect once executive orders are issued, as is the case in respect of for instance the Prohibition against assembly order and the Transport-related infections order. With executive order no. 213 of 17 March 2020, the Government has established that sections 5-7 and 12a-12f of the Epidemic Act and the executive orders issued in this respect, generally apply to the combating of the Coronavirus (COVID-19). However, this may also appear directly from individual executive orders. So far, the individual executive orders have been issued with immediate effect or on very short notice. Gorrissen Federspiel will follow up on any issue of such executive orders.

The Act does not extend to Greenland and the Faeroe Islands except that all or any of the provisions hereof may be brought into force by Order in Council for the said parts of the realm subject to any variations in their operation necessitated by the specific conditions prevailing in Greenland and the Faeroe Islands respectively. This has not yet happened.

Links

Epidemiloven (nr. 1026 af 1. oktober 2019 som ændret ved lov nr. 208 af 17. marts 2020)

Forsamlingsbekendtgørelsen (nr. 224 af 17. marts 2020 som ændret ved bkg. nr. 251 af 22. marts 2020)

Transportsmittebekendtgørelsen (nr. 220 af 17. marts 2020)

Read the newsletter online here.

Temporary compensation scheme for self-employed and freelancers

As part of the overall COVID-19 bailout package, the Government has announced the introduction of a temporary compensation scheme for business owners and freelancers that are particularly affected by the COVID-19 crisis. The scheme applies across sectors but is reserved for business owners owning at least 25% of the business and work in the business. There are still uncertainties as to the how the scheme will work, but below we attempt to describe the key issues in relation to the scheme.

Who can apply?

As a self-employed with a maximum of 10 full-time employees, you may receive compensation if COVD-19 has resulted in a loss of turnover of at least 30 percent for your company. To receive compensation under the scheme, your company must have had an average turnover of at least DKK 15,000 per month during the preceding period, and the company must have been registered on 1 February 2020 at the latest.

The scheme is reserved for company owners who have at least 25 percent ownership and who work in the company. This means that four owners each owning 25 percent may receive a maximum of DKK 23,000 per month per owner.

The self-employed and the company must be registered with the Danish CVR (central business register) and CPR (central national register) registers to be included in the scheme. Regarding freelancers: see below in the paragraph "*What applies if I do not have a Danish CVR-no.*".

How much can be applied for?

The compensation will amount to 75 percent of the expected loss of turnover in the period compared to the average turnover in the latest fiscal year. However, there is a maximum compensation of DKK 23,000 per month (per CPR no. in case of several owners).

The compensation may amount up to DKK 46,000 per month if the self-employed has an assisting spouse.

When and how can you apply?

The application for compensation will take place online. The scheme is not open yet; thus, it is not possible to apply for compensation yet. The Danish Business Authority has further informed that it will prepare an application guide which will include guidelines on how to calculate the expected loss of turnover.

In connection with the application, the following documents or information must be prepared:

- Statutory declaration, including the expected loss of turnover
- Explanation for how the loss of turnover is a consequence of COVID-19.

The owner of the company must further document a loss of turnover of more than 30 percent in the specified compensation period compared to the average turnover during the latest fiscal year.

The Danish Business Authority requires all companies to use accountant assistance.

What must you pay particular attention to?

The temporary compensation scheme applies from 9 March until 9 June 2020. You cannot receive compensation for the same cost from other compensation schemes introduced due to COVID-19. This means that you can also receive wage compensation for any employees who otherwise risked being made redundant.

You can only receive compensation once through this scheme, even though you own a minimum of 25 percent of other companies.

Further, you must be aware that if you do not make annual accounts, the accounts for the loss must be made based on VAT registrations to SKAT (the Danish tax authorities). If your company has existed less than 6 months, you must prove that you have suffered a loss of turnover by other means, e.g. through bookkeeping entries.

If it turns out that the turnover of your company did not decline with 30 percent during the compensation period, you must repay the compensation with the addition of interest.

Furthermore, you must repay the compensation with the addition of interest if your personal income in the tax system for the fiscal year 2020 exceeds DKK 0.8 mill.

The specific details of the scheme are not yet available. At present, only an appendix to the political agreement and a "fact sheet" are available.

What applies if I do not have a Danish CVR-no.?

A temporary compensation scheme for freelancers without a Danish CVR no. has also been introduced. Thus, you may be reimbursed 75 percent of your expected loss of income not taxable at source (Danish B income), however, a maximum of DKK 23,000 per month if you declare solemnly an expected loss of income of at least 30 percent during the period 9 March until 9 June 2020.

However, you must be aware that your income not taxable at source (Danish B income) in 2019 must have been DKK 180,000 at a minimum. At the same time, your personal income in 2020 must not exceed DKK 0.8 mill.

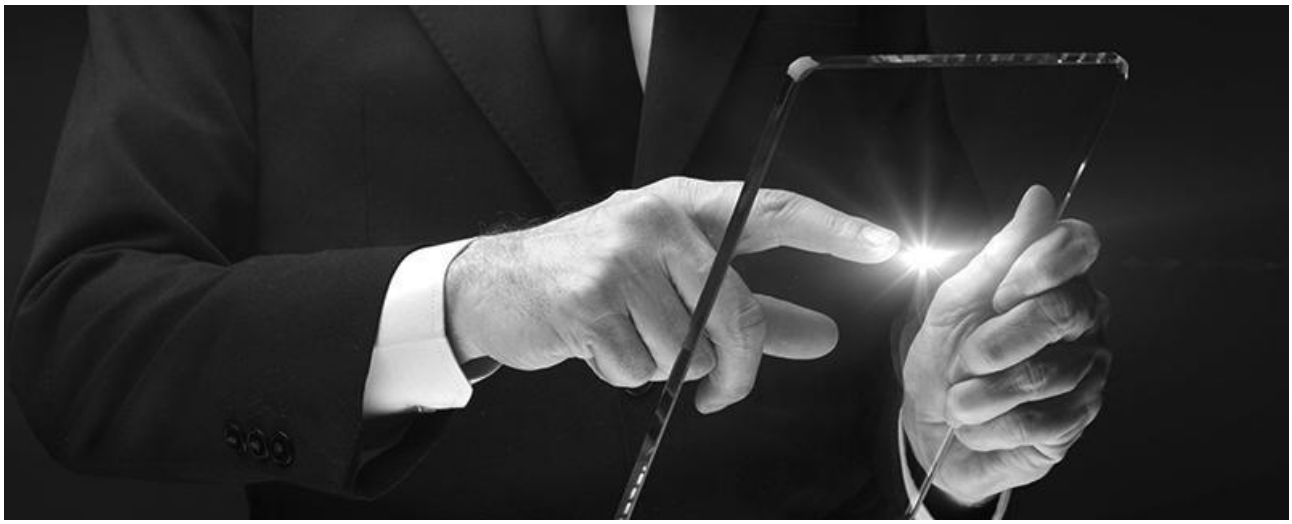
Links

https://www.fm.dk/nyheder/pressemeddelelser/2020/03/regeringen-og-partier-enige-om-hjaelpepakke

The company guide: Compensation for self-employed / Virksomhedsguiden: Kompensation til selvstændige

https://virksomhedsguiden.dk/erhvervsfremme/content/temaer/coronavirus_og_din_virksomhed/artikler/kompensation-til-selvstaendige/4087ea63-d8a1-4d55-91bb-5ac807afe301/

Read the newsletter online here.



Temporary compensation scheme for companies' overhead expenses

As part of the overall COVID-19 bailout package, the Government has introduced a temporary compensation scheme to cover fixed costs of companies, which are particularly affected by the COVID-19 crisis. The scheme applies across sectors and business sizes and is a supplement to the wage and salary compensation scheme. There are still uncertainties as to the how the scheme will work, but below we attempt to give our assessment of a number of the key issues.

Who can apply?

All companies expecting a decline in turnover of more than 40 percent *at home* in the period 9 March 2020 until 9 June 2020 due to COVID-19 can apply for compensation for their overhead expenses (details on specification below). The addition "at home" indicates that the decline in turnover only concerns Danish turnover. The use of the word "at home" may also indicate that only Danish companies can apply for compensation. It is unclear how the authorities intend to define Danish and foreign companies, and such distinction may cause problems in relation to the EU law.

If the overhead expenses are less than DKK 25,000 during the period, companies cannot apply for compensation.

How much can be applied for?

Expenses entitled to compensation are expenses which the companies must pay despite the decline in turnover. These expenses include e.g. rent, interest expenses and expenses bound by agreement terms (e.g. leasing). Depreciations is not included and neither are wage costs, as such costs are included in the scheme for temporary wage compensation for waged and salaried workers.

A company's expenses entitled to compensation must be documented by a specification of overhead expenses for the three preceding months certified by an auditor. Contrary to the specification of the decline in turnover, the agreement does not include a subsequent adjustment based on the actual expenses incurred. Based on the current proposal, a reduction of the overhead expenses compared to the three preceding months is thus not expected to result in a claim for repayment of the received compensation. An agreement on postponement of payment is also not expected to influence the entitlement to payment of costs.

Companies with a temporary ban to run their businesses may apply for compensation of 100 percent of their overhead expenses during the entire ban period. The compensation amount for the rest of the companies depends on the extent of the decline in turnover according to the below list:

- **80** percent of the overhead expenses in case of a 80-100 percent decline in turnover.
- **50** percent of the overhead expenses in case of a 60-80 percent decline in turnover.
- **25** percent of the overhead expenses in case of a 40-60 percent decline in turnover.

The expected decline in turnover must be calculated in percent in relation to the same period in 2019. I.e. if the company experiences a decline in turnover in the period 9 March until 9 May, the turnover must be compared to the turnover of the same period in 2019.

The maximum compensation per company in the period is DKK 60 mill.

As is the case with other COVID-19 support schemes, it is expected that a broad company concept is applied, and thus that the access to compensation is not dependent on the actual form of organisation.

In our view there are good arguments for calculating the decline in turnover on the basis on the whole business and not on the basis of the each company or specific entity. This could be done by using a group definition. However, in the agreement on temporary wage compensation, measurements are based on each individual company and it cannot be ruled out that the same approach will be used here to expedite administration of the program.

The Danish Business Authority states in the compensation scheme for self-employed and freelancers that an application guide will be prepared *"with e.g. guidelines for calculation of your expected loss of turnover"*. We imagine that similar guidelines will be prepared for calculation of the decline in turnover in relation to overhead expenses.

At present, the calculation of the decline in turnover gives rise to a number of questions.

- As an example, the calculation may result in problems for new companies without turnover for all or part of 2019. A solution could be to use the company's average monthly turnover in all or part of its lifetime until 9 March – further adjusted for special fluctuations, if applicable. The essential must be to make probable that the turnover of the company would have been at a certain level in the period 9 March until 9 June.
- Merged companies or companies emerged by transfer of assets face a similar challenge because a *common* turnover for 2019 may be missing. If data make it possible, the calculation must be based on the turnover during the lifetime of the merged/transferred company. Alternatively, the calculation must be based on the companies' individual turnover data from before the merger/transfer. Irrespective of the approach, the various methods ought not differ too much.
- The calculation of the decline in turnover also offers special problems for companies having experienced a high growth rate before COVID-19, and where the turnover for 2019 thus underestimates the actual loss of turnover related to COVID-19. The consequence will be a lower degree of compensation for the overhead expenses. To avoid this scenario, the company must prove

that the reference period for 2019 is not true and fair, and that a reference period closer to 9 March 2020 must be applied instead.

- For administrative purposes, the Danish Business Authority will probably take a uniform approach to the reference period of the turnover. The open questions above indicate, however, that there may be a need for a case-by-case assessment or detailed guidelines for special circumstances.

A decisive precondition to apply for compensation is furthermore to make probable that the loss of turnover can be ascribed to COVID-19. This is straightforward for many companies, e.g. airline companies and travel agencies. The connection to COVID-19 will need further explanation for other companies, including how the area of business/trade works and/or an explanation of why the companies' usual customers have reduced the demand due to COVID-19. In this connection, it is unclear how the authorities will consider companies who may be assumed to be able to recover the decline in turnover in the three month period – e.g. if the company uses the period to produce for stock.

When and how can you apply?

The Danish Business Authority handles payment of the compensation. Application will take place online.

The scheme is still being prepared and must be passed in the Danish Parliament. The scheme must be open, before applications can be submitted.

The Danish Business Authority has informed that application will *not* be processed according to a first-come, first-served policy.

The application must contain a specification of overhead expenses for the three preceding months certified by an accountant. Documentation for the overhead expenses must cover part of or the entire period from 9 March 2020 until 9 June 2020. At the same time, the company must declare solemnly that the turnover has declined. It is still unclear whether the specification of the expected decline in turnover also requires certification by an accountant.

If the application releases compensation for the company, 80 percent of the costs for certification by an accountant will be covered.

We expect that the application form will contain little detail, and that companies with circumstances differing from the standard circumstances, which the scheme is based on, must expect a long case handling.

What must you pay particular attention to?

The temporary compensation scheme applies from 9 March until 9 June 2020. In this period, you cannot receive compensation for the same cost from other compensation schemes introduced due to COVID-19.

If your decline in turnover is more/less than expected, the compensation will be readjusted accordingly.

The specific details of the scheme are not yet available. At present, only an appendix to the political agreement and a "fact sheet" are available.

Links

The Danish Ministry of Finance: Fact sheet on temporary compensation for companies' overhead expenses

https://www.fm.dk/nyheder/pressemeddelelser/2020/03/regeringen-og-partier-enige-om-hjaelpepakke

The company guide: Compensation for companies' overhead expenses

https://virksomhedsguiden.dk/erhvervsfremme/content/temaer/coronavirus_og_din_virksomhed/artikler/kompensation-for-virksomheders-faste-udgifter/668d7243-3b13-4b98-a35a-a61413490260/

Read the newsletter online here.

COVID-19: The Government and the Danish Parliament launch extensive bailout package

The Government and all parties in the Danish Parliament have agreed to launch an extensive bailout package to aid Danish economy in the unusual situation Denmark is facing due to COVID-19. The compensation schemes cover wage and salary earners, students and undertakings. We review the schemes here.

All the parties in the Danish Parliament and the Government on Thursday launched an extensive bailout package to aid Danish economy and help Danish wage and salary earners, students and undertakings through difficult times as stated by the Danish Ministry of Finance.

The Government and the parties have agreed on the following temporary compensation schemes:

- **Compensation scheme for business owners.** Business owners are not directly covered by the tripartite agreement on compensation of wages and salaries, even though their livelihoods may also be under threat. The Government and the parties in the Danish Parliament thus wish to ensure compensation to business owners experiencing large declines in sales, cf. appendix 1.

- **Compensation for undertakings' overheads.** The tripartite agreement on compensation of wages and salaries provided increased employee job security and the undertakings received significant subsidies for the wage and salary costs. The Government and the parties in the Danish Parliament now also agree to cover certain overheads, which the undertakings no longer have sales to cover, cf. appendix 2.

In addition, the Government and the parties agree on a number of other measures:

- **Increased access to export credit.** To support in particular small and medium-sized Danish export businesses, a new liquidity guarantee is set up under EKF – Denmark's Export Credit Agency. This will smooth the path for new loans for DKK 1.25bn for the benefit of small and medium-sized export businesses.

- **Increased frame of government-guaranteed credit schemes.** The frame of government-guaranteed credit schemes for small and medium-sized enterprises is extended. For large undertakings, the guarantee frame is increased by DKK 25bn, while a guarantee frame for small and medium-sized enterprises is set up for DKK 17.5bn and an appertaining loss frame of approx. DKK 5bn, which will facilitate lending up to DKK 25bn.

- **Public procurement to support undertakings.** Public procurement will help support undertakings - and thereby wage and salary earners - in getting through the crisis. The parties to the agreement agree that this will apply to the State, and the Government will open a dialogue with the National Association of Local Authorities in Denmark (KL) and the Danish Regions on the possibilities of doing the same in the municipalities and the regions.

- **Government guarantee to the Danish Travel Guarantee Fund.** In order to help travel agencies in getting through this extraordinary crisis, the Government and the parties to the agreement have agreed to strengthen the Danish Travel Guarantee Fund by providing a government guarantee of DKK 1.5bn.

- **Increased access to unemployment benefits and sickness benefits.** In order to ward off the negative effects of the spreading of COVID-19 on unemployment benefits and sickness benefits, the parties to the agreement agree ease the conditions for recipients of unemployment benefits and sickness benefits temporarily during the time come.

- **Increased possibilities of borrowing for students.** Some trainees and students at higher educations will lose their jobs due to COVID-19. Therefore, students and trainees in youth educations will obtain the right to take out additional student loans of up to DKK 6,388 per month in addition to the applicable student grants and loans available.

Read the entire agreement here

Fact sheet on the bailout package is available here.

Read the newsletter online here.

COVID-19: Compensation scheme for exposed undertakings and business owners

As an additional measure to ward off the economic consequences of the Coronavirus for Danish undertakings, the Government today at 12 noon proposed a temporary compensation scheme for certain fixed costs in Danish undertakings and a temporary compensation scheme for business owners to be negotiated with the other parties in the Danish Parliament. We review the schemes here.

Introduction

Although not stated directly in the proposals, it is assumed that the new compensation schemes will apply in conjunction with the guarantee scheme (state guarantee for new bank loans) for SMEs and large companies.

Temporary Compensation to Business Owners (Self-employed)

The proposal entails that business owners experiencing a decrease in turnover of more than 30% as a consequence of COVID-19, may receive compensation from the State of 75% of the lost turnover compared to last year's turnover; however, maximum DKK 23,000 per month. This amount may be increased to DKK 34,500, if the business owner has a spouse employed in the business. The Government proposes that the scheme is to cover small business owners only, without specifying this criteria in detail, except for a requirement that the business cannot have more than 10 full-time employees. The amount of compensation corresponds to the compensation tariffs in the compensation scheme for wages and salaries agreed with the Danish Employers Confederation and the Danish Trade Union Confederation in the tripartite agreement entered into on Sunday, 15 March 2020. Compensation is to be granted for a maximum of 3 months from 9 March to 9 June 2020. Undertakings must apply for compensation via the Danish Business Authority's

business portal (virksomhedsguiden.dk). The Danish Business Authority is working on getting ready to receive the first applications soon. Information in this respect will be published on the website: virksomhedsguiden.dk.

The Government's fact sheets on the temporary compensation schemes are currently available in Danish only (available here, here and here).

Read the newsletter online here.

Practical guide to compensation of wages and salaries to private undertakings

Following the compensation scheme of wages and salaries was introduced in March 2020, there have been some adjustments since the compensation scheme was first introduced. Thus, we have compiled the latest guidelines in the attached presentation, so you can get a comprehensive and updated overview of the scheme.

As the latest news, we can inform that the compensation scheme of wages and salaries has been extended by one month, so it now applies until 8 July 2020. The reapplication on the extension of the period must be done to the Danish Business Authority.

We have prepared a practical guide to the compensation of wages and salaries.

Read the newsletter and see the following presentation online here.

Practical guide to compensation of wages and salaries to private undertakings

21 April 2020

01. Background

Tripartite agreement for compensation of wages and salaries to private employers - background

- On 15 March 2020, the Government announced a new COVID-19 initiative in the form of a tripartite agreement between the Government, the Danish Employers' Confederation and the Danish Trade Union Confederation.
- The agreement was entered into on 14 March 2020 and will be administrated by the Danish Business Authority.
- The bill was introduced on 19 March 2020.
- Amendments were proposed on 23 March 2020.
- The bill was passed on 24 March 2020.
- The consolidation Act was published 25 March 2020.
- 30 March 2020 the pay limit was raised to DKK 30,000 per employee per month.
- 18 April 2020 the compensation scheme was extended by one month, so it now applies until 8 July 2020. The reapplication on the extension of the period must be done to the Danish Business Authority.
- The object of the agreement is to avoid dismissals and to ensure that employees receive wages and salaries as usual through a state compensation scheme for private undertakings, which are extraordinarily affected by COVID-19 and therefore face having to dismiss employees.
- The temporary compensation scheme will apply **from 9 march to 8 July 2020.**

Tripartite agreement for compensation of wages and salaries to private employers - background

The State pays 75% of the employee's salary (max DKK 30,000)

The undertaking pays 25% of the employee's salary

The employee waives five holidays

02. Conditions for entitlement to compensation

Conditions for entitlement to compensation

- The undertaking must have a Danish **CVR-number.**
- The undertaking is not founded 50% or more by government grants.
- The undertaking must send home at least 30% of its staff of employees or more than 50 employees due to COVID-19. Trainees can also be sent home with compensation. The number is calculated at undertaking level per CVR-number.
- The number of employees is calculated by number of units and not by number of full-time employees. A casual worker who is not allocated any hours, is not covered by the scheme.
- Employees for whom compensation is applied, must have their **place of work in Denmark**.
- Employees who are sent home cannot work for the undertaking.
- Compensation can not be obtained for employees, if the payroll expenditure are reimbursed in other ways, including by insurance or other state pay compensation schemes due to COVID-19. It can not be ruled out, that undertakings that are forced to close, may obtain a refund of 100% of staff costs.

Conditions for entitlement to compensation, continued

- The private undertakings continue to pay full salary to employees during the compensation period. The employees under threat of dismissal are not allowed to work, but are **sent home with full salary during the compensation period.**
- **The individual employee for which the undertaking applies for compensation, must take holidays and/or take time off in lieu of overtime amounting to a total of five days** in connection with the compensation period, if the compensation period is fully utilized from 9 March to 8 July. For a shorter compensation period, the employee must take holidays/ time off in lieu of overtime **proportionately.**
- **If the employee does not have holidays, time in lieu of overtime, etc. corresponding to five days left, time off must be taken without salary or holidays from the new holiday year must be taken.** Undertakings cannot receive compensation for such days.
- If a wage cut was agreed **immediately prior** to the employee being sent home, the employees must not take holidays.

Conditions for entitlement to compensation, continued

- The undertaking must not notify dismissals for economic reasons **during the compensation period**. It is **possible** to apply for compensation of wages and salaries even though dismissals have been **completed prior to the application** for compensation. In that case, compensation can only be applied for the period **after** the dismissals have been completed and there can not be applied for compensation to the employees who have been dismissed.
- It will be possible to recall a part of the compensated employees with **24 hours of notice.** In this case, compensation of wages and salaries will only cover employees, who are still sent home. **It is a condition that the undertaking continues to meet the requirement of at least 30% of employees having been sent home after a recall of employees.**
- The number of employees being sent home may be increased as required.
- Sending employees home partially is accepted to an unspecified extent: Thus, it is not a requirement that the same period is reported for all the effected employees. It is unclear which restrictions apply in respect of sending home employees partially. Sending home employees cannot constitute actual be division of labour, but must be without a duty to work during the compensation period.
    - It will be acceptable to send home Employee 1 in April and to send home Employee 2 in May.
    - It is unclear whether continuous replacement is possible, for example where 2 employees work every other week.

03. How are undertakings compensated?

How are undertakings compensated?

- The State **compensation of wages and salaries** for employees under threat of dismissal **will constitute 75% of the total payroll expenditure for the involved employees; however, maximum DKK 30,000 per month per full-time employee.** For hourly-paid employees and trainees, the state compensation can constitute 90%; however, maximum DKK 30,000 per month per full-time employee.
- The full wages and salaries are covered by the compensation scheme, which means the agreed wages and salaries including holiday allowance, contribution to a free choice account, regular predictable inconvenience payments and the employers' pension contributions.
- Undertakings may be **covered by the scheme for a maximum of three months.**
- Compensation of wages and salaries will **be paid based on the undertakings' information about the number of employees, which would otherwise have been dismissed** due to the COVID-19 situation.

04. How do I apply for compensation of wages and salaries?

Application for compensation of wages and salaries

- Application for compensation of wages and salaries must be submitted electronically to **the Danish Business Authority** via **virk.dk**.
- Application for compensation of wages and salaries opened on 25 March 2020.
- The following information must be provided:
  - How many employees you expect to apply compensation of wages and salaries for due to COVID-19 (minimum 30% of the staff of employees or more than 50 employees)
  - Danish personal identification number, name, wages and salaries, expected number of hours a week and the terms of employment (information about whether the employee is a salaried employee, blue-collar employee or trainee/ apprentice) for each employee.
  - The period for which compensation of wages and salaries is applied (the maximum period is from 9 March to 8 July).
  - For each of the employees for whom compensation of wages and salaries is applied for, it must be stated, whether the undertaking receives other public refunds in relation to the employees concerned during the same period.
  - Statement of truth that the provided information is correct.

Application for compensation of wages and salaries, continued

- The compensation of wages and salaries will be paid **directly** to the undertaking when the application is approved by the Danish Business Authority. Compensation will not be paid out if the documentation submitted is insufficient. Payment of compensation is made directly to the undertaking's **Nemkonto.** The compensation can be paid in advance. If an excessive compensation amount is paid in advance, the overpayment can be required to be repaid.

- **Not later that 6 months after the end of the compensation period,** the undertaking must submit the following additional documentation:

- The number of employees who have been sent home. The undertaking must provide documentation that the employees have been sent home without work. The documentation must be accompanied by a certificate from a professional representative in the undertaking stating that the employees concerned have been sent home without work. If the undertaking does not have e professional representative, the undertaking must provide documentation that the employees have been sent home without work.
  - The actual periods during which the employees were sent home without work. If there is a difference in the duration of the employees actual and reported home sending period, including any interruption periods.
  - The undertakings contractual obligation to pay out wages and salaries.
  - That the undertakings payroll expenditure for the individual employee are not compensated in any other way during the compensation period, including receiving other public refunds.
  - That the undertaking did not dismiss employees for economic reasons during the compensation period.
  - If you are in doubt about whether compensation of wages and salaries is an option for your undertaking, we will be pleased to assist you.

05. FAQ

FAQ

Q: Do my employees have to consent to be send home in order for me to receive compensation of wages and salaries?

A: No, you can just send home your employees. However, we recommend that the works committee is informed and is involved in the process.

Q: The compensation of wages and salaries scheme does not cover my undertaking. Do I have other options?

A: Sending employees home without pay to the extent permitted under your collective bargaining agreement.

Notification of remaining holidays and special holidays without notice. We note, that main holiday must still be notified with 3 months notice or as agreed. Note, that you actually agree on otherwise due to the Corona-crises.

Division of labour where employees for a period work shorter and take a pay cut while receiving supplementary unemployment benefits.

Dismissal of employees; note that the rules governing collective dismissals apply on unchanged terms.

Q: What happens if I dismiss employees during the compensation period?

A: Compensation of wages and salaries ceases as per the date of the dismissals.

06. Contact details and current updates

05. Kontaktdetaljer og Løbende Opdatering om Nyheder

Current updates

- We will provide current updates on the most important issues on our website, where you can also sign up for our updates https://gorrissenfederspiel.com/viden/nyhedsservice

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COVID-19: Specific measures for handling the reduced need for manpower

Businesses are currently experiencing a significantly reduced need for manpower. However, which options does the employer have of sending employees home on short or medium term notice?

Initially, the employer may instruct its employees to take any remaining holidays, which would have to be taken before 30 April anyway, and/or special holidays. Normally, the employer must give one month's notice of remaining holidays. The same typically applies in respect of special holidays. However, the notice to be given for remaining holidays may be waived, if "*special conditions*" so dictate. Considering the Danish Prime Minister's statements in the past few days, special conditions exist that immediately entitle the employer to take certain measures, when a material decline in the workload is experienced.

A quick solution to solving the reduced requirement for manpower here and now would therefore be to instruct employees to take any remaining holidays and special holidays on a shorter notice than 1 month. As for special holidays, the notice rules are the same as for remaining holidays. In this way, the employees contribute to financing part of the costs, if they are sent home without the possibility of working from their homes.

Prior to giving notice of holidays, we recommend that an extraordinary meeting of the works council, if any, be held, at which meeting the council is informed about the shortened notice of remaining holiday/special holidays.

However, businesses may experience that employees have already taken their remaining holidays or have already planned their holidays and/or special holidays, and therefore this model may not necessarily solve the problem here and now.

As for hourly-paid/non-salaried employees, another obvious alternative exists, as employers in the industrial sector may apply the rules on division of labour in the Collective Agreement for Danish Industry. Thereby,

the employer will in certain circumstances have the possibility of reducing the employees' weekly hours and wages.

In addition, on 15 March 2020, the Government announced a new COVID-19 initiative in the form of a tripartite agreement for compensation of wages and salaries, which is particularly relevant for private undertakings.

The rules on compensation of wages and salaries will be reviewed in a newsletter, which Gorrissen Federspiel will issue soon. The newsletter will focus on the background of the tripartite agreement and the conditions for receiving compensation for wages and salaries, including how private undertakings are specifically compensated.

Should you have any questions in respect of the above, please contact attorney Jacob Sand.

Read the newsletter online here.

The coronavirus and concerns relating to employees

In addition to the strong restrictive measures implemented across countries to contain the coronavirus (COVID-19), businesses are introducing internal procedures and measures including screening methods, to avoid the spread of the virus to the office facilities. This practice poses questions relating to employment law and processing of personal data. Thus, this newsletter will assess the GDPR and employment law consequences of implementing control measures in Denmark.

Introduction

COVID-19 was first reported on 31 December 2019 in Wuhan, China, and has since spread across the globe. On 30 January 2020, the World Health Organisation (WHO) declared the outbreak to be a public health emergency of international concern. To interrupt virus spread in the office space, companies have implemented restrictive measures. These include workplace shutdowns, temporary quarantines, social distancing and screening of employees. The measures may result in a collection of personal data from a wide range of individuals and consequently considerations of protection of personal data under the General Data Protection Regulation (the "GDPR") will have to be taken into account. Thus, businesses are seeking to understand their rights and obligations during these circumstances and particularly which measures are possible in a legal context. As a result, the Danish Data Protection Agency issued a guidance on 5 March 2020 concerning employers' control measures and rights and obligation in regards to registration and processing health related information about their employees.

GDPR considerations

When companies are implementing extraordinary measures to prevent the spread of COVID-19, they must be aware that if such measures include any collection and registration of information about:

- its own employees,
- employees of its suppliers,
- customers,
- other third parties, such as visitors to an office,
- the collection and processing of such data will constitute processing of personal data under the GDPR. If the information is collected by companies established in Denmark, the GDPR will apply to the collection and processing of such personal data.

Before implementing any preventive measures, the companies must assess whether such measures, like screening, comply with the GDPR.

Screening measures not involving health information

In its guidance, the Danish Data Protection Agency states that to the extent, companies are only registering information about whether a person has been to specific destinations within a limited period of time, such data will not be regarded as sensitive personal data (or special categories of data as defined in the GDPR article 9). Thus, companies can process such data based on the legitimate interest assessment set out in GDPR article 6(1)(f).

Provided a company actively initiates collection of information from employees, the company must make sure to inform the individuals about such collection and processing of their personal data for the specified purposes and in this respect comply with the requirements set out in GDPR article 13. Many companies will already have notified the employees about collection and processing of information, as this is a usual procedure at workplaces, for instance when registering illness in order to administrate staff availability and internal resources. However, notification will generally be required, if information about specific destinations is collected, as this will be processing of new personal data and for a new purpose.

Screening measures involving health information

If companies are screening individuals by collecting data about an individual's health, e.g. by taking their temperature or specifically stating that a person is infected with COVID-19, this will constitute processing of sensitive personal data (or special categories of data as defined in the GDPR). The processing of sensitive personal data generally requires the individual's consent (if such consent can be obtained freely), unless one of the other derogations set out in GDPR article 9 applies.

In order to ensure administration of internal resources and staff availability, companies may also want to keep a log of employees in quarantine or infected with COVID-19. Keeping a log of employees in quarantine and/or infected with COVID-19, requires that it is necessary to know the specific disease in order to carry out the administration. Additionally, the guidance of the Danish Data Protection Agency states that it, in certain circumstances, can be possible for an employer to register and disclose information that an employee has caught COVID-19. The agency uses the example that it is necessary for the management and colleagues to be able to take necessary precautions. However, the Danish Data Protection Agency is also making it clear that the right to register and disclose health information must be subject to that:

- there must be a good reason to register or disclose the information in question;
- it is necessary to specify the information, including whether the purpose of the registration or disclosure can be attained by 'sharing less';
- it is necessary to mention names, for instance the name of the person with COVID-19 and/or in quarantine.

Should the company find that they cannot reason the registration and/or disclosure with any of the above mentioned considerations the company will not be in compliance with GDPR if they register that an employee is infected with COVID-19 or in quarantine due to COVID-19.

In addition to the general principles outlined above, the company must also have a legal basis to collect and process the health data.

If the screening is done on employees, the processing will be permitted, if the processing is necessary for exercising specific rights of the data controller in the field of employment law, if such has a legal basis in member state law or collective agreements pursuant to member state law (GDPR article 9(2)(b)). In Denmark, the employer's right to implement control measures follows from the employer's managerial right and is codified in the agreement about control measures as of 27 October 2006 between the former LO and DA. The control measures must be relevant and proportionate to be legal. Employee involvement is crucial when implementing control measures and we recommend that the employer at companies with works councils, involve the works council. Under the agreement on control measures between LO and DA, control measures can only be implemented with a 6 weeks' notice, unless compelling reasons demand immediate actions. A general wish to be cautious does not constitute a compelling reason, as this at least will require a reasonable suspicion that employees are e.g. coming into work sick. To the extent the screening measures are proportionate and otherwise comply with the requirements for implementing new control measures, it should be noted that screening in the form of measuring the employees' temperature only in exceptional cases would be accepted as a proportionate.

Another derogation in GDPR article 9(2) is item (i), which stipulates that processing is not prohibited if the processing is necessary for reasons of public interest, in the area of public health, such as protecting against serious cross-border health threats, where such has a legal basis in member state law. In Denmark there are no specific rights for companies to collect and process personal data for the purpose set out in GDPR article 9(2)(i). Thus, Danish companies cannot apply this derogation.

To the extent, the screening measures cannot be implemented based on the employer's right to implement control measures, it must be assed if consent, as set out in GDPR article 9(2)(a), can be obtained freely from the individuals. To the extent, the individuals are employees of a company implementing screening of employees' health, the consent will not be regarded as freely, given the nature of the employee/employer relationship. It is likely that companies can implement screening measures based on the consent of other third parties, however, such screening measures will most likely not comply with the general principles of the GDPR, as the processing of such health data will not be regarded as proportionate.

Employment law considerations when dealing with COVID-19

Danish employers have a managerial right towards the employees and can thus structure work streams and impose control measures, provided the measures are fair, relevant and proportionate. The employer can generally take relevant measures to prevent the spreading of disease, including imposing restrictions on participation in business trips and meetings, under the authority of the managerial right. An employer can generally not limit the employees' free time or which holiday destinations the employees travel to. An employer can however, choose to impose restrictions on e.g. access to premises if employees have traveled to red zone destinations.

The employer can instruct employees to refrain from coming into work if they have been exposed to potential infection. If the employer instructs an employee not to come to work, the employer will in most cases have to pay salary even though the employee is unable to perform work. If possible, the employer can instruct the employee to perform work from home.

If an employee is quarantined by the authorities or in voluntary isolation based on recommendations by the authorities this will be considered lawful absence meaning that the employee is not in breach of the employment agreement by his/her absence from work. However, if the employees are not ill they may, depending on the circumstances, not have a legal right to receive salary and the absence can be viewed as holiday or free time at the employees own expense. The Danish Ministry of Employment has announced that the Ministry considers quarantine ordered by authorities equal to illness and thus salaried employees are entitled to salary even if they are not ill. The Salaried employees that are ill are legally entitled to receive payment for the full duration of the absence due to illness.

Recommendations

Consequently, in accordance with the guidance from the Danish Data Protection Agency, companies can implement procedures to document if employees have been to destinations where the coronavirus has been detected. However, under Danish law and GDPR, companies cannot implement screening measures involving processing of health data. Additionally in regards to employment law, we recommend that employers, when considering whether or not to pay salary to employees in voluntary isolation, to consider the risk that the employees may choose to conceal information that would qualify them for isolation and keep coming into work, if they will not receive salary during quarantine related absence.

Read the guidance from the Danish Data Protection Agency here.

Read the newsletter online here.

Far reaching COVID-19 measures for businesses in Germany

Like Denmark, Germany has also acted fast in taking far-reaching legal measures to assist citizens and businesses alike during the COVID-19 pandemic. Read about liquidity measures as well as changes to regulations regarding insolvency, lease agreements, private loans, company law and the labor market. Gorrissen Federspiel has the expertise to help clients navigate the situation of their business in Germany and a strong network of German law firms to refer to for local support.

1. Liquidity measures in Germany

In Germany, several measures supporting the liquidity of businesses have already been taken.

- Several schemes backed by Kreditanstalt für Wiederaufbau ("KfW") have been introduced, including a guarantee scheme supporting new loans or facilities to finance investments, operating resources or inventory for groups with a turnover of up to EUR 2 billion. The scheme can be used for investments in Germany, or investments outside Germany where the borrower is a German entity or a subsidiary of a German entity.

- In addition, almost every state has introduced measures for small businesses and self-employed entrepreneurs. These measures include grants that are not subject to repayment.

- Nearly all schemes can be used by internationals doing business in Germany.

2. Relaxed insolvency regulations

During this crisis, it is paramount that companies and businesses can survive. In addition to the liquidity measures, the German government has relaxed obligations to file for insolvency, eased the rules on payments

during factual and material insolvency and put a moratorium on third party filings for insolvency by creditors. This gives companies time to take advantage of state aid.

- In the event of an actual or material insolvency caused by the effects of the COVID-19 pandemic, the obligation to file for insolvency within 3 weeks for directors is suspended until 30September 2020. This suspension applies if the company did not lack liquidity on or before 31 December 2019.

- In a situation of illiquidity, managers may only make payments that are reconcilable with the diligence of a prudent businessperson. This provision has been relaxed so that all management measures taken in the ordinary course of business are now deemed reconcilable.

- Furthermore, the ability legally to challenge congruent payments (payments made or provided exactly as agreed) to business partners within insolvency proceedings is restricted for payments made until 30 September 2020.

- In addition, new restructuring loans (including shareholder loans) are given a privileged treatment in respect of legal challenges and liability. This also applies to commercial credits in connection with the delivery of goods. The repayment by 30 September 2023 of a new loan granted during the suspension period and the provision of collateral to secure such loans during the suspension period cannot legally be challenged in insolvency proceedings. In respect of financing within the framework of state aid programs granted by the KfW and its financing partners or other institutions due to the COVID-19 pandemic, the privileges apply for an unlimited period of time. Shareholder loans are equally granted a privileged status in respect of a suspension of the subordination of shareholder loans under insolvency law. The privileged treatment of collateral to secure such loan does not apply to shareholder loans. Only new loans enjoy the privileges, meaning that only loans adding additional liquidity are covered. The rules do not apply to extensions or novation of existing debt.

- The ability for third parties to instigate insolvency proceedings will be suspended for three months unless the reason for the insolvency already existed on 1 March 2020.

3. Protection of tenants in private and business lease agreements

The ability to terminate private and business lease agreements or to evict tenants due to the failure to pay rent is suspended until 30 June 2020. The outstanding rent can be repaid until 30 June 2022.

- The rent continues to be outstanding and carry interest. It is advisable for property owners as well as tenants to enter into payment agreements for an orderly payment of the outstanding rent after the crisis.

- The tenant has to claim and make credible that payment is impossible because of effects caused by the COVID-19 pandemic. Certain commercial tenants may make such claim credible to the extent that their business operation is prohibited or restricted by governmental measures.

- Major retailers in Germany controversially announced that they will take advantage of this new regulation. It may be expected that many business tenants will follow this practice even though the rent will have to be repaid with interest after the crisis.

4. Protection of consumers and micro-enterprises under certain agreements

- A moratorium until initially 30 June 2020 in respect of payment and performance obligations for (i) consumers under consumer contracts and (ii) micro-enterprises under certain agreements who cannot fulfil their contractual obligations based on circumstances relating to the COVID-19 pandemic, provided in each case that the underlying agreement constitutes a material continuing obligation;

- Deferral of payments falling due until 30 June 2020 by three months and exclusion of termination rights and adjustments by mutual agreement of consumer loan agreements (and subject to issue of an ordinance, loan agreements with micro-enterprises in particular, but also other corporates).

5. Changes to requirements for general meetings in companies

- For the company forms AG, KGaA and SE, the formal requirements to hold a general meeting have been relaxed. Furthermore, the ability to contest decisions by a general meeting have been greatly reduced.

- In a GmbH, the shareholders can make decisions reserved for the shareholders meeting in writing.

6. Short-time work allowance

As a main tool to offer economic relief, the German government announced a massive extension to the existing "Kurzarbeitergeld" taking effect retroactively from 1 March 2020. This means that employers can reduce their labor costs to a minimum without the need to terminate employees.

- Subsidiaries in Germany of Danish companies can apply for short-time work allowance if at least one third of the workforce has a loss of working hours exceeding 10%. This must be agreed either with the works council or by individual contract.

- Payments to the German social security systems are also suspended during the course of short-time work allowance

Germany has introduced relief schemes in several areas of the law to assist everyone from small businesses to large corporations. The common denominator is that liquidity for businesses and citizens alike should be preserved, and that personal contact should be avoided.

Gorrissen Federspiel together with our network of leading law firms in Germany stand ready to assist you.

Read the newsletter online here.

Liquidity and other measures in Denmark, across Europe and beyond

With the two Danish state guarantee scheme for large companies and small and medium-sized companies ("SMEs"), respectively, now in place and with several other measures to improve liquidity and support businesses in Denmark having been introduced, developments across Europe, the US and beyond follow a similar pattern. New schemes and measures are being introduced or amended on a daily basis. One common denominator is that most schemes are very local and that both coordination and local law expertise is key in order for cross border groups to navigate appropriately, including to assess whether foreign group companies in Danish based groups may access local liquidity schemes. Gorrissen Federspiel together with our network of leading law firms in relevant jurisdictions stand ready to assist.

1. Danish state guarantee scheme for large enterprises

The Danish state guarantee scheme for large enterprises covers 70% of the banks' and certain other lenders' new loans or working capital facilities to large Danish and Faroe Islands incorporated companies with a documented or expected loss of revenue of at least 30% due to COVID-19.

It is a condition for granting the state guarantee that the borrower was not in difficulty (within the meaning of the General Block Exemption Regulation) on 31 December 2019 and it presupposes that a credit assessment is made by the bank or other lender to this effect.

The maximum duration of the guarantee is six years with a linear reduction each year.

It will be possible to use the guarantee scheme for large enterprises both with and without collateral (e.g. for the new guaranteed loan to also share in a security package granted in support for other debt).

A market based upfront fee and guarantee commission (to be determined individually but following certain criteria) will be charged to the borrower. This is in addition to the fees, interest and other costs that will be charged by the banks or other lenders.

The scheme is managed by Vækstfonden and requires that the bank or other lender files an application to Vækstfonden on a specific application form.

2. Danish state guarantee scheme for small or medium sized enterprises ("SMEs")

A separate Danish state guarantee scheme is available for SMEs. It also covers 70% of the banks' and certain other lenders' new loans or working capital facilities to large Danish and Faroe Islands incorporated companies with a documented or expected loss of revenue of at least 30% due to COVID-19.

The majority of the conditions for the scheme are similar to the scheme for large enterprises, however with certain exceptions, including:

- The upfront fee is fixed at DKK 2,500 and the annual guarantee commission is fixed at 1% of the then applicable guaranteed amount.
- The new loan or credit facility must be unsecured.

3. Liquidity and other measures across Europe, the US and beyond

In Denmark, several other measures supporting the liquidity of business have already been introduced.

Similarly, new liquidity and other measures are being introduced across Europe, the US and beyond. Examples include:

- In the UK, a temporary Coronavirus Business Interruption Loan Scheme has been launched to support SMEs in accessing bank lending and overdrafts of up to GPB 5 m each
- In France, both a new guarantee scheme for loans and overdrafts as well as a new direct lending scheme have been introduced, aimed at French SMEs. Both schemes are operated by Banque Public d' Investissement. In addition, a French guarantee scheme for both large companies and SMEs have been introduced covering new loans made between 16 March and 31 December 2020
- In Germany, several KfW backed schemes have been introduced, including a guarantee scheme supporting new loans or facilities to finance investments, operating resources or inventory for groups with a turnover of up to EUR 2 billion. The scheme can be used for investments in Germany, or investments outside Germany when borrower is a German entity or a subsidiary of a German entity.
- In the US, negotiations continue in the Senate on the economic stimulus plan to respond to the COVID-19 outbreak.

Other countries have adopted or are in the process of adopting similar or different schemes to support liquidity, etc. and the landscape changes on a daily basis.

One common denominator is that most schemes are very local. This means that both coordination and local law expertise is key in order for cross border groups to navigate appropriately, including to assess whether foreign group companies in Danish based groups may access local liquidity schemes.

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Read the newsletter online here.

Temporary rules concerning businesses under supervision of the Danish Financial Supervisory Authority

The 18th of March 2020, a new executive order (BEK nr 223 af 17/03/2020) was issued in prolongation of the actions being taken to limit the spread of COVID-19 in Denmark (the "Executive Order"). The Executive Order sets out a number of deviations from current legislation. The Executive Order will be in force until the 30th of March 2020. This newsletter will provide a brief overview of the deviations in force on the fields of responsibility of the Danish Financial Supervisory Authority.

Introduction

The Executive Order is issued as the current circumstances makes it difficult for companies to comply with a number of obligations imposed by the regulatory framework applicable to institutions subject to supervision by the Danish Financial Supervisory Authority (the "**DFSA**").

The Executive Order sets out deviations to the following acts, which are supervised by the DFSA:

- The Financial Business Act,
- The Act on Measures to Prevent Money Laundering and Financing of Terrorism,
- The Capital Markets Act,
- The Act on Mutual Funds,
- The Payment Act,

- The Act on Financial advisors, Investment advisors and Housing Credit Providers,
- The Act on Administrators of Alternative Investment Funds,
- The Act on Employee's Fund For Higher Cost of Living,
- The Act on Occupational Injury Insurance,
- The Act on ATP,
- The Act on Companies Providing Credit for Properties,
- The Act on Mortgage-Credit Loans and Mortgage-Credit Bonds, and
- The Act on Ship Financing Institutes.

In general, the Executive Order deviates from sections of the acts that impose deadlines on the relevant institutions either to publish or provide information. The obligations deviated from typically include duties to:

- Notify the DFSA,
- submit annual reports or other documents to the DFSA,
- respond to or publish information related to warnings imposed by the DFSA or other type of information provided by the DFSA to the company (such as statements or evaluations), or
- publish reactions on the company's website, such as reactions to Anti-Money Laundering related incidents.

Examples of the above listed is that financial undertakings are relieved of the obligation to submit the audited and approved annual report without undue delay after final approval. This is also in line with Chapter 1 of the Executive Order, where the deadline for submitting the annual report to the Danish Business Authority is prolonged, provided that specific conditions are met.

Further, a financial undertaking that has received a warning from the DFSA is relieved of the obligation to publish the information on its website as soon as possible and no later than three weekdays after the undertaking has received notice of the warning, or no later than at the time of publication required under the Capital Markets Act.

Which conditions must be met to utilize the deviations?

The following conditions must be met, in order to utilize the deviations:

1. That the institution requests that the DFSA deviate from the obligations, and
2. that it is *impossible* or *disproportionately difficult* for the company to comply with the obligations due to the actions taken to limit Covid-19 in Denmark.

Given the content of the Executive Order it is uncertain whether the DFSA will conduct an assessment of, whether or not it actually is impossible or disproportionately difficult for the institution to comply. Our recommendation is that an institution facing issues in complying due to the current circumstances, completes the request to the DFSA explaining why it is impossible or disproportionately difficult for the institution to comply.

It is noteworthy that the threshold is set at, what can be deemed to be "disproportionately difficult". This means that it is not a question of cost or materiality that will be at the core of the assessment, but merely whether or not it is out of line with the difficulties usually associated with complying with the relevant acts.

Our assessment is that when internally evaluating whether or not it is the case, valid arguments (depending on the issue at hand) can be:

- That all or a large number of employees work from home,
- that the office buildings are inaccessible, or
- that urgent matters of importance to the society require more resources (but a detailed description why will likely be necessary), or similar.

The DFSA has issued a statement that the Executive Order shall not be seen as an exhaustive list of what is possible. Therefore the DFSA encourage companies to reach out should they meet other practical or administrative issues. The statement from the DFSA can be found here.

Further, the DFSA has issued a short statement on temporary terms in respect of the accounting and reporting rules for financial institutions. Specifically Finance Denmark has raised questions as to how devaluations of companies is handled. DFSA has essentially stated, that temporary relaxation of the credit evaluation to credit worthy customers as a direct consequence of the current circumstances shall not result in a reduction in the customer's credit worthiness. On the other hand, temporary breaches of existing agreements might be an indicator of a reduction in credit rating of the customer. The statement from the DFSA can be found here.

It is for the time being uncertain whether or not the current restrictions will be prolonged beyond the 30th of March. The Executive Order can be found here.

Read the newsletter online here.

ESMA issues new Q&A on Alternative Performance Measures in the context of COVID-19

ESMA has issued updated guidelines on the application of its Guidelines on Alternative Performance Measures (APMs) in the context of COVID-19. APMs are measures of financial performance, etc. other than those defined or specified in IFRS, such as Operating Results, EBIT, EBITDA, Free Cash Flows etc. The updated guidelines are particularly relevant to issuers contemplating making adjustments to existing and/or including new APMs in disclosures to the market related to financial reporting, e.g. in connection with quarterly reports or updates to their financial forecast.

The European Securities and Markets Authority (ESMA) has on 17 April 2020 issued a new Q&A that includes information on Alternative Performance Measures (APMs) in the context of COVID-19. The objective of the new Q&A is to provide guidance to issuers, whose securities are admitted to trading on a regulated market, on how to present the impact of COVID-19 for the purpose of the ESMA Guidelines on Alternative Performance Measures (APM Guidelines). The APM Guidelines apply to issuers using APMs when disclosing financial information to the market, e.g. in annual financial reports, half-yearly financial reports, quarterly financial statements, prospectuses and ad-hoc disclosures of inside information.

APMs are financial measures of historical or future financial performance, financial position, or cash flows, other than financial measures defined or specified in the financial reporting framework applicable to the issuer, which is typically IFRS for listed companies in Denmark. By way of example, APMs include financial measures such as Operating Results, EBIT, EBITDA, Free Cash Flows etc.

ESMA acknowledges that in light of the COVID-19 situation, an issuer may decide to disclose new or adjust definitions of existing APMs in its financial disclosures, such as its quarterly reports or ad-hoc disclosures of inside information. However, ESMA also observes that this approach may not be appropriate under all circumstances relating to COVID-19 in light of the requirement set out in the APM Guidelines that the definition and calculation of an APM should be consistent over time.

ESMA indicates that new or adjusted definitions of APMs may not always provide reliable and more useful information to the market, for instance, if the impacts of COVID-19 have a pervasive effect on the overall financial performance, position, and/or cash flows of the issuer. Instead, such APMs may mislead the users' understanding of the true and fair view of the issuer's assets, liabilities, financial position and profit or loss.

How should issuers present the impact of COVID-19 for the purpose of the APM Guidelines

ESMA recommends that:

- Issuers carefully assess whether any intended adjustments or new APMs will provide transparent and useful information to the market, improve comparability, reliability and/or comprehensibility of APMs and of the financial information disclosed to the market.
- Issuers improve their disclosures and include narrative information in order to explain the impact of COVID-19 rather than merely adjusting existing APMs or include new APMs.
- Issuers use caution when making adjustments to existing APMs and/or when including new APMs solely with the objective of depicting the impacts that COVID-19 may have on their performance and cash flows if this is not consistent with the requirement that the definition and calculation of an APM should be consistent over time.
- Issuers ensure, when disclosing APMs, that the measures provide a fair review of the development and performance of the business and of the position of the issuer and do not provide an incorrect depiction of the performance of the issuer which would give a misleading signal on the price of the listed shares (or other corresponding financial instruments).

For more information, read the new Q&A here.

Read our newsletter on ESMA recommendations concerning COVID-19, the duties of disclosure and financial information here.

Read the newsletter online here.

The reporting threshold for net short positions lowered to 0.1% and emergency short selling ban on shares traded on the Italian MTA market due to COVID-19's impact on financial markets

ESMA has in the past few days issued a decision on lowering the reporting threshold from 0.2% to 0.1% for net short position holders in shares traded on an EU regulated market and an opinion which allows an emergency short selling ban on shares traded on the Italian MTA regulated market. The decision and opinion are applicable for the next three months and have been made to ensure the orderly functioning of EU markets.

Introduction

The European Securities and Markets Authority (ESMA) considers that the current circumstances linked to COVID-19 constitute a serious threat to market confidence in the EU, and that it is essential for authorities to monitor developments in markets.

On 16 March 2020, ESMA issued a decision that lowered the notification threshold from 0.2% to 0.1% for net short position holders. The decision is available here.

The decision entered into force immediately upon its publication and applies for a period of three months to any natural or legal person, irrespective of their country of residence. The lowering of the reporting threshold is a precautionary action, which is linked to the exceptional circumstances of COVID-19 to allow for authorities to monitor developments in markets.

On 17 March 2020, ESMA issued an official opinion agreeing to an emergency short selling prohibition, for a period of three months, by the Italian Commissione Nazionale per le Società e la Borsa (CONSOB) on all transactions which might constitute or increase net short positions on all shares traded on the Italian MTA regulated market.

Notification requirements in connection with net short positions

Short positions triggering notifications: The short selling regulation (236/2012/EU) includes certain notification requirements in connection with net short positions in shares admitted to trading on an EU regulated market, e.g. Nasdaq Copenhagen.

When a natural or legal person has a net short position in relation to the issued share capital of a company with shares admitted to trading on an EU regulated market, such person is required to notify the relevant national competent authority whenever a net short position reaches, exceeds, or falls below the threshold of 0.2% of the issued share capital of the company. This threshold has for the next three months been lowered to 0.1%.

The obligation to notify also applies to each 0.1% increment above that, e.g. a short position of 0.12% of a company's share capital which is increased to 0.21% also has to be notified.

Short positions triggering public announcements: In addition, when a natural or legal person reaches or falls below a net short position of 0.5% of the issued share capital of a company with shares admitted to trading on a regulated market and each 0.1% threshold above that, such person shall make a public announcement of its net short position. No change has been made to this threshold for now.

Deadline for notifications: The deadline for the notification is 3.30 pm CET on the following trading day for reaching the net short position.

National competent authority: Net short position holders in companies admitted for trading on Nasdaq Copenhagen must submit the notifications to the Danish Financial Supervisory Authority. See further guidance here.

Emergency short selling prohibition on the Italian MTA regulated market

ESMA has also agreed to an emergency short selling prohibition, for a period of three months, by the Italian competent authority CONSOB. ESMA considers that the prohibition is justified by the adverse events or developments which constitute a serious threat to market confidence and financial stability in Italy.

It is expected that the proposed measure by CONSOB will enter into force on 18 March 2020 before the opening of the trading session and expire after the closing of the trading session on 18 June 2020. However, it may be lifted earlier by CONSOB depending on market conditions.

The prohibition concerns all transactions which might constitute or increase net short positions on all shares traded on the Italian MTA regulated market and all related instruments for the calculation of the net short position. However, the measure will not apply to market-making activities, trading in index-related instruments or short positions entered into to hedge positions on convertible bond or subscription rights.

It is yet to be seen if similar prohibitions will be proposed and allowed in other European jurisdictions as the effects of the COVID-19 on the European financial markets further materialise.

The official opinion is available here.

Read the newsletter online here.

ESMA issues recommendations concerning COVID-19, the duties of disclosure and financial expectations

ESMA has published a short recommendation for listed companies concerning the handling of COVID-19 in connection with the duties of disclosure and financial expectations.

The European Securities and Markets Authority (**ESMA**) has published a recommendation concerning the handling of the COVID-19 virus under the Market Abuse Regulation[1] (**MAR**). The recommendation is available here.

ESMA recommends that issuers ensure:

- That disclosure takes place as soon as possible of any relevant significant information concerning the impacts of COVID-19 on the undertakings' fundamentals, prospects or financial forecasts or financial situation under the Market Abuse Regulation,
- That there is transparency in the financial reporting on the actual and potential impact of COVID-19, to the extent possible based on both a qualitative and quantitative assessment on their business activities, financial situation and economic performance. This should be included in the annual report (if not yet finalised) or otherwise in their interim financial reporting disclosures,
- That they should be ready to apply their contingency plans.

Investment managers should also ensure risk management and act accordingly.

Undertakings are already affected – or will be affected – by COVID-19 and the ensuing macroeconomic instability. Therefore, it is of particular importance that listed companies on a current basis consider the effects on their previously issued financial forecasts, including whether adjustments are required.

A number of large, listed companies have included a short description of COVID-19 in their company announcements in relation to issuing the 2019 annual report and financial forecasts. The majority of these

announcements include a general comment concerning the uncertainty associated with the future effects of the COVID-19 virus. Considering the previously communicated information, undertakings will be obliged to consider the effects of COVID-19 and to publish the relevant adjustments.

Gorrissen Federspiel follows the development and on a current basis provides updates on new measures in this respect.

Read our newsletter on the handling of COVID-19 in connection with the holding of general meetings here.

Read the newsletter online here.

[1] Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse

COVID-19 update: Guidance from regulatory authorities for medicinal products and medical device companies

The coronavirus (COVID-19) crisis has a significant impact on companies operating within the fields of medicinal products and medical devices. Many regulatory authorities have introduced extraordinary measures to manage and mitigate the negative impact of the COVID-19 pandemic. In this update, we highlight some of the current measures put in place by the main regulatory authorities with respect to clinical trials, medicinal products and medical devices.

COVID-19-related measures for Clinical Trials

The COVID-19 pandemic has a significant impact on the conduct of clinical trials as the trial participants may be quarantined or otherwise hindered from following the protocol. Further, access to trial sites may be restricted, which may impact trial visits and the supply of investigational medicinal products and medical devices. Lastly, the work force at trial sites may be under significant pressure to handle other critical tasks.

Acknowledging the impact of COVID-19 on the pharmaceutical and medical device companies – and the broader society – many regulatory authorities responsible for monitoring clinical trials have put in place extraordinary measures and provide special guidance to manage and mitigate the negative impact of the COVID-19 pandemic on the conduct of clinical trials.

The European Commission's Guidance

In light of the COVID-19 pandemic, the European Commission – in collaboration with several other parties, e.g. the European Medicines Agency, the Good Clinical Practice Inspectors Working Group and the Clinical Trials Facilitation and Coordination Group – have published a guidance for all parties involved in clinical trials.

The guidance addresses the matter of initiating new trials. According to the guidance, the feasibility of starting new clinical trials or including new trial participants in ongoing trials should be critically assessed by the sponsors.

The guidance specifically provides that sponsors are expected to conduct risk assessments of each individual ongoing trial and that sponsors should consider whether to adjust their clinical trials on the basis of such risk assessments. Naturally, the safety of the participants are of primary importance, and the anticipated benefit for the participants and society should be weighed against the added challenges and risks due to COVID-19. If the risk assessment leads to actions affecting the clinical trial, the relevant competent authorities and ethics committees must be informed in accordance with the European and national framework.

The guidance maintains that sponsors are expected to continue safety reporting and that the involved investigators must maintain ways of collecting adverse events even if trial visits are postponed or cancelled.

The guidance also provides that in case a sponsor plans to initiate a trial aiming to test new treatments for COVID-19, advice should be sought on alternative procedures to obtain informed consents as it may not be possible to obtain written consents from COVID-19 patients.

The guidance also addresses the matter of changes in distribution of investigational medicinal products and medical devices, and the matter of monitoring and auditing.

Please find the European Commission's guidance on the management of clinical trials during the COVID-19 pandemic here.

The Danish Medicines Agency

On national level, the Danish Medicines Agency has issued guidance on extraordinary measures for clinical trials due to COVID-19, stressing, i.a., the importance of sponsors conducting risk assessments and escalating and managing any protocol deviations. The Danish Medicines Agency recommends handling COVID-19-related changes as "Urgent Safety Measures" which can be implemented without the approval from the Danish Medicines Agency.

The guidance also provides that the Danish Medicines Agency has reduced the time of first response for clinical trials investigating treatment or prevention of COVID-19. The Danish Medicines Agency has also stated that it will prioritize all requests regarding regulatory aspects in clinical trials with medicinal products in regards to COVID-19. Any communications to the Danish Medicines Agency in this regard should be directed to kf@dkma.dk and should be clearly marked with "COVID-19" and the EudraCT number in the subject field.

Further, the guidance states that it should be considered whether it may be appropriate to postpone initiating and recruitment for other clinical trials, and whether to postpone on-site visits or transferring such visits to telephone consultations.

The guidance from the Danish Medicines Agency contains detailed guidance as to the procedures for and format of notifications, as well as recommendations for handling changes to distribution of investigational medicinal products.

Please find the Danish Medicines Agency's guidance (in English) here.

The Danish Health Data Authority

The Danish Health Data Authority has stated that research projects concerning COVID-19 are prioritized, as applications for access to data (e.g. data in the National Patient Register) in connection with COVID-19 related research projects are being fast-tracked and jump the queue. Please find a link to the Danish Health Data Authority's information on the fast-track here.

Postponement of Medical Device Regulations

The two new medical device regulations (Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices and Regulation (EU) 2017/746 of the European Parliament and of the Council of 5 April 2017 on in vitro diagnostic medical devices) are currently set to enter into force and become applicable by 26 May 2020.

However, during a press conference held on 23 March 2020, the European Commission stated that it is working on a proposal to delay the entry into force of the new medical device regulations for one year considering the COVID-19 situation.

According to the Commission, this will release the national authorities and the industry from the pressure of implementing the regulations and allow them to focus fully on urgent priorities related to coronavirus crisis.

The Danish industry association for companies developing, manufacturing or selling medical devices (*Medicoindustrien)* agrees with the European Commission's proposal to postpone the implementation of the medical device regulations as member states, notified bodies and the industry are currently under significant pressure.[1]

Please find an audiovisual excerpt from the press conference of the European Commission here.

The Danish Medicines Agency puts inspections and control tasks on hold

The Danish Medicines Agency has the responsibility of inspecting the development, manufacture, distribution, dispensing and monitoring of medicines and medical devices. However, due to the COVID-19 pandemic – to contain the spread of the virus - the Danish Medicines Agency has stated that it will be putting all on-site inspections and laboratory controls on hold until further notice. Thus, the Danish Medicines Agency will only be conducting on-site inspections if there is a potential risk to patient safety.

However, office-based assessments will still be carried out, and the Danish Medicines Agency is working with the European Medicines Agency to find common control methods to be used during the pandemic.

Special measures on the supply of medical devices, personal protective equipment and disinfectants

In a recent update we have provided information on two recently issued Danish executive orders relating to the supply of medical devices, personal protective equipment and disinfectants in connection with the management of COVID-19.

The purpose of the issuance of the executive orders is to ensure sufficient supply of medical devices, personal protective equipment and disinfectants to regions, municipalities and hospitals. In order to reach this purpose, the executive orders introduce wide powers for the Danish Medicines Agency to impose extensive obligations on Danish companies.

Please find the update on the two executive orders here.

Gorrissen Federspiel is closely following the developments to keep its clients well-aware of the current situation within the pharmaceutical and medico fields.

Read the newsletter online here.

[1] https://medicoindustrien.dk/article/eu-kommissionen-vil-udskyde-implemetering-af-mdr

Special measures on the supply of medical devices, personal protective equipment and disinfectants

The Danish Government has recently issued two executive orders relating to the supply of medical devices, personal protective equipment and disinfectants in connection with the management of COVID-19. The purpose of the issuance of the executive orders is to ensure sufficient supply of medical devices, personal protective equipment and disinfectants to regions, municipalities and hospitals. In order to reach this purpose, the executive orders introduce wide powers for the Danish Medicines Agency to impose extensive obligations on Danish companies.

Introduction

In connection with the COVID-19 crisis the Danish government has issued (i) executive order no. 253 of 22 March 2020 on special measures relating to the supply of medical devices and personal protective equipment in connection with the management of COVID-19 ("**Executive Order No. 253**")[1] and (ii) executive order no. 277 of 25 March 2020 on specific measures relating to the supply of disinfectants in connection with the management of COVID-19 ("**Executive Order No. 277**")[2] (collectively the "**Executive Orders**").

The Executive Orders are issued pursuant to section 12(f) of the Danish Act on Measures against Infectious and Other Transmittable Diseases (the "**Act**"). According to section 12(f) of the Act, the Minister of Health may in situations involving the spread or the danger of spread of a dangerous disease lay down rules on special measures to ensure the supply of goods. The penalties laid down in the Executive Orders are issued pursuant to 29(2) of the Act.

The Executive Orders include a "sunset clause" and as such they are only in force until 30 August 2020, unless extended. While the Executive Orders also lay down obligations on Danish private hospitals, general practitioners, dentists, regions and municipalities, this newsletter focuses on the obligations, which apply to Danish manufacturers, importers and distributors.

Obligation to report on stock

The Executive Orders lays down an obligation for Danish manufacturers, importers and distributors to report on the size of their stock and expected consumption of their stock of certain types of medical devices, personal protective equipment and disinfectants, if required by the Danish Medicines Agency. The Danish Medicines Agency can lay down requirements for the form and content of such reporting.

Obligation to build stock of medical supplies

Under the Executive Orders, the Danish Medicines Agency can order Danish manufacturers, importers and distributors of medical devices, personal protective equipment and disinfectants to build up their stock for distribution to regions and municipalities. The Danish Medicines Agency has a right to lay down a more detailed framework, including scope and deadline, for when such stock shall be established.

Obligation to deliver medical supplies

Under the Executive Orders, the Danish Medicines agency can order Danish manufacturers, importers and distributors, to supply certain types of medical devices, personal protective equipment and disinfectants to regions and municipalities against payment from the region or the municipality. The Danish Medicines Agency has a right to decide the terms of payment and delivery.

What do the obligations entail?

The Danish Medicines Agency has already established a so-called 'logistics center' where municipalities and regions must register their holdings of i.e. gloves and protective masks. The reason for establishing such logistics center is for the Danish Medicines Agency to be able to get a comprehensive overview of the holdings of medical devices and personal protective equipment, but also to ensure that medical devices and personal protective equipment can be re-distributed between municipalities, regions or hospitals in the event of an acute shortage.

Even though not much guidance is available on the new Executive Orders, the issuance seem to be a further initiative in order for the Danish Medicines Agency to get a more comprehensive overview of Danish stock of medical devices, personal protective equipment and disinfectants to prepare for the care of the people infected with COVID-19 in Denmark. Furthermore, the Executive Orders leaves the Danish Medicines Agency with an option to order medical devices, personal protective equipment and/or disinfectants to be distributed from a Danish company to a region and/or a municipality if needed.

The obligation to report on current stock of medical devices, personal protective equipment as well as disinfectants, will be essential in order for the Danish Medicines Agency to be able to determine which manufacturers, importers and distributors will be able to and should (i) build up a stock of medical devices, personal protective equipment and/or disinfectants, and/or (ii) deliver current and/or future holdings of medical devices, personal protective equipment and/or disinfectants to a region or municipality in need. Manufacturers, importers and distributors will most likely receive notice to report on current stock of medical devices, personal protective equipment and/or disinfectants, before being asked to either build up stock or distribute their stock.

The obligation to build up stock of medical devices, personal protective equipment and/or disinfectants may include an obligation for Danish manufacturers to rearrange production to be able to produce such products. Many Danish companies have already voluntarily started production of i.e. disinfectants and personal protective equipment, but now the Danish Medicines Agency has legal authority to require additional Danish companies to do so.

Danish manufacturers, importers and distributors that receive a notice from the Danish Medicines Agency to either report on stock, build up stock or distribute stock of medical devices, personal protective equipment and/or disinfectants, should be aware that the Danish Medicines Agency has far-reaching powers under the Executive Orders to determine how such reporting shall be made, potential deadlines for when stock shall be in place or how the distribution shall be carried out, including terms of payment and delivery.

Who are the Executive Orders relevant for?

The Executive Orders are relevant for all Danish manufacturers, importers and distributors of medical devices, personal protective equipment and disinfectants.

The obligation to supply - upon request from the Danish Medicines Agency - certain types of medical devices, personal protective equipment and/or disinfectants to regions and municipalities applies to all Danish manufacturers, importers and distributors (i.e. not only to those which already produce or distribute personal protective equipment or disinfectants etc.). Accordingly, the Danish Medicines Agency has been granted broad legal powers to require, for instance, that device manufacturers supply personal protective equipment and/or disinfectants to regions and municipalities should this become necessary. However, in our assessment it is unlikely that the Danish Medicines Agency will use these powers to require a change in supply from companies, which do not already produce relevant medical devices, personal protective equipment or disinfectants.

Penalties for non-compliance

If a person fails to comply with the Executive Orders, the person may be punished with fine or imprisonment. Non-compliance by legal entities may be punished with fine pursuant to the provisions of chapter 5 of the Danish Criminal Code. Accordingly, compliance with the Executive Orders is mandatory and non-compliance is punishable.

Read the newsletter online here.

[1] Executive Order No. 235 can be found here (in Danish)

[2] Executive Order No. 277 can be found here (in Danish)

Update on EU export controls on medical supplies

As COVID-19 continues to spread, the availability of medical supplies, including personal protective equipment has become a concern within the EU. Certain EU member states took measures to ban or restrict exports of such products to not only third countries, but also to other EU member states, leading the EU to step in. On 15 March 2020, the EU imposed restrictions on the export of personal protective equipment outside of the EU. However, on 19 March 2020 the EU eased these restrictions by allowing export without a license to member states of the European Free Trade Association as well as certain other territories, such as Greenland and the Faroe Islands.

Introduction

As reported in our previous newsletter[1], on 15 March 2020 the EU by Commission Implementing Regulation (EU) 2020/402 of 14 March 2020 (the "Regulation") imposed restrictions on the export of personal protective equipment, whereby exports of gloves, masks, face shields and protective clothing outside of the EU requires an export license.

However, on 19 March 2020 the EU amended the Regulation by excluding a number of countries from the scope of application of the Regulation. In practice, this means that EU businesses will be able to export personal protective equipment to a number of third countries and territories, such as Norway, Iceland, Switzerland, Greenland and the Faroe Islands, without first obtaining an export license.

Changes to export controls on medical supplies

The EU has decided that even though measures within the EU may be necessary to ensure that the EU member states have enough personal protective equipment to prevent further spreading of COVID-19 and to

protect the health of medical staff treating infected patients, it may not be appropriate to control the exports of personal protective equipment to all third countries.

The EU has highlighted that the single market for medical and personal protective equipment is closely integrated beyond the boundaries of the EU, and so are its production value chains and distribution networks, which is particularly the case for Norway, Iceland, Liechtenstein and Switzerland. The EU recognizes that subjecting exports of certain personal protective equipment to these countries to an export authorization would be counterproductive, given the close integration of the production value chains and distribution networks. On this basis, the EU has decided to exclude Norway, Iceland, Liechtenstein and Switzerland from the requirement of obtaining a prior export authorization to export personal protective equipment.

Furthermore, many countries have particular dependency on the metropolitan supply chains of the EU member states to which they are adjacent or otherwise attached to. On this basis, the overseas countries and territories listed in Annex II of the Treaty on the functioning of the European Union,[2] including e.g. Greenland as well as the Faeroe Islands, Andorra, San Marina and the Vatican City are also excluded from the requirement of obtaining a prior export authorization to export personal protective equipment.

Despite Brexit, the United Kingdom is considered to be an EU country in this context, and the export of personal protective equipment from an EU member state to the UK can therefore take place without an export license.

The changes to the Regulation implemented on 19 March 2020 also include an obligation for the authorities of the excluded countries and territories to ensure that their own exports of personal protective equipment is adequately controlled, in order to ensure that the objective of the Regulation is not undermined.

Applying for export licenses

Businesses should note that the requirement for an export license also applies to deliveries under contracts entered into prior to the Regulation entering into force.

Each EU member state has their own national authorities which oversee compliance with EU export controls. Generally, these national authorities are also responsible for processing applications for export licenses, including applications for exports of personal protective equipment covered by the Regulation.

In Denmark, the Danish Business Authority is the national authority overseeing compliance with EU export controls and is as such responsible for processing export applications. Danish companies should file export applications for the export of personal protective equipment electronically through www.virk.dk. Further guidance in relation to the application process can be found here.

If a company is granted an export license under the Regulation, the company is advised to keep records, including supporting documentation for exports made under such license, in order for the company to properly document that the exports were carried out in compliance with the Regulation.

Read the newsletter online here.

[1] Link to newsletter on COVID-19's impact on the globalized world – exports

[2] Link to Annex II of the Treaty on the functioning of the European Union

COVID-19's impact on the globalized world – export controls

As COVID-19 continues to spread, the impact on the globalized world accelerates. With COVID-19 limiting travel and closing borders, global exports are affected. Not only is it difficult for businesses to carry on business as usual, governments have also imposed bans or export controls on exports of certain pharmaceutical products and medical devices.

Introduction

The COVID-19 crisis has highlighted the downsides of extensive international integration and many governments and businesses have now realized the risks involved in relying on complex global supply chains. While governments are closing down borders, imposing travel bans, additional visa requirements and export restrictions, the globalized world as we know it is temporarily becoming more national.

This newsletter highlights some of the immediate export challenges that the globalized world is currently facing due to the COVID-19 crisis.

Export controls on medical devices

A large number of governments, including China, South Korea, Taiwan, Thailand, Kazakhstan, India, Russia, Germany, France and the Czech Republic have imposed bans and/or export restrictions on medicines and medical devices in response to the COVID-19 crisis. The export bans and export controls mainly cover the export of medical devices such as respiratory masks, facemasks, gloves and protective suits. However, India has restricted the export of pharmaceutical ingredients and the medicines made from them, including paracetamol. While export controls do not necessarily mean that exports are prohibited, they make export licenses a requirement. Consequently, transactions may be delayed and potentially denied or cancelled.

Even with the free market in the EU, Germany, France and the Czech Republic have banned the export of facemasks – initially, also within the EU. Health ministers across the EU have expressed concerns about the

potential shortage in protective medical equipment in some member states as a result of bans and controls on exports put in place by other governments.

As a result of the increasing export bans and controls on medical devices, also within the EU, on 15 March 2020 the EU imposed restrictions on export of personal protective equipment (Commission Implementing Regulation (EU) 2020/402 of 14 March 2020). The export restrictions cover gloves, masks, face shields and protective clothing; prohibits exports of such items outside the EU without prior authorization by the authorities of the respective member state; is in effect as of 15 March 2020 and runs for six weeks. The EU member states are obliged to process export license applications within five days, which may be extended by a further five days under exceptional circumstances.

The EU has taken this step in order to meet the vital demand of personal protective equipment arising from the spread of COVID-19. As a result of the newly implemented EU regulation, France and Germany have now removed restrictions on exports of medical devices to the EU market.

While the various restrictions on exports are not in violation of the rules of the WHO, the director-general of the WHO has earlier this week stated that governments should be easing restrictions on the export and distribution of medical supplies, adding that "*This is a question of solidarity. This cannot be solved by the WHO alone, or one industry alone.*" The WHO has earlier encouraged companies producing medical equipment to increase such production. The WHO is concerned that companies will not ramp up production enough as long as exports are restricted.

Global export challenges

The globalized world as we know it is deeply dependent on complex global supply chains. Since the lockdown of China in January 2020, exports from China have decreased markedly. The shutdown of many Chinese factories has resulted in exports from China decreasing by 17 percent year-over-year and it has already disrupted the production of European cars, iPhones and other consumer goods. Not only are many offices, factories and ports in China short-staffed or closed down, causing delays, it also remains a challenge for exporters to get access to factories and port areas without the risk of facing quarantine on arrival or when returning to a larger city or a new country.

Italy has been under lockdown since 9 March 2020 and other governments are either closing down borders, encouraging or ordering citizens to stay at home, or implementing other initiatives in order to stop COVID-19from spreading even more. If COVID-19 continues to spread at its current pace, the expectation is that more countries will soon be under a lockdown similar to the lockdown in Italy. Lockdowns of countries and other initiatives to keep out COVID-19 from spreading is likely to result in a further decrease in global exports.

Read the newsletter online here.

Navigating the contractual disruption of the COVID-19 outbreak – Update on force majeure

As the COVID-19 is spreading, its impacts are rippling throughout international trade and supply chains. In this newsletter we provide some of the key points for companies to focus on and consider.

Introduction

Governments and authorities across the globe have imposed restrictions in order to limit the spread of the COVID-19, and many companies have also taken voluntary precautions. These restrictions are causing disruptions in international supply and distribution chains as many companies are facing delay in performance of their contractual obligations or have been unable to fulfil them. Still, many governments, including the Danish government, are exerting continuous efforts to maintain and support some level of business continuity in the private sector and are encouraging ongoing production with certain restrictions, in order to ensure cross-border exchange of goods, rescheduling, and progress in public projects in these challenging times.

Can the outbreak of COVID-19 now be considered a force majeure event?

In a recent update we analyzed the key-parameters applicable when assessing whether COVID-19 could constitute a force majeure event under relevant legal principles.

From a Danish law perspective, this may very well be the case. However, this ultimately comes down to a case specific assessment of (i) the legal framework, contracts etc. of the individual relationship, and (ii) the very specific matters surrounding each case of non-performance, both in terms of geography, business sector and

market conditions. Hence, what may constitute force majeure for one company, one project or one business sector, may be subject to a different conclusion for other companies with different activities in other areas.

A significant difficulty is the fact that the COVID-19 pandemic as such and the governmental measures taken are evolving and changing rapidly. In Denmark, as in most countries, the successive measures adopted by governments have progressively increased the restrictions and bans on movement and assembly, thus substantially altering the legal analysis of the consequences of the pandemic day by day.

Important focus points

Based on our daily contacts with clients on concerns and challenges surrounding non-performance and force majeure calls, please find below some of the most important focus points to help navigate your way around the force majeure issues and contractual disruption:

Be proactive and do your homework. It has to start with an identification and assessment of any key contracts and the risk of your company not being able to meet the contractual obligations therein. When reviewing, pay specific attention to the presence or lack of force majeure clauses.

Check the scope of the force majeure clause. Many force majeure clauses will include a list of examples of those events, which may constitute force majeure. Generally, and in particular in jurisdictions relying solely on the contractual concept of force majeure, it will be easier to claim force majeure if the event is listed as an example in the specific contract clause. While epidemics and/or pandemics may sometimes[1], but certainly not always, be included as such an event, the impact of a pandemic similar to COVID-19 may be subsumed within more general terms such as “disease” or “illness”, or emergency measures to address or contain an outbreak may be listed or covered under general terms such as “government action” or “national or regional emergency”.

Consider other remedies available to you. Some contracts may have provisions – other than force majeure - providing relief or entitlements in the event of governmental actions which impact contract performance. Governments worldwide have instated measures, orders and policies to be followed, and these might amount to such a change in law as to give effect to e.g. change-in-law provisions in contracts, or so called hardship provisions, which may help justify non-performance without incurring legal liability under the present circumstances.

Performance is more difficult or expensive now – is that enough? Depending on the exact wording of your force majeure clause (if you have one) and the choice of law covering your contract, generally speaking, force majeure defense claims will come neither easy nor cheap. Very often the party calling on force majeure will be required to prove that the non-fulfillment is due to the impossibility to perform his obligations. In most jurisdictions, this is a very high threshold to meet. As a starting point, it will not in itself be sufficient that performance of some or all contractual obligations have become much more burdensome, less profitable or even entirely unprofitable. As a result, companies need to give careful consideration to whether a contract can be fulfilled in a timely fashion in any alternative way despite disruptions. You might include the following considerations:

- Is it technically, logistically and practically possible to source components from other suppliers?
- Is it possible to take in temporary workers as intermediary replacements of absent employees?
- Do you have the rights to pass on any excess costs either to suppliers or to customers?
- Consider whether there are suppliers in the market that hold greater stocks of any relevant supplies in demand.

- Consider whether parts of the supply chain can be delivered or assisted virtually using technology or spec up via process or other improvements.

Focus on your defense file. The question of force majeure remains to be finally settled retrospectively in court or arbitration. Remember that the burden of proof rests with the party seeking to rely on a force majeure event. Make sure to collect any relevant documentation of all relevant facts rendering performance disrupted. This is often crucial for subsequent disputes potentially settled not only in Danish courts but also if a dispute is to be considered and battled in courts in most other jurisdictions and foreign legal systems. The documentation should include any relevant details related to the timing, the scope of impact on workforce/sourcing of parts/alternative facilities or the lack thereof, as well as evidence of all mitigating efforts or means taken to prevent non-compliance or limit the impacts of non-compliance.

Consider the impact of governmental relief and bail-out measures. Alongside the implementation of restrictive measures and lock-down, governments are rushing through bail-out legislation, all of which would presumably serve as mitigating relief, not least financial, at least to some businesses. In addition, by way of political decision, the Danish government has decided that public contract parties should refrain from pursuing claims for breach of contract including liquidated damages, against supplier's to support the suppliers and relieve them of the uncertainty related to force majeure[2]. The impact of those measures have yet to be seen, but they may serve to paint the color of the landscape surrounding any non-performance of a contract. Consequently, any positive effects on a company of such measures might limit the need for and applicability of force majeure.

Consider your global supply chain. Almost inevitably, any chain of contracts upstream and downstream will fail to provide full back-to-back relief. Whereas you might be fortunate that you have been able to agree on Danish law and Danish dispute resolution with your non-Danish supplier as well as your non-Danish customer, more of often than not, this is not the case. National legal concepts and interpretations of force majeure will vary from country to country, and only time will tell to what extent legal interpretations will spread globally. Local courts in any country will apply their own legal framework. However, considering the global scale of the COVID-19 pandemic itself, and the massive and rather similar issues facing businesses everywhere, including when the global legal community these days at great lengths discusses the concepts of force majeure, interpretations might end up with a more global answer, but there is no certainty, or even precedence for this at the moment.

If you have Chinese suppliers or sub-suppliers, you should be particularly aware that the China Council for the Promotion of International Trade (a state organ) has issued "force majeure certificates" since early February 2020 in order to help Chinese companies build their case in disputes with foreign trading partners, arising from Chinese government control measures related to the COVID-19 pandemic. Whereas the certificates do not *per se* infer force majeure, they do certify facts relating to the virus outbreak. Presumably, these certificates will gain rather strong recognition by and sympathy from Chinese courts (hearing disputes subject to Chinese law), whereas the value outside of Chinese courts and choice of law remains more uncertain. For any non-Chinese company affected by Chinese events in their downstream supply chain, we do however recommend asking their Chinese contract parties to provide the certificate to serve as evidence in any upstream chain force majeure disputes. Other countries may follow China's approach on issuing force majeure certificates, it which event similar caution as stated above should be taken.

Communicate clearly and stringently. Communicate clearly and loyally to your contract parties, explaining the nature and scope of the problems you are facing and what you are doing to address them. Try to balance the commercial need of the company and its management to raise the voice and ease concerns on the one hand, and the legal requirements of force majeure obligation to serve formal notice of force majeure on the other hand. Moreover, you will be in a much stronger legal position if you update your counterparty on an ongoing basis, both before and after you have given formal notice, telling them what the problems are and what you are doing to address them. Again, this may prove important in the context of mitigating losses and giving your customer/counterparty ample opportunity to comment on or otherwise confirm the proposed mitigation measures, as this will make it harder for them to object later down the line.

Make sure you comply with formal requirements of notification. Most contracts will only accept force majeure if formal notice is given without undue delay or within a certain period of time after you have become aware, or should have been aware, of the event constituting force majeure. If the contract does not provide time limits for issuing notices or other notifications, they must be issued within a reasonable time. It is also worth reviewing your business insurance policies in order to make sure that any damage events are notified within the time required by the insurance terms.

Be alert to new contracts. As the COVID-19 pandemic has become the new reality for business worldwide, traditional and generic force majeure clauses are likely to be insufficient in mitigating any of the future risks associated with the development of the outbreak in future contracts. In particular, a party seeking to rely on COVID-19 as a force majeure event in contracts entered into subsequent to the international spread of the outbreak, is unlikely to fulfill the condition of unforeseeability. Consequently, companies should consider incorporating a specific "COVID-19 clause" specifically granting contractual relief from and defining the contours and consequences of any non-performance due to the outbreak. When drafting such clauses, a number of issues should be carefully considered, including, inter alia, the specific delimitation of the relevant circumstances granting relief, and the extent of such relief.

And, if you are the party receiving the force majeure notice from a supplier or subcontractor, make sure that it is passed up the chain in accordance with any contractual notification requirements, even if you consider the notice to be questionable or inadequate in some way. Make sure to react and reserve your position towards that contract party claiming force majeure, even if this involves engaging in good-faith negotiations to help bridge the difficulties. Request further information and details from the notifying party to help build your own defense file.

In Gorrissen Federspiel we will be keeping a close watch on developments and will provide further briefings as the situation changes.

Read the newsletter online here.

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[1] See for example, the widely accepted Orgalime S2012 and SI14, which contrary to their predecessors include the explicit term "epidemics".

[2] Please refer to this fact sheet prepared by the Danish government.

Board duties in times of crisis

On 11 March 2020, the WHO declared the worldwide outbreak of COVID-19 a pandemic. As COVID-19 spreads, the Danish Government is adopting more and more measures to contain the spread of COVID-19. However, all these measures have major consequences for the Danish economy. This leaves many Danish companies in a difficult financial situation, and in that scenario, it is important that management acts.

Introduction

For a number of Danish companies, the COVID-19 crisis will mean that in the near future they will be in a situation where they risk breaking financial covenants and lack liquidity. In addition, several Danish companies will most likely end up in a situation where they will have to suspend their payments temporarily until they can resume normal operation through the use of the Government's bailout packages and through other forms of adjustment and restructuring, respectively.

This newsletter addresses the most important considerations for the board of directors of Danish companies facing financial difficulties and provides recommendations as to the considerations the company's board of directors must take into account in light of the acute financial problems caused by the COVID-19 crisis. In companies that do not have a board of directors, the responsibility rests with the executive board. The considerations and responsibilities described in the following are in all material respects common to all management functions in companies.

Duties of the board of directors

Section 115 of the Danish Companies Act contains an obligation for the board of directors not only to take care of the overall and strategic management, but also to ensure a sound organization of the capital company's activities. This entails, among other things, a duty for the board of directors to ensure that it receives the necessary reporting on the company's financial position on an ongoing basis, and that the company's capital resources are sound and adequate at all times, including that there is sufficient liquidity to meet the current and future obligations of the company as they fall due.

The board of directors is thus obliged at all times to assess the financial situation. The board of directors has an obligation to actively respond to a crisis that the Company may face because of COVID-19, in order to protect the Company, including its creditors, and avoid the risk of liability.

In the current situation, where the financial difficulties of several companies is directly attributable to the COVID-19 crisis, this assessment is particularly difficult, as the difficulties cannot be attributed to conditions within the company's sphere of control, but conditions that must be expected to end over time. However, it remains uncertain when this time will come. The fact that the conditions are expected to end over time can be included in the assessment, so that the board of directors in its assessment and forecast for future operations tries to involve and adjust the company – not only to the current economic reality of the company, but also in terms of the expected future situation of the company. Considerations on an unannounced suspension of payments concurrently with a scale-down of the company's activities can be included in the assessment. In respect of considering an announced suspension of payments, the board of directors should consider seeking external advice, as the board of directors or the company may potentially face liability if not carried out in accordance with applicable law.

The board of directors' obligation to ensure adequate capital resources

The duty to ensure adequate capital resources implies that the board of directors must continuously be aware of and monitor the company's financial position, including the liquidity situation, and decide whether the situation is financially sound.

The company must have sufficient liquidity and equity to withstand temporary falls in earnings. It is the right as well as the duty of management to continue running a company in financial crisis and try to overcome it, but management must not incur additional liabilities on the company that cannot realistically be covered. The management's responsibility for the company's sound capital resources also entails a responsibility for the operation and thus a duty to stop the company's operations if a sound continuation is no longer possible (in Denmark referred to as the moment of hopelessness).

In assessing whether the capital resources can be deemed adequate, particular attention must be paid to the future. The evaluation must be done taking, among other things, the company's updated budgets and forecasts based on the current situation into consideration; however, the fact that the conditions are expected to end over time can also be included, cf. the considerations above.

In assessing whether the company's capital resources are sound and adequate, the board of directors should also consider the possibility of obtaining financial support through the Government's various bailout packages, and the expected positive effect of such packages may also be included in the company's budgeting and assessment of the adequacy of the company's capital resources.

Duties of the board of directors in the event of insolvency

When a company is in a situation where it does not have sufficient liquidity, the board's main task is to protect and/or increase the creditors' expected payments from the company - either through a solvent restructuring or through an insolvent restructuring and ultimately a bankruptcy. In this case, it is the creditors, and not the shareholders, that are the first priority of the board of directors.

The general assessment of insolvency is a test of the ability to pay. The crucial factor is not whether the company is insolvent on its balance sheet, but, on the other hand, whether the company is able to pay its creditors as claims fall due for payment and that the lack of ability to pay is not just temporary. Particularly,

as regards the latter – the fact that the lack of ability to pay must be more than just temporary – is a crucial factor if it is due to a sudden drop in sales directly related to COVID-19. In the assessment of such current insolvency, the board of directors may include the possibility of applying for financial support through the Government's bailout packages, the effects of short-term scaling-back and the forecasts of the company overcoming the crisis within a (short) period of time.

If the company lacks liquidity, the board has an obligation to protect the interests of creditors and thus take all reasonable steps to avoid that the insolvency becomes worse and that the creditors' losses increase, respectively. In many cases, a bank will step in and make additional credit facilities available to avoid insolvency, but in the current situation, substantial amounts of funds may be received through the Government's bailout packages. In addition, the company may consider suspending its payments and initiating negotiations for a composition/respite with its most important creditors, respectively, including in particular if the access to financial support through bailout packages will be able to improve the results of operations. This will also be the case if, in the long term, further steps may prevent the insolvency and additional losses, respectively. In conclusion, it is important that the board of directors prepares concrete action plans for how the company is going to overcome the crisis which the company is facing, and the board of directors should as soon as possible take the measures necessary to maintain and supply liquidity.

If, based on an overall assessment, the company is deemed insolvent, and the insolvency is not realistically expected to be prevented through the voluntary measures and bailout packages, etc., the board of directors may be required to initiate formal proceedings before the bankruptcy court. Either in the form of a petition for restructuring, which, among other things, gives the company creditor protection under an announced suspension of payment, whereas the possibility of a comprehensive scheme with its creditors is investigated in consultation with an appointed restructuring administrator and a restructuring accountant. In the last resort, and if there is no basis for a restructuring, the board of directors may have to file the company's own bankruptcy petition.

However, the formal insolvency measures will not be necessary as long as there is reasonable prospect of preventing the insolvency by way of refinancing, support through bailout packages, voluntary arrangements or the like. In other words, the board of directors may, before initiating proper insolvency proceedings, examine the possibility of a solvent refinancing/solution and include this possibility in the basis for decision. In principle, the company will be entitled to continue its business while in pursuit of such refinancing in consultation with its key creditors, as long as this is done on a realistic and well-founded basis. It is crucial that the board of directors continuously evaluates the possibility of refinancing, whether by way of e.g. owner's equity contribution, bank financing or the Government's bailout packages, so that any measures can be taken in time. Depending on the specific situation, it will generally be a good idea to operate with several different action plans that take into account that the company operates in a changing market with many unknown factors.

Responsibility of the board of directors

Section 361(1) of the Danish Companies Act states that members of management who intentionally or negligently have caused damage to the company, shareholders or creditors are liable to pay damages. However, under Danish law, the board of directors is granted relatively broad frameworks in its attempt to save the company from a current insolvency as long as it is made on a well-founded, realistic and carefully prepared basis. In this respect, a crucial factor is that the board of directors constantly ensures that it does not act contrary to, e.g., the principles of equal distribution laid down in the Danish Insolvency Act (*konkursloven*) and that, after insolvency has been determined, no new substantial liabilities are established which the company will not be able to meet later. Generally, we recommend that the company's board of directors seeks advice if a current insolvency is determined, as regulation in this area is comprehensive, and there are many pitfalls and legal risk weightings.

Recommendations

If a company risks breaking financial covenants and is lacking liquidity, the board of directors should be aware of the following:

- The board should consider drawing up a detailed action plan and align it with key creditors;
- The possibility of obtaining financial support through the Government's bailout packages and the effects of these and the effects of organizational restructuring, etc. may be and should be included in the assessment of the company's capital resources and solvency, respectively.
- In its assessment of a possible insolvency, the board of directors may thus include the expected future improvement of the situation – and must not necessarily act solely on the current situation.
- The board of directors may consider initiating an unannounced suspension of payments and a dialogue with its most important creditors, respectively, as regards a short respite until, e.g., the effects of the bailout packages, organizational restructuring, etc. are in place.
- The company should not make material investments. Asset disposals should only take place after careful consideration and consultation with legal advisers and key creditors.
- The company should refrain from incurring new, substantial debt.
- The company should, in a current insolvency situation, refrain from taking actions that are not in the interest of all creditors, including payments to creditors that are not critical to the business. This is especially the case if the company is only able to pay some, but not all, creditors, see above regarding considerations in respect of an unannounced suspension of payment.
- The board should document all considerations and actions in the board minutes.

The measures required will of course depend on a specific assessment of the company's financial situation. It can be difficult for board members to assess which decision is the right one. However, it is important that the board of directors reacts quickly to the crisis. In case of insolvency, and before suspension of payments is effected, we recommend that the company seeks advice.

Read the newsletter online here.

Practical guide to the new rules on prohibition against assembly and extension of the deadlines for submitting annual reports in connection with the 2020 annual general meetings

The Minister for Health has issued executive order no. 224 of 17 March 2020 on the prohibition against assemblies with more than 10 participants (the "Prohibition against assembly order"). In addition, the Minister has issued executive order no. 223 of 17 March 2020 on the derogation from the duty of private persons towards public authorities in the area of the Ministry of Industry, Business and Financial Affairs (the "Extension of deadlines order").

Introduction

The Prohibition against assembly order is available here (in Danish).

The Extension of deadlines order is available here (in Danish).

The Prohibition against assembly order as well as the Extension of deadlines order entered into force on 18 March 2020 at 10 am and will be in force initially until 30 March 2020.

The two new executive orders affect a number of the upcoming general meetings. Many listed companies have not yet held their annual general meetings, but most of them have convened them to be held in the coming weeks. In this newsletter, we present a practical guide in respect of holding the upcoming general meetings.

In addition, we refer to our previous newsletters of 9 March 2020, available here, and 13 March 2020, available here.

Prohibition against assemblies with more than 10 participants

The Prohibition against assembly order prohibits the arrangement of and participation in indoor and outdoor events, functions, activities etc. with more than 10 participants. Violations of the prohibition is punishable by fine, just as companies may be held liable under the rules of the Danish Criminal Code.

The prohibition affects this year's annual general meetings, which will typically involve more than 10 participants, even with the very low number of participants so far this spring. In addition to the shareholders, representatives of management, the chair of the meeting, minute taker, access control and any translators, sound and light staff, etc. will be present.

The police are granted powers under the Prohibition against assembly order to assess whether an assembly poses special danger of infection, just as the police have access to facilities and other buildings/locations without a court order in order to ensure compliance with the prohibition. The police's assessment must take place subject to the Danish Health Authority's general recommendations concerning the risk of infection with COVID-19.

It is not stated in the Prohibition against assembly order whether more than 10 people may be assembled, if it is secured that the participants in the general meeting are separated in different facilities with less than 10 people in each room and if additional access control is applied. Since the aim is to reduce the risk of spreading of the disease, we assess that this will be an option. The police have been granted powers to assess whether an assembly poses a risk of infection and may prohibit such general meetings. In our opinion it will be considered whether the groups of 10 people in question may be separated entirely – also in connection with access and registration and in respect of access to rest room facilities etc. We recommend that companies consult with the police in respect of carrying through the general meeting in order to ensure that it takes place lawfully.

As a consequence of the Prohibition against assembly order, it may be considered taking additional measures to limit the participation in any general meeting, including by encouraging shareholders to vote by postal vote or proxy, or by encouraging shareholders to follow the general meeting by webcast instead of appearing in person. Such "warnings" have already been sent out to most companies. Such measures may be supported additionally by for instance allowing shareholders signed up to attend to submit comments/questions by email prior to the general meeting, so that they may be read out by the chair of the meeting within a predefined frame. Thereby it can be avoided that more than 10 people are assembled at the general meeting. If a physical general meeting is carried through it is therefore important to ensure that no more than 10 people are assembled in one place.

In practice, this may be done by placing shareholders in different rooms with a video link to the main room. In this respect, companies should note that shareholders must have the option to pose questions from the individual rooms and that the number of persons in each room is limited to the maximum number allowed. 10. Furthermore, the company should limit the number of "internal" participants, such as company representatives, advisors and technicians, as they also count in the total number of participants.

In this respect, we refer to our newsletters of 9 march 2020, which is available here, and 13 March 2020 which is available here.

Extension of deadlines for submitting annual reports

Under the Extension of deadlines order, the deadline for submitting annual reports has been extended for companies, which

i. have not yet held their annual general meeting at which the annual report is to be adopted,

ii. have several owners and due to the prohibition against assemblies with more than 10 participants have not held their general meeting at which the annual report is to be adopted, and

iii. are unable to hold an entirely virtual general meeting due to the lack of provisions to this effect in the articles of association.

It is stipulated in the Danish Financial Statements Act that listed companies must submit the annual report to the Danish Business Authority 4 months after the end of the financial year at the latest and non-listed companies and other undertakings 5 months after the end of the financial year at the latest.

Under the Extension of deadlines order, these deadlines are extended for 8 weeks after the Prohibition against assemblies order has been lifted, i.e. up until and including 25 May 2020 (provided that the current prohibition against assembly, which initially applies until 30 March 2020, is not extended).

The possibility of extending the deadline applies to listed companies, non-listed companies and other undertakings, and the 8-week extension of the deadline applies regardless of the companies' potential provisions in the articles of association in respect of shorter deadlines for holding the general meeting.

This means – with the current prohibition against assembly – that listed companies can postpone their general meetings, currently until 25 May 2020 at the latest, while other companies may hold their annual general meetings until the end of May 2020, if they are subject to the Extension of deadlines order.

Cancelling or postponing the annual general meeting due to the new Prohibition against assembly order

As stated in our previous newsletters, companies may cancel the general meeting entirely until the day of the scheduled general meeting. Since the Government's latest recommendation, a large number of companies have elected to postpone the general meeting, and many more companies are expected to take this approach.

If it is expected that more than 10 people will attend the meeting in person, the board of directors will be obliged to cancel/postpone the general meeting, unless special measures are taken to ensure compliance with the prohibition.

Any cancellation/postponement must be notified in the same manner as the notice of the general meeting, i.e. as a company announcement, on the company's website and by email to the shareholders, who have requested this. In addition, if the company has an ADR program, this must be coordinated with VP Securities/Computershare and the depositary, if any. We recommend that it is clearly stated in the notification that the general meeting is cancelled/postponed.

If the general meeting is cancelled/postponed, a new annual general meeting must be convened before the expiry of the deadline as set out in the Extension of deadlines order, cf. above. The general meeting can be postponed to be held in accordance with any deadlines stipulated in the articles of association.

The notice of the general meeting must in accordance with the rules of the Danish Companies Act be sent out by 3 May 2020 at the latest (three weeks prior to the meeting) and by 29 April 2020 at the earliest (five weeks prior to the meeting). If the company has an ADR programme, any deadlines under the depositary agreement must also be observed.

Practical issues in relation to Computershare/VP Securities

Computershare as well as VP Securities have currently imposed restrictions, which imply that they will not be able to be present at the venue of the general meeting. Access control will thus have to be carried through in cooperation with the chair of the meeting, a company representative and the keeper of the register of shareholders.

Considering the limited attendance at the general meetings held recently (often less than 10 external participants, even at general meetings that normally have several hundred attendants), the modified access control is not expected to affect the physical completion of the general meeting.

If a company decides to cancel a general meeting that has already been convened, it will be possible to hold the new general meeting as a partially virtual general meeting. Only companies that already have a provision to the effect that wholly virtual general meetings can be held in the articles of association, can use this option when convening a new general meeting. It applies to both solutions that the option must be described in the notice convening the general meeting.

If a company decides to hold a partially virtual meeting, Computershare as well as VP Securities offer different technical solutions after the prohibition against assembly has been lifted, which give shareholders the option of voting, watching the webcast and asking questions. In the past years, Computershare has used the LUMI app, which is downloaded on the mobile phone or tablet. The app can be used at the meeting as well as from other locations. VP Securities has for several years also offered a solution to carry through fully virtual general meetings, which is for instance used by SparInvest. This option renders it possible to integrate a partially or wholly virtual general meeting through an updated user platform, which in many ways resembles the investor portal, which companies and shareholders are already using.

In deciding whether to introduce partially or wholly virtual general meetings, companies should be aware of the applicable voting recommendations from the international proxy advisor services: ISS Inc. and Glass Lewis & Co. ISS Inc. initially recommend voting against introducing wholly virtual general meetings, but recommend voting in favour of partially virtual meetings. In this respect, Glass Lewis does not currently have a voting recommendation for Denmark.

We are on a current basis keeping an eye on additional guidelines and legislation in this respect that may affect upcoming general meetings.

Read the newsletter online here.

COVID-19 – Prohibition against assemblies with more than 100 participants | How this affects upcoming general meetings?

On 12 March 2020, the Government adopted an amendment to the act on measures against contagious and other transmittable diseases (the "Danish Epidemic Act"). With this legislative change, a prohibition against public events with more than 100 participants is imposed. Furthermore, the police is granted access (without a court order) to premises and other facilities for checking compliance with this prohibition.

Introduction

The final bill as adopted is available here (in Danish).

The act enters into force upon publication in the Danish Law Gazette. Until the prohibition enters into force, the Government recommends that events with more than 100 participants be cancelled or postponed due to the risk of the spreading of COVID-19, and that event organizers assist in reducing the risk of infection.

This affects a large number of upcoming general meetings in listed companies.

We refer to our newsletter of 9 March 2020, which is available here, in which you will find a practical guide to handling COVID-19 in connection with conducting the upcoming general meetings, including how companies and participants should behave in order to reduce the risk of infection with COVID-19.

Cancelling or postponing the annual general meeting due to the new prohibition?

As stated in our newsletter of 9 March 2020, companies may cancel the general meeting entirely until the day of the scheduled general meeting.

Any cancellation must be notified in the same manner as the notice of the general meeting, i.e. as a company announcement, on the website and by email/letter to the shareholders, who have requested this. In addition, if the company has an ADR programme, this must be coordinated with VP Securities/Computershare and the depositary, if any.

The board of directors is obliged to cancel the general meeting, if it is obvious that the general meeting may pose a risk for the participants due to COVID-19, or if there is risk that more than 100 people will be assembled in one place. It is therefore recommended that the companies keep themselves updated on COVID-19 on the Danish Health Authority's website and follow the Government's recommendations and instructions.

If the general meeting is cancelled, a new general meeting must be convened to be held before the end of April in order to ensure the timely submission of the annual report, i.e. by 30 April 2020 at the latest. Please note, that the articles of association may prescribe a different time limit.

The notice of the general meeting must in accordance with the rules of the Danish Companies Act be sent out by 8 April 2020 at the latest (three weeks prior to the meeting) and on 25 March 2020 at the earliest (five weeks prior to the meeting). If the company has an ADR programme, any time limits under the depositary agreement must also be observed.

Neither the Danish Companies Act nor the Danish Financial Statements Act currently contains the necessary authority for the Danish Business Authority to postpone the time limit for holding general meetings or the companies' adoption and submission of the annual reports.

Thus, the options of postponing the annual general meeting to a later time are limited.

We keep a watch on any additional rushed through legislation in this respect, which may affect the upcoming general meetings, including any options of postponing the time limits, etc.

Read the newsletter online here.

COVID-19 – Practical guide for annual general meetings 2020

On 6 March 2020, the Government recommended that events with more than 1,000 participants should be cancelled or postponed due to the risk of the spreading of COVID-19, and that event organizers must assist in reducing the risk of infection. The recommendation from the Government currently applies for the month of March. This affects a large number of upcoming general meetings in listed companies. In this newsletter, you will find a practical guide to handling COVID-19 in connection with conducting the upcoming general meetings, including how companies and participants should behave.

Time limit for holding annual general meetings

The annual general meeting must be held at such date that allows ample time for the annual report to be submitted to the Danish Business Authority within four months of the end of the financial year; i.e. by Thursday, 30 April 2020 at the latest for companies using the calendar year as the financial year.

If the time limit is exceeded, the Danish Business Authority may impose daily or weekly fines on the members of the board of directors and may lastly compulsorily dissolve the company.

Neither the Danish Companies Act nor the Danish Financial Statements Act contain authority for the Danish Business Authority to postpone the time limit for holding general meetings or the companies' adoption and submission of the annual reports. Currently, we are not aware of any new legislation, which would provide the possibility of postponing the time limit.

Possibility of cancelling or postponing the annual general meeting

Companies may cancel the general meeting entirely until the day of the scheduled general meeting.

Any cancellation must be notified in the same manner as the notice of the general meeting, i.e. as a company announcement, on the website and by email/letter to the shareholders, who have requested this. In addition, if the company has an ADR programme, this must be coordinated with VP Securities/Computershare and the depositary, if any.

If the general meeting is cancelled, a new general meeting must be convened to be held before the end of April in order to ensure the timely submission of the annual report, i.e. by 30 April 2020 at the latest. Please note, that the articles of association may prescribe a different time limit.

The notice of the general meeting must in accordance with the rules of the Danish Companies Act be sent out by 8 April 2020 at the latest (three weeks prior to the meeting) and by 25 March 2020 at the earliest (five weeks prior to the meeting). If the company has an ADR programme, any time limits under the depositary agreement must also be observed.

Thus, the options of postponing the annual general meeting to a later time are limited.

Restrictions on assemblies

The authorities in certain countries have imposed restrictions on assemblies, which may affect large general meetings. In Denmark, no restrictions have yet been imposed on large assemblies, but the Government recommends that events with more than 1,000 participants be cancelled or postponed due to the risk of the spreading of COVID-19.

If restrictions on assemblies are imposed in Denmark, the general meeting may still be held – e.g. by using separate rooms with video link. In this respect, it might be worth considering alternative options for holding the general meeting as reviewed below.

In addition, it must be assumed that the board of directors will be obliged to cancel the general meeting, if it is obvious that the general meeting may constitute a risk for the participants due to COVID-19. It is therefore recommended that the companies keep themselves updated on the development of COVID-19 on the Danish Health Authority's website.

Other options (postal vote, proxy, webcast, etc.)

Due to the risk of the spreading of COVID-19, it is recommended that as few people as possible be assembled in one place. However, it is still important to ensure that as large a number of shareholders as possible are represented or participate. The companies should therefore consider taking a number of measures in connection with holding the general meeting this year.

The individual companies should consider issuing an announcement to the company's shareholders (either all of them or solely the ones registered to attend), e.g. by announcement on the website and/or announcement from VP Securities/Computershare encouraging shareholders to:

- **Vote by postal vote or proxy:** The company may consider encouraging the shareholders to vote by postal vote or by proxy in advance instead of attending the general meeting in person. In order to ensure that the shareholders obtain the best possibility for doing so, the company may consider extending the time limit for submitting postal votes and voting by proxy until the latest possible date and time prior to the general meeting. Any extension of the time limit must be announced to all shareholders and must be coordinated with VP Securities/Computershare in advance.

- **Follow the general meeting by webcast:** The company may consider using webcast or extending any existing webcast in order to ensure that shareholders obtain the possibility of following the general meeting from their homes.

- **Follow the Danish Health Authority's recommendations:** The company may urge people who (i) show signs of infection, (ii) within the past two weeks have visited high-risk areas for local spreading of COVID-19 or (iii) within the past two weeks have been in close contact with other people, who either have visited such areas or are being monitored for infection, not to attend the general meeting.

- **Raise questions in advance:** The company may consider encouraging the shareholders to raise any questions in advance instead of attending the general meeting in person to take the floor.

- **Leave out catering:** Any catering should be cancelled or be served wrapped up in order to reduce the risk of any spreading of COVID-19.

At the actual general meeting, the company may also put up posters providing advice on hygiene and put out hand sanitizers in order to prevent infection, ensure that the participants are spread out, e.g. by placing participants on every other seat in the hall/halls and put up TV screens in hallways etc., allowing participants that attend to follow the general meeting without sitting down in the hall with the other participants.

Who must be present at the general meeting?

The company representatives, who must present the board of directors' report and present the annual report must be present at the general meeting. This will typically be the company's chairman of the board of directors or the deputy chairman and the CEO.

It is not a requirement that the company's other management members attend the general meeting, but it is considered good corporate governance that all members of the management attend, unless the persons in question within the past two weeks have visited high-risk areas for local spreading of COVID-19 or have been in close contact with other persons, who have either visited such areas or are being monitored for infection with COVID-19.

Is it possible to prevent people from attending the general meeting?

The companies cannot prevent shareholders from attending general meetings – or from bringing advisors – unless a participant shows obvious signs of being infected. However, companies may encourage participants not to bring advisers.

In addition, companies may urge people to follow the Danish Health Authority's recommendations and omit participating if they (i) show signs of infection, (ii) within the past two weeks have visited high-risk areas for local spreading of COVID-19 or (iii) within the past two weeks have been in close contact with other people, who have either visited such areas or are being monitored for infection. In addition to issuing an announcement, cf. above, companies may put up posters in this respect at the entrance of the general meeting.

Virtual general meetings

Wholly virtual meetings

The company may as an alternative to the physical general meeting hold a wholly virtual general meeting (i.e. without any physical attendance), if the company's articles of association contain provisions in this respect. If the articles of association do not contain such provisions, the company cannot decide to hold a wholly virtual annual general meeting in 2020.

Partially virtual meeting

Partially virtual general meetings, where the participants may choose to attend virtually or physically, may be decided by the board of directors and does not require a separate provision to this effect in the articles of association.

This presupposes that the notice of the general meeting states how the participants can register for the virtual meeting and the procedure for virtual participation.

If the notice of the general meeting has already been sent out and the notice does not contain the option of a partially virtual general meeting, it will (i) until the latest date and time for convening the general meeting, or (ii) by cancelling the general meeting and re-convening a new general meeting, be possible to forward a new notice of general meeting, which includes notice of the partially virtual general meeting.

If the time limit for convening the general meeting has expired, and the notice does not contain information on a partially virtual general meeting, the chair of the meeting will have to decide whether the company can carry through a partially virtual general meeting. However, this presupposes that the general meeting can be held safely and that none of the participants are prevented from participating in the general meeting.

It is important, that companies coordinate the use of virtual participation with the chair of the meeting, VP Securities/Computershare and the streaming provider in ample time prior to the general meeting, since partially/wholly virtual general meeting involve a large technical setup and it must be ensured that the general meeting is conducted in a safe and responsible manner. A partially virtual general meeting presupposes that the participants have the possibility of following the general meeting, have the possibility to vote and to take the floor through electronic media.

Read the newsletter online here.

Coronavirus as force majeure? Implications for commercial contracts

The current outbreak of coronavirus (COVID-19) disease has already lead to quarantines, bans and other restrictions in several areas inside as well as outside China and as a result, numerous businesses are having difficulties fulfilling their contractual obligations. Consequently, it may be relevant to consider whether the outbreak constitutes a force majeure event granting contractual relief, and how the outbreak should be taken into account when drafting commercial contracts in the future.

Force majeure as a concept

Under Danish law, force majeure describes the concept of extraordinary events preventing a contractual party from fulfilling its obligations under a contract; events which the relevant party could not foresee, prevent or overcome. Typical examples of force majeure events include war, riots, import bans, blockade, public seizure, fire and natural disasters.

The main legal implication of a force majeure event is temporary relief for the party being prevented from fulfilling its obligations – even if this has not been explicitly agreed upon in the relevant contract. Hence, the party subject to the restrictions of a force majeure event cannot be met by remedies for breach of contract from its counterparty. If performance of the contract is impeded by the force majeure event for an indefinite duration, a party's obligations to fulfil the contract may even cease altogether.

Does the outbreak of coronavirus constitute a force majeure event?

An assessment of whether the outbreak of coronavirus constitutes a force majeure event will be based primarily on an assessment of the contractual relationship in question.

In the lack of a separate force majeure clause in the relevant contract, two particular issues should be considered when assessing whether the outbreak of coronavirus constitutes a force majeure event:

First, the timely and accurate performance of the contract must be deemed *impossible* as a result of the outbreak. In this respect, the party seeking to rely on force majeure should consider how the outbreak has prevented or hindered the party from performance of the contract. One should keep in mind that, although the outbreak of coronavirus may have rendered it considerably more burdensome, more expensive or even unprofitable for the party to meet its contractual obligations, this will not in itself imply that force majeure can be relied upon. In addition, the mere default of a sub-supplier does not render performance of the contract impossible, if a possibility of contracting with alternative sub-suppliers is present.

Secondly, the outbreak of the coronavirus and the consequences hereof must be deemed as *unforeseeable* to the party seeking to rely on force majeure. Here, the date of entering into the contract will be an important factor, since it can be assumed that the outbreak, at its present stage, is sufficiently known by the public to render businesses capable of anticipating the potential consequences of the outbreak. However, for contracts entered into prior to the outbreak, e.g. before the point of the WHO officially classifying the outbreak as a public health emergency, it is more likely that the condition of unforeseeability can be met.

Choice of law and force majeure clauses

When operating in the realms of international contracts, it is important to keep in mind that choice of law clauses in the relevant contract may turn out to have great impact on the possibility of invoking force majeure. Where force majeure applies as a general legal norm in contracts subject to Danish law, this will not always be the case if the contract is subject to the law in another jurisdiction. Specifically, common law jurisdictions such as the US, Great Britain, Singapore and Hong Kong have no general force majeure-doctrine. In such jurisdictions, a contractual party is only entitled to rely on force majeure to the extent that this has been expressly regulated in the contract.

Correspondingly, contracts subject to Danish law may contain a separate force majeure clause, which will be relevant to consider. Depending on the specific wording of such clauses, the access to invoking force majeure may vary from contract to contract.

In addition, it is common for international contracts to contain alternative clauses, which may be relevant to consider in relation to the outbreak, including hardship or material adverse change (”MAC”) clauses. Depending on the matter at hand, these clauses may form alternative routes to contractual relief, if a party is unable to rely on force majeure.

Notice requirements

It is important to note that Danish law requires any party seeking to assert force majeure as a basis for suspending performance to provide notice to its counterparty. If this duty of notification is not observed, the party relying on the force majeure event may incur liability towards its counterparty, and the contractual relief may lapse completely.

A similar notice requirement is usually found in international contracts not subject to Danish law. As such, numerous international standard contracts, e.g. the FIDIC Suite of Contracts and the Orgalime General Conditions, prescribe that failure to send such notices within a certain number of days, may result in the force majeure defence being waived or other adverse consequences. The formal requirements for the drafting of such a notice may vary from contract to contract.

Practical implications

As apparent from the above, the assessment of whether the outbreak of coronavirus will constitute a force majeure event will be highly dependent on an in-depth assessment of the contract in question. For this assessment, we recommend that the following is considered:

- Does the contract contain a force majeure clause? If so, it must be examined to which extent it covers impediments to performance as a result of epidemics, pandemics, quarantines, isolation and other relevant restrictions.
- If the contract does not contain a force majeure clause, it must be examined whether the law governing the contract contains a general force majeure doctrine.
- Was the contract entered into before or after the coronavirus outbreak?
- Has the coronavirus outbreak in fact prevented or hindered performance of the contract or could it be possible to solve the complications by use of alternative means?
- Have the relevant contractual parties been notified of the lack of performance which should be anticipated due to force majeure?

Furthermore, concerned businesses should conduct an overall review of their standard contracts and consider how the outbreak may be taken into account when drafting contracts in the future. In particular, it should be considered whether the risks associated with the outbreak have been sufficiently addressed in existing force majeure clauses or whether the outbreak necessitates the incorporation of a specific "coronavirus clause" defining the contours and consequences of any non-performance due to the outbreak. When drafting such clauses, a number of issues should be carefully considered, including, inter alia, the specific delimitation of the relevant circumstances granting relief, and the extent of such relief. Gorrissen Federspiel is closely following the development of the outbreak and would be happy to assist in this regard.

Read the newsletter online here.

The European Commission has amended its Temporary Framework for coronavirus related State aid measures

On 19 March 2020, the European Commission adopted a Temporary Framework for State aid measures to enable EU Member States to support the economy in the current COVID-19 outbreak. On 3 April 2020, the European Commission published an amended version of the Temporary Framework, which includes new potential support measures along with clarifications and amendments concerning measures in the original Temporary Framework. This newsletter provides a brief overview of the amended Temporary Framework.

Since the beginning of the coronavirus outbreak, the European Commission has approved more than 20 State aid measures by EU Member States who are attempting to tackle the effects of the COVID-19 outbreak on their economy.

Almost all of the measures were approved under the European Commission's Temporary Framework for State aid measures to enable EU Member States to support the economy in the current COVID-19 outbreak, which was adopted on 19 March 2020.

As described in our newsletter on the adoption of the Temporary Framework, the original Temporary Framework set out temporary State aid measures that the European Commission considered compatible under Article 107(3)(b) TFEU, and which could be – and have been – approved very rapidly upon notification to the European Commission by the Member State concerned.

On 3 April 2020, the European Commission amended the Temporary Framework by adding additional support possibilities for five types of aid measures and by clarifying and amending support possibilities under the original Temporary Framework.

According to Executive Vice-President Margrethe Vestager, in charge of competition policy, the amended Temporary Framework enables Member States to support companies that develop and manufacture much-needed products to fight the coronavirus, e.g. vaccines, medicines, medical devices, disinfectants and protective equipment. Further, the amended Temporary Framework will help Member States ease liquidity constraints faced by companies and save jobs in sectors and regions that are hit particularly hard by the coronavirus crisis.

The amended Temporary Framework now also covers the following five types of aid measures:

1. **Support for coronavirus related and other relevant antiviral research and development (R&D)** in the form of direct grants, repayable advances or tax advantages. A bonus may be granted for cross-border cooperation projects between Member States. Beneficiaries must commit to grant non-exclusive licences under non-discriminatory market conditions to third parties in the European Economic Area.

2. **Support for the construction or upscaling of infrastructures needed to develop and test products useful to tackle the coronavirus outbreak, up to first industrial deployment,** in the form of direct grants, tax advantages, repayable advances and no-loss guarantees. The products include medicinal products (including vaccines) and treatments, medical devices and equipment (including ventilators, protective clothing and diagnostic tools), disinfectants, data collection and processing tools useful to fight the spread of the virus. A bonus may be granted when an investment is supported by more than one Member State and when the investment is concluded within two months after the granting of the aid.

3. **Support for the production of products relevant to tackle the coronavirus outbreak** in the form of direct grants, tax advantages, repayable advances and no-loss guarantees. The products include medicinal products (including vaccines) and treatments, medical devices and equipment (including ventilators, protective clothing and diagnostic tools), disinfectants, data collection and processing tools useful to fight the spread of the virus. A bonus may be granted when an investment is supported by more than one Member State and when the investment is concluded within two months after the granting of the aid.

4. **Targeted support in the form of deferral of tax payments and/or suspensions of social security contributions in specific sectors or regions or for types of companies that are hit the hardest by the coronavirus outbreak.**

5. **Targeted support in the form of wage subsidies for employees to companies in sectors or regions that have suffered most from the coronavirus outbreak, and would otherwise have had to lay off personnel.**

Further to these additional potential State aid measures that the European Commission considers compatible under Article 107(3)(b) or 107(3)(c) TFEU, provided that a number of conditions are met, the Temporary Framework contains clarifications and amendments with regards to certain aid measures already included in the original Temporary Framework published on 19 March 2020.

For example, the amended Temporary Framework enables Member States to give, up to the nominal value of € 800 000 per company, zero-interest loans, guarantees on loans covering 100 % of the risk, or provide equity.

Another example relates to short-term export-credit insurance. Normally, marketable risks cannot be covered by export-credit insurance with the support of Member States. This follows from a European Commission Short-term export-credit Communication, according to which trade within 27 EU Member States and nine OECD countries, with a maximum risk period of up to two years, entails marketable risks and should not be insured by the State or State supported insurers.

As described in our newsletter on the adoption of the Temporary Framework, the original Temporary Framework introduced additional flexibility on how to demonstrate that certain countries are not-marketable risks.

As a consequence of the current COVID-19 outbreak, the European Commission decided on 27 March 2020 to temporarily remove all countries from the list of “marketable risk" countries under the Short-term export-credit Communication. Therefore, Member States can make available public short-term export credit insurance in light of the increasing insufficiency of private insurance capacity for exports to all countries in the current coronavirus crisis, without the need for the Member State in question to demonstrate that the respective country is temporarily “non marketable.” This is also reflected in the amended Temporary Framework.

Member States wishing to grant aid under the Temporary Framework must show that a number of conditions are fulfilled. Different conditions apply for the different State aid measures mentioned in the Temporary Framework.

Undertakings that may receive State aid are encouraged to seek legal advice and ensure that all conditions are complied with since the consequences of receiving illegal State aid, i.e. State aid that has not been notified to and approved by the European Commission, can be severe.

Read the newsletter online here.

The European Commission adopts Temporary Framework for State aid measures to enable EU Member States to support the economy during the current COVID-19 outbreak

On 19 March 2020, the European Commission adopted a Temporary Framework for State aid measures to enable EU Member States to support the economy during the current COVID-19 outbreak. The aim is to lay down a framework that allows EU Member States to tackle the difficulties undertakings are currently encountering whilst maintaining the integrity of the internal market in EU and ensuring a level playing field. This newsletter provides a brief overview.

Introduction

Governments all over the world attempt to handle the effects of the COVID-19 outbreak on the economy. The European Commission has issued a communication with a Temporary Framework for State aid measures to enable EU Member States to support the economy in the current COVID-19 outbreak. The communication sets out the possibilities EU Member States have under EU State aid rules to ensure liquidity and access to finance for undertakings of all types that face a sudden shortage. This allows undertakings to recover from the current situation and to preserve the continuity of economic activity during and after the COVID-19 outbreak. At the same time, a level playing field within the EU is preserved.

Background

Under Article 107 of the EU Treaty, State aid consists of aid granted by an EU Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and which affects trade between EU Member States.

State aid can generally only be implemented after approval by the European Commission which is in charge of ensuring that State aid complies with EU rules.

The European Commission may approve State aid that is considered compatible with the internal market.

For example, Article 107(3)(b) of the Treaty provides that "aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State" may be considered compatible with the internal market.

The Temporary Framework sets out temporary State aid measures that the European Commission considers compatible under Article 107(3)(b) TFEU, and which – according to the communication – can be approved very rapidly upon notification to the European Commission by the Member State concerned.

Other options for EU Member States include:

- Support measures outside the scope of EU State aid control without the involvement of the European Commission, e.g. measures applicable to all undertakings regarding wage subsidies, suspension of payments of corporate and value added taxes or social welfare contributions, or financial support directly to consumers for cancelled services or tickets not reimbursed by the concerned operators.

- Support measures in line with the General Block Exemption Regulation without the involvement of the European Commission.

- Notification to the European Commission of aid schemes to meet acute liquidity needs and support undertakings facing financial difficulties on the basis of Article 107(3)(c) TFEU and as further specified in the Rescue and Restructuring State aid Guidelines.

- Notification to the European Commission of damage compensation measures to undertakings in sectors that have been particularly hit by the outbreak (e.g. transport, tourism, culture, hospitality and retail) and/or organisers of cancelled events for damages suffered due to and directly caused by the COVID-19 outbreak on the basis of Article 107(2)(b) TFEU.

- Notification to the European Commission of alternative State aid approaches – both aid schemes and individual measures.

State aid under Article 107(3)(b) of the Treaty

According to the Temporary Framework, the European Commission considers that State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b), for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability, especially of small and medium enterprises. This is because the COVID-19 outbreak affects all Member States and the containment measures taken by Member States impact undertakings.

The Temporary Framework sets out the compatibility conditions the European Commission will generally apply to aid granted by EU Member States under Article 107(3)(b) until 31 December 2020.

Member States wishing to grant aid under the Temporary Framework must show that the State aid measures notified to the European Commission are necessary, appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned and that all the conditions of the European Commission communication regarding the relevant State aid measure are fulfilled.

The Temporary Framework lists the following possible temporary State aid measures:

- **Aid in form of direct grants, repayable advances or tax or payments advantages**. Member States will be able to set up schemes to grant up to € 800,000 to a company to address its urgent liquidity needs.

- **Aid in the form of public guarantees on loans taken by companies from banks**. Member States will be able to provide State guarantees for a limited period and loan amount to ensure banks keep providing loans to the customers in need.

- **Aid in the form of subsidised interest rates**. Member States will be able to grant loans with favourable interest rates for a limited period and loan amount to companies. The loans may help businesses cover immediate working capital and investment needs.

- **Safeguards concerning aid in the form of public guarantees and subsidised interest rates channeled through banks**. Some Member States plan to build on banks' existing lending capacities, and use them as a channel for support to businesses, e.g. to small and medium enterprises. The Temporary Framework establishes that such aid channeled through banks is regarded as direct aid to the banks' customers – not to the banks themselves. The Temporary Framework also gives guidance on how to ensure minimal distortion of competition between banks.

- **Short-term export credit insurance**. Normally, marketable risks cannot be covered by export-credit insurance with the support of Member States. As a consequence of the current COVID-19 outbreak, it cannot be excluded that, in certain countries cover for marketable risks could be temporarily unavailable. The Temporary Framework introduces additional flexibility on how to demonstrate that certain countries are not-marketable risks. This enables short-term export credit insurance to be provided by the State where needed.

Different conditions apply for the different State aid measures mentioned in the European Commission communication.

Undertakings that may receive State aid are encouraged to seek legal advice since the consequences of receiving illegal State aid, i.e. State aid that has not been notified to and approved by the European Commission, can be severe.

In case of illegal State aid, which is subsequently approved by the European Commission, market interests may have to be paid for the period in which the aid was unlawfully implemented.

In case of illegal State aid, which is not subsequently approved by the European Commission, the full amount may have to be repaid with interests.

Read the newsletter online here.

COVID-19 puts merger control on hold

Merger control is experiencing a temporary standstill as the Covid-19 epidemic spreads across Denmark and the EU. In Denmark, large parts of the public administration is shut down for the time being. As a consequence, the time limits for assessing a merger notification by the Danish Competition and Consumer Authority have been suspended. Meanwhile, the EU Commission has asked companies to hold off on notifying transactions. Companies should consider the timing of a potential merger notification, as the duty to notify a notifiable concentration and the standstill obligations remain in force.

Introduction

The COVID-19 virus has led to unprecedented times in relation to containing and preventing the further spread of the virus. In these times, companies can be hard pressed to act swiftly and have an interest in trying to close any pending transaction.

During the past days, however, merger control regimes across the world have become affected by the COVID-19 pandemic, including in Denmark and the European Union.

Danish time limits suspended

The time limits for the Danish Competition and Consumer Authority ("**DCCA**") to assess merger notifications pursuant to the Danish Act on Competition, section 12d (1)-(5), have been suspended by executive order no. 225 of 18 March 2020, section 7. According to the executive order, the suspension of time limits shall last for 14 days. A reassessment of the need for further suspension of time limits will be done after this period.

It is of note that the executive order entered into force on 18 March 2020 at 10:00 CET, and will be revoked on 30 March 2020. Therefore, the executive order is not in force for the full 14 days, as it is revoked on 30 March rather than 1 April, which could lead to uncertainty as to whether the time limits are suspended or not

at the end of the period. If further suspension of the time limits have not entered into force on 30 March 2020, then the suspension will no longer be in effect.

In a press release, the DCCA stated that the COVID-19 situation provides challenges for the DCCA and the merging parties, as well as customers and competitors. Customers and competitors maintain an important role in market investigations conducted by the DCCA. Market investigations are dependent on information from the merging companies and third parties.

As a result of the COVID-19 situation, the DCCA finds it likely that time limits cannot be met in some cases, which in turn could lead to incorrect decisions, i.e. mergers being blocked when they should have been approved, or vice versa.

Finally, the DCCA stated that the DCCA would do its best to keep within the normal time limits, and encouraged potentially merging parties to contact the DCCA at first opportunity.

The EU Commission asks companies to hold off on notifying transactions

The EU Commission has requested merging companies to hold off on notifying any pending transactions for an indefinite period as a result of the COVID-19 pandemic. A number of measures has been put in place for the "time being".

The Commission has stated that the DG COMP services are likely to face difficulties in collecting information from third parties in the coming weeks. Furthermore, the Commission's staff may be limited in terms of access to information and databases and in terms of information exchange as the staff follows remote working measures.

There has been no official suspension of time limits for the Commissions handling of merger notifications.

Consequences for parties to transactions

Companies should take notice of these challenges when engaging in notifiable transactions. Neither companies' duty to notify nor their standstill obligations are affected by the suspension of the time limits or possible inability by the competent authorities to assess merger cases. Therefore, companies should carefully consider the timing when signing transaction documents as the period between signing and closing may be prolonged.

Read the newsletter online here.

COVID-19: New subsidy schemes for undertakings

The effects of COVID-19 imply a number of considerations for undertakings and public authorities, including the possibility of obtaining economic aid. Public subsidies may, however, be covered by the EU state aid rules, which should always be examined before public aid is granted in connection with COVID-19.

Introduction

The Danish Government has in the past days presented a number of measures to help Danish undertakings in connection with the outbreak of COVID-19, including:

- A compensation scheme in connection with the cancellation of large events due to COVID-19 and
- Guarantees for small and medium-sized companies ("SMEs") and large companies.

In addition, the Government has in cooperation with, inter alia, DI, the Danish Chamber of Commerce and the Danish Trade Union Confederation set up the "Government and Trade Corona Unit", which is to discuss possible measures in connection with the undertakings' challenges due to the outbreak of COVID-19, including the challenges in the transport trade, tourism and the experience economy.

Several of the Government's measures may be covered by the EU state aid rules, which require that the aid be notified to and approved by the European Commission before it can be granted, unless the aid is covered by specific exemptions. This also applies to any subsidy schemes from e.g. municipalities, which will initially also require notification to and approval by the European Commission.

The general state aid rules

Under article 107 TFEU, state aid exists if:

- aid is granted
- through state resources,
- which distorts or threatens to distort competition,
- by favouring certain undertakings or the production of certain goods, and
- affects trade between Member States.

Public subsidies granted on market terms are not considered as state aid and must therefore not be notified to the European Commission. In addition, the European Commission has adopted a general block exemption regulation (GBER) and a De minimis rule according to which certain state aid measures may be exempted from notification.

Whether the conditions for state aid are fulfilled and the aid must thus be notified to the European Commission or is covered by the exemptions in this respect, must be based on a specific assessment of the individual subsidy schemes.

Compensation scheme for cancellation of large events due to COVID-19

On 12 March 2020, the European Commission approved the first compensation scheme in respect of COVID-19 in Denmark and in the EU.

The scheme covers state aid in the amount of EUR 12 million to organizers of events that are cancelled, changed significantly or postponed during the period from 6 to 31 March 2020 due to the Government's request for cancelling events with more than 1,000 participants and events with more than 500 participants that are targeted at specific COVID-19 risk groups, such as elderly people and people with ill health.

The European Commission has approved this subsidy scheme under Article 107(2), letter b, TFEU, which covers *"aid to make good the damage caused by natural disasters or exceptional occurrences"*.

The European Commission assessed that COVID-19 is an exceptional occurrence with significant economic effects and that the state aid was directly associated with the damage caused by COVID-19.

The European Commission also assessed that the specific scheme is proportional, as it does not go beyond what is necessary in order to limit the economic effects. Thus, the scheme is in compliance with the EU state aid rules and can therefore be granted.

The Government's fact sheet on compensation for cancelling large events due to COVID-19 is available here.

The European Commission's press release on the approval is available here.

Guarantees for SMEs and large companies

The guarantee scheme for SMEs includes a state guarantee of 70% of the banks' new lending to otherwise sound SMEs that can document an operating loss of more than 50% due to COVID-19.

According to the Government, the scheme implies state aid and will thus be subject to the approval of the European Commission.

The guarantee scheme for large companies covers 70% of the banks' lending to large companies that can document a loss of revenue exceeding 50% due to COVID-19. The scheme for large companies must granted on market terms and will therefore most likely not be subject to the EU state aid rules.

The Government's fact sheet on guarantee schemes is available here.

The effects of receiving illegal state aid

The consequences for undertakings of receiving direct or indirect aid that is not subject to a compensation scheme approved by the European Commission may be extensive, as the undertakings risk having to repay the entire compensation amount with interest.

In addition, undertakings may risk having to pay interest if the compensation is approved after the undertaking having received the compensation. Therefore, it is crucial that undertakings and public authorities consider the state aid rules before granting public subsidies in connection with COVID-19.

Read the newsletter online here.

COVID-19: Possibility under procurement law to make changes and emergency purchases

The latest measures taken in connection with COVID-19 involve a number of considerations in relation to procurement law for many undertakings and contracting authorities. This may be the case in relation to ongoing tender procedures and existing contractual relationships, but also in relation to the need for emergency purchases.

Need for emergency purchases

Under procurement law, all public contracts with a value exceeding the threshold values must initially be put out to tender. This may involve a number of challenges for contracting authorities, when the need for emergency purchases arises due to the measures taken in connection with COVID-19.

However, in special circumstances, the contracting authorities have the opportunity of making purchases without a prior tender, if for instance the conditions under section 80(5) of the Danish Public Procurement Act are fulfilled. These conditions are fulfilled when:

1. An emergency need exists,
2. It is impossible to comply with the time limits of a tender procedure,
3. The need is the result of an unforeseeable event, and
4. The purchase only concerns the necessary volume.

The exemption under section 80(5) of the Danish Public Procurement Act must be construed restrictively and has only been used a few times. An example is the refuge crisis in 2015, where the European Commission found that an emergency need to purchase, among other things, tents and food existed. In 2013, the Complaints Board for Public Procurement held that The North Denmark Region was entitled to enter into a

contract for the delivery of a medical management system without a prior tender procedure due to a supplier's bankruptcy and considering the impact on patient safety.

According to the Danish Competition and Consumer Authority, the outbreak of COVID-19 per se constitutes an unforeseeable event, but emergency needs due to the development in the preparedness or other effects may imply a possibility of purchasing goods, services and/or building projects without a prior tender.

The possibility of using the exemption under section 80(5) of the Danish Public Procurement Act must be assessed for each individual purchase and cannot be invoked in the award of contracts, which e.g. may be conducted by using fast-track procedures, where the time limits are shorter than in the usual tender procedures.

Extension of time limits in ongoing tender procedures

Undertakings and public authorities may as a result of internal and external measures taken in connection with COVID-19 experience difficulties in relation to meeting the original time limits set out in the tender. Particularly undertakings may in connection with a reduction of the staff experience challenges in respect of preparing applications and bids within the time limits. This may imply fewer applications and bids and thus reduced competition.

Under the Danish Public Procurement Act, the contracting authority has, however, the possibility of extending the time limits for submitting applications and bids, when this is due to objective considerations, including the principles of proportionality and equal treatment.

According to the Danish Competition and Consumer Authority, measures, including the shortage of staff due to COVID-19, may constitute an objective basis for extending the time limits for submitting applications and bids in ongoing tender procedures.

The same will apply in respect of circumstances on the part of the contracting authority, such as quarantine or sending home employees, which imply that the tender procedure cannot follow the original time schedule.

However, the contracting authority cannot extend the time limit for submitting applications and bids, if they have already expired, since such an extension of the time limit would initially be contrary to the principle of equal treatment.

Changes to existing contractual relationships

The effects of COVID-19 may imply that the contracting authorities need to make supplementary purchases under an existing contract or to extend the contract until an ongoing tender is completed.

This may be the case if the time limit for submitting bids in an ongoing tender is extended, so that an existing contract expires before the new contract can be entered into.

According to the Danish Competition and Consumer Authority, COVID-19 and the measures taken in this respect form the basis for extending existing contracts under section 183 of the Danish Public Procurement Act until a new contract can be entered into. In this respect, it is a condition that:

1. the need for the change could not be foreseen by a diligent contracting authority,

2. the overall nature of the contract is not altered and

3. the value of the change does not exceed 50 per cent of the value of the original contract.

In addition, a contract extension must observe the principles of equal treatment, transparency and proportionality. This means, inter alia, that a contract extension cannot last longer than necessary and can only concern the parts that are necessary in relation to COVID-19.

It may also be possible to make supplementary purchases under the above-stated conditions set out in section 183 of the Public Procurement Act and under the De minimis rule in section 181 of the Public Procurement Act, when the total value of such purchases are lower than the threshold values and lower than 10% of the original goods/services contract or 15% of the original works contract.

The Danish Competition and Consumer Authority's assessment of the framework for procurement law in respect of COVID-19 is available here.

Read the newsletter online here.

COVID-19: Price strategies and cooperation with competitors

The outbreak of COVID-19 implies a number of commercial considerations, including future price strategies and potential cooperation in the sector in order to reduce the effects of COVID-19. However, undertakings must be aware that the competition rules also apply during a pandemic.

Cooperation with competitors

At a time when the number of infected persons increases every day, countries are closing down and the Prime Minister encourages Danes to close ranks, it may seem obvious to reach out to competitors in order to ensure that the effects of COVID-19 are reduced. However, even with the best intentions, undertakings must be aware that the competition rules also apply during a pandemic.

Section 6 of the Danish Competition Act and Article 101(1) TFEU prohibits undertakings from entering into agreements that have restriction of competition as their direct or indirect object or effect. This prohibition also applies to agreements within an association of undertakings and concerted practices between undertakings, for instance if undertakings wish to enter into a cooperation concerning purchases or wish to exchange strategies for handling COVID-19.

The prohibition also implies that undertakings are not allowed to exchange information, if such exchange of information may have restriction of competition as its object or effect.

In certain circumstances, the exchange of information between undertakings, including discussions concerning the undertakings' best practice for handling e.g. the reduced need for staff capacity and the restrictive measures in respect of COVID-19 in and between undertakings, may be justified in order to ensure a well-functioning supply chain in accordance with the changes in the authorities' recommendations and measures.

The exchange of information can, however, not imply a risk of coordination of e.g. the undertakings' prices and production.

Discussions with competing undertakings should only be initiated following a prior competition law assessment.

Price increases due to COVID-19

Several national competition authorities in and outside the EU have announced that they in connection with the outbreak of COVID-19 will monitor the undertakings' pricing. This is the case in for instance the UK, where the competition authorities have announced that they are monitoring the undertakings' pricing. In Italy, the Italian competition authorities are currently examining the pricing of hand sanitizers and face masks, and in China, the authorities have already issued fines for significant price increases on face masks.

In Denmark and in the EU in general, there is a prohibition against undertakings holding a dominant position abusing this position.

A dominant position normally exists, if an undertaking has a market share of at least 50%, but it may also exist for undertakings with lower market shares. In the current situation, market shares may suddenly change, for instance if undertakings in a market are no longer able to deliver the services in question. This may affect the assessment of whether an undertaking is holding a dominant position.

Abuse may be in the form of a dominant undertaking forcing unreasonable purchase or sales prices on others. This may be unreasonably high prices, if the prices are not commensurate with the economic value of the goods/services in question. An assessment of whether this is the case will be based on a specific assessment, including typically an examination of the profit margin in question and a comparison of e.g. historic prices, prices in other countries, etc.

If an undertaking experiences price increases this may be reflected in the undertaking's resale prices. Significant price increases due to shortage of supplies or increased demand may, however, be contrary to the prohibition against the abuse of a dominant position.

Violation of the prohibition against abuse of a dominant position may involve large fines and liability for damages.

Therefore, undertakings should carefully consider their pricing strategy in connection with COVID-19 in Denmark and abroad.

Read the newsletter online here.

COVID-19 virus: Restrictions on business leaseholds

On 17 March 2020, the government announced a number of additional initiatives to reduce the spread of the COVID-19 virus. The new initiatives entered into force 18 March 2020. The new initiatives involve, inter alia, closing of shopping malls, department stores, restaurants and cafés for customers. The initiatives may have substantial impact on both lessors and lessees.

New temporary bans restrict the use of commercial leaseholds

At a press conference held 17 March at 19:00, the Danish government announced a number of additional initiatives directed at reducing social contact, ensuring proper distance between the Danes and increasing the effect of social distance.

The new initiatives entered into force on 18 March under ministerial order (bekendtgørelse) no 224 of 17 March 2020 and derive from the amendments to the Epidemic Act (epidemiloven), which the Parliament passed on the 12 March 2020. You can read more about the amendments to the Danish Epidemic Act (epidemiloven) here.

The new initiatives entails, inter alia, a temporary ban on:

- shopping malls, department stores, arcades and bazaars etc. The ban does not include grocery stores, super markets and pharmacies located in shopping malls etc.
- places where food, beverages or tobacco are served (e.g. restaurants, cafés, nightclubs, discotheques, bars, taverns, shisha bars, etc.). It is still allowed for restaurants, cafés etc., under more specific conditions, to serve food and beverages to go (takeaway).

For the time being, all bans remain in force until 30 March 2020. You can find more details about the specific bans on the website of the Danish police and in the above-mentioned ministerial order.

The new bans raise a number of issues for both lessors and lessees related to business leaseholds in the retail, catering and tourist industries. This newsletter primarily deals with the impact of the new bans in connection to

- the lessors' duty to make the leasehold available to the lessee;
- the lessee's duty to keep the leasehold open and pay rent;
- the lessor's or lessee's breach of their obligations, including in cases of force majeure.

What is agreed in the lease agreement?

To a wide extent, the parties of a business lease agreement (lessor and lessee) can agree freely on the terms of the lease agreement. Thus, it is of paramount importance to determine what the parties have agreed upon in the lease agreement. If the parties, e.g., have specifically agreed which circumstances constitutes force majeure or who bears the risk of using the leasehold, it is that specific agreed term that will be taken into consideration when determining the right of the parties.

If the parties have not specifically agreed upon the terms of the lease agreement, the parties' legal position must be viewed in the lieu of the standard terms of the Danish Business Lease Act.

Force majeure

It is most likely that the latest government actions constitute force majeure in relation to some of both lessors and lessees obligations under a lease agreement, as

- fulfillment of terms of the lease agreement can be impossible due to the extraordinary situation created by the outbreak of COVID-19 virus and the bans imposed by the government, and
- the extraordinary situation – at least for the lease agreements drafted prior to the outbreak of COVID-19 virus – must be assumed to have been unpredictable for the parties.

Furthermore, as argued in newsletter dated 2 March 2020 "*Coronavirus as force majeure? Implications for commercial contracts*", it is – in addition to the two conditions mentioned above – a condition for exemption from liability that the party claiming exemption dutifully notifies the other party thereof. This also applies for business lease agreements.

Under Danish law, generally, the consequence of force majeure is that the party unable to fulfill his commitment is temporarily exempted from liability.

The lessor's obligation to make the leasehold available

The primary obligation of the lessor under a lease agreement is to provide the premises to the lessee during the lease period. The risk of amendments, public orders or other external circumstances arising during the lease period is usually considered to be the responsibility of the lessee, which also often will be reflected in the terms of the lease agreement.

The lessors' obligation to make the leasehold available to the lessee will, in principle, be fulfilled even in a situation where the use of the leasehold has been prohibited. However, this is not given if there are specific circumstances either as a result of individual lease agreement terms (e.g. guarantees), circumstances concerning the draft of the lease agreement or the nature of the leasehold that may lead to a different result.

What can a lessee do when it is not possible to conduct business from the leasehold due to a temporary public ban?

Can the lessee terminate the lease agreement or demand a rent reduction? And does it affect the lessee's obligations to keep the business open and pay rent?

Termination of the lease agreement?

A public ban of the use of the leasehold does not constitute a breach justifying termination of the lease agreement. Thus, the lessee will not be able to terminate the lease agreement.

If the lessee experiences a significant decline in revenue, the lessee may consider terminating the lease. Under the Danish Business Lease Act the lessee in general has an unrestricted right of termination, unless otherwise agreed in the lease agreement. Termination is subject to the agreed notice – or if no term has been agreed with three months' notice. However, if non-termination is agreed, this constitutes a restriction on lessee's notice of termination.

According to the Danish Business Lease Act, Section 23 (2) the lessee is entitled to terminate the lease agreement untimely "*because a public authority has banned use of the premises by the lessee for health or other reasons"* and *" the lessee is only under an obligation to pay rent until the day on which such ban becomes effective*".

If, however, the ban merely restricts the use in a manner, which is of minor importance, the lessee is only entitled to proportionate reduction of the rent, cf. 23 (2), last sentence.

It is stated in the preparations for the Danish Business Lease Act, section 23 (1) that the provision *"relates to the situation where it is due to the lessor's affairs, or affairs of which the lessor bears the risk, that the public authorities due to health reasons or other reasons has banned the lessee's use*."

The provision typically aims at situations, where the state of the building or the leasehold means that the use of the leasehold must be prohibited. The current situation most likely cannot be regarded as covered by section 23 (2), but there is no relevant case law related to the provision which may contribute to definitive clarification. Therefore, it is uncertain whether the current ban on shopping malls, etc. will be covered by the provision – either directly or indirectly.

However, even if the provision applies, individual terms may be agreed in the lease agreement, which means that the risk still is incumbent on the lessee.

Finally, in case the latest governmental ban constitutes force majeure, the lessor will most likely not be in breach of contract, even if the leasehold (temporarily) is not available for the lessee.

Is the lessee obligated to pay rent and other expenses?

The operation of the lessee's business is, as a general rule, not the risk of the lessor. Unless otherwise agreed in the lease agreement the lessee alone carries the risk of any decrease of customer flow and consequently any decline in revenue.

Therefore, in a situation where the lessee experiences a significant decline in revenue, the lessor maintains the right to collect rent and other expenses and claim breach of contract, including termination, if the lessee fails to pay rent.

It may be considered whether the ban constitutes force majeure that relives the lessee from paying rent. Most likely this will not be the case, but here may be specific circumstances either because of the terms of the individual lease agreement (e.g. guarantees) or because of specific circumstances surrounding the conclusion of the lease agreement that will lead to a different result.

Reduction in the rent?

Under the Danish Business Lease Act the lessee is entitled to demand a proportional reduction of the rent, if the state of the leasehold diminishes the lessee's actual use of the leasehold (section 18) or where the use is wholly or partly contrary to legislation (section 22). It is doubtful whether these provisions will apply as a result of the new bans – and thus entitle the lessees to a reduction in the rent. This is due to the intentions of Section 18, which intends to regulate specific (especially physical) defects in the lease, while Section 22 relates to original (and not subsequent) legal defects.

In addition, the lessee may be entitled to reduction in the rent under the Danish Business Lease Act section 23 (2), last sentence, cf. above, e.g. in a situation where the public authorities impose a ban that only "*limits the use [of the leasehold] in a less substantial way (...)*".

As stated above, it is uncertain whether the present situation of bans concerning shopping malls, etc. will be covered by section 23 (1), and thus whether the provision provides the foundation for a claim of reduction of the rent**.**

Does the lessee have an obligation to keep the business open?

According to the Danish Business Lease Act section 39 (1), shops and restaurants – which is quite often in accordance with terms agreed in the lease agreement – have an obligation to "*keep the business open and operating to the customary extent*".

Failure to comply with this obligation will, after the lessor's demand and the lessee's failure to remedy, give the lessor the right to terminate the lease agreement, cf. section 69 (1), no. 9.

Note, that there is a difference between the situation where the lessee of a shop or restaurant voluntarily chooses to close the business for customers or guests, and the situation where the lessee is forced to close as a result of the new ban.

If the lessee voluntarily closes the business, this likely constitutes a breach of the lease agreement, cf. section 69 (1), no. 9 – also in the current situation.

If the lessee of a store or restaurant is forced to close the business, that's an entirely other matter. With the government's latest initiative to ban shopping malls, etc. it is most likely this constitutes force majeure. If this is the case, the lessee is not in breach of contract if the business is (temporarily) closed.

Summary

It is beyond doubt that the current situation with COVID-19 virus – especially in light of the new bans – can and will have a significant impact on the retail and restaurant industry, among others.

This is an extraordinary situation and the initiatives taken by the public authorities are unprecedented. This also means that in relation to the legal consequences this is without precedent.

It can be risky for both the lessor and the lessee – and may have major financial consequences in the form of claims for damages – to take positions on (i) the other party's failure of performance, (ii) the claim for rent reduction or no (temporary) rent or (iii) even termination. Both the lessor and lessee risk unintentional bankruptcy for the lessee and thus considerable vacancy and losses of otherwise healthy businesses.

The concrete and individual situation and lease agreement should therefore be subject to a specific assessment, and the results may well differ for shops, restaurants and hotels.

In relation to existing lease agreements, we recommend that the effects of the current situation are sought to be mitigated by negotiating voluntarily commercial solutions between lessor and lessee. Such solutions could include, for example:

- full or partial extension of payment, which has already been seen in several cases;
- temporary rental discount (possibly with a built-in stepway solution);
- redistribution of the total rental amount payable within the period of non-termination;
- (temporary) transition to cost-based rent;
- Non-performance or mitigation of indexing the rent.

It is important that such agreements are properly concluded and take into account that the situation may be prolonged, that the government can provide supportive initiatives to both lessor and lessee, which can affect the relationship between the parties. Furthermore, such agreements must consider the position of the parties, when the situation is normalized.

In relation to entering into new lease agreements, it is essential that the parties take COVID-19 virus into account so that, for example, a situation does not arise where the leasehold cannot be made available to the lessee on the day of commencement.

See the newsletter online here.

Force majeure and delivery issues in outsourcing and it-contracts, practical solutions

The COVID-19 situation is affecting the delivery of outsourcing and IT-services and both suppliers and customers are struggling to establish an overview of where the delivery issues will occur, identify whether the current situation constitutes a force majeure event and evaluate what can be done to overcome the issues. This newsletter will address how contracting parties should discuss and document how to resolve the delivery issues at hand, both in respect of existing contracts, where the situation may constitute a force majeure event, but also in relation to new contracts.

Customers and suppliers must collaborate to avoid deadlock and force majeure situations

How to deal with force majeure situations in practice under existing contracts, very recently entered contracts, and those still under negotiation

As we addressed in our newsletter on 18 March (Outsourcing customers are facing hard choices) force majeure protection under IT- and outsourcing services under Danish law will depend on the interpretation of the specific force majeure clause agreed in each contract.

Even though a force majeure clause is agreed in a contract and it designates *"epidemics"* or *"governmental regulations"* as force majeure situation, most force majeure provisions will set out more requirements that must be fulfilled before a party's non-performance is excused by force majeure.

Such additional requirements may require a party to give *"prompt notification"* and to*"use all reasonable endeavours to limit the effect of the delay or non-performance"*. Even if force majeure is deemed to exist under these requirements, for some or all of the services this may be followed by further requirement to

agree *"on procedures for such continuation or resumption of performance that under the circumstances is reasonably possible"*.

Most suppliers will therefore experience issues both proving that a force majeure event has occurred and ensuring they have complied with the relevant requirements. Most suppliers will try to mitigate and manage any delivery issues as best they can before calling force majeure, not only due to their contractual obligations but also to keep themselves in business and to avoid damaging their relationships with their customers. Offshore providers arranging to work remotely from home is one real and practical example of how suppliers are trying to mitigate the potential issues associated with COVID-19 in the BPO and ADAM spheres. Furthermore, where the outsourced services are crucial for a customer's business, the customer will often be more interested in collaborating with the supplier to find a practical solution than insisting on strict contractual performance.

Generally, there are good reasons for both parties to collaborate to limit any non-performance issues rather than waiting for the issue to become a legal dispute.

When faced with circumstances which may amount to force majeure, the first thing to do is a risk assessment:

- Will the supplier be able to perform in accordance with the contract?
- How may the supplier's supply chain be affected?
- Is there any way to mitigate the effects?
- How may the customer be affected and what can the customer do?

Having assessed the concrete circumstances, one can turn to the contract to identify:

- Which business continuity plans are in place under the contract?
- Should customer (or supplier) call a "disaster" under the BCP regime?
- Will current circumstances qualify for force majeure?
- If the supplier can partly perform the services, is there a breach and should notification of breach be given to preserve rights?
- Is step-in under step-in rights in a contract an option?

Practical solutions for existing contracts

It is important to note that the situation will change over time, meaning what was not force majeure last week may be force majeure this week (and vice versa). Therefore, the customer should track and evaluate the delivery situation continuously in cooperation with the supplier. This should not be tracked for the overall situation only, but for each service element and deliverable under the contract. Furthermore, under most force majeure clauses it is a strict requirement that the supplier notifies the customer as soon as they become aware of such circumstances. So far, in practice we have seen very few suppliers calling force majeure.

When the customer has an overview of the issues at hand from the supplier, the parties should together investigate to what extent:

- non-critical deliverables can be postponed e.g. if a hardware or software update was agreed to take place, it may be possible to postpone;
- non-critical services can be reduced or even closed down, e.g. if some services are not in use, due to the customer's employees working from home or due to the customer having to close down or reduce parts of its business;
- services can be supported or co-supported by customer in some areas where customer still have employees with the relevant knowledge or is capable of hiring in consultants with such knowledge;
- critical services or deliverables can be provided from other supplier countries or from other locations than otherwise agreed, and the move of this responsibility can be done with less restrictions than otherwise set out in the contract;
- services can be optimised or automated with new tools/software;
- it is possible for the supplier to find new subcontractors, not affected in the same way or with different technology to support or take over some services;
- service levels can be reduced or suspended;
- work remotely from the homes of employees of the vendor may be set up; and
- invoicing and payments can be changed, e.g. higher payment to include a new subcontractor and of course lower payments for less services (this is often set out directly in the force majeure clause), or a right for the supplier to invoice more often than originally agreed to provide cash flow to the supplier's organisation.

All of the above may affect the security of the services, breach GDPR requirements or introduce other risks, including the risk of service levels not being performed in accordance with the contract. For each decision the customer makes, it must be assessed:

i. whether it is legal to change the services or postpone deliverables e.g. reduction of security levels cannot deviate from GDPR and sector specific legislation; and

ii. for how long the customer's business will be able to accept such reduction or change in the services or payments etc.

All solutions agreed between the parties must be documented in temporary amendments to the contract or a change note for changes of an operational character, with the possibility to prolong and change as and when the situation changes. In the event a party acknowledges that a force majeure event exists for some or all services the agreed amendments or change note may constitute: *"procedures for such continuation or resumption of performance that under the circumstances is reasonably possible"*, if such a requirement is included in the force majeure clause.

It is important to note that a force majeure event only suspends the contractual obligations that are affected by the event, and the burden of proof is on the supplier to demonstrate the force majeure event has occurred and the services have been affected.

In the event the customer is not convinced that the supplier is in a force majeure situation it should be set out that the amendments do not constitute an acceptance of force majeure and all rights are reserved on the customer's part. As a reaction to this approach by a customer, the supplier may require that the amendment state that the supplier maintains that the circumstances constitute force majeure and if such circumstances should later be deemed to exist, the supplier may claim expenses and losses for any assistance provided.

Rather than going into detailed legal discussions, the parties should consider simply reserving their rights and focus on collaborating to secure continuity of services in the best possible manner and take such steps required to remain compliant with regulatory requirements. When doing so, parties should be aware of utilising those contractual solutions and guidelines that may be applicable in the current circumstances. For example, if a contract has a step-in rights mechanism, the practical solution to the situation at hand may be for the customer to take over some of the services and lead supplier resources.

New contracts – no force majeure?

Contracts that are currently being negotiated or that have been signed within the last weeks may have a force majeure clause. However, a party is unlikely to seek force majeure protection as the Covid-19 pandemic and the consequences may not have been "*unforeseeable*".

In the event the contract are currently under negotiation and the COVID-19 situation is expected to have effect on deliveries, time schedules, pricing etc. the parties may consider the following options:

- Pause the negotiations and await the normalization of the situation;
- Finalize negotiations but postpone signing and startup till the situation has normalized;
- Finalize the negotiations but postpone signing, however, startup deliveries under a letter of intent with an interim set up, including interim pricing and a possibility to terminate for convenience;
- Finalize negotiations and sign, however, agree a COVID-19 protocol that set out how the situation will be handled until normalization, including escalation procedures and extended obligations on cooperation. The commercial handling under such a protocol could be e.g.:
- To agree clauses that allows the customer to defer some specific services till a later stage, e.g. by prolonging the contract in the end, so the supplier will effectively have delivered for the period of time agreed in the first place;
- To agree specific relief events or limited liability for the supplier on some services which are more at risk to be affected by the situation;
- To agree additional payment for some services being delivered on-shore.

The choices depend on the situation for both the customer and supplier, and even though it may at first glance appear best to pause and wait for the situation to normalize, this may not be the best commercial outcome. Some contracts are crucial for the customer's business and should not be put on hold.

Read the newsletter online here.

Cyber security in the context of COVID-19

The current situation in which many employees work from home as a way to prevent the corona virus in spreading, poses and increases the threat to companies regarding their cyber security. This newsletter addresses some of the challenges.

Introduction

During the past couple of days, numerous actors, including the Danish Centre for Cyber Security and the Danish Data Protection Agency, have emphasized how the various precautionary measures related to COVID-19 have increased the cyber security threat to companies' and organisations' security measures, as working from home increases the risks to cyber security.

Companies and organisations should be aware that the risk based approach taken in respect of cyber security standards and rules, similarly applies in the current situation.

As an example, the risk based approach, as set out in article 32 of the General Data Protection Regulation (GDPR), requires an assessment of the increased risks of working from home on company hardware with access to company networks. Although working from home is more common at the moment due to the COVID-19 precautionary measures, it is important to note that this will not exempt companies and organizations from taking into account the added cyber security risks associated with working at home in a risk based approach.

Companies and organisations must continue to "*ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services*", cf. art. 32 of the GDPR.

Under these unusual circumstances, where a wide part of the population is required to work from home, some employees may be tempted to use easier and more accessible solutions, although such solutions may not be as secure. This may for example be the case if employees find that it is easier to work around the VPN connections or to skip or ignore software updates.

Companies and organisations must therefore be aware of the fact, that some of the workarounds, which employees may generally be prone to use, and which under normal circumstances would be caught by on-site measures or not possible on-site at all, may potentially entail liability of the company or organisation on behalf of its employees, as such acts may be negligent. Similarly, it is important to be aware of such workarounds or inadequate practices from a data protection perspective.

As a result, it is important that companies and organisations provide sufficient instructions to its employees regarding security measures when working from home.

We endorse the recommendations issued by the Danish Centre for Cyber Security on 14 and 15 March 2020, containing specific action points to mitigate the increased cyber security risks associated with working from home:

Recommendations for companies and organisations

- Should it at some point become relevant to temporarily adjust or suspend information security policies (in part or in whole) as a result of access requests to systems or to facilitate a different pattern of use, it is important to ensure that such adjustments or suspension are accompanied by adequate measures to counteract any negative consequences.

- Ensure that hardware provided to employees, e.g. iPhones, laptops, etc., is encrypted, and that access is restricted by appropriate password protection.

- Ensure that communication channels are established and that all employees are aware of such channels.

- Be aware of the cyber security threat landscape, as criminals may try to use the current situation, e.g. to spread ransomware and send phishing links and text messages, under guise of COVID-19.

- Ensure that employees are aware of the processes and measures established to ensure remote access securely, and to test that such measures are effective (e.g. VPN, multiple factor authentication, etc.).

- Ensure that the infrastructure supporting remote access has the capacity and number of licenses required to accommodate the increased number of users that need access at the same time.

- Ensure that automatic software updates are enabled when employees are working remotely. Alternatively, if this is not technically possible, ensure that employees are regularly reminded to update software on the hardware they are using when working from home.

- Ensure that the company is aware of risks associated with temporary access or permissions, and to reassess, when the need and use of such access and permissions ceases.

- As the situation turns back to normal, remember to evaluate the experience and collect feedback, to improve remote access, related processes and contingency plans.

Recommendations for the employee

- Use the tools and communication channels, which your company has put at your disposal and remember that the information security policies of your company or organization still apply when you are working from home. As an example, be aware that your company or organization may have rules for use of private email accounts and file exchange services.

- If your work computer does not update automatically, make sure to do so manually.

- Make sure to test that the remote access works, in order to ensure that potential problems may be remedied up front.
- Be aware of any potential fake email or text messages, which you may receive in guise of news about COVID-19.
- Remember to also protect the physical access to your work computer, when you are working remotely.

Read the newsletter online here.

COVID-19 – Outsourcing customers are facing hard choices but can leverage robust contract protections

COVID-19 has now spread to almost all of the world and WHO has declared it a pandemic. More countries including Denmark are taking severer measures in use to avoid or slow down the virus spreading. The public sector in Denmark is closed except from the most important functions and the private sectors are asking their employees to work from home or are taking other measures to mitigate the risks both in respect of employees' health and the companies' financial situation. This newsletter addresses some of the questions the customer should consider in outsourcing and it-contract in the event the supplier is not performing or the customer anticipates poor performance in the near future, if the supplier claims force majeure or if the customer cannot receive the supplier's deliveries due to the current COVID-19 situation.

The supplier is not performing or the customer anticipates non-performance will occur in the near future

The supplier must notify the customer of the force majeure situation, the supplier cannot just stop the services. As long as such a force majeure notice has not been received in accordance with the notice procedure in the contract, the customer should expect delivery as agreed.

In the event the supplier is not performing in accordance with the contract and has not claimed force majeure, the customer's first reaction should be to write the supplier and claim breach of contract specifying which deliveries or services have not been provided, reserve all the customers rights according to the contract and finally ask for a remediation plan and information to understand the issues.

The customer has by this letter ensured the customer's position under the contract for a period of time and will hopefully have caught the supplier's attention. This may lead to the supplier's prioritising solving the delivery problems. If not, the customer should investigate other options under the contract; please see bullet

points below on “other remedies”. If the supplier’s reaction to the breach letter is to claim force majeure please see next section on “force majeure”.

In the event the customer is expecting important deliveries within a short period of time or the company is moving into a phase where the supplier’s performance of services under the contract are of great importance to the customer’s business, and the customer anticipates that the supplier will not be able to perform then the customer should act proactively. The proactive measures should be both in respect of the day-to-day corporation and dialogue with the supplier but also by investigating the options under the contract:

- Is there a force majeure clause in the contract the supplier may claim is in effect;
- Is there a legal doctrine on force majeure or similar in the jurisdiction under which the contract is regulated that could come into effect;
- Is there other clauses the supplier may rely on in this situation e.g. hard ship clauses or other specific relief event clauses;

Furthermore, some contract have other remedies that may be possible to enforce as long as force majeure is not established:

- Is there a step in right and would it be possible for the customer to enforce this effectively;
- Is there proactive risk management or proactive remedies agreed that may be used to mitigate or limit the risks if activated;
- Are there other rights and remedies that could mitigate the risks and/or ensure the customer’s rights under the contract;

The supplier claims force majeure

The Danish Sale of Goods Act § 24 is not directly applicable for services or software deliverables and it can be discussed if the general principles deriving from this paragraph can be claimed if the contract is silent on force majeure in respect of services. In the following we assume that most it- and outsourcing contracts have a force majeure clause which is worded in line with the general principle of force majeure for goods.

In the event a force majeure situation is deemed to exist the supplier will be relieved from his obligations to deliver under the contract for the time period the force majeure situations exits, but as stated above the supplier must notify the customer of the situation.

Furthermore, in the event the supplier claims force majeure under the contract referring to an agreed force majeure clause, it will always be based on a specific interpretation of the situation and the wording of the clause whether force majeure can be claimed or not. It is generally important to note, however, that it is the supplier who must demonstrate that the COVID-19 situation is a force majeure event under the contract. Even if the clause specifically refers to epidemics or governmental regulations this will not in itself be enough to constitute force majeure under a usual force majeure clause.

The supplier must specifically demonstrate that the situation was *unforeseen*, when the contract was signed *and* that it is *impossible* to perform or deliver under the contract. For all contracts signed in 2019 and before the situation will most likely be regarded as “unforeseen”, however, for new contracts signed in 2020 this may be argued dependent on when the contract was signed in relation to the expansion of the COVID-19 outbreak.

In respect of demonstrating that delivery is "impossible" it is not sufficient that the fulfilment becomes more expensive or will become unprofitable to the supplier. Further, the customer should be aware of the following situations:

- If a sub-supplier is not delivering to the supplier and claims force majeure towards the supplier this is not sufficient prove of force majeure towards the customer, the supplier is still obligated to try and find another sub-supplier or the supplier should take over the sub-suppliers delivery;
- Meetings can be held and information be exchanged by using telecommunication both internally and with the customer;
- In the event key resources are ill the supplier will have to investigate if other resource can replace these key resources or if work can be restructured until the key resource is well again;
- In complex contracts with multiple services and deliveries and where the supplier are present in and delivers to multiple jurisdictions, the supplier must investigate the delivery situation for each element of the services, since some service elements may be possible to deliver, e.g.:
    - Some service elements may be provided by the supplier's staff working from home with remote access to it-systems etc., but in this case the security requirements of the contract should still be fulfilled;
    - In the event some employees need to be at the supplier's workplaces to perform their work, this can be handled by imposing restrictions at the workplace. Have employees work with a "safety distance", ensure masks and disinfectant are available and if needed and legal screen the employees for fever when they come to work;
    - The services may be provided from different countries with different restrictions enabling the supplier to continue some services as usual or with less restrictions in certain countries;
    - In the above situation the supplier should also investigate if the services can be reallocated to other jurisdictions with less restrictions or jurisdictions where the supplier have better facilities to enable delivery, however, this will still require the GDPR requirements are fulfilled;
    - The above also applies to deliveries from different locations within the same country, i.e. the supplier may have a location where employees can work in single offices and not share toilets etc. if they have to work from the suppliers offices to deliver the services;
- The fact that it is not possible to receive a visa for a short work stay in Denmark is not in itself a force majeure situation. The supplier needs to investigate if he can allocate Danish resources e.g. from his own organisation or hire a Danish located subcontractor, or provide the services remotely;
- In the event a governmental regulation requires a full lock down, i.e. it is not allowed to be outside or go to workplaces, some parts of the services may be impossible to deliver, if it is not possible to provide the required services by having the employees working from home; However, will not be for all services, since it will most likely always be allowed to go to e.g. a datacentre to replace a physical server or a power supply.

Based on the above Gorrissen Federspiel's current advice if a customer receives a claim for force majeure from a supplier is that the customer should (i) challenge if the deliver is actually "impossible" and (ii) ask for specific evidence for each service element reminding the supplier that it is not sufficient to fulfil the requirement of "impossible to deliver" that the fulfilment becomes more expensive or will become unprofitable to the supplier. Furthermore, the customer should (iii) claim breach and reserve its rights under the contract, and we recommend this even though the customer is working closely with the supplier to solve the delivery problems.

In the event the supplier accepts that force majeure is not in effect and provides the customer with alternative solutions to solve the delivery issues, e.g. by moving service delivery to other locations/countries or having the employee's work from home. These alternatives should be documented as temporary changes to the contract. Further, the customer should discuss and agree in writing with the supplier to which extent , if any, the customer can accept some delays in deliveries, deviations or suspensions of fulfilment of some or all service levels for a temporary period of time to provide the supplier with some latitude in the effort to ensure the service delivery.

Can the customer claim force majeure?

All the criteria set out above in respect of the supplier claiming force majeure applies to the customer as well. If the parties have contractual force majeure clause and it refers to epidemics or governmental regulations, this will not in itself be enough to constitute force majeure under a usual force majeure clause. The customer must specifically demonstrate that the situation was *unforeseen*, when the contract was signed *and* that it is *impossible* to perform or deliver under the contract. If this can be demonstrated the customer will be relieved of its delivery obligations for the time period the situations exits.

The most usual "delivery" from the customer to the supplier under a contract is payment for the services. The fact that the COVID-19 situation provides challenges for the customer's cash position will not be considered a force majeure situation under Danish law which have a strict responsibility for making payments.

However, in complex it-contracts and outsourcing contracts the customer will most likely also have other obligation under the contract than payment. These obligations could be, e.g.:

- Testing and approval of deliveries;
- Participation in meeting to plan, provide information or make decisions necessary for the supplier to continue working;
- Provide the supplier with access to it-systems;
- Buy new hardware and install this to enable the supplier to deliver software;
- Update operations software in existing infrastructure to enable the supplier to deliver software;
- Have other suppliers' of the customer provide information to the supplier or corporate with the supplier to enable the supplier to deliver;
- Allow the supplier physical access to customer's locations in order for the supplier to deliver.

In respect of the above examples the customer must demonstrate that it is impossible to fulfil, and as for the supplier it is not sufficient that it will become more expensive for the customer to fulfil than expected. Prior to informing the supplier of force majeure the customer should investigate in which ways the customer's obligations under the contract can otherwise be fulfilled regardless of the COVID-19 situation:

- Meetings can be held and information be exchanged by using telecommunication both internally and with the supplier;
- To the extent the customer's employees can work from home with remote access to it-systems this should be arranged;
- In the event some employees need to be at the customer's workplaces to perform their work, this can be handled by imposing restrictions at the workplace. Have employees work with a "safety distance",

ensure masks and disinfectant are available and if needed and legal screen the employees for fever when they come to work (please see: https://gorrissenfederspiel.com/viden/nyheder/the-coronavirus-and-concerns-relating-to-employees);

- In the event key resources are ill the customer will have to investigate if other resource can replace these key resources or if work can be restructured until the key resource is well again;

- Ensure tight coordinating with customer's other suppliers where their assistance is needed or deliveries are expected to enable the supplier to deliver, since they will also be affected by the situation;

Generally the customer should coordinate closely with the supplier to enable the delivery of services and to ensure that the customer can fulfil its obligations under the contract. In the event the contract have clauses that allow the customer to postpone deliveries or have other clauses that can provide the customer with latitude these should of course be considered. Such clauses often have a time limit or can only be used once or twice under the contract or provides the supplier with similar rights, so the timing of such initiation is important to consider.

Read the newsletter online here.

COVID-19 update: Measures taken by patent and trademark authorities

In light of COVID-19, many patent and trademark authorities and local offices have put in place measures to ensure the continued functionality and operation of the intellectual property right systems. As the majority of the activities of the patent and trademark authorities can be conducted remotely/online, the impact of COVID-19 is generally not expected to be significant. Nevertheless, the measures put in place (e.g. concerning deadlines and format of submissions) may impact companies seeking to protect and maintain their intellectual property rights. In this newsletter, we highlight some of the current measures put in place by the main patent and trademark authorities.

The **European Union Intellectual Property Office** ("EUIPO") has informed users that it will continue to receive and process trademark and design applications as usual. At the same time, the Executive Director has issued a decision to extend all time limits expiring between 9 March 2020 and 30 April 2020 to 1 May 2020 (i.e. Monday 4 May 2020). Staff of the EUIPO will be working remotely, and the offices will be closed. Therefore, all events have also been postponed and registered participants will be contacted with information on the updates.[1]

The European Patent Office's ("EPO") latest update on COVID-19 measures show that staff of the EPO have been instructed to work from home. In light of the disruptions caused by COVID-19, periods expiring on or after 15 March 2020 are extended until 17 April 2020. The Supervisory Board on qualifying examinations has decided to cancel pre-examination and main examination papers. Oral proceedings before the Board of Appeal will not be held between 16 March and 27 March 2020. Concerned parties should have been contacted in this regard. As a starting point, oral proceedings before examining and opposition divisions will take place as scheduled – only proceedings involving representatives that have recently visited "high risk areas" will be postponed or held via videoconference.[2]

In an update of 17 March 2020, the **World Intellectual Property Office** ("WIPO"), has declared that its Geneva headquarters are closed and that its staff are working remotely. Likewise, all events and meetings organized or co-organized by WIPO have been postponed. However, the update also informs that processing of applications filed through Global IP Services, the PCT, Madrid System and the Hague System are unaffected.[3]

Many national patent and trademark offices have also implemented special measures due to the impact of COVID-19. For example, the **Italian Patent and Trademark Office** has decided to stay almost all official deadlines falling within 9 March and 3 April 2020.[4]

The **United States Patent and Trademark Office** ("USPTO") is re-scheduling in-person meetings to be conducted remotely and the USPTO offices are closed to the public starting 16 March 2020. On 16 March 2020, the USPTO also declared that it would be waiving petition fees in certain situations for customers impacted by COVID-19. However, other requirements or deadlines set by statute will not be affected.[5]

In Denmark, the employees of the **Danish Patent and Trademark Office** are working from home until Friday 27 March 2020, but the office has proclaimed that the office is operating as normal – meaning that due dates will not be stayed. However, delays may be expected with regard to receipt of applications and payments.[6]

Gorrissen Federspiel is closely following the developments to keep its clients well-aware of the current situation in the IP field.

Read the newsletter online here.

[1] https://euipo.europa.eu/ohimportal/da/web/guest/news/-/action/view/5644698

[2] https://www.epo.org/news-issues/news/2020/20200306.html

[3] https://www.wipo.int/portal/en/news/2020/article_0011.html

[4] https://uibm.mise.gov.it/index.php/it/covid-19-sospesi-con-decreto-direttoriale-fino-al-3-aprile-2020-i-termini-in-scadenza-per-i-procedimenti-di-competenza-dell-uibm

[5] https://www.uspto.gov/about-us/news-updates/relief-uspto-customers-affected-covid-19

[6] https://www.dkpto.org/covid-19-information/

COVID-19: Prospects for dispute resolution in the wake of COVID-19

Whilst the Danish courts have now reopened, the outbreak of COVID-19 continues to have consequences for court and arbitration cases in Denmark. Companies and individuals may face difficulties in having disputes settled by traditional means in the near and perhaps longer term calling for alternative routes for dispute resolution in the wake of COVID-19. This newsletter explores the status of the Danish courts, the arbitration institutes and virtual means available, and the prospect of mediation as an alternative dispute resolution mechanism.

The Danish courts are partially reopening

Following the partial reopening of Danish public institutions from 15 April, the Danish courts on 24 April 2020 announced the plan for the reopening of the courts.[1]

Oral hearings are resumed while observing all relevant health guidelines. The resumption of oral hearings will happen with regard to the essentiality of the cases and the court's capacity to conduct hearings while limiting the spread of the coronavirus.

All civil cases can be heard, but the courts do not expect to have their usual capacity to conduct all cases. The Danish Court Administration recommends that civil cases are prioritized on the basis of the age, character and significance of the case, but the individual courts will prioritize which cases will be heard. Following guidelines have been issued for the prioritisation:

- Scheduled hearings in civil cases: Hearings scheduled at a time after the partial opening will as a starting point be upheld. Civil cases may be cancelled or rescheduled to accommodate hearings in the most pressing criminal cases.
- Hearings postponed due to COVID-19: Postponed cases will be scheduled before unscheduled cases (i.e. incoming cases that have not yet been scheduled). Postponed cases before the high courts should, if possible, be conducted in writing. Parties are encouraged to settle the case by mediation.

- New unscheduled cases: New unscheduled criminal cases are prioritized over new unscheduled civil cases. Any new civil cases will be scheduled if it does not hinder scheduling highly prioritized cases.

The Danish Court Administration has, together with the Danish Patient Safety Authority and the Danish Working Environment Authority, drafted guidelines for individuals visiting the courts.[2] These guidelines overall entail that

- There must be at least 2 meters between any participants in the courtroom
- The audience can be limited
- Because the facilities vary from courtroom to courtroom, the individual courtroom makes the final decision on the conduction of oral hearings.

As we are seeing new developments on a regular basis, we recommend that parties to court proceedings and their advisers stay updated at minretssag.dk and at the website of the courts, namely domstol.dk.

Status on pending arbitration proceedings – updates from the institutes

Pending arbitration cases also continue to be effected by COVID-19 and arbitration institutes around the world are now generally organising their work in consideration of authorities' instructions.

As a part of their handling of the COVID-19 outbreak, arbitration institutes have been sending out updates that address how the outbreak affects their daily operation and casework.

The Danish Building and Construction Arbitration Board

The Danish Building and Construction Arbitration Board (*Voldgiftsnævnet for Byggeri og Anlæg*) has on 28 April 2020 issued guidelines for oral hearings during COVID-19.[3] The Board will resume oral hearings from 27 April 2020 if the hearings can be conducted safely. The Board will, if possible 3 weeks prior to the hearing, schedule a conference call or a written hearing to plan the oral hearing.

During oral hearings, participants must keep 2 meters between them at all times, and the number of participants in each room will be limited according to size, all rooms maximised to 10 participants. Each participant is required to use the hand sanitizer made available before entering the room. Advisers are encouraged to help ensure that the number of participants is limited as much as possible. In case of hearings at a different venue, the Board will ensure the same level of safety.

General case handling will continue because a large part of the work at the Board can be handled digitally and from home. The Board will continuously update the guidelines according to any regulations from the authorities.

The Danish Institute of Arbitration

The Danish Institute of Arbitration (DIA) has also decided to gradually reassume oral hearings from 20 April 2020.[4] Hearings will be conducted in accordance with the relevant safety guidelines, including limiting the number of participants. As for casework, the DIA will handle pending cases and answer inquiries by telephone and email in the usual manner. The DIA will maintain deliberations with the parties in pending cases to consider the need for oral hearings and to discuss the course of the case.

ICC International Court of Arbitration

The Secretariat of the ICC International Court of Arbitration (ICC) has on 9 April 2020 published a guidance note as to the ICC's operations in consideration of COVID-19.[5] The Court remains open and continues to progress pending arbitrations and new cases to ensure fair and efficient resolution of disputes. The secretariat encourages all tribunals to consider any possible procedural options and to communicate pro-actively with the parties to consider any measures that may mitigate the procedural disruptions caused by COVID-19.

As a general matter, the Secretariat maintains that all communications with the Secretariat be conducted by email, including new requests for arbitration.[6] As for correspondence in pending proceedings, the Secretariat still advises that anyone sending correspondence (including awards and ADR decisions) by courier or post to the Secretariat should promptly inform the relevant case management team ahead of dispatch. The Secretariat further encourages that the parties agree to electronic notification of awards.

The Secretariat also advises that the tribunals and the parties consider whether convening at a physical location is necessary, and if not seek to agree on a virtual hearing.

Notably, it is the Secretariat's assessment that ICC rules allow the tribunal to proceed with a virtual hearing without party agreement or over party objection. If a hearing is held virtually, the tribunal and the parties must confer on a cyber-protocol to comply with data privacy regulations. The secretariat can assist with support and assistance with virtual hearings.

The Arbitration Institute of the Stockholm Chamber of Commerce

In dealing with the COVID-19 outbreak, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has announced that the SCC Platform – a secure digital platform for communication and file sharing between the SCC, parties and the tribunal – remains fully operational and can even be used for cases initiated prior to the use of the platform.[7] SCC has also made the platform available free of charge to any ad hoc tribunal in arbitrations registered by December 31 2020.

The SCC will be working remotely as a measure to adapt to the outbreak.[8] As for arbitral tribunals in SCC arbitrations, they are encouraged to use alternative means such as audio- and visual meeting facilities going forward. The SCC expects that tribunals will be managing proceedings in accordance with timetables previously established. Online hearings remain a topic for discussion in the Swedish arbitral community most recently through webinars held by the SCC.

The London Court of International Arbitration

In a service update on 18 March 2020, the London Court of International Arbitration (LCIA) announced a number of precautionary measures in order to maintain its service, while safeguarding the safety of its staff.[9]

Regarding new and pending cases, the LCIA generally advises that all communication, including requests for arbitration, will be handled digitally through its online filing system or by email.

This also applies to awards in pending cases. Arbitrators are thus requested to deliver their awards by email,[10] as the LCIA will, except in exceptional cases, transmit awards to parties electronically, with originals and certified copies to follow, once the LCIA office has re-opened. The LCIA has not yet announced any end date for the new measures taken, but the LCIA will continue to provide regular updates through its website.[11]

Online Dispute Resolution

Arbitration institutes are accordingly doing their best to remain operational by working remotely but whilst large parts of the general casework can be maintained, the COVID-19 outbreak will continue to have ramifications for oral hearings.

Most of the rules of the major arbitration institutes leave open the opportunity of conducting oral hearings by video or by other means of technology. For instance, both Article 14 of the LCIA Arbitration Rules 2014 and Article 22 of the ICC Arbitration Rules 2017 allow the tribunal to adopt procedures appropriate for the arbitration. Owing to the outbreak, the use of telephone or video conferencing for hearings will often be appropriate.

However, the use of technology to conduct oral hearings does not come without difficulties. In addition to practical issues such as ensuring the right sound quality and sufficiently strong internet connections, the live effect of witness examination is generally diminished if conducted online and one may not know if a witness is being coached off-screen.

We generally find that it is difficult for parties to agree to virtual hearings. Nevertheless, we expect a change in attitude given the current situation and we are largely seeing parties and advisers who are willing to engage in discussion regarding how to make accommodations owing to COVID-19. In addition, we experience arbitral tribunals making directions that parties should prepare for online oral hearings if the current situation does not change going into the autumn/winter.

We generally expect that tribunals will seek to confer with parties as well as facilitate party agreement in order to safeguard the fundamental arbitration rights of equal treatment and of having an opportunity to present one's case. It remains to be seen whether and on what grounds oral hearings may be held online against the wish of one party.

Need for alternative dispute resolution methods in the wake of the COVID-19 outbreak?

As apparent from the above, the COVID-19 outbreak is creating many challenges for dispute resolution in general, and it will inevitably continue to do so for some time. Not only are current cases being postponed, but depending on the duration and the extent of the current partial lockdown, the pile of backlogged cases may in turn lead to increased processing times for court and arbitration cases. For this reason and as a

consequence of the many business disruptions caused by COVID-19, an increased demand for alternative dispute resolution methods such as mediation and other non-traditional methods may emerge. Both the Confederation of Danish Industry and the Institute of Mediation in Denmark are of the opinion that there will be an increased demand for ADR in the wake of COVID-19.[12]

Mediation – an overview

Mediation is one method of alternative dispute resolution (ADR) available to parties who wish to settle their disputes outside of the court and arbitration. Arbitration can also be considered as a form of ADR but unlike arbitration, mediation does not involve decision-making by a neutral third party, rather the process is facilitated by a neutral.

Essentially, mediation is a procedure by which a neutral third party, the meditator, assists the disputing parties to reach a settlement. Unlike the court and arbitration, mediation is based on the voluntary participation of the parties and thus encourages the parties – ideally – to reach a mutually satisfactory settlement.

The mediator plays a central role in settling the dispute by facilitating an environment in which the parties can reach a settlement, e.g. by facilitating communications between the parties, by defining the core risks of the dispute on both sides, by suggesting ways of resolving the dispute, and ultimately assisting the parties with the drafting of the settlement. In our experience, whilst many commercial contracts provide for negotiation and escalation clauses, once disputes arise, negotiations are often obstructed by the parties' positioning. In this respect, a mediator can often play a key role in breaking the commercial deadlock.

Benefits of mediation - in general and in the light of COVID-19 outbreak

What distinguishes mediation from court and arbitration cases is that a party to a mediation cannot be forced to accept an unsatisfactory outcome. Unlike an arbitrator or a judge, the mediator has no judicial authority, and the mediation process is typically not bound by stringent regulation. The parties involved in a mediation thus have a larger degree of flexibility, which can serve as an advantage.

The costs associated with mediation are often much lower than the price of an average court case. According to the Danish Institute of Mediation, the costs of an average mediation are 50% less than the costs of an average court case. In addition, mediation is generally a quicker way of settling a dispute. The duration of a mediation is typically three to four months, on average, whereas a court case can take up to 16 months and often much longer.

The Danish Institute of Mediation is now offering online mediations, in which they will provide virtual assistance. The Institute's online administrative services will also be provided for free in the coming time.[13] Accordingly, there are opportunities to consider and explore this form of ADR.

Enforcement of mediation settlements in Denmark

The mediation process in Denmark is regulated by the general principles of contract law as there is no act on mediation in Denmark, though the need for one has been raised a number of times during the last couple of

years. On this basis, there are a number of options available to enforce mediation settlements in Denmark. In many situations, the parties voluntarily abide by the agreed terms of their mediation settlement agreement, but there have been situations when the parties fail to do so. In these instances it is crucial to have an enforcement mechanism in place. For the time being the two options available in Denmark are:

- According to section 478(1)(iv) of The Administration of Justice Act, enforcement may be made on the basis of extrajudicial written settlements on overdue debts where it is expressly provided in such settlement that it may serve as the basis of enforcement. This provision also applies to mediation settlements.

- Another option is that a mediator or another third party affirms the settlement as an arbitral award on agreed terms pursuant to section 30 and 31 of the Danish Arbitration Act. Hereafter, the settlement can be enforced as an arbitral award.

Enforcement internationally

Internationally, mediation is perceived as an important means of resolving commercial disputes. However, the lack of an international mechanism for enforcing mediated settlement agreements has often been cited as a shortcoming.

The United Nations Convention on International Settlement Agreements resulting from Mediation, also known as the "Singapore Convention on Mediation" (the "Convention"), was adopted in December 2018 and deals with this enforcement issue. The Convention applies to international settlement agreements resulting from mediation and it ensures a harmonised legal framework for the enforcement of such agreements. Thus far, over 50 countries have signed the Convention and it enters into force on 12 September 2020 after Qatar, as the third country to do so, ratified the Convention on 12 March 2020. Denmark is not yet a signatory to the Convention, and for the time being, the Convention has limited significance from a Danish perspective.

Gorrissen Federspiel would be pleased to assist your company in respect of any considerations or questions you may have regarding court proceedings, arbitration, mediation or other alternative dispute resolution methods.

Read the newsletter online here.

[1] http://www.domstol.dk/om/Nyheder/oevrigenyheder/Documents/Gen%C3%A5bningsplan%20for%20Danmarks%20Domstole%20eku.pdf

[2] http://www.domstol.dk/om/Nyheder/oevrigenyheder/Pages/Gen%C3%A5bningafDanmarksDomstoleVigtiginformationtilallebrugerevedDanmarksDomstole.aspx

[3] https://voldgift.dk/wordpress/wp-content/uploads/2020/04/Notat20om20h%C3%A5ndtering20af20m%C3%B8der20under20COVID-1920.pdf

[4] https://voldgiftsinstituttet.dk/nyheder/
[5] https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf
[6] New requests for arbitration can be filed at this address: arb@iccwbo.org
[7] https://sccinstitute.com/about-the-scc/news/2020/covid-19-information-and-guidance-in-scc-arbitrations/
[8] https://sccinstitute.com/about-the-scc/event-calendar/covid-19-information-about-the-current-scc-work-and-event-policy/
[9] https://www.lcia.org/lcia-services-update-covid-19.aspx
[10] I.e. to casework@lcia.org
[11] https://www.lcia.org/
[12] https://advokatwatch.dk/Advokatnyt/Tendenser/article12035723.ece
[13] https://advokatwatch.dk/Advokatnyt/Tendenser/article12035723.ece

COVID-19: The effects on ongoing litigation and arbitral proceedings

So far, the outbreak of COVID-19 has had large effects all over the world. This is also the case in Denmark where all public servants not serving in critical functions have been sent home, initially until 27 March 2020, and where the Government now recommends avoiding all assemblies and physical contact in order to reduce the risk of the spreading of the disease. Thus, the outbreak of COVID-19 has also had large effects on the courts and on ongoing litigation and arbitral proceedings in Denmark.

To which extent are ongoing civil lawsuits continuing before the courts?

Because of the Prime Minister's announcement at the press conference on 11 March 2020, the Danish courts have now initiated emergency procedures. For ongoing litigation, this generally means that the courts as of 13 March 2020 and initially until 27 March 2020 will only process "critical cases", since the courts' staff have largely been sent home.

In this newsletter, we will review the effects of the emergency procedures initiated by the courts and the effects this will have on ongoing litigation as well as the effects of the outbreak of COVID-19 on ongoing arbitral proceedings.

Suspension of the processing of all non-critical cases until 27 March 2020

The courts' emergency procedures imply that the processing of all non-critical cases is suspended. Consequently, the cases fixed for hearing up until and including 27 March 2020 will be adjourned.
It is not possible to provide an exhaustive list of which cases are deemed as critical. However, generally it means that the cases mainly concern issues that are not dealt with in civil commercial litigation before the courts. Therefore, most civil cases will most likely be considered as non-critical and will be adjourned initially

until 27 March 2020, whereas cases concerning pre-trial detention and very urgent bankruptcy proceedings are more likely to be considered as critical. These types of cases will still be processed by the courts under their emergency procedures, and court hearings in such cases will initially not be cancelled or adjourned.

It will be for the individual court to plan its own work. It is therefore for the individual court to decide which cases will be considered as critical and which cases will not. The planning of the work before the courts of Denmark may therefore vary under the emergency procedure.

Most court hearings, including ongoing main hearings and most civil cases are cancelled, but the fixed time limits are maintained

Even though differences in the courts' processing of cases may be experienced for some time to come, the emergency procedures generally imply that all court hearings and main hearings in civil lawsuits before the courts of Denmark, which are non-critical, will be stayed and adjourned.

For instance, the Supreme Court has cancelled all main hearings and court hearings up until 27 March 2020.[1]

Not all courts in Denmark have yet communicated the same clear guidelines for case processing in the time to come. However, the Eastern Division of the High Court has announced that time limits that have already been fixed, will initially be maintained for cases that are in preparation.[2] The Maritime and Commercial High Court has also announced that all main hearings and physical meetings are cancelled during the emergency period, but that all telephone meetings and time limits in cases in preparation will continue to apply, unless otherwise announced.[3]

We expect that the remaining courts in Denmark will generally plan their work in accordance with this practice.

For parties to ongoing litigation this means that the preparation of the case continues and that time limits fixed must therefore be met, but that any court hearings and main hearings are cancelled. We generally experience that cancelled court hearings and main hearings cannot be rescheduled due to the uncertainty as to the future situation.

The courts' notification of changes/adjournments of ongoing litigation

Communication from the courts in respect of adjournments and other changes in respect of ongoing litigation may also vary from one court to another. For instance, the Eastern Division of the High Court and the Copenhagen City Court have announced that the courts will notify parties, attorneys, etc. directly as to whether court hearings will be carried through or be adjourned in the cases that have been fixed for hearing up until 27 March 2020. Conversely, the Western Division of the High Court has announced that individual cancellations will not be forwarded in the individual cases.[4]

We therefore recommend that you keep updated on the website minretssag.dk and on the courts' website domstol.dk, if you are scheduled to appear in court.

The effects of the outbreak of COVID-19 on ongoing arbitral proceedings in Denmark

Arbitral proceedings are not processed by public institutions and are as such not affected by the courts' emergency procedures. Nevertheless, several arbitration institutes have elected to plan their work considering the authorities' instructions.

Electronic case processing ensures continued processing of ongoing arbitral proceedings, but main hearings are sought rescheduled

The Danish Building and Construction Arbitration Board has announced that the Board in the time to come will contact the arbitration courts and the parties to the proceedings in order to reschedule oral hearings or agree on any alternative measures.[5] The general case processing will continue, as a large part of the Arbitration Board's work can be handled digitally and from workplaces at home.

In addition, the Danish Institute of Arbitration will continue to process cases during the period from 13 March to 27 March even though the staff has been sent home. In addition, the Institute of Arbitration has announced that during the same period they will take telephone calls and answer emails as usual, but that they are generally closed for physical appearance.[6]

ICC Denmark have also elected to follow the authorities' instructions and have announced that all meeting activity is cancelled. ICC does not specifically state how to handle oral hearings of ongoing arbitral proceedings under the ICC. However, we expect that the ICC will also attempt to encourage the arbitral courts and the parties to the proceedings to agree on rescheduling. However, the ICC will just as the other institutes of arbitration continue processing ongoing arbitral proceedings.[7]

We are generally experiencing that arbitral courts follow the authorities' instructions to avoid assemblies and limit physical contact, and that they are cancelling ongoing main hearings and main hearings scheduled in the months to come. In particular for international arbitral proceedings, main hearings are in most cases impossible to carry through at the moment due to the travel restrictions, and we generally experience that it is very difficult to agree on carrying through main hearings virtually.

We at Gorrissen Federspiel will be pleased to assist your company in respect of any considerations.

Read the newsletter online here.

[1] http://www.hoejesteret.dk/hoejesteret/nyheder/ovrigenyheder/Pages/H%C3%B8jesteretfremtilog27marts2020.aspx

[2] http://www.domstol.dk/oestrelandsret/nyheder/ovrigenyheder/Pages/Informationomsagsbehandlingogsagsafviklingi%C3%98streLandsretiforbindelsemedforebyggelseafspredningafCoronavirus.aspx

[3] http://www.soeoghandelsretten.dk/soeoghandelsretten/nyheder/Pages/corona.aspx

[4] http://www.domstol.dk/vestrelandsret/Pages/default.aspx

[5] https://voldgift.dk/corona-nyt/

[6] https://voldgiftsinstituttet.dk/nyheder/

[7] https://iccdanmark.dk/icc-aendringer-pga-corona-situation/

COVID-19: Proposal to expand the Danish Travel Guarantee Fund (updated)

As a consequence of COVID-19, the travel industry is under a lot of pressure and airlines are forced to cancel flight after flight. The Danish government has adopted a scheme for the travel industry as an attempt to protect the travel providers' economy. In this connection, the Danish Government has introduced an amendment to the Danish Travel Guarantee Fund Act in order to enable the Danish Travel Guarantee Fund to cover travel providers' reimbursement expenses related to travels canceled due to the COVID-19 situation. The Danish Travel Guarantee Fund scheme on extraordinary situations has been passed without amendments and entered into force on 6 April 2020.

(Updated on 20 april 2020)

The proposal to secure reimbursement in extraordinary situations

The Danish Travel Guarantee Fund is established in order to provide assistance to travelers in case of the travel provider's bankruptcy, but the Danish Government intend to expand the purpose to cover extraordinary situations, including the current situation caused by COVID-19.

The Travel Guarantee Fund will then be able to reimburse travelers who have purchased a travel package from a travel provider registered with the Travel Guarantee Fund, who have chosen to use the Danish guarantee scheme, which has not gone bankrupt and is affected by extraordinary circumstances. If the travel provider has already repaid the traveler, the travel provider can receive reimbursement from the Travel Guarantee Fund.

In the current Danish Travel Guarantee Fund Act, a guarantee provided in accordance with the rules of the country within the EU/EEA area where the travel provider is established replaces the guarantee provided

under the Danish Travel Guarantee Fund Act. It follows from the preparatory work to new amendment, that reimbursement in relation to extraordinary circumstances is reserved for travel providers who have provided a guarantee in accordance with the Danish scheme set out in the Danish Travel Guarantee Fund Act.

The trade association for travel providers in Denmark ("Rejsearrangører i Danmark") has argued that the reimbursement scheme should also be available for travel providers that has provided guarantees in other EU/EEA member states as long as such travel providers are members with the Danish Travel Guarantee Fund and contributes to the Danish Travel Guarantee Fund by the paying the mandatory fees.

Since the amendment has not yet been finalized and adopted by the parliament, the legal position may be changed in the final amendment.

A new fund for extraordinary situations

The amendment sets up a separate fund for extraordinary circumstances from which payment of reimbursement will be deducted.

In the proposed amendment, the Danish Minister for Industry, Business and Financial Affairs is granted authorization to decide when the fund for extraordinary situations must be activated. In this connection, the Danish Minister for Industry, Business and Financial Affairs lays down the more specific provisions on which exceptional situations can be covered, including the period for which the coverage applies.

It is clear that the purpose of the amendment first and foremost is to cover the current COVID-19 situation.

Contributions and repayment to the new fund

The Travel Guarantee Fund will receive access to a state guarantee of DKK 1.5 billion to ensure that the fund has liquidity to meet requirements for reimbursement.

Once the fund has been activated by the Danish Minister for Industry, travel providers has to pay a wealth-building contribution to the fund. The contribution is determined by the board of the Travel Guarantee Fund as a percentage of the travel providers' yearly revenue.

After the Travel Guarantee Fund has reimbursed a traveler, the Travel Guarantee Fund will enter the traveler's original claim against the travel provider. The travel guarantee fund's claim against the travel provider will be reduced proportionately as the fund receives the wealth-building contributions to finance reimbursements.

To ensure that travel providers who have benefited from the scheme do not subsequently initiate measures to avoid or reduce their payment of the wealth-building contribution, the travel provider will have to repay the full amount the Travel Guarantee Fund under specific circumstances. These circumstances include when the travel provider deletes its registration in the Travel Guarantee Fund, when the travel provider agrees to another guarantee scheme and when the travel provider restricts its activities so that revenue falls below 50 per cent compared to 2019.

Finalizing the proposed amendment

The proposed amendment was introduced on 24 March 2020 and it is scheduled to be examined and finalized by the parliament on 26 March 2020. The amendment will enter into force as soon as the EU Commission as confirmed that the scheme provided by the amendment complies with the state aid rules.

Updated: The Danish Travel Guarantee Fund scheme on extraordinary situations has been passed without amendments and entered into force on 6 April 2020.

Read the newsletter here.

COVID-19: Undertakings' handling of financing and potential liquidity challenges due to COVID-19

The Coronavirus has already had a large global effect on citizens and undertakings, and many Danish undertakings are currently experiencing the effects of the Coronavirus and the measures taken - in Denmark and on a global level – in order to handle the disease and reduce the risk of infection/spreading of the disease.

Bailout packages

In order to ward off the negative effects, the Government has introduced a number of bailout packages to help Danish undertakings.

The most important points of the bailout packages are that the largest undertakings are allowed to defer payment of VAT, just as the deadlines for paying PAYE tax and labour market contributions have been extended. The Government also wishes to include SMEs in this package, which is expected to improve liquidity for small and medium-sized enterprises. In addition, the Government proposes an extension of the time limit for the payment of B-tax, which in particular will benefit self-employed people.

In addition, the Government has introduced several new initiatives to help trade and industry. The Government contemplates, among other things, suspending the sickness benefit system's so-called employer period in order for undertakings to obtain refunds from day one where employees are sent home or are put in quarantine due to the Coronavirus.

The Government has also introduced two new guarantee schemes aimed at Danish undertakings, just as the scheme on division of labour will become more flexible in order for undertakings to temporarily put employees on reduced hours allowing undertakings to quickly adapt to the situation and thus avoid dismissing employees.

For the same purpose, the Government has together with the unions and the employers' organizations entered into a tripartite agreement on the refund of wages and salaries for private employers, which implies

that undertakings initially have the option of receiving refund of wages and salaries of up to 90% of the employees' wages and salaries.

In addition, the Minister for Industry, Business and Financial Affairs has decided to give banks wider options for granting loans. This takes place by releasing the so-called counter-cyclical capital buffer (broadly speaking money, which the banks are ordered to put aside for hard times), which gives the banks greater room to manoeuvring in order to withstand losses without having to impose restrictions on their lending.

- Read more about the contents of the individual bailout packages and other measures in respect of COVID-19.

Effects on the liquidity of undertakings

The bailout packages and the other government measures aim to give undertakings sufficient liquidity to pay their creditors, e.g. rent, suppliers and wages and salaries, and thus to ward off the undertakings' immediate economic challenges due to the Coronavirus.

In a crisis such as this one, which hit us suddenly, and which hits undertakings directly on their revenues, it is first of all important that the management focuses on budget and liquidity management. It is important for the management to assess, whether changes can be made that may contribute to ensuring liquidity and thus the operation in the short as well as in the long term. In this respect, it may be relevant to enter into a direct dialogue with the creditors and not least the bank, in order to find a solution; potentially for the deferment of payments or similar arrangements.

In relation to the bank, undertakings should review their bank and credit facilities in order to ensure that they do not risk breaching the conditions in the current situation, including any special conditions in respect of financial performance indicators (covenants) or otherwise breach their loan agreements.

Correspondingly, all other contracts should be reviewed, including in relation to any effects of failure to perform, if there is a risk that one or more contracts cannot be fulfilled. In such situations, the undertaking's management should generally act proactively and initiate a dialogue/negotiations with the relevant contractual parties concerning alternative solutions models.

In addition, it should be uncovered whether the undertaking has the option of using the Government's bailout packages and other measures and what it specifically means for the individual undertaking in order to use these options in the best possible manner.

If the economic challenges are clear and cannot immediately be rectified, a number of useful tools exist to ensure efficient and expedient handling of the situation and to ensure the survival of a financially distressed undertaking, which ultimately may lead to restructuring proceedings or other form of financial restructuring of the undertaking. In such situation, it is decisive that the management focuses on cash flow and ensures that one or more creditors are not treated unfairly and in a manner that is contrary to applicable rules.

Previous financial crises show that it is important to act quickly in a changing market where the preconditions and the framework can change in an instant. Furthermore, we know that targeted and intensive cooperation between all the undertaking's stakeholders, including banks and financial institutions, public authorities, suppliers, unions and trade organizations, etc.

Read the newsletter online here.

Danish Parliament adopts tax bailout package

The Danish Parliament has adopted a tax bailout package aiming to ward off the economic consequences of the Coronavirus outbreak (COVID-19) for Danish undertakings and wage and salary earners. The bailout package is to strengthen the Danish undertakings' liquidity by extending the payment deadlines for small, medium-sized and large undertakings.

Introduction

In order to ease the pressure on the liquidity of small, medium-sized and large undertakings in connection with the outbreak of the Coronavirus (COVID-19), Danish Parliament has adopted a bailout package, which includes, among other things, an extension of the deadlines for the payment of VAT and PAYE tax:

Extension of payment deadlines for VAT

The deadline for **large companies'** payment of VAT is extended by 30 days for March, April and May 2020:

Applicable rules		**Deferred payment**	
Tax period	*Deadline for payment*	*Tax period*	*Deadline for payment*
1 March – 31 March	27 April	1 March – 31 March	25 May
1 April – 30 April	25 May	1 April – 30 April	25 June
1 May – 31 May	25 June	1 May – 31 May	27 July

Large companies are undertakings with orders subject to VAT exceeding DKK 50 million annually.

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Medium-sized undertakings' deadline for payment of VAT for Q1 2020 is extended from 2 June to 1 September 2020, which is also the due date for the settlement of VAT for Q2 2020:

Period of settlement	Original reporting deadline	New deferred payment deadline
1 January - 31 March 2020	2 June 2020	1 September 2020
1 April – 30 June 2020	1 September 2020	Payment for both periods on 1 September 2020

Medium-sized undertakings are undertakings with total orders subject to VAT exceeding DKK 5m but not exceeding DKK 50m.

Small undertakings' payment deadline for settling VAT for H1 2020 is extended from 1 September 2020 to 1 March 2021, which is also the due date for settling VAT for H2 2020.

Period of settlement	Original reporting deadline	New deferred payment deadline
1 January - 30 March 2020	1. September 2020	1. March 2021
1 July - 31 December 2020	1 March 2021	Payment for both periods on 1 March 2021

Small undertakings are undertakings with orders subject to VAT of DKK 5m or less annually.

It is still possible to report after the expiry of the tax period and thus obtain payment of negative VAT liability under the applicable rules for the payment of negative VAT liability.

Extension of the deadlines for paying retained PAYE tax and labour market contributions

The deadlines for the payment of retained PAYE tax and labour market contributions are extended by 4 months for April, May and June 2020:

	Small and medium-sized undertakings		**Large companies**	
	Applicable rules	*Deferred payment*	*Applicable rules*	*Deferred payment*
April rate	11 May	10 September	30 April	31 August
May rate	10 June	12 October	29 May	30 September
June rate	10 July	10 November	30 June	30 October

Large companies are undertakings covered by section 2(6) of the Danish Act on the Collection of Taxes and Dues.

No changes are made to the deadlines for *reporting* retained PAYE tax and labour market contributions, which must still take place according to the applicable rules.

Extension of the deadlines for paying B-tax and provisional labour market contributions

The deadlines for payment of B-tax and provisional labour market contributions are extended for the months of April and May 2020:

- B-tax and provisional labour market contributions for April 2020 fall due for payment on 1 June 2020 and must be paid by 20 June 2020 at the latest.
- B-tax and provisional labour market contributions for May 2020 fall due for payment on 1 December 2020 and must be paid by 20 December 2020 at the latest.

In the months of June and December payment of B-tax or provisional labour market contributions must be made under the general rules.

Temporary increase of the credit balance limit in the tax account

In addition, a temporary increase to DKK 10 million of the maximum that undertakings are allowed to hold in the tax account is introduced. Today, undertakings are as a maximum allowed to hold DKK 200,000 in the tax account.

The aim is to ward off the negative effects, which the extension of the deadlines may trigger in the form of negative interest, since the extension of the deadlines imply that the undertakings may have large bank deposits.

In order to avoid negative interest, undertakings may pay up to DKK 10 million into the tax account.

The new amount limit will apply for the period from 25 March 2020 up to and including 30 November 2020.

The amount limited must be actively adjusted for the undertaking in question.

Read the newsletter online here.

The Minister for Taxation has proposed a Corona bailout package for undertakings

The Danish Minister for Taxation has proposed a new bill in order to ward off the economic consequences for Danish undertakings and wage-earners of the Coronavirus (COVID-19). The aim of the bill is to improve the liquidity of Danish undertakings by extending the deadlines for paying retained PAYE tax, labour market contributions and VAT.

Introduction

In order to ward off the negative economic effects for Danish undertakings and wage-earners of the Coronavirus (COVID-19), the Danish Minister for Taxation has proposed a new bill that aims to help the strained liquidity of Danish undertakings.

The bill was presented and debated (first reading) on 13 March 2020 and the second and third readings will be conducted on 17 March 2020 (fast-track procedure).

The bill contains three initiatives, which we review below:

Extension of the deadlines for paying retained PAYE tax and labour market contributions

First, it is proposed that the deadlines for the payment of retained PAYE tax and labour market contributions be extended by 4 months for April, May and June 2020:

Payment deadlines – Labour market contributions and PAYE tax

	Small and medium-sized companies		Large companies	
	Applicable rules	*Deferred payment*	*Applicable rules*	*Deferred payment*
April rate	11 May	10 September	30 April	31 August
May rate	10 June	12 October	29 May	30 September
June rate	10 July	10 November	30 June	30 October

Large companies are companies covered by section 2(6) of the Danish Act on the Collection of Taxes and Dues.

No change is proposed to the deadlines for *reporting* retained PAYE tax and labour market contributions, which must still take place according to the applicable rules.

Extension of the deadlines for reporting and paying VAT

Second, it is proposed that the deadline for large companies' payment of VAT be extended by 30 days for March, April and May 2020:

Tax period and payment deadlines for VAT – large companies

Applicable rules		Deferred payment	
Tax period	*Deadline for payment*	*Tax period*	*Deadline for payment*
1 March – 31 March	27 April	1 March – 31 March	25 May
1 April – 30 April	25 May	1 April – 30 April	25 June
1 May – 31 May	25 June	1 May – 31 May	27 July

Large companies are companies with orders subject to VAT exceeding DKK 50 million annually.

It appears from the bill that it is currently being examined whether the tax periods for *small and medium-sized enterprises* should also be extended.

The extension of the deadlines for payment for large companies does not defer the Tax Administration's deadline for paying negative VAT payable to the companies.

Temporary increase of the credit balance limit in the tax account

In addition, a temporary increase to DKK 10 million of the maximum that undertakings are allowed to hold in the tax account is proposed. Today, undertakings are as a maximum allowed to hold DKK 200,000 in the tax account.

In order to ward off the negative effects, which the proposed deferred payment of PAYE tax, labour market contributions and VAT may trigger in the form of negative interest, since the – forced – extension of the deadlines imply that the undertakings may have large bank deposits. In order to avoid negative interest, undertakings may pay up to DKK 10 million into the tax account.

The new amount limit will according to the bill apply for the period from 25 March 2020 up to and including 30 November 2020.

The bill is prepared as a separate act, which defers the tax periods set out in the bill, and subsequently the general rules will apply again.

Read the newsletter online here.

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