

COVID-19: Far-reaching mistakes related to determining the “NOW group”

The Dutch NOW-aid programs, a Dutch subsidy related to COVID-19, are complex, especially in the event of more comprehensive organizational structures, such as multinationals, family businesses or private equity firms. An incorrect NOW application can have a significant impact. Therefore, NOW advice is paramount and requires specialist knowledge. In practice, we see a lot of mistakes in determining which entities belong to the NOW group. In this law alert, we will provide guidance on this matter.

1 Importance correct determination “NOW group”

Prior to the application for the NOW 2.0 subsidy, it is essential to assess carefully which entities belong to the so-called NOW group. This is also (still) relevant for the application for subsidy under the NOW 1.0 regulation.

An incorrect use of the “group” definition at the initial NOW application may have severe financial consequences for the company, as it is imaginable that the entity for example wrongfully assumed to not be part of a group, or assumed that the composition of the entities being part of the group was different. This may lead to the consequence that the (expected) loss in turnover will stay below or will be above the minimum threshold of 20%, leading to the outcome that the entity is not eligible for the subsidy and/or turns out to have filled an incorrect submission. Also, in practice it occurs that entities, being part of a group, have already applied for NOW 1.0, whilst they have not discussed this application upfront and, for instance, each applied a different period of loss in turnover (which, when forming one group, should have been the same period for all group entities which applied for the NOW).

If an incorrect submission has been filed, it is for example in principle not possible to switch between the group regulation and the operating company regulation. Further, more stringent conditions apply to the operating company regulation that must be met prior to the initial application. In the event these conditions were not met timely, the application may be rejected. Hopefully, the Dutch Public Employment Service (PES) and/or the Ministry of Social Affairs and Labor will be lenient on non-compliance with the conditions of the operating company regulation. However, so far there have not yet been any communications in this respect. Therefore, applying entities will have to comply strictly and timely with the NOW regulations.

2 Group

Insofar the employer is part of a group, within the meaning of Section 2:24b of the Dutch Civil Code, or qualifies as subsidiary company of another entity within the meaning of Section 2:24a of the Dutch Civil Code, these entities combined will be treated as group under the NOW regulations.

To determine whether it qualifies as group within the meaning of Section 2:24b of the Dutch Civil Code, the following aspects are relevant:

- ▶ Organizational connection of the legal entities or companies
- ▶ Central management (a hierarchical organizational structure upon which a common strategy is based)
- ▶ Economic unity

To determine whether it qualifies as parent-subsidary relationship within the meaning of Section 2:24a of the Dutch Civil Code, the following aspects are relevant:

- ▶ Can the parent company, whether alone or jointly with one or more subsidiaries, exercise more than 50% of the voting rights in the general meeting of shareholders?
- ▶ Can the parent company, whether alone or jointly with one or more subsidiaries, appoint or dismiss more than 50% of the directors and/or members of the supervisory board?

3 Loss in turnover

Once the group has been established, it must be assessed whether an entity within the group is eligible for the NOW subsidy. First, the expected loss in turnover should be determined.

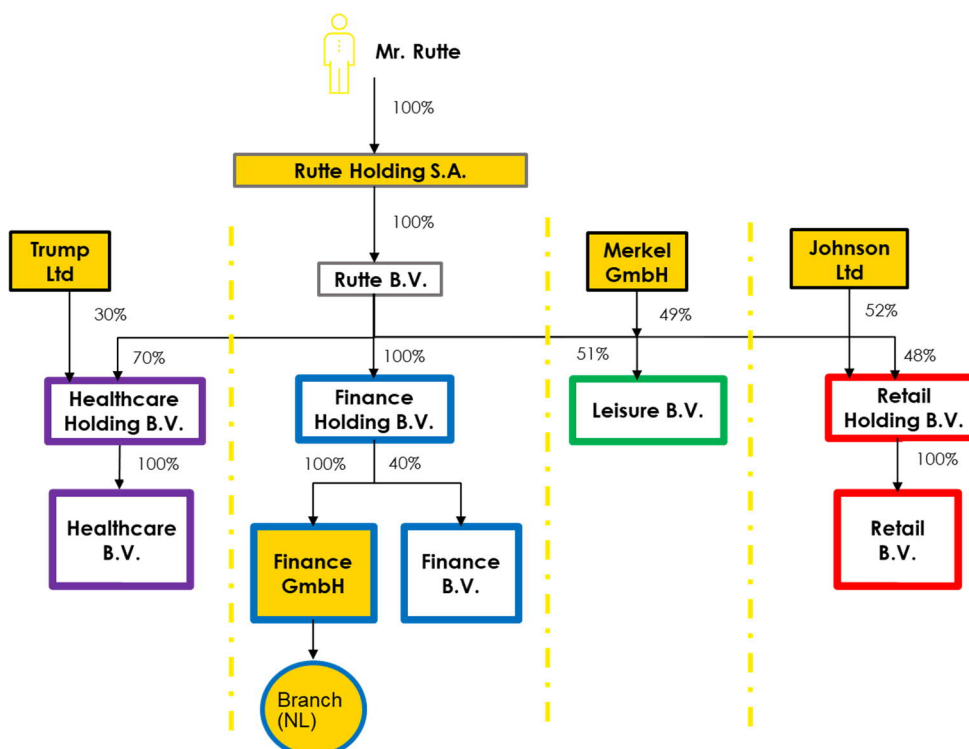
For the group, the following specific rules apply when determining the (expected) loss in turnover:

- ▶ All Dutch legal entities and/or companies within the group must be included
- ▶ Foreign legal entities and/or companies within the group should only be included, insofar these entities/companies pay social security wages (in Dutch: 'sv-loon') in the Netherlands.

Please note that the abovementioned definition of foreign legal entities and/or companies only applies with respect to the determination of the loss in turnover. Therefore, it does not apply to other conditions with references made to the definition "group", such as regarding the bonus and dividend policy.

4 A practical example

In practice, we see unclarity with respect to and questions regarding the determination of the group within the meaning of the NOW regulations. Such unclarity may be caused by various reasons, such as ignorance of the employer regarding the existence of other group entities or the unawareness of the (ultimate) parent entity that entities within the group have already submitted a request for a NOW subsidy. Please see below for a hypothetical organizational structure based on which we will elaborate on a step-by-step basis on the subject matters: group, expected loss in turnover and "NOW-entities".

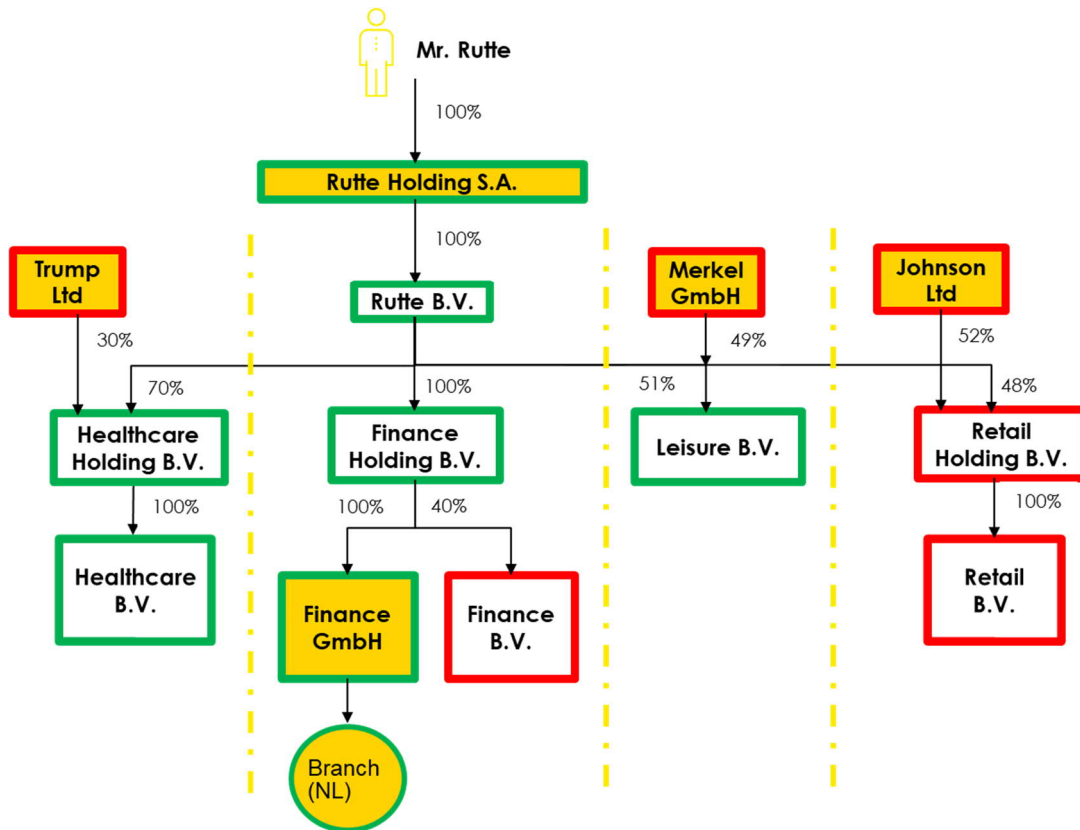


The overview above shows an organizational structure of a private equity firm. The parent company is a Luxembourg entity. The private equity firm holds four portfolio firms, active in the health industry, financial industry, leisure industry and retail industry. Due to the COVID-19 pandemic, the turnover of the entities in the leisure and retail industry has drastically decreased. However, the turnover of the entities active in the health industry has increased significantly and the entities active in the financial industry also show a slight increase of turnover. Retail B.V. and Leisure B.V. have both applied for NOW 1.0. in April 2020. There was no consultation between these two entities prior to the NOW application.

The question arises whether Retail B.V. and Leisure B.V. have acted correctly by directly filing for the NOW 1.0 subsidy for its' own legal entity in April 2020. You will find below a step-by-step approach which discusses the determination of the group, the loss in turnover and for the NOW qualifying NOW-entities.

1. Determination group

Within this organizational structure, only the entities circled in green form a group within the meaning of the NOW regulations:



- ▶ the parent company is Rutte Holding S.A.
- ▶ no part of the group: the remaining minority shareholders, Finance B.V., Retail Holding B.V. and Retail B.V., as there is:
 - ▶ a minority interest, meaning a minority of voting rights in the general meeting of shareholders and/or a minority vote in appointing and/or dismissing managing directors and/or members of the supervisory board; and/or
 - ▶ a lack of (i) organizational connection of the legal entities or companies, (ii) central management and (iii) economic unity
- ▶ Johnson Ltd, Retail Holding B.V. and Retail B.V. however do form a separate group

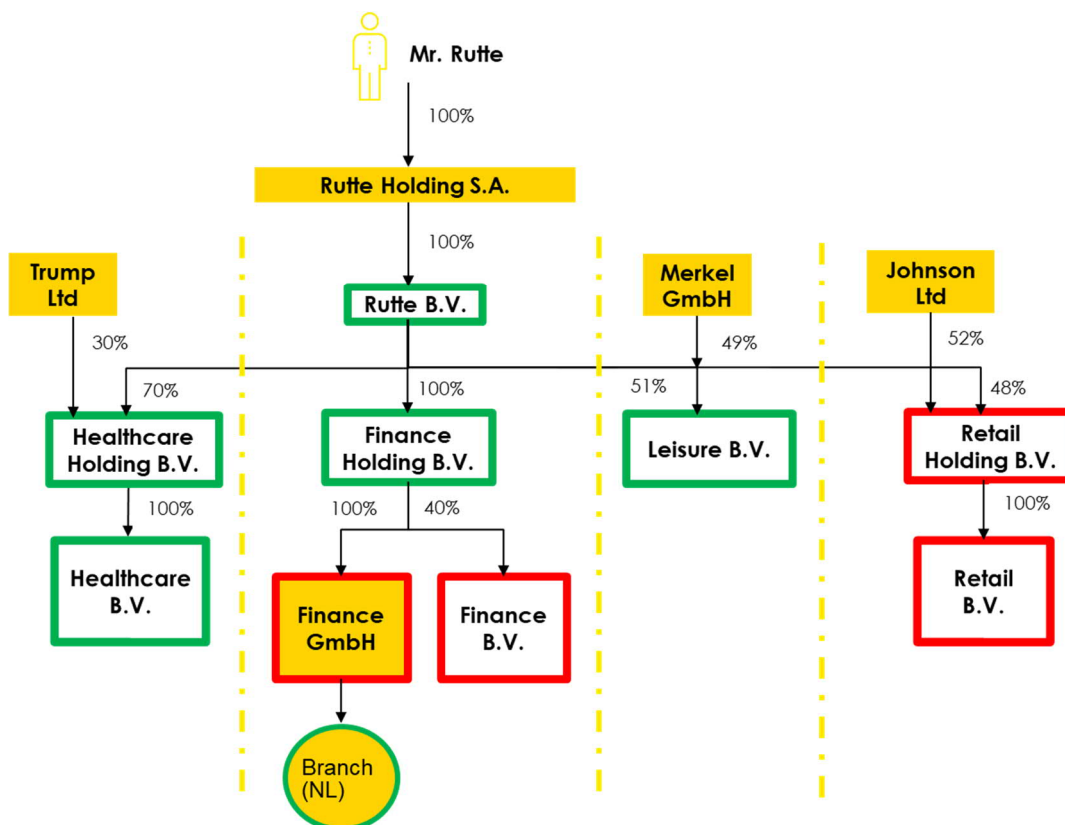
2. Determination loss in turnover

To determine the loss in turnover all group entities as above circled in green must be taken into account. The reasons thereof are that all Dutch legal entities from the group should be taken into consideration, as well as the in Germany located Finance GmbH, since this GmbH pays social security wages in the Netherlands as it has a Dutch branch. It is important to realize that in such event, the entire turnover of the GmbH must be taken into account.

3. Determination NOW-entities

The NOW-entities as below circled in green can apply for a NOW-subsidy, if:

- ▶ The group expects at least a 20% loss in turnover
- ▶ Finance GmbH can only apply for the NOW-subsidy for its employees for whom it pays Dutch social security wages, i.e. the employees of the Dutch branch. In the overview, the GmbH has been circled red, however the GmbH must – as formal employer and legal entity – apply for the NOW for the employees of the Dutch branch.



4. Consequences for the already submitted NOW requests

As stated in the example, Retail B.V. and Leisure B.V. have directly applied for the NOW 1.0 subsidy in April 2020.

- ▶ Leisure B.V. should have consulted with the other group entities, to be able to adequately determine the group and subsequently to assess the loss in turnover of the entire group. By not consulting, it has not been assessed whether the group as a whole expected at least 20% of the loss in turnover and the most beneficial period of loss in turnover for NOW 1.0 has also not been determined. Since the other portfolio's of the private equity firm are financially healthy, it is questionable whether 20% loss in turnover can be expected at a group level. If not, Leisure B.V. should have waited until the introduction of the 'operating company regulation', which has been introduced since 5 May 2020 – provided the conditions for this regulation were met.

- ▶ Leisure B.V. can still apply for the 'operating company regulation' under the NOW 2.0, provided the conditions for this regulation are met. One of the conditions, however, is the strict bonus and dividend policy for the group. This may lead to the outcome that applying for the NOW 2.0 for the private equity firm as group is not beneficial and therefore will not be requested for Leisure B.V.
- ▶ As not qualifying for NOW 1.0 and/or 2.0 may have significant consequences for the liquidity position of Leisure B.V., immediate action is required, such as restructuring, entering into consultation with the bank to request extra credit lines based on the assumption that Leisure B.V. would receive the NOW subsidy/subsidies and/or requesting delay of payment at the Dutch Tax Authority (if not yet requested). Furthermore, it should be noted that the other shareholder (Merkel GmbH) may be negatively affected by this situation, as this entity assumed that the financial position could be stabilized by the requested NOW 1.0 (and possibly 2.0) subsidy, which afterwards turns out to be incorrect.
- ▶ Retail B.V. forms a separate group with – at least – Johnson Ltd en Retail Holding B.V. The fact that Retail B.V. had already applied for the NOW 1.0 before consulting with the private equity firm does not impact the possible entitlement of the private equity firm to the NOW. It is however advisable for Retail B.V. to double check the aforementioned steps, to ascertain that the NOW regulations have been applied correctly. In the event mistakes were made, it should be assessed whether corrections can still be made, preferably as soon as possible.

What HVG Law can do for you

We assess complex organizational structures in the view of the NOW on a daily basis. This way we help clients to prevent rejection of the NOW requests and/or claims of repayment.

COVID-19 helpdesk

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