

LEGAL AND TAX ALERT

Dutch Act on Management and Supervision of Legal Entities (“MSLE Act”, or “WBTR”) to enter into force

July 2, 2021

As of today, July 1, 2021, the Act on Management and Supervision of Legal Entities (*Wet bestuur en toezicht rechtspersonen*) will be effective. The MSLE Act amends certain provisions of Book 2 of the Dutch Civil Code (“DCC”) and aims to harmonize management and supervision rules applicable to the various types of Dutch legal entities.

Primarily, the MSLE Act will affect Dutch foundations (*stichting*), associations (*vereniging*), cooperatives (*coöperatie*) and mutual insurance associations (*onderlinge waarborgmaatschappij*). In this Legal Alert we will provide a brief overview of the most notable and upcoming changes to Book 2 of the DCC.

Conflict of interest

The MSLE Act modernizes the conflict of interest regulation for foundations (section 2:291 under 6 DCC), cooperatives (section 2:53a conj. 2:44 under 6 DCC) and associations (section 2:44 under 6 DCC) by bringing the regulation in accordance with the current regulation for NV’s and BV’s. In the MSLE Act, the conflict of interest rules form an internal matter for all legal entities.

Any invalid decision-making, in case a given board member or supervisory director participates in the decision-making process despite a conflict of interest, will not affect the (external) power of representation. This in contrary to the old ‘representation rule’. Consequently, third parties are now in a more secure position and can rely on the representation of a legal entity.

Under the new rule, a (supervisory) director with a conflict of interest will not take part in the decision-making on that particular subject, if he or she has a(n) (in)direct personal interest that conflicts with the interests of the respective legal entity and the enterprise or organization connected with it. To ensure resolutions can still be adopted in the event of a conflicted (supervisory) director, the following mandatory escalation procedure will apply:

1. If no board resolution can be adopted due to a conflict of interest of the sole, or all, members of the management board, the supervisory board shall take the decision.
2. If (i) no supervisory board has been established, or (ii) no decision can be taken by the supervisory board due to a conflict of interest of the sole or all supervisory directors, the general meeting shall take the decision, unless the articles of association provide otherwise.

As most foundations do not have a supervisory body and certainly do not have a corporate body comparable to a general meeting, a slightly different arrangement applies. As a result, the management board of a foundation remains competent in case decision-making is impossible due to a conflict of interest of all board members, provided the board records the considerations with regard to the relevant resolution in writing.

Liability

Previously, for foundations and associations, the liability regime of the management or supervisory board members was not quite clear. The MSLE Act therefore adds a legal basis for directors' liability, i.e. the basis for liability in case of bankruptcy, in case of (manifestly) improper performance of duties, for the association (section 2:50a DCC) and the foundation (section 2:300a DCC). Furthermore, under the MSLE Act, (supervisory) board members of foundations and associations, subject to annual accounts reporting requirements, will become subject to certain refutable and irrefutable presumptions that bankruptcy is a result of mismanagement, in the event they have not (properly) complied with the annual accounts obligations.

These presumptions only apply to management or supervisory board members of *commercial* associations or foundations. However, this does not mean that management or supervisory board members of non-commercial associations or foundations *cannot* be liable in case of a bankruptcy, yet in those cases the burden of proof lies with the receiver in bankruptcy. This is yet another example where the legislator has sought uniformity with the rules for the NV and BV.

Multiple voting rights

The DCC allows that multiple voting rights can be granted to specific board members or supervisory directors of NV's and BV's. One director could cast, for example, three votes. This provided that a single director may not cast more votes than the other directors together. The MSLE Act introduces a similar regime of multiple voting rights to (supervisory) directors of associations (section 2:44 under 3 DCC), foundations (section 2:291 under 4 DCC) and cooperatives (section 2:53a conj. 2:44 under 3 DCC).

Inability and absence

The MSLE Act contains obligations for associations (section 2:44 under 5 DCC), foundations (section 2:291 under 5 DCC), cooperatives (section 2:53a conj. 2:44 under 5 DCC) and mutual insurance associations (ibid) to include in their articles of association, rules regarding the decision-making in the event of absence or inability to act. "Inability to act" exists if a vacancy on the management board or supervisory board arises due to the resignation of a management board member or supervisory board member. "Absence" is a less clearly defined concept: it concerns situations in which a management board member or supervisory board member is "temporarily unable to perform his or her duties", for example due to suspension or illness.

Recommendations

In certain cases, the MSLE Act may significantly impact daily practice. Therefore, it might be essential to review your current articles of association to identify which provisions need to be amended or supplemented. The MSLE Act contains several "transitional provisions", to accommodate current practice.

Our most crucial recommendations for existing foundations, associations, cooperatives and mutual insurance associations are:

- In case a foundation or association has already established an internal supervisory board under the articles of association: assess, on the basis of the powers attributed to such a body, whether this body qualifies as a supervisory board under the MSLE Act. If so, the new rules for the supervisory board are deemed to apply to that body, and we would recommend to imply it properly;
- For existing associations, foundations, cooperatives and mutual insurance associations: verify if the articles of association (by-laws) contain provisions in connection with conflict of interest that can no longer be invoked after the MSLE Act enters into force. Even though deviating provisions in the articles of association do not have to be amended without delay, it is nevertheless recommended to

change the articles of association;

- For existing provisions in the articles of association that deviate from the statutory principle that a management or supervisory board member may not cast more votes than the other board members combined: these remain valid until no later than five years after the effective date of the MSLE Act, which means until the earlier of the first coming amendment to the articles of association, or 30 June 2026;
- Inability and absence: if the articles of association of an existing association, foundation, cooperative or mutual insurance association do not already contain rules governing inability and absence of work, the legal entity must include such regulation in the articles of association, no later than at the time of the next amendment to the articles of association after the regulation came into effect.

QUESTIONS OR FURTHER INFORMATION

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