

As of 1 July 2021, the Dutch 'Act on Management and Supervision of Legal Entities' (WBTR) will come into effect. The WBTR is intended to improve the quality of management and supervision for associations, foundations and cooperatives and to prevent mismanagement, irresponsible financial management, abuse of position and other undesirable activities within boards as much as possible. In this document you can read directors/supervisors also as associate and foundation 'board members'

I - AMENDMENT OF THE ARTICLES OF ASSOCIATION

With a view to the WBTR, amendment of the articles of association may be desirable. Amendments to the articles of association are not immediately necessary before 1 July 2021, but it is wise to check to what extent your articles of association are in line with the new legislation, especially if there is a supervisor. A statutory regulation for supervisors already existed for the NV and the BV, but is now also being made for other legal entities. The following subjects may give rise to an amendment to the articles of association.

DECISION

- The WBTR explicitly provides that one director/supervisor can cast more than one vote, if the articles of association so provide. It is not possible to give one director/supervisor more votes than the other directors/supervisors together. He should therefore not be able to 'overrule' the others. A provision under the Articles of Association that determines before the WBTR comes into force that a certain director/supervisor can cast more votes than the other directors/supervisors combined, is valid until no later than 5 years after 1 July 2021 and must be amended with the next amendment to the Articles of Association. Even if the articles of association do not yet regulate decision-making by directors and/or supervisors, it is advisable to include provisions on this in the articles of association.

ABSENCE AND IMPEDIMENT

- Absence and prevention of situations in which one or more directors and/or supervisors are no longer in office or can no longer perform their function (temporarily). This may include a director who is ill for a long time. The articles of association must state how these situations are dealt with. If this has not yet been laid down in the articles of association, this must be arranged at the latest with the next amendment to the articles of association.

CONFLICT OF INTEREST

- The new statutory conflict of interest scheme applies to actions from 1 July 2021. Existing statutory conflict of interest schemes no longer apply insofar as they do not fit within the statutory scheme. The statutory regulation provides that if one director has a conflict of interest, the other directors decide. If all members of the board have a conflict of interest, the supervisory body decides - if present. If a member of the supervisory body also has a conflict of interest, the other supervisors will decide. If all supervisors have a conflict of interest (ie everyone), the basic principle is that the general meeting decides, unless the articles of association provide otherwise. In that situation, in the case of foundations, the board or - if present - the supervisory body takes a decision, stating in writing the considerations underlying the decision. If the existing statutory conflict of interest scheme is not in line with the statutory scheme, it is advisable to amend the articles of association.

REGULATORY DATA DISCLOSURES

- Under the WBTR, the board is obliged to provide any supervisors with all necessary information that they need in the performance of their duties. If there is a supervisory body, it is advisable to include provisions on the provision of data in the articles of association.

II - LIABILITY

The WBTR aims to improve and professionalise management and supervision. To prevent mismanagement and irresponsible financial management, among other things, rules regarding liability of directors and supervisors are being tightened. The rules on liability as a director vis-à-vis the legal person remain unchanged. The WBTR changes the liability regulations on the following subjects.

MISMANAGEMENT

- Directors and supervisors may be held liable by third parties. A subcategory is liability in the event of bankruptcy. The regulation of directors' liability in bankruptcy as currently applicable to directors and supervisors of NV and BV ('manifestly improper management') will also apply under the WBTR to directors and supervisors of associations, foundations and cooperatives.

MISLEADING FINANCIAL STATEMENTS

- Directors will also be jointly and severally liable towards third parties for a misleading presentation in the annual accounts or the management report or interim figures (balance sheet liability). The same liability applies to regulators, but not to interim figures. If the regulations regarding administration and the annual accounts are complied with correctly and in a timely manner, balance sheet liability will not arise

JUDICIAL DISMISSAL

- The grounds for dismissal for judicial dismissal for non-performing directors and supervisors in, in short, mismanagement and other shortcomings of directors will be broadened. We emphasize that judicial dismissal only applies in the event of neglect of duties or other serious reasons or major changes on the basis of which the retention of a member of a director/supervisor cannot reasonably be tolerated.

AVOID LIABILITY

- In view of the foregoing tightening, it's recommended examining to what extent a – if any – insurance policy for directors' liability offers cover against this stricter liability and broadened grounds for dismissal.