Declaring a state of emergency in the Netherlands – what additional powers for government?

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Nations worldwide are implementing strict and far-reaching measures to protect public health and safety. So far, the Dutch government has explicitly resisted declaring a national state of emergency, but this may change when this becomes crucial to containing the spread of the coronavirus and its impact on the population, and current measures no longer suffice. By declaring a national state of emergency, the government will obtain extensive additional powers, such as general powers to maintain public order and safety, but also specific ones, such as to requisition and take possession of property, limiting traffic and transport, and placing restrictions on financial transactions. This will undoubtedly have a negative impact on many companies, especially as they will have limited legal protection against measures issued during a state of emergency. They should therefore follow all developments closely, especially where measures and decisions are issued that have a potential impact on their business, in terms of having to meet compliance requirements and dealing with potential damage for which there may or may not be compensation.

Current status: no state of emergency yet

Although no state of emergency has been declared yet, the government has used existing laws to deal with the current coronavirus situation, especially the Dutch Public Health Act, and it may decide to invoke other acts or additional powers as well. The Public Health Act grants special powers to the Minister of Health, Welfare and Sports and to the chairs of security regions. The Minister may instruct a security region chair how to deal with fighting the virus. The chair may take measures such as having someone admitted to hospital or put into quarantine; ordering inspection, decontamination and shutdown of buildings; and taking action regarding the use of planes and ships.

In addition, based on the Dutch Security Regions Act, a security region chair may take over current powers vested in mayors with regard to public order and safety. See, for example, as there are many safety regions, the Amsterdam-Amstelrand Chair’s decision of 16 March 2020, and its subsequent decision of 26 March 2020. This latest decision, for example, prohibits gatherings and events, imposes a safe distance between people, and sets rules on the opening of educational institutions and childcare facilities.

Declaring a state of emergency

Declaring a state of emergency could be a potential next step by the Dutch government if the “intelligent” (or “informal”) lockdown as mentioned by the Dutch prime minister on 23 March 2020, does not have sufficient effect. Declaring a state of emergency is possible in case of “extraordinary circumstances”, such as our current circumstances. The government may declare either a general or a limited state of emergency, both based on the same procedure. The additional powers granted to the government in both situations are also more or less the same – we mention some exceptions below under “general powers”.

How is a state of emergency declared?

The power to declare a state of emergency is based on the Dutch Constitution and the Exceptional Situations Coordination Act (Coordination Act). As a general rule, the Dutch cabinet issues a royal decree, on the prime minister’s initiative. The royal decree must be published in the Dutch Bulletin of Acts and Decrees (unless the urgency of the situation means a royal decree cannot be awaited, based on unwritten emergency law).

A royal decree means that parliamentary approval is not formally required to declare a state of emergency. However, based on the constitution, parliament (in a joint session of both houses of parliament) must immediately and continuously discuss the continuation and effect of the legislative measures that have entered into force – and parliament can lift the state of emergency, as can the cabinet.

Additional governmental powers

During a state of emergency, the government has the right to bring into force far-reaching legislation, or parts thereof. This legislation is set out on list “A” (in the case of a limited state of emergency) and on list “B” (in the case of a general state of emergency) as attachments to the Coordination Act. Some, but not all, of the prominent additional government powers are summarised below, from a company’s perspective, rather than a citizen’s perspective.

Please note that the royal decree declaring the state of emergency will state exactly which legislation, or specific articles in that legislation, will take effect during the state of emergency.

General powers

The Civil Authorities Special Powers Act grants general powers to the Minister of Justice and Safety, to the King’s Commissioner and to mayors. The powers may relate to disclosure obligations towards the government; maintenance of public order and safety; and limiting time outdoors – the latter may also be possible without there being a state of emergency. In the case of a general state of emergency, more powers could become available, such as regarding gatherings; censorship; further disclosure rights; intervention in mail delivery; inspections of objects and human bodies; entering homes and other places; banning or seizure of property; limiting the use of objects; and imprisoning people. For most types of damage, this act does not require the government to pay compensation.

Requisitioning and taking possession of property

In general, article 3a of the Dutch Requisition Act enables any Minister to requisition ownership, or right of use, of any movable
situations payments by transfer are allowed to settle a cash debt; circulation; protecting cash circulation; declaring in which interest-based financing services; putting emergency cash into moratorium; setting regulations in relation to remuneration for to provide credit without permission; issuing a banking be granted to the Minister of Finance, including prohibiting banks financial transactions authorities.

Financial transactions
Under the Financial Transactions (Emergencies) Act, powers may be granted to the Minister of Finance, including prohibiting banks to provide credit without permission; issuing a banking moratorium; setting regulations in relation to remuneration for interest-based financing services; putting emergency cash into circulation; protecting cash circulation; declaring in which situations payments by transfer are allowed to settle a cash debt; setting rules for stock exchanges and for financial international relations.

The Dutch Central Bank, the European Central Bank and other bodies have published communications on the current coronavirus situation. Refer to their websites for the most recent information. In addition, national measures must comply with EU state aid rules, this is further explained in our recent article on competition law.

Hoarding
Measures that may have a practical impact on your business could follow from the Dutch Hoarding Act. The Minister of Economic Affairs and Climate Policy could lay down rules to counter hoarding. These rules could include a ban on delivering or taking delivery of more than a specific amount of specific food within certain time periods.

Limited legal protection against governmental measures
Normally, Dutch law offers the possibility for interested parties to object and/or appeal against government decisions within the meaning of the Dutch General Administrative Law Act (GALA). However, this is the exact opposite in the case of a state of emergency. Then, generally, there is no possibility to object or appeal against decisions that have been taken under the Coordination Act or supporting legislation (article 8:4 par 2 GALA). The same applies to emergency decrees issued by the chair of a safety region, as recently confirmed by the Rotterdam District Court in preliminary relief proceedings.

There are some exceptions to this basic principle, namely for decisions mentioned in article 4 of Annex 2 to the GALA. These decisions are subject to direct appeal (that is, without an objection phase) to the Trade and Industry Appeals Tribunal (College van Beroep voor het bedrijfsleven). Examples include decisions based on the Hoarding Act and the Prices Emergencies Act. Even though in those limited cases there may be a possibility to appeal a decision, the state of emergency will give the government a lot of freedom of action. We therefore expect the tribunal to be cautious when reviewing decisions.

No appeal can be lodged against a royal decree declaring a state of emergency. In theory, parties may seek to approach the civil courts, for example in injunction proceedings, in all cases where no appeal is possible before the administrative court, but we would also expect the civil courts to be very cautious in intervening in this situation.

Compensation
Government decisions based on legislation applicable in a state of emergency may have a negative financial impact on companies and individuals. The government may decide to set up specific compensation rules, even without having declared a state of emergency, as we have already seen in its letter to the House of Representatives, dated 17 March 2020. Furthermore, specific laws may contain compensation schemes; we have mentioned some of these above. Again, state aid rules must be complied with.
In addition, compensation may be requested for lawful or unlawful government acts. But bear in mind that exceptional circumstances require exceptional measures, and that a state of emergency will unavoidably result in damage not only borne by the government, but also by companies and individuals.

Enforcement measures
The exceptional circumstances in which a state of emergency is issued, require that the government cannot only decide what should happen, but can enforce these decisions as well. Specific legislation therefore contains provisions on enforcement. These may be of a practical nature, such as to call on the police for assistance; to impose administrative enforcement orders (last onder bestuursdwang and last onder dwangsom); to compel provision of information; and to inspect objects and open packaging.

Other provisions have a more punitive nature. Article 32 of the Requisition Act, for example, includes the possibility of imprisonment (for up to four years) and fines (currently, up to EUR 21,750). This fine, in the case of legal entities, may be increased to a higher category, or may be dependent on the entity's turnover. Non-compliance as referred to in article 32 is considered a serious or minor criminal offence, depending on the nature of the non-compliance. Note that withholding information requested may result in a fine as well, or even in detention.

Will the Netherlands follow other countries?
Several countries like the US, Italy and Spain have already declared a state of emergency. The Dutch government may do the same if its measures taken so far turn out to be insufficiently effective. In that case, the government could, for example, start to requisition face masks (as announced on 18 March 2020, but withdrawn soon after), other medical supplies or food, or set further rules on social distancing and restrict people's ability to leave their homes. Should the government aim for a countrywide lockdown, a state of emergency is likely to be issued.

In this briefing we have focused on emergency measures in the Netherlands, as this type of legislation is generally determined by each individual EU member state. However, emergency measures do still have to comply with EU law. The bigger picture is relevant and we will be happy to discuss with you how measures in other member states or at the EU/international level may affect your company.