

Introduction

The Management and Supervision of Legal Entities Act (hereinafter: WBTR) will be enforced on 1 July 2021. The legislative changes included herein have consequences for, among other things, the articles of association of new and existing associations and foundations. With the WBTR, the regulation for the management and supervision of these legal persons is supplemented and clarified and it is given a legal basis in Book 2 of the Civil Code. Below is a brief explanation of each change and its consequences.

Supervision

The WBTR provides for associations and foundations with the option of setting up a supervisory board or a one-tier board. The supervisory board has the task of supervising the policy of the board and the general course of affairs in the association or foundation. In practice, some associations and foundations already had such a supervisory body, often in the form of a supervisory board. With the introduction of the WBTR, this body now also has a legal basis. The WBTR also stipulates that the supervisory board can also be designated as a supervisory board. Moreover, the statutory provisions and powers after introduction apply to every supervisory body, regardless of the name of the body. An advisory council or a meeting of representatives can also, unintentionally, start to comply with the concept of a supervisory body. For the overview, I will use the term supervisory board or supervisor below. In a one-tier board, the board consists of executive and non-executive board members. The non-executive board members are charged with supervision.

Absence and inability scheme

Associations and foundations must, just like 'BVs' and 'NVs', include a statutory provision in the articles of association in which way the tasks and powers are (provisionally) exercised in the event of the absence or inability to act of all board members. In the absence or inability to act of one of the board members, the other board members or the other board member is temporarily charged with the management.

Pursuant to transitional law, this absence and inability scheme must be included in the articles of association with the next amendment to the articles of association after the WBTR has come into effect. In an association it will be customary for the general members meeting to appoint someone who is temporarily charged with the management of the association. At a foundation, any supervisory body present can appoint someone. If there is no supervisory body in the foundation, someone else will have to be appointed for this task. These regulations apply mutatis mutandis to any supervisory board present.

Interest of the legal entity

A new feature of the WBTR is that directors (and supervisors) of an association and foundation, when performing their duties, focus on the interests of the legal entity and its affiliated enterprise or organization. This legal provision now also applies to 'BV' and 'NV'. This provision will also have to be added to the articles of association with the next amendment to the articles of association.

Conflict of interest

Currently, the law provides for associations in the event that a board member (or supervisor) has an interest that conflicts with the interests of the association and its affiliated company or organization. This scheme differs from the current scheme for 'BV' and 'NV'. The law does not contain a conflict of interest regulation for the foundation. The WBTR introduces a conflict of interest scheme that will be the same as the scheme that already applies to 'BV' and 'NV'. This regulation means that a board member (or supervisor) with a conflict of interest does not participate in the meeting and the decision-making of the association or foundation.

The consequence of this change is that the conflict of interest regulation must be included in the articles of association. The situation may arise that this regulation does not allow a valid management decision to be taken, for example if there is only one board member or all board

members have a conflict of interest. In this case it is advisable to lay down in the articles of association how a valid board decision can still be taken.

Multiple voting rights

It is not common, but some existing associations or foundations contain a provision in the articles of association that one of the board members is entitled to more votes than other board members. Multiple voting rights will be limited with the introduction of the WBTR. A board member (or supervisory director) cannot cast more votes than the other board members (or supervisory directors) combined. If such a provision is included in the current articles of association, the WBTR provides transitional law for this multiple voting right. The provision remains valid until 5 years after the entry into force of the WBTR or until the next amendment to the articles of association.

Liability

The WBTR stipulates that in the event of bankruptcy of an association or foundation, board members (and / or supervisors) can be jointly and severally liable in the event of improper performance and it is likely that this improper performance is the main cause of the bankruptcy. This regulation currently only applies to private limited companies and public limited companies, but will therefore also apply to board members (and / or supervisors) of associations and foundations as of 1 July 2021.

Conclusion

With the introduction of the WBTR, a number of regulations that already apply to 'BVs' and 'NVs' are largely aligned for associations and foundations. This concerns regulations for supervision, absence and inability to act, the interest of the legal person, conflict of interest, multiple voting rights and liability. It is advisable to read the current articles of association carefully and, where necessary, to align the articles of association with the WBTR. With the next amendment to the articles of association after July 1, 2021, the articles of association must be in line with the new law.