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The Act on Management and Supervision of Legal Entities

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1. Introduction

The Act on Management and Supervision of Legal Entities (**MSLE Act**; *Wet bestuur en toezicht rechtspersonen*) will enter into force on 1 July 2021. On 10 November 2020, the Dutch Senate (*Eerste Kamer*) agreed without a vote to the MSLE Act without amendments to the legislative proposal adopted by the House of Representatives (*Tweede Kamer*) on 28 January 2020.

The MSLE Act embodies the cross-sectoral response of the legislator to the demand for measures to improve the quality of management and supervision of foundations and associations in the semi-public sector. Recent years have seen a tightening of rules and principles for good governance and supervision in sectoral legislation and codes. In supervisory frameworks of external supervisors, too, the emphasis is on tightening up rules on good governance and supervision.[1] With the MSLE Act, the legislator has opted for a general clear legal basis that applies to all legal entities. Even though the MSLE Act mainly affects foundations and associations, the MSLE Act entails changes for all legal entities and is therefore important for a broad group of our clients. For a schematic overview of the changes per legal entity, please refer to the *easy reference overview* attached to this Quoted (***Appendix***).

The MSLE Act introduces statutory rules for the foundation (*stichting*), association (*vereniging*), cooperative (*coöperatie*) and mutual insurance association (*onderlinge waarborgmaatschappij* (**OWM**)) for, *inter alia*, the one-tier board and the supervisory board. Also, conflict of interest rules and rules in respect of liability of management and supervisory board members will become more analogous to the respective rules for the private limited liability company (**BV**) and public company (**NV**). The MSLE Act also contains rules for the management board on the division of duties, remuneration and an advisory vote in the general meeting. Sectoral laws and codes will of course remain of continued importance but will need to be amended on certain points to avoid duplication of rules.

The MSLE Act clarifies the statutory duties of management and supervisory board members of foundations, associations, cooperatives and OWMs. This task entails acting in accordance with the interests of the legal entity and the enterprise or organisation connected with it and involves a weighing up of interests. In doing so, the overriding interest of the proper functioning of the legal entity must be prioritised and the own interests of a management or supervisory board member may not prevail.

In this Quoted we will discuss the most prominent changes to Book 2 Dutch Civil Code (**Book 2 DCC**) that the MSLE Act brings for the foundation, association, cooperative and OWM.

In addition to this, we will elaborate on some clarifications following from the legislative process in respect of the interpretation of certain rules for the BV and the NV that were already incorporated in Book 2 DCC (see section 8).

We will discuss the further regulations for the supervisory body in section 4, the performance of duties and decision-making in section 5, conflict of interest in section 6 and liability in section 7. We conclude with a number of practical recommendations (section 9) and a brief conclusion (section 10).

2. Purpose and background

Incidents resulting from poor governance and failing supervision *inter alia* at foundations in the semi-public sector, led to the publication in 2013 of the report "*Een lastig gesprek*" ("A difficult conversation") by the commission on responsible governance and supervision in the semi-public sector (also known as the Good Governance Commission or the Halsema Commission)[2]. The commission concluded that there are flaws in the (political) administrative order, the steering mechanisms and the division of responsibilities in the semi-public sector that are a source of immoral behaviour on the part of board members and supervisory board members. This report convinced the Dutch parliament that a legal governance framework is needed for all legal entities. In the same year, the Management and Supervision (Public and Private Companies) Act (*Wet Bestuur en Toezicht*) came into force, which contained a package of regulations for the management and supervision of BVs and NVs. This act served as an important starting point for the MSLE Act. The purpose of the MSLE Act is therefore to supplement the regulations for management and supervision applicable

1 We refer, for example, to the work programme of the Dutch Healthcare Authority (NZa) for 2019 and 2020.

2 F. Halsema et al., *Een lastig gesprek* (advies van de Commissie Behoorlijk Bestuur), annex to: *Parliamentary Papers II* 2013-14, 28 479, no. 68.

to foundations, associations, cooperatives and mutual insurance associations in Book 2 DCC and to align them as much as possible with the regulations for BVs and NVs. In addition, the MSLE Act aims to clarify the legal framework already in force and to stimulate further professionalism in foundations, associations, cooperatives and mutual insurance associations.

The MSLE Act has consequences for foundations in particular, since the current general law on foundations (Title 6 of Book 2 DCC) only contains a very limited governance scheme. At the moment, this regulation contains little more than that a foundation must have a board consisting of at least one management board member.

3. Parliamentary debate

The MSLE Act has a somewhat turbulent parliamentary history due to a number of crucial changes made to the original draft.[3] The original MSLE Act legislative proposal, published in June 2016, provided for a fundamental change to Book 2 DCC, whereby the standards for all legal entities would be collectively incorporated in Title 1 of Book 2 DCC (the general part). The existing regulations for NVs and BVs, including the rules on liability, would therewith apply to all legal entities and therefore also to the foundation, association, cooperative and OWM. All then went quiet around the MSLE Act legislative proposal until it was again debated by the House of Representatives at the end of 2018.

The 'collective approach' described above in Title 1 was abandoned by the Minister in a Memorandum of Amendment (*Nota van wijziging*) at the end of 2018[4], because there would not be sufficient opportunity to deviate per legal entity from the basic rule and flexibility would therefore be jeopardised. Despite being a fundamental change, it made little difference in legal terms. As a result of this change, the amended MSLE Act legislative proposal included the additional provisions per legal form separately, with variations where required due to the respective legal form.

The change of direction at the end of 2018 also included an alleviation of the proposed liability regimes so that both remunerated and unremunerated management board members of non-commercial foundations and non-commercial associations are exempted from the presumption of legal proof in the event of bankruptcy. Also, the rules requiring provisions regarding absence or inability to act in the articles of association, as well as those limiting the use of multiple voting rights of management and supervisory board members, were deleted following (limited) criticism expressed in literature[5]. The arguments expressed in literature were that having these rules apply *mutatis mutandis* on all legal entities would restrict the freedom of organisation, would entail the need to change existing structures and would not be in line with the rationale of the legislative proposal (flexibility). All in all, the MSLE Act in its updated form resulted in a downsized set of changes to Book 2 DCC.

The renewed MSLE Act was perceived as more user-friendly, but was not seen as an improvement on all points. In particular, deleting the previously envisaged rules on absence and inability of management and supervisory board members and the rules limiting the use of multiple voting rights for the foundation and association were seen as unfortunate changes that undermined the objectives of the legislative proposal (amongst others, introducing uniform rules for all legal entities).[6] The limitations on the use of multiple voting rights should be the same for all legal entities since there is no good reason to make a distinction between associations, cooperatives, OWMs and foundations on the one hand, and NVs and BVs on the other hand. The same argument applies to the requirement that articles of association of all legal entities need to contain provisions regarding absence and inability of management and supervisory board members.

This view was shared by the House of Representatives, as evidenced by the fact that in January 2020, the content of the MSLE Act legislative proposal was corrected at the last minute by two amendments concerning the reinstatement of the aforementioned rules in respect of absence and inability and limitations on the use of multiple voting rights.[7]

3 *Parliamentary Papers II* 2015/16, 34491, no. 2.

4 *Parliamentary* Papers II 2018/19, 34491, no. 7.

5 Cf. J.D.M. Schoonbrood & J.J. Meppelink, 'Gevolgen van het voorstel tot beperking van het meervoudig stemrecht voor andere rechtspersonen dan de NV en BV', WPNR 2016/7118, pp. 683-686.

6 See *inter alia* W.J.M. van Veen and J.A.M. ten Berg, 'Enkele overpeinzingen bij het wetsvoorstel Bestuur en toezicht rechtspersonen', WPNR 2019/7236, pp. 324-334.

7 *Parliamentary Papers II* 20192020, 34491, nos. 13 and 14.

On 10 November 2020, the Senate adopted the proposal without a vote. For the SGP-representatives was noted that, it the proposal would have been up for a vote, that they would have voted against.

4. Supervisory body

4.1 General

The MSLE Act provides a basis for foundations and associations to introduce a supervisory body, either by establishing a supervisory board (dualistic) or by establishing a one-tier board (monistic). A legal basis for the supervisory board already existed for BVs, NVs, cooperatives and OWMs but was still lacking for foundations and associations.

In practice, there is a need for rules for both the two-tier board model and the one-tier board model, as that various foundations and associations already use such a model, but in the absence of a legal basis, there is legal uncertainty as to their qualification. In principle, the introduction of a supervisory board or one-tier board is optional[8], so the choice to introduce an internal supervisory body lies, in principle, with the legal entity itself.

4.2 Two-tier board model

At the MSLE Act coming into force, the existing rules on supervisory boards of BVs, NVs, cooperatives and OWMs will also apply to foundations and associations. Similarly to management board members of foundations, the law will not prescribe the manner in which supervisory board members of foundations are appointed and dismissed, so that these rules can be given form in the articles of association at the foundation's own discretion.

As for associations, the general meeting of members appoints the supervisory board members. The articles of association may also provide otherwise, provided that each member may (in)directly participate in voting in respect of the appointment.

The statutory duty of the supervisory board is first and foremost to supervise the policy of the management board and the general course of affairs within the legal entity and the enterprise or organisation connected with it. The supervisory board also assist the management board by providing advice and - like the management board – acts in accordance with the interests of the legal entity and the enterprise or organisation connected with it. In order to carry out its duties, the supervisory board must receive all necessary information from the management board and at least once a year it must be comprehensively informed by the management board of, among other things, the policy of and the risks for the legal entity. Unlike the management board, a supervisory board may consist only of natural persons. If the legal entity, due to its size, is obliged to have a two-tier board structure, the supervisory board will have a more extensive range of duties.

4.3 One-tier board model

Since 2013, BVs and NVs have had the one-tier board model, which creates the possibility of setting up a one-tier board, consisting of executive and non-executive directors. As from the entry into force of the MSLE Act, a similar legal basis will exist for foundations, associations, cooperatives and OWMs.

The one-tier board encompasses a division of tasks between executive and non-executive directors and requires a basis in the legal entity's articles of association, which can be elaborated in board resolutions or board regulations. The division of tasks means that one or more directors are particularly concerned with the day-to-day management of the legal entity and the enterprise or organisation connected with it (the executive directors). Directors to whom no specific executive tasks are assigned, have as their main task management in general (the non-executive directors). The role of these directors can only be compared to a limited extent with the role of supervisory board members in a two-tier board model. After all, the range of duties includes much more than supervision and advice.

Management tasks that are not specifically assigned to individual directors belong to the board as a whole, i.e. to both the executive and non-executive directors. The non-executive directors therefore also bear management responsibility for all management actions, including the actions of the executive directors. However, the broader responsibilities of non-executive directors (and the resulting greater liability risks) are seen as a disadvantage of this board model. What is considered an advantage, however, is that the non-executive directors are more involved in day-to-day management than a

8 Exceptions apply in the case of applicability of the two-tier board system to cooperatives and mutual insurance associations and on the basis of sectoral regulations.

supervisory board. By being closer to the information, action can be taken at an earlier stage if circumstances so require.

There are limits as to the possibility to divide task within the board. For example, non-executive directors cannot be deprived of their supervisory task. Furthermore, the chairmanship of the board, making nominations for the appointment of a director and determining the remuneration for executive directors cannot be granted to an executive director.

The MSLE Act assumes decision-making by the one-tier board as a whole. However, it is possible to provide in or pursuant to the articles of association that one or more directors may adopt resolutions concerning the management tasks assigned to them. In that case, a resolutions so adopted by one or more directors will nevertheless be attributed to the board as a whole.

Several sectoral laws exclude the use of the one-tier board model, for example, the Housing Act and the Care Institutions (Accreditation) Act Implementation Decree. In the literature it is argued that an adjustment of legislation and regulations for the housing corporation and healthcare sector needs to be made now that the MSLE Act opens the possibility of the establishment of a one-tier board.[9] After all, the prevailing view is that good governance and due supervision can be achieved in both a two-tier and one-tier board model.

4.4 Governing and executive board

In practice, foundations and associations regularly make use of a structure in which there is a governing board and an executive board. This board model is used, for example, in organisations of whose management is very time consuming. Where the executive board is responsible for day-to-day affairs, the governing board is more remote and has a more supervisory, coordinating and advisory role.

The MSLE Act is clearly based on a single board. It is therefore generally accepted that the governance model with a governing board and an executive board reflects a division of management tasks between two bodies which together form the board in the sense of Book 2 DCC. The division of management tasks and powers must be clear from the articles of association adopted by the respective legal entity.

Variations to the approach described above are possible, for example, a structure whereby the governing board is explicitly designated in the articles of association as the board within the meaning of Book 2 DCC. In this situation, the mandatory powers accrue to the governing board; certain other powers are delegated to the executive board.

The MSLE Act does not provide transitional rules for the board model described in this section. Subsequently, there is no immediate need to change the structure of the legal entity (within a certain period of time) after the entry into force of the MSLE Act. However, in the light of the MSLE Act, whether there is a one-tier or two-tier board model and therefore whether the general directors essentially qualify as non-executive directors or supervisory board members will have to be examined on the basis of the articles of association and actual implementation. As such, it may be advisable to make adjustments in order to avoid ambiguities about the mandatory duties and powers, responsibilities and liabilities.

5. Fulfilment of tasks and decision-making

5.1 Guidance

In the case of BVs and NVs, the standard for the performance of duties by management and supervisory board members has already been expressly laid down by law: management and supervisory board members must be guided by the interests of the legal entity and the enterprise connected with it.

For foundations and associations, the MSLE Act adds rules on duties and the guideline to be used to the provisions on the performance of duties. After all, management and supervisory board members of these legal entities may also be confronted with a conflict of interests. Since not all foundations and associations run a business, reference is made not only to “guided by the interests of the legal entity and the enterprise connected with it” but also to the “organisation”.

9 Inter alia by: A.G.H. Klaassen, ‘Het wetsvoorstel Wet bestuur en toezicht rechtspersonen en de semipublieke sector: een betere aansluiting op Boek 2 DCC is wenselijk’, *Ondernemingsrecht* 2017/107.

5.2 Multiple voting rights

For BVs and NVs, the principle of directors' collegiality was enshrined in law almost twenty years ago. It follows from this principle that a management board member (or a supervisory board member) can never cast more votes than his fellow directors jointly. For foundations, associations, cooperatives and OWMs, the MSLE Act provides for equality with the rules for BVs and NVs in this respect. This means that pursuant to the MSLE Act, management and supervisory board members cannot cast more votes than their fellow board members jointly.

With regard to multiple voting rights, transitional law applies. Based on this, a provision in the articles of association that prior to the entry into force of the MSLE Act stipulates that a certain management or supervisory board member of an association, cooperative, OWM or foundation may cast more votes than the other board members jointly, is valid until no later than five years after the date on which the MSLE Act enters into force or until the next amendment of the articles of association after the entry into force of this Act, whichever comes first.

5.3 Absent or unable to act

From the moment the MSLE Act comes into force, foundations, associations, cooperatives and OWMs are obliged to include provisions in their articles of association for cases in which all management or supervisory board members are absent or unable to act. A provision in the articles of association for the absence or inability to act of only some of the management or supervisory board members is optional.

The management board or supervisory board of a legal entity may consist of one or more persons. The law does not prescribe the number of persons; the articles of association may do so. If a legal entity has more than one management or supervisory board member, the principle of collective management or supervision applies. This means that resolutions are deemed to have been adopted in mutual consultation, and that all management or supervisory board members are responsible for their joint management or supervision.

If a management or supervisory board member is unable to carry out his duties, that means that resolutions cannot be adopted on the basis of mutual consultation between all board members. A board member is unable to act in situations where he is temporarily unable or prevented from performing his duties, for example, because of suspension or long-term illness or inaccessibility. In that case, provisions concerning absence or inability to act may provide for a solution. Such an arrangement will be of a temporary nature. An absence occurs when a vacancy arises: the officer ceases to be a board member, for example, by resignation or upon death.

The MSLE Act also provides for a legal basis for NVs, foundations, associations, cooperatives and mutual insurance associations to define "unable to act" in the articles of association. In practice, for example, some articles of association extend the concept by stipulating that an officer is unable to act if he has declared this in writing. The articles of association may also qualify a board member as being unable to act in case of a conflict of interests.

The MSLE Act clarifies that the person who, in case of absence or inability to act of a board member, is appointed to perform acts of management is equated with a management board member as far as these actions are concerned. A similar provision is introduced for supervisory board members.

Transitional law also applies to the rules in respect of absence or inability to act. Based on the transitional rule, it is not required to amend articles of association purely for the introduction of provisions in respect of absence or inability to act. However, the articles of association of a legal entity that do not yet include MSLE Act compliant provisions on this subject must incorporate such provisions at the occasion of the first amendment to its articles of association after the MSLE Act has come into effect.

5.4 Advisory role at general meetings

Under the MSLE Act, management board members of associations are given an advisory role in general meetings. Supervisory board members of associations will also have such an advisory vote under the MSLE Act, in order to enable them to give their views on the resolutions proposed by the general meeting, so that the members of the association can take these into account.[10] If a resolution is adopted in the general meeting without the board members being able to give their advice on the basis of this basis principle, the resulting resolution will be voidable.

10 *Parliamentary Papers II* 2015/2016, 34491, no. 3, p. 24.

The same principle under the MSLE Act applies to the adoption of resolutions outside of meetings. In such cases, strictly speaking, it is not possible to refer to an advisory vote so that management and supervisory board members must be given the opportunity to provide advice before the relevant resolution is adopted.

5.5 Dismissal by the Court (foundation) and (supervisory) board member disqualification

The MSLE Act contains new rules specifically for foundations to modernise and clarify the dismissal of management and supervisory board members by the Court. Under current law, the possibilities for a dismissal by the Court are limited. The Court will acquire more discretional powers to dismiss a management or supervisory board member of a foundation if so requested by the Public Prosecution Service or another interested party.

Under the MSLE Act, a management or supervisory board member of a foundation can be dismissed by the Court at the request of the Public Prosecution Service or another interested party (i) for neglect of his duties, (ii) for other important reasons, or (iii) due to a drastic change of circumstances on the basis of which the continuation of his position as board member cannot reasonably be expected.

This regulation, based on the regulation for an entity to which the large company regime (*structuurregeling*) applies, offers an extra means of dismissing a board member who is not functioning properly. This is a welcome change as not all foundations have a supervisory board that is able to take appropriate measures.

By law, the dismissal of a management or supervisory board member by the Court entails a five-year disqualification as board member. The Court may make an exception to this rule if the respective officer cannot be held seriously culpable in view of the duties assigned to others.

6. Conflict of interest

As from the entry into force of the MSLE Act, the conflict of interest rules that have already applied to BVs and NVs since 2013 will also apply to associations, cooperatives and OWMs.

For all legal entities, the conflict of interest rules will be an internal matter as from the entry into force of the MSLE Act: any invalid decision-making, whereby a given board member participates in the decision-making process despite a conflict of interest, will not affect the external power of representation, contrary to the old "representation rule" (which until the entry into force of the MSLE Act will still apply to associations, cooperatives and OWMs). Legal certainty is therefore greatly enhanced by this change.

Under the new rule, a management or supervisory board member with a conflict of interest will not take part in the deliberations and decision-making on the particular subject if he has a (in)direct personal interest that conflicts with the interest of the respective legal entity and the enterprise or organisation connected with it. In practice, the respective management or supervisory board member is expected to temporarily not participate in the meeting or in the decision-making process until after the relevant item on the agenda has been dealt with.

In order to determine which body is authorised to adopt resolutions in the event of a conflict of interest on the part of a management or supervisory board member of an association, cooperative or OWM, we refer to the escalation steps that follow from the *easy reference overview*. Incidentally, the articles of association of the legal entity may deviate from the basic statutory regulation. As foundations are subject to a slightly different set of rules, we would like to make the following additional comments.

Many foundations do not have a supervisory body and apart from that (in view of the fact that foundations are prohibited by law to have members) they do not have a corporate body comparable to a general meeting. In connection with this, the management board of a foundation without a supervisory board remains competent (in case decision-making is not possible due to a conflict of interest of all board members), provided the board records the considerations with regard to the relevant resolution in writing. The background to this written record is to ensure that board members are aware of

the standard that in the performance of their duties, the interests of the legal entity should prevail over their own interests.[11] A similar rule applies to the supervisory board of a foundation. Deviating principles may be included the articles of association.

If a resolution is adopted notwithstanding the conflict of interest rules, this resolution is voidable.[12] Annulment of the resolution has no consequences for the legal act of the legal entity and the power of representation of the management board or the management board member concerned. The legal act therefore remains in force. Contracting parties are therefore, in principle, not affected by a conflict of interest on the part of a board member.

The new rules have no retroactive effect. If the articles of association of associations, cooperatives or OWMs are still in line with the old legislation, a transitional scheme is provided for.

From the transitional scheme follows hat a provision in the articles of association stipulating that in the event of a conflict of interest on the part of a management board member, the legal person must be represented by a person other than the management board or a management board member, has no legal force for legal acts entered into after the entry into force of the MSLE Act. Also, the general meeting can remedy any void legal acts entered into before the entry into force of the MSLE Act by ratifying those. The general meeting can therefore, by means of a resolution or a series of resolutions, repair the power of representation that has arisen as a result of the old statutory rules. If the general meeting fails to do so, the legal entity will as yet be able to invoke nullity in respect of those old legal acts.

7. Liability of management board and supervisory board members

Until now, for foundations and associations, the liability regime of management or supervisory board members in respect of the duties assigned to them was not sufficiently clear yet. At present, non-commercial foundations and associations must fall back on the general director liability regime contained in Section 2:9 DCC[13] and possible liability by virtue of a wrongful act. To this, for formal commercial associations and commercial foundations, the MSLE Act adds a legal basis for director liability, i.e. the basis for liability in the event of bankruptcy under Section 2:138 DCC, via the mutatis mutandis clauses of Sections 2:50a and 2:300a DCC. Here too, therefore, uniformity is sought with the rules for BVs and NVs.

On the basis of the MSLE Act, manifestly improper management (or supervision) is irrefutably established when the management board has failed to fulfil the requirement to keep records or when the financial statements have not been published on time. In that case there is also a (rebuttable) presumption that the improper performance of duties is an important cause of the bankruptcy. The foregoing applies to management and supervisory board members of an association or foundation that is liable for corporation tax, or that is a semi-public entity and (by virtue of sectoral legislation and regulations) is obliged to publish its financial statements. These presumptions therefore do not apply to management or supervisory board members of non-commercial associations and foundations. While this does not mean that they cannot be liable in bankruptcy, in those cases the burden of proof lies with the trustee in bankruptcy.

According to the Note on the report on the legislative proposal in the House of Representatives, the MSLE Act contains a legal framework for the liability regime for foundations and associations which the various sectors can tailor to their needs.[14] In its report, the Halsema Commission called for a more precise description of the tasks, duties and liability of management and supervisory board members of institutions in semi-public sectors: this was lacking for the internal supervisor.

11 *Parliamentary Papers II* 2015/16, 33491, no. 3, p. 6.

12 It is unclear as to the legal consequences of failure to comply with the obligation to make a written record of the considerations on which the resolution is based. According to the Minister, the breach of the obligation does not result in voidability. Several authors are of the opinion that the resolution should be voidable.

13 Internal director's liability requires serious culpable mismanagement, a standard that was introduced in Supreme Court 10 January 1997, NJ 1997/360 (Staleman/Van de Ven), ground 3.3.1. This was later codified in Article 2:9 DCC.

14 *Parliamentary Papers II* 2018/2019, 34491, no. 6.

8. BVs and NVs

8.1 Limited changes

The changes that the MSLE Act brings to BVs and NVs are first and foremost aimed at harmonising the rules applicable to absence and inability to act. The relevant statutory provisions for management board members of BVs and NVs currently differ slightly from each other, but - even if the wording of the respective sections of the DCC might suggest otherwise - require that provisions are included in the articles of association for the event that all board members are absent or unable to act. The same applies for supervisory board members of BVs; for supervisory board members of NVs there is currently not yet a statutory rule regarding absence or inability to act.

Under the MSLE Act, BVs and NVs are obliged to include an arrangement in their articles of association for the manner in which the duties and powers are temporarily provided for in the event of absence or inability to act of all management or supervisory board members. The articles of association may contain provisions in the event of absence or inability to act of one or more board members.

As from the entry into force of the MSLE Act, it will also be clear by law that the articles of association of NVs may specify in more detail when a board member is unable to act. For BVs, such a legal basis already exists.

With regard to the rules on liability, pursuant to the MSLE Act a board member cannot set off a claim of the company on account of improper performance of duties against a possible claim against the company.

8.2 Clarifications resulting from the legislative process

There was discussion in literature as to whether statutory rules concerning absence and inability to act of board members may include that, in the event of a conflict of interest of all board members or the sole board member, one or more temporary board members are appointed, while a supervisory board has been established. In the Note on the report on the legislative proposal (Nota naar aanleiding van het verslag), the Minister confirmed that this is permitted: it is up to the BV or NV to decide which approach is chosen in respect of the situation in which a board member is unable to act. The Minister states that if the legal entity choses an approach in which temporary board members are appointed in the event of a conflict of interest of statutory board members, these temporary board members are also obliged by law to act in the interest of the legal entity. If there is a supervisory board, it will supervise these temporary board members.[15]

In addition, in literature there were several views on the question of how the conflict of interest rules relate to the authority of the management board to approve distributions to shareholders (Section 2:216(2) DCC) if management board members themselves hold shares. The Minister provided clarity in the Note on the report on the legislative proposal by stating that pursuant to Section 2:216(2) DCC, the management board will refuse the approval of the resolution of the general meeting to make a distribution if it knows or should reasonably foresee that the company will not be able to continue to pay its due and payable debts after the distribution. According to the Minister, it is not appropriate to apply the conflict of interest rules to this approval right, as at the occasion of the approval the board lacks any discretionary power of weighing up any (possibly conflicting) interests. In short, the management board may only assess a proposed distribution on the basis of the legally defined criterion of Section 2:216(2) DCC so that the conflict of interest rules does not apply to Section 2:216(2) DCC.[16]

Finally, the Note on the report on the legislative proposal addresses the relationship between any statutory delegation under Sections 2:129a/2:239a(3) DCC and the rules on conflict of interests. According to these Sections, an individual director in the one-tier board may be authorised by the board to adopt resolutions qualifying as board resolutions on matters falling within his mandate. The authority to resolve on these matters should revert to the board as a whole in cases where the director concerned is conflicted, in order to prevent a dead lock in respect of decision-making on matters delegated to the respective director. The Minister believes that it is up to the legal entity to include rules in the articles of association of the respective legal entity to ensure clarity on legally valid decision-making in these circumstances.

15 *Parliamentary Papers II* 2018/2019, 34491, no. 6., p.12.

16 *Parliamentary Papers II* 2018/2019, 34491, no. 6., p.12.

According to the Minister, it is obvious that this authority will revert to the board as a whole, with the conflicted director not participating in the deliberations and decision-making.[17]

9. Practical recommendations

9.1 General

In certain cases, the MSLE Act will have a substantial impact on daily practice. It is important to review the current articles of association to identify which provisions will need to be amended or supplemented (in due course). Below are several practical recommendations.

9.2 Amendment to articles of association?

The MSLE Act contains several transitional provisions to accommodate current practice. The most important considerations for existing foundations, associations, cooperatives and OWMs are:

a. if the articles of association do not yet contain rules governing absence and inability of board members, such rules are to be introduced at the earliest opportunity. In cases where a foundation has a sole board member, we recommend to amend the articles of association without delay;
b. a provision in the articles of association under which, prior to the entry into force of the MSLE Act, a management or supervisory board member may cast more votes than the other board members jointly, is valid until five years after the entry into force of the MSLE Act or until the next amendment to the articles of association (whichever is sooner). We are happy to advise on a possible alternative solution in cases where the articles of association contain such a multiple voting right provision;
c. if a foundation or association has established an internal supervisory body, we advise to assess, based on the statutory powers under the new legislation, whether this corporate body qualifies as a supervisory board under the MSLE Act; and
d. if a board model is used consisting of a governing board and an executive board, we advise to assess whether this model qualifies as a one-tier board model or whether the governing board is essentially a supervisory board.

9.3 Recommendation on new conflict-of-interest regulation

In section 6 we explained that the MSLE Act provides for transitional law in connection with the amended conflict of interest rules for associations, cooperatives and OWMs. The general meeting of such a legal entity may resolve to ratify an invalid representation after the entry into force of the MSLE Act by resolving to appoint the respective representative(s) for that purpose.

Provisions in the articles of association that deviate from the statutory rules do not have to be amended without delay but can no longer be invoked. Therefore, it is obvious to have the articles of association amended on this point.

In addition, we recommend that the management board and/or supervisory board regulations lay down the procedure to be followed in the event of a conflict of interest situation. As far as we are concerned, the fact that the legislator has not opted to include an obligation to provide information in the MSLE Act in the event of a conflict of interests does not detract from the need to provide for a proper procedure in this respect. Under sectoral regulations or codes obligations to provide information in the event of a conflict of interests already exist, for example in the health care, education and cultural sectors.

In practice, such a procedure may involve, for example, that the (potentially) conflicted board member reports the (potential) conflict of interests to his fellow board members without delay. If a supervisory board has been established, it is obvious that the chairman of the supervisory board must also be informed. In principle, the (potentially) conflicted board member should not be participate in the decision as to whether or not a conflict of interests exists. Of course, the respective board member may be heard prior to the decision-making.

If a choice is made for provisions in the articles of association pursuant whereto a corporate body remains authorised to resolve upon a certain topic despite the existence of conflicting interests, a right of approval of the relevant resolution by the general meeting or supervisory board is often opted for in practice, assuming of course that such a corporate body is present or established.

17 *Parliamentary Papers II* 2018/2019, 34491, no. 6., pp.12 and 13.

9.4 Sectoral regulations

Applicable sectoral regulations or codes will continue to be relevant following the entry into force of the MSLE Act. Based on such regulations or codes there may be a need to include specific provisions in the articles of association and this will remain the case.

The MSLE Act brings a broad legal basis with it with guiding principles for management and supervision for all legal entities. It is not the intention to alter sectoral principles, so that, for example, the articles of association may continue to contain additional provisions on the duties and powers of the supervisory board, such as approval rights in respect of board resolutions.

10. Conclusion

This Quoted deals with the most important amendments to Book 2 DCC pursuant to the MSLE Act. Together with the *easy reference overview*, which schematically sets out all changes pursuant to the MSLE Act, we provide a complete overview of the new statutory rules.

According to the Explanatory Memorandum (*Memorie van Toelichting*), the MSLE Act meets a practical need.[18] Fact is that the MSLE Act introduces a clear set of general rules in Book 2 DCC applicable to all legal entities, therewith serving daily practice and legal certainty. However, it concerns rules that only define the main tasks, duties and authorities of the management board and supervisory board. Practical elaboration in sectoral legislation and codes and further colouring by the Courts remains as important as ever.

In addition, it remains to be seen whether the MSLE Act indeed provides an effective basis for the intended improvement of the quality of management and supervision (especially in the semi-public sector).

18 *Parliamentary Papers II* 2015/16, 33491, no. 3.

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Quoted

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