# Covid-19 lockdown: worth a claim under business continuity insurance policies?

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Until a few weeks ago, in an effort to combat the COVID -19 pandemic, the vast majority of "non-essential" businesses were required to close in many countries. There is now a rather important debate around a "second wave" of coronavirus infections, which could well provoke new administrative lockdown decisions, albeit probably on a more local level than what we have collectively experienced in the past months.

Whether as a means to bridge the losses caused by the missed operating results of the past lockdown, or by way of preparation for possible future lockdowns, businesses may want to check whether a claim against their business continuity insurance policy is realistic. From the insurer's side, the question also arises as to whether the wording of the policies to be concluded in the future should be amended to consider this issue.

Recently, some cases determined by foreign courts have confirmed that business interruption due to the lockdown induced by the COVID-19 pandemic could be covered under some business interruption policies available in these jurisdictions.

On 15 September 2020, the High Court of England and Wales handed down a judgment in a case brought by the Financial Conduct Authority against several insurers. This judgment confirmed that, where the policy wording allowed it, business interruption due to COVID-19 lockdowns could be covered. The High Court provided insightful guidance on the interpretation of, amongst other clauses, so-called "prevention of access clauses", *i.e.*, those clauses in insurance policies that provide coverage in case of closure of a business by the authorities. A key takeaway of this decision is that the prevention of access must not necessarily be physical, and that a legal prevention to conduct business is sufficient to speak of "prevention of access".

In May 2020, in summary proceedings brought by a restaurant owner, the President of the commercial Court of Paris had already granted an injunction against an insurer under which the insurance company was ordered to pay a provisional indemnity. In essence, the court's decision was grounded on the fact that nothing in the law or under the policy excluded coverage for business interruption induced by a pandemic. It is reported that this case was eventually settled.

Similarly, in July 2020, the court of Nanterre ordered an insurer to pay a substantial provisional indemnity pursuant to a claim brought by a hotel owner against a policy that appeared to explicitly cover administrative closure due to epidemics.

At least two other cases were brought in France in summary proceedings, but these cases were dismissed on the grounds that they required a full trial.

Whether similar decisions could be rendered in Belgium remains to be seen and will depend to a very large extent on the policies' wording.

There would, in any event, be several hurdles to clear, amongst which the fact that the vast majority of business interruption insurance policies available in Belgium are taken out in the form of an additional guarantee ancillary to a general "fire & flood" policy. Therefore, obtaining a payout under a business continuity policy generally requires physical damage of some sort (fire, flood, electric shock, etc.) causing the business interruption. In the case of the COVID-19 pandemic, there is no such physical harm or occurrence. In most cases, it is to be expected that pandemics will therefore not be insured under a typical business continuity policy.

In addition, discussions should be expected on other topics such as the extent of the hurdle to the insured's business continuity. For instance, restaurants that were able to pursue or develop business of some substance through delivery services will probably face the argument that their business continuity was not actually (or not sufficiently) affected to trigger cover. The restaurant owner would, in that case, find support in the High Court's decision mentioned above.

The insureds would, however, not be without any recourse if they hold policies that leave reasonable doubt concerning the coverage of business interruption caused by a pandemic risk. Indeed, these insureds would in some cases be able to rely on the contra proferentem rule of interpretation (article 23, § 2 of the 2014 Insurance Act). This provision dictates that in case of doubt, insurance agreements must be interpreted in favor of the insured.