LOYENS & LOEFF

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Management and supervisory boards in the Netherlands **in brief**

Foreword

This updated 2021 booklet highlights a number of practical topics relevant to both management board members and supervisory board members of Dutch public companies, private limited liability companies and cooperatives. The topics range from adoption of resolutions to division of duties, from appointment to dismissal, from a one-tier board to representation and from liability to discharge and insurance.

This booklet also addresses several employment-related aspects of the relationship between the company and its management board members, the relationship between supervisory board members and the company and the corresponding tax position for both.

Although not intended to be exhaustive, we do hope this booklet will again spark your attention to several interesting and pertinent issues. Amongst other things, we refer to the Temporary Act governing the COVID-19 Measures (*Tijdelijke Wet Covid-19*) that in response to the coronavirus crisis was introduced with retroactive effect to 16 March 2020 and has been extended several times since then. This Act permits, for example, the option to hold virtual meetings of shareholders or members, deviations from statutory provisions and provisions under the articles of association and the postponement of preparing and publishing financial statements. We also refer in a number of places to the Act on Management and Supervision of Legal Entities (*Wet bestuur en toezicht rechtspersonen*) which will enter into force on 1 July 2021, an Act that primarily changes the statutory provisions that apply to foundations and associations, but also implements a number of harmonising amendments that affect Dutch public companies and private limited liability companies.

For the sake of readability, this publication does not contain references to any applicable legal articles, case law or literature. Please do not hesitate to contact us if you have any specific questions about the role of management board members and/or supervisory board members in the Netherlands or about other governance-related topics.

I would also like to take this opportunity to thank everyone who contributed to preparing this booklet. My particular thanks go to Marieke Kolsters (Corporate Law), Klaas Wiersma (Employment Law, Taxes and Benefits), Hans van Ruiten (Employment Law, Taxes and Benefits) and Mijke Sinninghe Damsté (Litigation and Risk Management), Huib Schrama (Litigation & Risk Management), Céline van Asperen de Boer (Litigation & Risk Management) and Michel Bosman (Litigation & Risk Management).

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On behalf of Loyens & Loeff N.V.
Prof. mr. drs. D.F.M.M. Zaman

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Part I

The management board **in brief**

I The management board in brief

1 Duties of the management board

Dutch law only briefly defines the duties conferred on the management board: a management board manages the company. The following duties, based on legislation and case law, are conferred specifically on the management board:

- day-to-day management
- determining long-term and short-term policy and strategy
- monitoring the general course of events in the business of the company
- monitoring the liquidity position of the company
- overseeing risk management
- pursuing financial policy
- preparing and reporting to the (annual) general meeting
- following up and implementing resolutions validly adopted by other corporate bodies
- providing information to the supervisory council or the supervisory board, if applicable
- ensuring that employees carry out their duties
- fulfilling tax obligations (and tax planning)
- fulfilling other administrative obligations, such as:
  - keeping the books
  - financial reporting
  - keeping information in the business register up to date
  - keeping information in the shareholders' register up to date
  - preparing, publishing and, if applicable, filing the annual accounts
- representation.

The management board must carry out its duties in line with the objects of the company as provided for in the legal entity's articles of association. However, the management board's responsibilities are actually broader: when carrying out their duties, management board members must be guided by the interests of the company and the enterprise connected with it. This responsibility is not limited to the objects of the company as provided for in the articles of association; the interests of stakeholders as well as shareholders,

employees, creditors and suppliers, and under certain circumstances the public interest such as with semi-public organisations, must also be taken into account. In addition, any applicable good governance rules, codes or regulations must be considered, such as the **Dutch Corporate Governance Code** for listed companies and, if applicable, other governance codes, such as the Healthcare Governance Code (*Governancecode Zorg 2017*).

The objects clause included in a company's articles of association is often worded very broadly, thus creating the opportunity to perform legal acts without these acts likely being in conflict with the company's objects. Nevertheless, situations may still arise in which the legal acts performed are contrary to the objects stated in the articles of association. The company may declare a legal act of this nature void.

A legal act will only be voidable when:

- an ultra vires act has been performed, and
- that ultra vires act is not in the company's best interests, and
- the other party knew or should have known - without carrying out any investigation - that the relevant act constituted ultra vires (bad faith).

The right of nullification expires after three years. The other party may, in order to put an end to its uncertain position, set a "reasonable" term to the legal entity within which it must invoke the nullification.

2 Management board members and financial reporting

One of the management board's core responsibilities is financial policy and, by extension, transparent financial reporting.

Financial reporting takes place in the form of the annual accounts and the management report, to be prepared in accordance with the requirements of Title 9, Book 2, of the Dutch Civil Code (*Burgerlijk Wetboek*). The management board is required to prepare these documents on time. Preparation of the annual accounts involves adopting the contents of the annual accounts by board resolution. In principle, this board resolution must be adopted within five months of the end of a financial year. However, the articles of association may provide

for a shorter period of time.[1] A period of four months (without the possibility of extension) applies to listed companies.

In special circumstances, the general meeting may grant the management board an extended period of no more than five months in which to prepare the annual accounts. Examples of relevant special circumstances are:

- the figures required are not available yet;
- the management board and the supervisory board are unable to agree on the contents of the annual accounts;
- some uncertainty exists concerning the valuation of items on the balance sheet; and/or
- an emergency situation has arisen (e.g., a fire or flood), as a result of which all or part of the company's books and records have been lost.

Listed companies are required to apply the International Financial Reporting Standards (**IFRS**). By law, non-listed companies are also able to take the IFRS as their starting point. Increasingly more companies are opting to do this.

All management board members are required to sign the annual accounts. By signing, they consent to the contents of the annual accounts. If a management board member does not agree with the contents of the annual accounts, he/she may refuse to sign the annual accounts and may have the reason for the absence of his/her signature stated in the annual accounts. If all shareholders of a private limited liability company are also directors of that company, the signature (subject to a number of specific other conditions) also constitutes adoption of the annual accounts.

If a management board member is unable to agree with the contents of the annual accounts and his/her objections are not resolved, the management board member could consider resigning from the board.

If the Netherlands Authority for the Financial Markets (**AFM**) has any doubts about whether a listed company is applying reporting standards properly, it may

1 In the case of an association, cooperative or mutual insurance association, this period is in principle six months. The Temporary Act governing COVID-19 Measures *(Tijdelijke Wet Covid-19)* provides for an extension to the statutory periods and the periods under the articles of association.

ask that listed company to provide a more details explanation. If a company does so, but the AFM still has its doubts, the AFM can:

- notify the company of this fact;
- advise the company to publish a notice in which it explains which sections of the financial report do not comply with the regulations and how these regulations will be applied in the future; and/or
- ask the Enterprise Chamber of the Amsterdam Court of Appeal to order the company to prepare the annual accounts in accordance with the applicable reporting standards.

3 Internal decision-making and adoption of resolutions

A distinction must be made between board resolutions (i.e. internal) and acts of representation on the company's behalf (i.e. external; see chapter 8). The management board implements the duties conferred on it by adopting resolutions. If the management board is representing the company, it will be deemed to be doing so on the basis of a valid board resolution.

In cases of a multi-member management board, each management board member has only one vote. The company's articles of association, however, may provide that a management board member has multiple voting rights, on the understanding that one management board member may not cast more votes than all other management board members jointly. Once the Act on Management and Supervision of Legal Entities (*Wet bestuur en toezicht rechtspersonen, hereinafter* '**WBTR**') enters into force, this will be the statutory rule for all legal entities.

Where there is a tied vote, the basic rule is no resolution will be deemed to have been adopted. A possible solution to a tied vote is for the resolution to be adopted by a corporate body designated to do so in the articles of association. For example, this could be the supervisory board or the general meeting. It could also be justified that a management board member designated in the articles of association (e.g., the chairman of the board) may have a casting vote. All members of the management board must in principle be given the opportunity to participate in discussions about all topics on which resolutions are to be adopted. This requires that each management board member be given sufficient time to prepare and be granted the opportunity to attend

management board meetings. This does not mean that all management board members must actually attend each meeting, or they all need to agree on a particular resolution. However, the articles of association or board rules may provide otherwise. If a resolution is adopted outside a meeting, all management board members must agree that no meeting will be held. When resolutions are adopted outside meetings, the agreement of all management board members on how resolutions are adopted should be set out in writing. If a resolution is to be adopted on a topic in relation to which one or more management board members has or have a (direct or indirect) personal interest that is in conflict with the company's interests, the relevant management board members must refrain from participating in deliberations and the decision-making process about the topic in question (see chapter 4).

Management board members may not simply send a replacement to attend meetings or vote on resolutions. However, a management board member may give a fellow management board member a proxy to act for him/her in specific and clear-cut situations. A management board member may not give a general proxy to a fellow management board member.

If there is a vacancy on the management board ('absence'), or a management board member is (temporarily) unable to perform his duties due to illness or for other reasons ('inability to act'), the other management board members will retain full administrative authority in most cases and will have the power to adopt valid resolutions (see chapter 17). Whether or not this is actually the case will depend on the relevant provisions of the articles of association.

The management board should meet frequently, at least as often as circumstances require. The importance of clear and complete minutes of meetings is great: a list of resolutions alone is not enough. If the management board or one or more of its members disagree with the (intended) actions of the management board or of the other supervisory board members, if applicable, this - as well as the specific reasons for abstention - must be explicitly stated in the minutes. This is particularly relevant in connection with the possibility of exculpation in the event of the management being held liable.

The minutes of management board meetings are not publicly available, and shareholders are not entitled to inspect these reports. The supervisory board, however, may demand that it be allowed to inspect minutes of management board meetings.

4 Conflict of interest

When carrying out their duties, management board members must be guided by the company's interests and the enterprise connected with it. If a resolution is to be adopted on a topic in relation to which a management board member has a direct or indirect personal interest that is contrary to the company's interests and the enterprise connected with it, that board member - as prescribed by law - must refrain from participating in deliberations and the decision-making process. This means that such management board member must temporarily leave the management board meeting, if and when the item concerned is on the agenda. If a management board member fails to leave and proceeds to take part in deliberations and/or the decision-making process concerning the item concerned, this will cause the resolution to become voidable. However, any acts of representation carried out on the basis of the resolution will not be affected. As such, a conflict of interest will in principle not be enforceable externally in relation to third parties. The annulment of the resolution may be requested by a fellow director or supervisory board member and any interested party who has a reasonable interest in it.

If all management board members have a conflict of interest where a particular resolution is concerned and a board resolution cannot be adopted as a result, the power to adopt the resolution on that particular topic will rest with the supervisory board. If no supervisory board has been established, or if all the supervisory board members also have a conflict of interest, the general meeting may adopt the resolution.

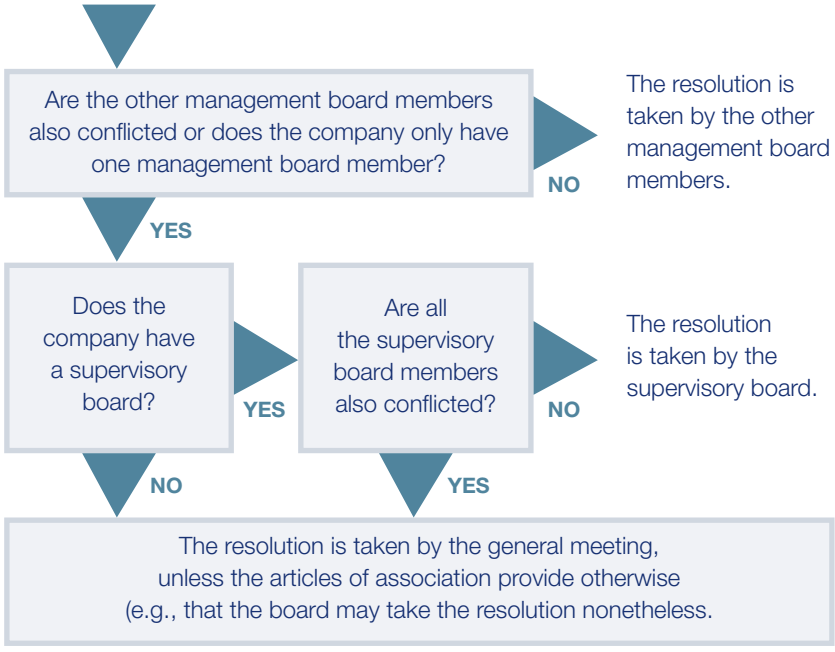
A company's articles of association may provide for a different approach to the situation outlined above. Should the conflicting directors nevertheless pass the resolution, the resolution is void: it was passed by an unauthorised body. The question is whether such resolutions can be repaired. The prevailing doctrine in literature is that this is not possible.

The general rule prior to 1 January 2013 was that the existence of a conflict of interest would deprive the management board of its authority to represent the company, except where the articles of association provide otherwise. Companies that are not duly represented under the former regime will still be able to invoke invalidity even after 1 January 2013, except where the general meeting ratifies the specific legal act at a later date. Provisions of the articles of association that still provide for the loss of management board members' authority to represent the company in the event of a conflict of interest,

in accordance with the wording of the former regime, will no longer apply in relation to legal acts performed after 1 January 2013. This rule of transitional law will also apply upon entry into force of the WBTR, which introduces a conflict-of-interest rule for the association, cooperative and mutual insurance association similar to the rule for the Dutch public company (**NV**) and the Dutch private limited liability company (**BV**), and a largely similar rule for the foundation (*stichting*).

In addition to the legal rule under which a management board member with a direct or indirect conflict of interest must refrain from participating in related deliberations and decision-making, there are other customary internal procedural rules on decision-making in the event of a conflict of interest. These are often set out in board rules. Board rules frequently stipulate that, in the event of a conflict of interest, advice should be obtained from an external expert or other steps taken to ensure that due consideration is given to the company's interests in relation to an envisaged transaction. Board rules are also frequently geared towards avoiding any appearance of a conflict of interest. Governance codes, if applicable, also generally contain provisions to prevent this. The appearance of a conflict of interest is in fact more likely than a personal direct or indirect conflict of interest.

The procedure ensuing from the rules on conflicts of interest is as follows:



5 Division of duties

A multi-member management board may divide duties among its various management board members. This does not mean that responsibility for the actions of each of the management board members is limited to the duties conferred on an individual management board member. The management board continues to have joint responsibility for the policy pursued. This also follows from implementation of the rules on liability.

In case of a one-tier board (see chapter 6), the law offers the possibility of granting one or more management board members the authority to take certain board resolutions under or pursuant to the articles of association, in addition to making a division of duties. Resolutions adopted on the basis of this authority are then attributed to the management board as a whole. Here too, the principle of joint responsibility applies.

6 One-tier board

A one-tier board, also known as a monistic board structure, is a special approach to the statutory division of duties within the management board of an NV or BV. From the moment that the WBTR enters into force, there will also be such a statutory basis for the foundation, association, cooperative and mutual insurance association.

Establishing a one-tier board requires a provision in the company's articles of association stipulating that the duties of the management board are conferred on one or more executive directors and one or more non-executive directors (executive board or committee and a governing board or committee).

Where there is a one-tier board, both executive directors and non-executive directors are management board members as defined by law.

Executive directors are responsible for managing the company's day-to-day affairs. To a certain extent, the role of non-executive directors can be compared with the role of supervisory board members, but non-executive directors have more responsibility. After all, non-executive directors are management board members as defined by law, and therefore deemed to receive more information and sooner in time, to be closer to the day-to-day management and therefore

are in a better position to take action. This is exhibited in an increased risk of liability for non-executive directors compared to supervisory board members. By law, the chair of a one-tier board may not be an executive director and executive directors may not participate in decision-making about their remuneration or nominations for the appointment of board members. Companies governed by the Dutch 'large company regime', known as 'large companies' (*structuurvennootschappen*), are also permitted to have a one-tier board.[2]

7 Management board autonomy

A management board is largely autonomous when performing its duties. Management board members must be guided by the company's interests and the enterprise connected with it. If shareholders' interests differ from the company's interests, management board members must be guided by the company's interests, even if they risk being dismissed by the general meeting for doing so. Management board members risk directors' and officers' liability for any incorrect decisions they make. Within the framework of the company interest, a management board's autonomy can be restricted somewhat by the general meeting's and/or the supervisory board's right of approval or right to issue instructions, as based on the articles of association.

If a company is a NV, board resolutions on important changes to the identity of the company require the general meeting's approval. Although this provision does not apply to BV's, the due care required of directors of BV's may also require them to consult the general meeting about far-reaching resolutions. In addition, certain board resolutions are always subject to the supervisory board's approval in the case of a "large company".

2 To put it briefly, a company will qualify as 'large company' under the 'large company regime' if it has had, for at least three consecutive years, (i) an equity capital of at least EUR 16 million, (ii) more than 100 employees in the Netherlands and (iii) a works council. The Act provides for exemptions from the regime (see Chapter 2).

8 Representation

The management board as such is jointly authorised to represent the company. Each management board member is also authorised to represent the company independently. However, a company's articles of association may provide for different arrangements on representation.

Management board members' authority to represent the company may not be limited to certain legal acts or to a certain amount. A management board has unlimited and unconditional authority to represent the company, unless the law provides otherwise. However, the articles of association may limit management board members' authority to represent the company by other means. One fairly common example of this is the provision already mentioned above, where a company may only be represented by two management board members acting jointly. Examples of this are where two management board members acting jointly have authority, or that the authority to represent accrues only to a director A and a director B, acting jointly.

A company's articles of association may also limit management board members' internal authority to represent the company by stipulating, for example, that important board resolutions require the prior approval of the general meeting or the supervisory board. If a management board member commits an ultra vires act internally or acts contrary to agreed procedures, such as the required prior approval indicated above, this will in principle not have any consequences for their external authority to represent the company, but it may have so for the director's internal liability towards the legal entity.

An ultra vires act (see chapter 1) is enforceable externally, but only if the company invokes an ultra vires act and the counterparty knew, or should have known, that the act was ultra vires.

When seeking to determine who is permitted to represent a company, third parties may rely on publicly available information that can be consulted from the commercial register of the Chamber of Commerce. The management board must ensure that this information is up to date. The general rule is that all amendments must be notified within eight days.

9 Executive committee

Many companies, including large companies, opt to establish an executive committee (**Exco**), sometimes also referred to as management committee. An Exco usually consists of both directors under the company's articles of association and members of senior management. An Exco can be defined as a management tier where preparations for and the implementation of the adoption of resolutions by the company occur. Companies that decide to establish an Exco also often opt for a smaller management board under their articles of association. There are various reasons for establishing an Exco, one of which is to gain support for and implement the management board's policy. Management board members can gain the support of senior management via the Exco and implement the chosen strategy directly.

Formally, management authority is, however, conferred solely on management board members. Legally, members of the Exco who are not management board members will function as employees under the responsibility of management board members.
If a company has established a supervisory board as well, the supervision it exercises will also extend indirectly to members of senior management that are members of the Exco.

In specific cases, a board model with an Exco will reflect the business model of the company or the environment in which the company operates. As such, establishing a standard board model or rules with an Exco in place is not possible since the duties and powers of a certain Exco depend on the company's specific characteristics.

In the Corporate Governance Code, the Dutch Corporate Governance Code Monitoring Committee has attempted to anticipate the potentially restricted control of the supervisory board in the case of an Exco by introducing a new best practice provision which stipulates that a company with an Exco must ensure that the checks and balances in the company are safeguarded. This also entails safeguarding the expertise and responsibilities of the management board as well as providing adequate information to the supervisory board. The supervisory board monitors this. The management board must render account in the management report as to why an Exco has been introduced, what its role, duties and its composition are, and how contact is arranged between the supervisory board and the Exco.

10 Holders of powers of attorney

A company may grant a continuing power of attorney by law or under its articles of association. This type of power of attorney is also referred to as a power of procuration. Holders of powers of attorney will carry out their duties on the basis of this power of attorney. This power of attorney is often granted to officers in certain positions. Sometimes the holder of a power of attorney is a vice-president or a branch or deputy director, but is not a part of the management board under the company's articles of association.

The authority to represent the company that holders of powers of attorney have may be of a general nature, but may also be restricted in comparison with that of management board members under the company's articles of association. All restrictions to be imposed on an authority to represent the company may be set out in a continuing power of attorney. For example, the authority of a holder of a power of attorney to represent the company may be restricted to certain legal acts and/or to a certain amount.

By law, a company is only bound - in principle - by legal acts that a holder of a power of attorney has performed on the company's behalf if that individual remained within the authority conferred on him/her. This means that, with certain exceptions, holders of a power of attorney will never be a party to the legal act themselves, but the company will be bound directly. However, the counterparty must be aware of the relevant restrictions to the authority to represent the company. For this reason, it is advisable to enter the continuing power of attorney in the Commercial Register. This makes it easier for the company to invoke the restrictions in question against third parties.

11 Articles of association and board rules

Relationships between a company's corporate bodies (the management board, the general meeting and possibly also the supervisory board) as well as relationships within these corporate bodies can be elaborated on and stipulated in the company's articles of association and rules, in addition to or, if permitted, in departure from statutory provisions.

Examples include:

- requiring the management board to observe certain instructions issued by another corporate body in the company's articles of association (e.g., the supervisory board or the general meeting);
- making certain board resolutions subject to the approval of another corporate body under the company's articles of association;
- conferring the authority to issue shares on the management board (in the company's articles of association);
- making share transfers (in case of NV's and BV's) subject to the management board's approval;
- conferring multiple voting rights on management board members (up to a maximum number of votes that is equal to the number of votes to be cast by all other management board members jointly;
- establishing rules for tie votes;
- setting out a division of duties (in board rules);
- providing information to the general meeting and/or the supervisory board;
- establishing rules on decision-making by the management board (in board rules);
- establishing rules (in the company's articles of association or board rules) pertaining to a conflict of interest;
- elaborating on the role of the chairman or company secretary (in board rules).

The adoption of board rules is not subject to any legal requirements. Articles of association often stipulate that board rules may be adopted by the management board itself, but the first adoption and later amendments are subject to the approval of the general meeting or the supervisory board.

12 Relationship between the management board and the supervisory board

The management board must inform and keep the supervisory board informed to enable it to perform its supervisory duties. The supervisory board has the same responsibility as the management board: both must be guided by the company's interests and the enterprise connected with it. As such, there are few instances in which the management board would be justified in withholding information that the supervisory board requests from it.

Under the law, the management board must notify the supervisory board in writing at least once a year of the main features of strategic policy, general and financial risks and the company's management and control system.

Where good governance is concerned, it is important that the management board heeds the opinion of the supervisory board on important matters. However, the management board may disregard the advice of the supervisory board, but the reasons for doing so should be set out in writing.

The supervisory board is authorised to suspend management board members, even if it is not authorised to appoint and dismiss management board members (as is the case in "large companies").

13 Management board and the (annual) general meeting

The starting point by law is that the management board plays an important role in the organisation of the (annual) general meeting. This includes:

- giving shareholders the opportunity to exercise their right to put items on the agenda;
- adopting a resolution to convene a meeting;
- sending notices or e-mail messages convening meetings to the (e-mail) addresses recorded in the shareholders' register;
- planning and organising meetings (logistics);
- setting the agenda;
- (sometimes) leading a meeting (often also by the chairman of the supervisory board);
- ensuring that the proceedings of meetings are minuted. If necessary, this will be in the form of a notarial record (e.g., in conflict situations).

The supervisory board may also convene the general meeting, although the articles of association may confer this power on others as well. If another competent corporate body resolves to convene a meeting, this corporate body will be authorised to set the agenda.

At the general meeting, management board members and supervisory board members (each individually) plays an advisory role in relation to the matters to be discussed at the meeting. If the general meeting disregards this authority,

the resolution adopted will be voidable. However, the general meeting is not obliged to follow the advice of management board members or supervisory board members. In principle, the advisory role does not extend to resolutions adopted at a meeting of holders of shares of a certain type or designation. The articles of association may include rules under which this right applies for meetings of this nature as well.

If shareholders avail themselves of the opportunity to adopt resolutions outside a meeting, the management board will not be involved in the preparation and production of minutes of the meeting. In this situation, the shareholders themselves must send the resolution to the management board so that it can be added to the other resolutions and minutes. The advisory role that management board members and supervisory board members have also extends to shareholders' resolutions to be adopted outside a formal meeting.

The management board must provide the general meeting with all information requested. The general meeting may ask for all information pertaining to the company's financial and operational situation. The management board may only refuse to provide information if doing so were to be detrimental to overriding interests. The legal right to information does not apply to an individual shareholder separately. The starting point is that information relating to the company will be provided at the general meeting (in the sense of a meeting of shareholders).

14 Appointment of management board members

Both natural persons and legal persons may be appointed as management board members of a company, whether for a fixed or indefinite period. The initial management board members of a company are appointed by means of the deed of incorporation. Subsequent changes to the management board are effected by a resolution adopted by the general meeting (or, if the full two-tier management board regime applies, by a resolution of the supervisory board). The company's articles of association may provide that appointment and/or dismissal may also be effected at the meeting of holders of shares of a certain type or designation. However, this is conditional on each shareholder having the opportunity to participate in decision-making about the appointment of at least one management board member.

The company's articles of association may set quality and other criteria that a management board member must fulfil. For example, holding a certain interest in the company or complying with a professional requirement (e.g., the management board member is a lawyer or accountant). The articles of association may also provide that the authority of the general meeting to appoint a management board member is limited by the fact that another corporate body is authorised to draw up a binding nomination for at least one person.

If a company has a works council, any changes proposed to the management board must be submitted to the works council for its advice. In accordance with the Works Councils Act (*Wet op de ondernemingsraden*), advice must be requested at a time such that the works council can have a meaningful impact on the contemplated resolution. For NV's, the chairman of the works council, or another member designated by the works council, must be allowed to attend the general meeting to explain the position of the works council. Additional rights of approval or rights to be consulted may apply by virtue of good governance regulations and sector-specific regulations. Once a management board member has accepted his/her appointment as such, this individual's name must be recorded in the business register kept by the Chamber of Commerce.

When appointing management board members, consideration must be given to the rule stipulating that a management board member of a large entity (see below) may not be a member of more than two supervisory boards (or similar positions; e.g., non-executive director in a one-tier board) in large entities simultaneously. In practice, this limitation regime is referred to as the 'points regulation', while the points associated with a certain position are referred to as *'Irrgang points'*. An individual who is the chairman of a supervisory board or of the one-tier board of a large entity may never be appointed as a management board member of another legal entity.

If an individual holds more than the maximum number of positions permitted with large entities, this may render appointment resolutions invalid. An exemption applies for positions accepted prior to the Management and Supervision Act (*Wet bestuur en toezicht*) entering in force on 1 January 2013.

A target figure applied until 1 January 2020 for management and supervisory boards of large entities in order to achieve a balanced number of male and female board members. Although no sanction was attached to not complying with this target figure, the company was required to explain any non-compliance

of this nature in its management report. The abolition of these rules with effect from 1 January 2020 does not mean that there is less focus on the subject of diversity, as is also apparent from the Notification of Diversity Policy Decree (*Besluit bekendmaking diversiteitsbeleid*) (Bulletin of Acts and Decrees 2016, no. 559). September 2019 also saw the publication of advice by the Social and Economic Council (SER): '*Diversiteit in de top*', and three motions were carried in the Lower House to adopt the recommendations of the SER's advice. This is expected to lead to legislation, as a result of which certain legal entitles will be legally obliged have at least one-third of supervisory board positions held by women ('statutory quota'). A consultation has already taken place in April/May 2020 concerning the modernisation of the law relating to public companies, and a more balanced number of men and women (www.internetconsultatie.nl).

A large entity in the sense of the limitation regime set out above is understood to mean an NV or BV that does not meet two of the three requirements taken into consideration when applying the annual account exemption for small legal entities.

15 Legal relationship between management board members and the company

A management board member of a BV or a non-listed NV may be both a management board member (a corporate relationship) and an employee (a relationship under employment law). In this situation, the management board member has what is known as a dual legal relationship with the company. These relationships are indivisible, except where terminating the employment is prohibited (e.g., in the event of illness), or if another arrangement is agreed upon (see chapter 19: *Dismissal of management board members*).

When drawing up an employment agreement for a management board member, the following issues should be considered:

- the notice period (a maximum of six months for the management board member and at least twice as long for the company;
- the targets to be achieved in relation to any bonus and the procedure regarding a bonus in the event that a management board member is dismissed;

- where severance arrangements (golden parachute) apply, it is important to record the background of the arrangement in writing, how it is calculated and whether the transition payment is deducted from/has been factored into the contractual severance payment;
- the non-competition clause will only be valid if signed by the management board member; if an employee is to become a management board member, the non-competition clause previously agreed on may need to be revised and must in any event be signed again. If a fixed-term employment agreement has been entered into, the employment agreement must explicitly describe and substantiate what the interests of the company are to bind the management board member to a non-competition clause (subject to being declared void).

Not all management board members work on the basis of an employment agreement. For example, management board members of a listed NV may not be appointed on the basis of an employment agreement (see chapter 27: *Management board members of listed companies*). The same applies to non-executive directors of a large company (one-tier board). In other cases where a natural person is employed as a management board member of a company for remuneration, this is done on the basis of an employment agreement. The Supreme Court has consistently ruled that the criterion of authority (required for an employment agreement) must be interpreted strictly formally. This leaves no room for a salaried board position by a natural person on the basis of a management agreement.

If the management board member is a legal entity, the work is carried out on the basis of a management agreement. The tax authorities tend to 'look through' such a legal person-management board member, if this is the management company of the natural person who actually performs the management activities. In our opinion, this (substantive) approach is at odds with the formal interpretation that the Supreme Court follows with regard to exercising authority over directors.

16 Remuneration paid to management board members

The general meeting is authorised to adopt resolutions about the remuneration to be paid to the management board, except where the company's articles of association designate a different corporate body (e.g., the supervisory board). For Dutch listed companies, the Corporate Governance Code's point of departure is that this authority should be conferred on the supervisory board. See also Chapter 27 that discusses the management board members of Dutch listed companies.

A non-listed NV must have a remuneration policy. The remuneration to be paid must be determined in line with a remuneration policy adopted by the general meeting. The works council has the right to determine a position in advance on the remuneration policy and then explain this position at the general meeting. The absence of a position of the works council does not affect the decision-making regarding the remuneration policy.

For Dutch listed NV's and BV's, the remuneration policy must be submitted to the general meeting for adoption at least once every four years. A majority of ¾ of the votes cast is required, unless the articles of association prescribe a larger majority. The works council has a right to be consulted[3] in adopting the policy. The remuneration policy must be clear and easy to understand. Furthermore, the remuneration policy must contain a number of elements,[4] such as an explanation of the way in which the policy contributes to the company strategy, the long-term interests and the sustainability of the company. In addition, a remuneration report must be drawn up each year with an overview of all remunerations awarded or owed to individual management board members.[5] The remuneration policy must be submitted each year to the general meeting for an advisory vote.

3 If the advice of the works council is not, or not fully, followed, a written explanation for deviating from the advice must be submitted to the general meeting. The works council has no right of appeal.

4 Section 2:135a of the Dutch Civil Code contains a list of subjects that must at any rate be included in the remuneration policy.

5 Section 2:135b of the Dutch Civil Code contains a list with elements that must at any rate be included in the remuneration report, such as the relative proportion of fixed and variable remuneration, the number of shares and share options awarded and offered, and the most important conditions for exercising the rights.

The remuneration paid to a management board member consists of his/her pay (e.g., a fixed salary), any bonuses (also in the form of shares or share options), private use of a car, pension commitments and a severance payment.

16.1 Remuneration cap

Book 2 of the Dutch Civil Code and the Corporate Governance Code do contain rules on the remuneration policy and on adopting and amending the remuneration for individual management board members, but no rules on the amount and nature of the remuneration. In recent years, the remuneration paid to management board members has become the subject of increasing scrutiny. This has manifested itself in a number of ways, including various pieces of sectoral legislation that impose limits on the remuneration paid to management board members. For example, the Remuneration Policy (Financial Enterprises) Act (*Wet beloningsbeleid financiële ondernemingen*), which limits the remuneration (and any variable remuneration) paid in financial undertakings, and the Senior Officials (Standards for Remuneration) Act (*Wet Normering bezoldiging Topfunctionarissen*), which applies to the public and semi-public sectors.

16.2 Bonuses

Disputes about bonuses are often related to the discussion about the degree of enforceability of the bonus: is it an enforceable commitment/agreement or merely a discretionary power/general statement by the company that does not commit itself to anything in relation to the management board member? In light of this, it is advisable to set the targets to be achieved for any bonus in advance and to explicitly agree that the bonus is not structural, but always at the discretion of the company.

In certain circumstances, NV's may adjust and/or claw back bonuses from their management board members. The amount of the bonus to be paid to a management board member may be adjusted if payment of the bonus is unacceptable in the specific circumstances. A bonus that has already been paid to a management board member may be clawed back, if it is found that the bonus was paid on the basis of incorrect information about achieving the objectives underlying the bonus or about the circumstances on which the bonus depended. In takeover situations, NV's must also withhold an increase in the value of shares and options held by the management board members of Dutch listed companies.

17 Absence and inability to act

On the basis of the current provisions of Book 2 of the Dutch Civil Code, NV's or BV's articles of association must contain rules on how the company will be managed temporarily in the absence or inability to act of all management board members.

For NV's and BV's, the WBTR provides for a harmonisation of the rules for absence and inability to act. The statutory provisions concerned for the management board members of the NV and BV's currently deviate slightly from each other, but - even though the legislative text may suggest otherwise - oblige each of them to include rules in the articles of association governing the situation in which there is an absence or inability to act of all management board members. The new legislative text expresses more clearly than the existing text of the law that rules under the articles of association must provide the manner in which the temporary exercise of the tasks and powers will be provided for in the absence or inability to act of all management board members, and that including rules in the absence or inability to act of one or more management board members is optional.

The term 'inability to act' *(belet)* refers to a situation in which a management board member is unable to perform his management duties for a short or longer period of time (e.g., due to illness). When drawing up rules of this nature, the company has a great deal of freedom in determining arrangements that are in keeping with the company itself and its nature.

Under existing law, a BV's articles of association may define the term 'inability to act' further. It is generally assumed that this can also be done in the articles of association of a NV, even though there is no legal basis for this at present. The legal basis will be established for the NV (and also for the association, foundation, cooperative and mutual insurance association) with the entry into force of the WBTR.

In the articles of association, one could think of an extension to the term 'inability to act', such as by determining that an officer is unable to act if he has declared this in writing. The articles of association can also include provisions under which an officer qualifies as being unable to act if he is deemed to have a conflicting interest.

The WBTR clarifies that the person who is appointed to perform management duties in the case of absence or inability to act, will be equated with a management board member as regards these management duties.

18 Suspension of management board members

Both the corporate body that originally appointed a management board member and the supervisory board are authorised to suspend a management board member. A management board member must be heard before he or she is suspended. Other management board members must also be given the opportunity to express their views regarding the proposal to suspend a management board member. This will often not apply (depending on the company's articles of association) if the resolution to suspend a management board member is adopted by a meeting of the holders of shares of a certain type or designation. For NV's, the works council has the right to determine a position well in advance of the general meeting and then to explain this position at the general meeting. If it is then decided to suspend the management board member, the following must be taken into consideration:

- suspension is an emergency measure and must therefore be of a temporary nature;
- there must be valid arguments for suspension, and they should preferably be substantiated on the basis of documents;
- the company's articles of association may specify the nature and duration of a suspension;
- the court in summary proceedings may terminate a suspension at the request of the management board member in question;
- a rash suspension may result in the payment of (additional) compensation to the management board member after his/her dismissal.

19 Dismissal of management board members

In the event of the dismissal of a management board member,[6] the relationship between the company and the management board member - under company law and, if applicable, also under employment law - must be terminated.[7] In practice, this is often achieved by agreeing on a termination arrangement in which the management board member 'voluntarily' gives up his position as a management board member. In this situation, the management board member agrees to terminating his employment agreement with the consent of both sides (and is usually awarded a severance payment).

If no settlement can be agreed on, the management board member may be dismissed by the corporate body authorised to do so under the company's articles of association. If a management board member is dismissed under company law, the employment agreement will, in principle, also be terminated. However, this will not apply, for example, if termination of employment is prohibited (e.g., in the event of illness) or if the parties agree that the employment agreement will continue to apply after the dismissal effected under company law.

A management board member will have less protection under employment law than the regular employee. Unlike agreements with regular employees, an employment agreement entered into with a management board member may be terminated without the consent of a court or the Employee Insurance Agency (UWV). Unlike regular employees, the employer may also terminate the employment agreement lawfully without the written permission of the management board member.

The non-voluntary dismissal of a management board member will usually take place during an extraordinary meeting of shareholders. The following points are important at a meeting of this nature:

6 Other rules currently apply for the dismissal of an officer of a foundation than for the dismissal of a management board member of a public or private limited company. From the entry into force of the WBTR, the position of the officer of a foundation under employment law will be equated with that of the management board member of an NV or BV. The court will no longer issue an order to reinstate the employment agreement between the foundation and the officer.

7 The management board member of a listed NV can only work on the basis of a contract for services and therefore does not enjoy protection under employment law.

- the meeting must be convened in accordance with the applicable rules, which are:
  - the date of the general meeting must be set at a minimum of 15 days after the date of the invitation for NV's and a minimum of 8 days after the same date for BV's, unless the articles of association prescribe a longer period of time (for a Dutch listed company, meetings must always be convened at least 42 days prior to the date of the meeting in question);
  - the invitation to attend the general meeting must be sent to all shareholders and presented to the management board member in person (in order to prevent the management board member calling in "sick" prior to receipt of his/her invitation to attend the general meeting); and
  - the invitation to attend the general meeting must contain the agenda, which must include the proposed dismissal of the management board member and the (brief) reasons for the proposed resolution to dismiss the management board member
- depending on the circumstances, a draft termination agreement may be presented to the management board member, together with his/her invitation to attend the general meeting of shareholders and the agenda
- the works council (if one exists) must be asked for its advice in good time (see Chapter 21)
- the following individuals will in any event speak at the general meeting:
  - a shareholder who is able to explain the reasons for the dismissal, with due care being required because these reasons cannot be supplemented or changed later in any legal proceedings;
  - the management board member (or his/her counsel), who is permitted to respond to the reasons for the dismissal
  - the chairman of the works council in an NV will be permitted to explain the position of the works council on the proposed dismissal
  - the other management board members and the members of the supervisory board (if applicable) must be given the opportunity to cast their advisory votes
- the resolution to dismiss the management board member under company law may then be adopted, further to which the corporate relationship will be terminated with immediate effect and the employment agreement with the management board member will be terminated, with or without observance of the applicable notice period. We advise that the meeting be adjourned briefly prior to the resolution in order to consider the defence put forward by the management board member
- the (former) management board member may be granted a discharge

- the minutes of the general meeting, the letter of dismissal and any signed termination agreement must be provided to the (former) management board member
- the name of the (former) management board member must be removed from the business register. This will avoid third parties being under the impression that the management board member may still legally represent the company

It is always important, of course, to comply with procedural rules applicable under company law when adopting a resolution. However, if the procedural rules to be observed when resolving to dismiss a management board member have been disregarded, the management board member may invoke the nullity or voidability of the dismissal resolution. In this situation, the employment relationship will also continue to exist. If a dismissal resolution has been adopted in line with the rules applicable under company law, the court will not be able to rule that the employment relationship is to be reinstated.

If the parties have not agreed on a settlement and the employment agreement has been terminated, a management board member who performs his/her duties on the basis of an employment agreement will be entitled in principle to a statutory severance payment - the “transition payment” (see chapter 20.1: *Transition payment*). A management board member who finds himself in this situation may also go to court to demand fair compensation (see chapter 20.2: *Fair compensation*).

It is unclear whether the corporate-law dismissal of a management board member who performs his/her duties on the basis of a management agreement will have direct consequences for the management agreement - as is the case where a management board member performs his/her duties on the basis of an employment agreement. To be on the safe side, the management agreement must be terminated separately once the management board member has been dismissed. The provisions of the management agreement that pertain to termination of the agreement must be taken into consideration in this situation. If nothing has been arranged, a ‘reasonable’ notice period must generally be observed.

20 Severance payment

The severance payment is often an important part of the dismissal process to be observed in relation to a management board member. Parties will sometimes have already established the amount of this payment in the employment agreement when employment commences. This is often not the case, however, and agreements about the amount of this payment are then only made when terminating employment (further to negotiations). The starting point is that a management board member with an employment agreement will be entitled to a transition payment.

In principle, a management board member who performs his/her duties on the basis of a management agreement will not be entitled to any form of severance payment, except where the parties have agreed to a severance payment in the management agreement. If the notice period has not been observed when terminating an agreement, the management board member will be able to demand compensation equal to the length of the notice period. A management board member will only be able to claim compensation in addition to the above in very exceptional cases.

20.1 Transition payment

A management board member who carries out his/her duties on the basis of an employment agreement and whose employment agreement is terminated by the company will be entitled to a 'transition payment' - similar to regular employees.[8] The amount of the transition payment will depend on the number of years of service and the (gross) monthly salary. The transition payment is for each year that the employment agreement has lasted, equal to a third of the monthly salary (from the first working day, 1/3 of the monthly salary per whole year of service) and a proportional part thereof for a period that the employment agreement has lasted less than one year (salary received for the remaining part of the employment agreement divided by the monthly salary) x (1/3 of the monthly salary divided by 12)). In addition, a maximum of EUR 83,000 (2020), or a maximum of one gross annual salary, will apply if the annual salary is more than EUR 83,000 (2020). The monthly salary for calculation purposes will include a holiday allowance, fixed emoluments and variable emoluments, such as the average bonus for previous years.

8 Since the entry into force of the Balanced Labour Market Act (*Wet arbeidsmarkt in balans*), the employee is also entitled to a transition payment in the event of employment that has lasted less than two years.

20.2 Fair compensation

The breaking of ties under corporate law by means of a legally valid dismissal decision does not automatically produce a reasonable ground for terminating the employment agreement. For reasonable grounds for dismissal to exist, just as with a regular employee all conditions for the dismissal must have been met. In addition, it must be examined whether it is possible to reassign the management board member, certainly in the case of a group. Reassignment is not compulsory if this, whether or not with the aid of additional training, is not possible or not a logical course to take. In practice, reassignment of the management board member will often not be possible because no comparable position is available.

When asked to do so by a management board member, the court may award him/her fair compensation if the company: (i) had no reasonable cause to terminate the agreement and/or did not sufficiently investigate possibilities for redeployment, or (ii) the termination is the result of a serious imputable act or omission on the employer's part. This fair compensation will generally be paid in addition to the transition payment. In case law, it also happens that the transition payment is (partly) deducted from the fair compensation. The fair compensation must be claimed through the court within two months of the date on which the employment agreement has been terminated.

The amount of fair compensation awarded depends entirely on the circumstances of the case and on the imputability of the company.

It follows from the Supreme Court's rulings that the following elements may be of importance: the loss of salary, loss of financial compensation and entitlements, the degree of imputability on both sides, any new job and income from it, and future income (in view of the labour market position, the expected duration of unemployment, etc.). This list of viewpoints is not exhaustive, and it depends on the circumstances of the case which viewpoints are of importance to the budget. Furthermore, case law shows that fair compensation can amount to several tonnes, with peaks of more than half a million euros.

It follows from case law that a well-substantiated difference of opinion about the policy to be pursued is, in principle, regarded as a reasonable cause for termination, as a result of which fair compensation does not appear to be awarded in cases of this nature. Part of a proper substantiation is to make it plausible that the difference of opinion is irreconcilable, and to demonstrate

that the management board member has been confronted with the difference of opinion and that it was then indicated in concrete terms which changes the shareholder considered necessary.

21 Management board members and the works council

If a company has fifty employees or more, it must establish a works council. In this situation, the management board must provide the works council with the information required and have a "consultation meeting" with the works council at least twice a year.

In practice, these meetings are usually held more frequently. During these consultation meetings, the general course of events in the company is discussed, as well as decisions - if any - proposed by the management board that require the approval or advice of the works council and agreements will be made as to when and how the works council will be involved in decision-making.

The right of the works council to give advice extends - inter alia - to proposed decisions concerning:

- appointment or dismissal[9] of a management board member within the meaning of the Works Councils Act (*Wet op de ondernemingsraden*). A management board member within the meaning of this Act is 'he who alone or together with others exercises the highest direct control in managing the work';
- transfer of control of all or part of the company;
- termination of the activities of all or part of the company;
- any important changes in the organisation;
- important investments to be made for the company;
- raising an important loan for the company;
- granting an important loan and providing security for important debts of another business owner, except where this happens as part of the normal course of activities in the company; and

9 With regard to the right to be consulted in the case of appointing or dismissing a management board member within the meaning of the Works Councils Act, the works council has not right of appeal if the entrepreneur does not follow the advice.

- providing and formulating a consultancy assignment to an expert outside the company concerning, among other things, the matters referred to above.

If the advice of the works council is not followed, or not followed in full, the works council has the option of lodging an appeal before the Netherlands Enterprise Court at the Amsterdam Court of Appeal (*Ondernemingskamer*).

In addition, the works council has a right of approval concerning - among other things - intended decisions to adopt or amend:

- pension scheme;
- working hours and rest time regulations or a holiday scheme;
- a remuneration or job evaluation system.

Furthermore, the works council of an NV has the right to state its position on the following at the general meeting:

- important board resolutions that might result in far-reaching changes to the nature of the company and in relation to which the general meeting has the right of approval referred to in Section 2:107a of the Dutch Civil Code;
- resolutions to appoint, suspend or dismiss a management board member or supervisory board member;
- a motion to adopt a remuneration policy (non-listed NV).

The works council must be given the opportunity to determine a position on the topics mentioned above in good time before the date of the general meeting. However, the absence of this position will not affect the validity of the relevant resolution of the general meeting.

As stated in Chapter 16, the works council of a listed NV or listed BV has the right to be consulted when adopting the remuneration policy. In the case that the advice of the works council is not followed, or not followed in full, this must be explained to the general meeting in writing. In addition, the chairman of the works council (or another member of the works council) must be given the opportunity to explain the advice. The works council has no right of appeal.

Where companies employ a minimum of 100 employees, management board members must notify the works council annually in writing about the amount and content of the employment conditions per groups of employees as well as about agreements of this nature with the management board and the supervisory board. Furthermore, management board members are required to discuss this information as well as the development of pay ratios in the company at least once a year during the consultation meeting.

22 Liability towards the company

Management board members have joint responsibility for the company's day-to-day and general policy. The management board has a "collective" responsibility, which means, among other things, that management board members are - in principle - jointly and severally liable to the company for shortcomings in the performance of management duties.

Management board members may divide their duties among themselves. In principle, the management board must decide jointly on the main outlines of general and financial policy. We recommended that the management board lay down a division of duties in writing, in board regulations, for example.

A management board member should carry out his/her duties 'properly' and will only be liable in the event that "serious culpability" can be attributed to him/her. Acting in breach of provisions of the articles of association which are intended to protect the legal entity will generally result in a serious reproach.

A management board member will be able to avert liability (exculpating him/herself individually) if he/she is able to demonstrate that the failure to perform duties properly cannot be attributed to him/her (a division of duties is relevant in this context) and that he/she has not been negligent in acting to prevent the consequences of shortcomings in the duties to be performed by the management board. Therefore, it is vital that the activities, decisions and considerations of the management board are documented properly. If a management board member disagrees with how matters are handled by the management board, he/she can choose to resign - in extreme cases.

For a one-tier board (for a brief overview, see chapter 6: *One-tier board*), in principle, the same responsibilities and liabilities apply for executive and non-executive directors. With this in mind, the division of duties and proper documentation are vital for the internal liability of the one-tier board.

By paying dividends, a situation may arise in which the company is unable to continue to pay its debts. This may cause the management board to be held liable by third parties, for example on the grounds of a wrongful act (see chapter 23: *Liability towards third parties*) or mismanagement in the event of the bankruptcy of the company.

Moreover, for BV's, the company could take action against the management board on the basis of a specific statutory provision in a situation of this nature. The management board of a BV has a legal right of veto in the form of a power to approve a payment that has been proposed. The management board may only withhold its approval of a resolution to pay out if it knew, or could reasonably have been expected to foresee, that the company would not be in a position to pay its debts following the payment in question. If the management board still proceeds to approve a payment in this situation, the management board members who knew, or should have known, at the time of the payment that the company would not be able to continue to pay its debts will be bound jointly and severally to pay the shortfall that has arisen for the company as a result of the payment.

23 Liability towards third parties

A management board member may also be liable to third parties for shortcomings in day-to-day policy. Here too, the 'serious culpability' criterion (see chapter 22: *Liability towards the company*) will in principle apply. Given the high threshold, in principle, it is not likely that a director will be liable to third parties. However, Dutch legislation provides for a less stringent criterion in relation to certain liabilities (e.g., tax liabilities; see below).

The most important categories of liabilities towards third parties are: (i) tax liabilities (see chapter 28: Tax position of management board members); (ii) as a result of misleading annual accounts; (iii) a wrongful act towards trade creditors, financiers, shareholders and employees, etc.; or (iv) in relation to a shortfall in assets in the event of a bankruptcy.

Two examples follow below as an illustration of the above.

A management board member may be liable by virtue of a wrongful act if he enters into a contract on behalf of a legal entity when he knew, or could reasonably have been expected to know, when entering into the contract, that the legal entity would not be able to meet its commitments, or would not be able to do so in a reasonable period of time, and would not provide any opportunity to recover the losses that the other party of the legal entity would sustain as a result. This criterion remains applicable to acts by a management board member after he has filed for the legal entity's bankruptcy.

In the event of the company's bankruptcy, the bankruptcy trustee will be able to hold the management board members liable for the total deficit in the assets in certain circumstances. There must be 'manifestly improper performance' in the three years prior to the bankruptcy in this situation and this must have been a major factor in the company's bankruptcy. Far-reaching liability of this nature will only be possible if serious culpability can be attributed to the management board members. It is also important to ascertain that 'no reasonable management board member would thus have acted in the same manner in the same circumstances'. The same possibility for exculpation applies here as that already set out directly above in chapter 22: *Liability towards the company*.

The risk of liability will increase significantly if the duty to keep accurate books and records or to file the annual accounts within the statutory time limit has not been fulfilled. In this situation, manifestly improper performance is an established fact and cannot be refuted, except where an immaterial omission is the case: e.g., publishing the annual accounts only two days later than the date required. The suspicion is then manifestly improper performance has been a major factor in the company's bankruptcy. A management board member must then demonstrate that this manifestly improper performance of his duties was not a major cause of the bankruptcy.

The WBTR codifies the rule that a management board member cannot offset a claim of the company against the management board member for improper performance of his duties against any claim that the management board member may have against the company.

24 Criminal liability

Dutch criminal law provides for various forms of liability.

First, a management board member, just as any other individual, may perpetrate or be a co-perpetrator in a crime and be held criminally liable as a result. For example, a management board member may be prosecuted for fraud or forgery of documents. The Dutch Penal Code also contains provisions that focus specifically on management board members, such as in relation to prejudice to creditors in bankruptcies.

In addition, a management board member may be held criminally liable for criminal offences committed by the legal entity, if he was the actual manager of or ordered (instructed) such conduct. In practice, giving instructions is rarely prosecuted, but criminal liability of actual managers does often occur, certainly with respect to financial, economic and tax crimes.

Actual manager: If it has been established that a particular criminal offence can be attributed to a legal entity, it will then be considered whether an individual can be held criminally liable for this as the actual manager. The linguistic meaning of the term already implies that this relates to who 'actually' managed what had happened, not who was formally authorised. Management board members may be considered actual managers, as well as for example department heads. The formal position is not the deciding factor. A less senior manager may also be the actual manager.

An individual may undisputedly be considered the actual manager if he has actively and effectively encouraged the prohibited conduct of the legal entity. An actual manager may also be relevant if the person concerned - as a management board member or in any other position - has pursued a general policy of which the prohibited conduct was the unavoidable consequence or if the person concerned has contributed to a series of acts or behaviour that has led to the prohibited conduct and has taken the initiative in such a way that he must be deemed to have actually managed that prohibited conduct.

A more passive role can also result in the person being considered the actual manager. The threshold for liability as a manager is met when a person, while he was authorised and reasonably obliged to prevent or terminate the prohibited conduct, has failed to take measures to that end. By failing to do so while he could

and should have intervened, the manager is deemed to have deliberately promoted the prohibited conduct. 'Conditional intent' is sufficient here: the manager must at least have accepted the significant likelihood that the prohibited (or similar) conduct of the legal entity occurred. He must therefore have been aware of this.

The criminal liability as an actual manager is strongly dependent on the responsibilities and control of the person in question and the actual knowledge and involvement with regard to the offence committed by the legal entity. In general, it is not unusual for management board members to be designated as actual managers, since in their role they are often involved in the day-to-day management of the legal entity.

25 Liability towards supervisors

A management board member may be subject to an administrative fine by supervisors such as the ACM, AFM, DNB, AP and the Tax and Customs Administration for violations committed by the company. The supervisors will then fine the management board member as a co-perpetrator, as the person giving the instruction or as actual manager. These forms of liability are based on criminal law and incorporated into (punitive) administrative law. Just as in criminal law, the act of instructing is rarely used in administrative law to hold someone liable. The vast majority of administrative fines imposed on individuals are imposed on actual managers, or management board members acting as actual managers. Supervisors apply the same criteria that are discussed in Chapter 24. Recently, management board members have also been fined as co-perpetrators, which is discussed below.

Co-perpetrators: A co-perpetrator will be punished, together with the finable company, as the perpetrator. Criminally liable and finable co-perpetrators are defined as two or more (legal) persons, in this case possibly the company and the management board member, who jointly commit an offence. To qualify as co-perpetrators, there must have been a sufficiently close and deliberate cooperation with another person or with other persons. The emphasis is on cooperation and less on the question of who carried out which actual actions. In practice, an important question is when the cooperation has been so close and deliberate that one may speak of being a co-perpetrator.

Examples: Actual management: The actual main activity - and essentially only activity - of the legal entity consists of the prohibited conduct, for example: the running of a particular business without the required permit. A management board member is solely/independently authorised to make decisions and has direct control of the business operations. In that case, it can generally be assumed that this management board member directly encourages the prohibited behaviour (i.e., the active form of actual management).
If a management board member, as is often the case in a larger company, is a little further removed from the prohibited behaviour of the company, such as when the know-your-customer provisions are not complied with, he may - under certain circumstances - be deemed to be aware of the main activities of the legal entity he manages and is reasonably obliged to take measures to prevent these from being in breach of the law. If he does not do so, he accepts that the prohibited behaviour will occur.

Being a co-perpetrator: A management board member is the only person who determines a company's policy. Moreover, as representative of the company's bank accounts, he/she is aware of the actual use of the funds by the company, he/she makes payments and gives orders to make payments.
Furthermore, a management board member has deliberately and closely cooperated with the company in connection with the offering of the bonds and the spending of the bond money, and the management board member has played an important role in committing the misleading commercial practices.

26 Discharge, insurance and indemnification

26.1 Discharge as protection against liability

Discharge is when a management board member is released by the general meeting of shareholders from (potential) liability towards the company. It should be observed that discharge differs from indemnification (see chapter 26.3: *Indemnification as protection against liability*). It is customary for discharge to be granted at the annual general meeting on the basis of the annual accounts for the past financial year. The general meeting may grant discharge to a management board member but is not obliged to do so. Discharge must be included as a separate agenda item for the (annual) general meeting.

Once a company has granted a management board member discharge, it will - in principle - no longer be able to hold that management board member liable, even in the event of (seriously) culpable conduct. However, certain liability risks still apply even when discharge has been granted:

I. discharge will only release a management board member from liability for his actions regarding the company insofar as evidenced by the annual report and accounts and/or if discussed at the general meeting;
II. third parties, such as trade creditors or banks, may completely disregard any discharge that has been granted, nor may discharge be enforced against a bankruptcy trustee who holds a management board member liable for manifestly improper performance either; and
III. the discharge resolution may be annulled under certain circumstances.

If a management board member resigns before the (annual) meeting, it should be documented in writing that a specific discharge will be granted with effect from the time at which the management board member resigns, or that a resolution about the discharge to be granted to the former officer will be adopted at a later (annual) meeting, which meeting could be attended by the management board member in question.

26.2 Insurance as protection against liability

Directors & officers (**D&O**) liability insurance provides management board members with the most effective protection against liability. The company is the policyholder and pays the premium, while management board members are the insured parties. D&O insurance usually covers all acts undertaken by management board members, with the exception of wilful misconduct and fraud.

The insurance provided is often based on the ‘claims made’ principle. In this situation, the policy only covers claims made within the term of the insurance policy and/or (depending on the terms and conditions of the insurance policy) that have been reported to the insurer.

The consequences of an insurance policy based on the ‘claims made’ principle can be mitigated by taking out run-off cover. It is important that:

- the insurance covers liability towards the company and third parties
- no detrimental exclusions have been included
- the costs of legal representation are also insured
- claims are always filed on time
- once a management board member has received the terms and conditions of the insurance policy, he must verify that they correspond with the agreements he has made with the company
- in the event of liquidation of the legal entity, “run-off cover” can be purchased by the receiver, but also by the management board member(s). This often has to be done within a short period of time

26.3 Indemnification as protection against liability

In addition to D&O insurance, a management board member may also be offered protection by the company or a third party (e.g., a major shareholder) in the form of contractual indemnification or indemnification under the company’s articles of association. Generally, the company or third party will compensate the management board member under the indemnification if third parties were to assert a claim against the management board member in relation to his/her activities as a management board member.
In this situation, the management board member will be protected against any losses that a third party tries to recover from him/her and against the cost of legal representation.

Limited protection is provided by an indemnification. For example, a management board member will not in principle be able to invoke indemnification if held liable for gross negligence. We note that claims for liability are often brought against management board members in bankruptcy situations. However, the company is no longer in a position to pay compensation in this situation (major shareholders possibly will be able to do so). As a result, any indemnification that the management board member has received from the company will be of little use to him/her at this time.

Having said this, an indemnification can be useful in protecting a management board member against the consequences of liability (in addition to D&O insurance). D&O insurance only covers claims in a certain period and up to a specific amount, while these limitations do not generally apply in relation to an indemnification. In addition, there is always a risk that an insurer will refuse to provide cover under a D&O insurance policy. In this situation, it is wise to have an alternative in reserve.

27 Management board members of Dutch listed companies

The Corporate Governance Code's starting point for Dutch listed companies is that a company's articles of association designate the supervisory board as the body that is competent to adopt a resolution on remuneration (see chapter 16: *Remuneration paid to management board members*). The remuneration resolution is adopted in line with the remuneration policy that is adopted by the general meeting. The Corporate Governance Code explicitly states that the remuneration policy is aimed at the long-term value creation of the company and its affiliated enterprise and takes into account the internal pay ratios within the enterprise. In addition, the remuneration policy may not encourage management board members to act in their own interest or to take risks that are contrary to the strategy formulated for the company.

As regards the term of appointment applicable for management board members of a Dutch listed company, the Corporate Governance Code stipulates that the initial term of appointment will be for a period of no more than four years and that re- appointment will be effected for a period of up to a maximum of four years. The objectives of diversity policy should be taken into consideration when appointing and re-appointing management board members.

The Corporate Governance Code also limits the severance payment made to a management board member to a maximum of one annual salary, based on the 'fixed' part of his remuneration. No severance payment is made if the contract is terminated prematurely on the initiative of the management board member or if the management board member's actions can be characterised as seriously culpable or negligent.

The Corporate Governance Code only applies to Dutch listed companies and then only in the sense that, although a listed company should meet the standards set out in the Code in the annual accounts, it may also depart from those standards, provided reasons for doing so are explained in the management report (the "comply or explain" principle). In order to safeguard the quality of the explanation provided, companies are required to indicate in their management report how they have deviated from a provision of the Corporate Governance Code. The explanation must comply with the requirements of the Corporate Governance Code.

The management board members of NV's may not be appointed on the basis of employment agreements. In this situation, a management agreement (a contract for services) must be in place between the company and each management board member. As a result of this agreement, management board members no longer enjoy the protection of employment law, because of which they are unable to claim certain protection under employment law, including continued payment of wages during illness and certain employment protection. Employment agreements entered into before 1 January 2013 will not be affected by this arrangement and will continue to exist.

28 Tax position of management board members

The starting point in the explanation below is a management board member of an NV or BV who lives in the Netherlands. The tax-related starting points for a management board member of a company with a different legal form (a foundation, for example) may depart from the rules below.

Payroll taxes (i.e., wage tax, national insurance contributions, employee insurance contributions and the income-related healthcare insurance contribution) are due if a private-law or notional employment relationship exists.

A private-law employment relationship applies if the following conditions are met:

1. the employee is required to perform duties himself/herself;
2. the employer is obliged to pay wages; and
3. a relationship of authority exists between the employee and the employer.

In practice, the last of these conditions determines whether or not a private-law employment relationship exists between a management board member and the company. If an individual is a management board member of an NV or BV, an employment relationship will generally apply because a management board member is subject to the authority of the general meeting or the supervisory board in this situation.

When someone is appointed to the position of management board member of a Dutch listed company, this will be deemed to be a notional employment relationship. This is due to the legislator's choice to make the appointment of such directors no longer subject to an employment agreement with effect from

1 January 2013 (see chapter 27). This was corrected for tax and social security contributions on the same date by treating their engagement in fiction as being equivalent to employment.

With effect from 1 January 2018, this fiction has again ended for non-executive directors of a listed company. This has been done for the sake of forcible coordination with supervisory board members.

If an employment relationship exists, the management board member is considered an employee for wage tax purposes. The same applies in principle to employee insurance schemes. In this situation, the company will be obliged to withhold wage tax and national insurance contributions from the remuneration it pays to its management board members.

28.1 The 30% ruling

The 30% ruling is a tax facility that is designed to put Dutch companies in a position to recruit specialist employees from abroad. This ruling means that a management board member who has been recruited from abroad, for example, will be able to receive a tax-free expense allowance for a maximum of five years[10] Periods of earlier employment and/or residence in the Netherlands will, in principle, be deducted from this period. The amount of this payment is fixed and will be a maximum of 30% of the sum of the taxable pay applicable in the Netherlands, plus the 30% allowance.

In many cases, the company and the management board member agree that the payment will replace 30% of the salary.

A number of (formal) conditions apply for application of the rule.
Physical residence in the Netherlands is not a requirement for the management board member. To be able to profit from this ruling in full, an application for a 30% decision must have been submitted to the inspector of taxes within four months of the date on which the management board member starts work.

To be eligible for application of the 30% ruling, an individual must have been recruited abroad or have been posted to the Netherlands from abroad.

10 This maximum duration applies from 2019, previously the maximum duration was eight years, whereas in 2019 and 2020 transitional law applied.

The individual must also have a scarce, specific expertise that cannot be found on the Dutch employment market, or that is difficult to find on this market. Specific expertise will be deemed to be the case in the event of a salary in excess of EUR 38,347 per annum (2020). In addition to the above, the individual must have resided at a distance of more than 150 kilometres from the Dutch border (as the crow flies) for at least two-thirds of the 24-month period prior to starting work.

Please note: depending on the applicable tax treaty and the extent of the extraterritorial costs, it is not necessarily always favourable for a management board member not residing in the Netherlands to make use of the 30% ruling.

28.2 Director and major shareholder

A management board member who directly or indirectly holds shares in the company is referred to as a director and major shareholder (**DMS**). An employment relationship between a DMS and the company also exists if the management board member holds (all of the) shares in the company. This is the case because the DMS is subject to the authority of the general meeting (in the DMS's capacity as management board member). The Dutch Supreme Court applies a formal assessment in this situation.

The fact that the DMS himself/herself has a level of control at the general meeting does not detract from the relationship of authority.

The Regulation on the appointment of a director and major shareholder (*Regeling aanwijzing directeur-grootaandeelhouder*) is important where employee insurance schemes are concerned. If a management board member is employed by a Dutch company under private law, the protection offered by employee insurance schemes will nevertheless not apply if one of the exceptions set out in this Regulation applies. These exceptions pertain in particular to the possibility that the management board member can prevent his/her own dismissal, or to a situation in which the shareholders are holding an equal number of shares each and all of them have been appointed as management board members of the company.

28.3 Remuneration paid to the DMS

As the management board member of the company, a DMS may decide not to receive a salary from the company. If this is the case, one of the requirements for the existence of an employment relationship under private law is absent, this being the obligation of the employer to pay a salary. The tax law provides for a "notional employment relationship" in this situation.

A notional employment relationship is understood to mean the working relationship applicable for a DMS that carries out work for the company in which he/she (or his/her spouse) has a substantial interest (being at least 5% of (any class of) the shares). The DMS will still not receive an income for this notional employment relationship alone. The customary salary scheme was created in this context.

On the basis of the customary salary scheme, the salary of the DMS should be set to the highest of the following amounts:
- 75% of the salary for the most comparable position;
- the highest salary of the workers in the employ of the (group) enterprise;
- EUR 46,000 (2020 figure).

In situations where, on the basis of this ruling, the salary would be higher than 75% of the salary for the most comparable position, the salary may under conditions be adjusted downwards (the burden of proof for this lies with the withholding agent).

A point of attention here is that a customary salary must be established for each (notional) employment relationship that the DMS has. Thus, if the DMS engages in activities for a number of companies in which he/she has a direct or indirect substantial interest, the customary salary must be determined per company. From a practical point of view, this can be overcome by applying the "continued payment of wages rule" (*doorbetaaldloonregeling*). Under this rule, the withholding obligation of the various companies for which the DMS engages in activities shifts to the personal company of the DMS. In this situation, the customary salary will only be taken into consideration at the level of the personal company. The continued payment of wages rule may be applied without a ruling from the inspector of taxes if: (i) the DMS has a direct or indirect substantial interest in both the company and the personal company, and (ii) the personal company declares the wages in accordance with the rule.

For a DMS and major shareholder of qualifying start-ups, an alternative (favourable) regime applies to establish the customary wage.

The continued payment of wages rule does not apply by definition to employee insurance contributions.

28.4 Taxation of excessive remuneration components

Certain types of remuneration that a management board member receives may qualify as a lucrative interest and will therefore be taxed at the progressive rate in Box 1 (49.5% max.). The lucrative interest provision focuses primarily on two forms of employee participation:

- the “carried interest” schemes that often apply to employees and investment managers employed by private equity funds
- the share participation that is often offered to the existing management of a company to be taken over in the context of a takeover by a private equity fund (“leveraged buy-outs”)

The lucrative interest scheme does not however limit itself to these two forms; there are other forms of (employee) participation available. As such, when granting participations, it is important to determine the best way to do so to achieve the most tax-friendly result.

Moreover, when making a severance payment to a management board member who earns in excess of EUR 559,000 per year (2020), the company must bear in mind rules on excessive remuneration components. This is because a pseudo final levy equal to 75% of the severance payment made to a management board member with an annual salary of more than EUR 559,000 will be imposed on a company if this severance payment exceeds certain thresholds. The levy is a pseudo final levy because it is imposed on the employer in addition to the wage tax deduction from the severance payment made to the employee. One point of attention here is that for the calculation of the ‘severance payment’, all wage components that have been received since the calendar year preceding the year of leaving the employment (e.g., bonuses, shares, Stock Appreciation Rights) are taken into account.

28.5 Directors' and officers' liability for wage tax, social security contributions and VAT

In certain situations, management board members may be held jointly and severally liable for liabilities on the part of the company in respect of (among other things) wage tax, social security contributions and VAT. Management board members are liable if manifestly improper management can be attributed to them. Management board members who have been held liable have a conditional possibility of exculpation. The company is obliged to notify the Dutch Tax and Customs Administration immediately when it becomes clear that the company will not be able to fulfil its payment obligation. If this notification is made on time and in full, management board members will only be liable if it is likely that the non-payment of tax liabilities is a result of manifestly improper management that can be attributed to them in the three years prior to the notification.

Part II

Duties of the supervisory board

II The supervisory board in brief

1 Duties of the supervisory board

Generally, the supervisory board is responsible by law for supervising the policy pursued by the management board and the general course of affairs in the company and its business. The supervisory board also advises the management board.

However, maintaining supervision over the management board is not always simple. There are situations where supervisory board members are not timely involved in decision-making adoption or where a situation is not fully explained to them. There are also occasions when how a resolution is implemented differs from what has been discussed with the supervisory board.

A few of the main rules applicable to supervision are:

- the supervisory board reviews every important board resolution. This is only possible if the supervisory board members have all the information they need. The management board must provide this information
- the management board must inform the supervisory board in writing of the main aspects of strategic policy, general and financial risks and the management system and system of checks and controls in place in the company at least once a year
- if there is any doubt about the completeness or accuracy of the information provided, the supervisory board members are expected to adopt a proactive approach. In this situation, the supervisory board must request additional information in writing

The consultative and advisory role played by supervisory board members puts the supervisory board in a position to provide the management board with advice both requested and unrequested. The management board may not disregard this advice without stating reasons. The supervisory board is permitted to obtain professional advice at the company's expense. The supervisory board must do so in good time if this is deemed necessary for the performance of its supervisory activities, for example, in the case of an important transaction in which there are conflicts of interest.

Supervisory board members also have the following duties:

- represent the company in matters in which management board members have an interest that conflicts with the company's interests and its business
- supervise financial reporting (see chapter 2: *Supervisory board members and financial reporting*);
- communicate with the works council (see chapter 14: *Supervisory board members and the works council*); and
- appoint and dismiss management board members in "large companies" (governed by the unmitigated so-called large company regime).

2 Supervisory board members and financial reporting

The duties of the supervisory board include the supervision of financial policy and the financial reporting of the management board. Increasingly, larger companies and institutions are setting up an audit committee as a subcommittee of the supervisory board. For Dutch listed companies are concerned, this principle has been set out in the Dutch Corporate Governance Code and - in certain cases - in EU directives. The supervisory board must be composed so that it is in a position to supervise financial policy and financial reporting properly. Clear and comprehensive minutes of the meetings of the audit committee are also very important.

The auditor's report, in addition to the auditor's statement, is an important tool for the supervisory board when evaluating the annual accounts. The auditor reports on his findings in the auditor's report, which is addressed to the supervisory board and the management board. The auditor is obliged to report, among other things, on his findings in relation to the reliability and continuity of the computerised data processing system.

In practice, the auditor's report is presented in writing. The supervisory board must enter into discussions with the auditor if prompted to do so by the auditor's findings. Other relevant sources of information for the supervisory board are the letter of representation prepared by the auditor (which contains certain reservations ensuing from the audit), the management letter prepared by the management board and, if applicable, the "in control" statement.

Dutch listed companies are required to apply the International Financial Reporting Standards (**IFRS**). By law, non-listed companies are also able to opt to apply the IFRS. This is happening more and more.

All supervisory board members are required to sign the annual accounts. By signing, they are indicating their consent to the contents of the annual accounts. If a supervisory board member is unable to endorse the contents of the annual accounts, he/she may refuse to sign and have the reason for the absence of his/her signature stated in the annual accounts.

If a supervisory board member is unable to agree with the contents and his/her objections are not resolved, he could consider resigning.

If the Netherlands Authority for the Financial Markets (**AFM**) has any doubts about the proper application of reporting standards, it may ask the listed company in question to provide further explanation. If a company has complied with a request for further explanation from the AFM, but the AFM still has its doubts, the AFM can:

- notify the company of this fact
- make a recommendation to the company that it publish a general notice in which it explains which aspects of its financial reporting are not in compliance with the regulations and how these regulations will be applied in the future
- ask the Enterprise Chamber of the Amsterdam Court of Appeal to order the company to prepare the annual financial statements in accordance with the obligatory reporting standards.

3 Decision-making and adopting resolutions

The supervisory board is required to meet on a frequent basis, in any case as often as circumstances require. It is very important that the minutes of these meetings are clear and comprehensive: a mere summary of the list of decisions will not suffice. If the supervisory board or one or more of its members disagrees with the (proposed) actions of the management board or the other supervisory board members, this - as well as the specific reasons for abstention - must be explicitly clear from the minutes. This is particularly relevant in connection with the possibility of exculpation if any claims for liability are brought against the supervisory board.

4 Conflict of interest

As already explained above in chapter 4 of Part I, a management board member must, by law, refrain from participating in the decision-making process if he/she has a direct or indirect personal interest that conflicts with the company's interests. The same applies for supervisory board members. A supervisory board member with a direct or indirect personal interest that conflicts with the company's interests and the enterprise connected with it may not participate in deliberations or the decision-making process within the supervisory board regarding that particular subject.

If all supervisory board members have a conflict of interest concerning a resolution, thus making it impossible to adopt the resolution, that resolution will be adopted by the general meeting, except where the company's articles of association provide otherwise.

As already mentioned in Chapter 4 of Part 1, the conflict of interest rules that have applied to Dutch public companies (**NV**) and Dutch private limited liability companies (**BV**) since 2013 now also apply to the association, cooperative and mutual insurance association with the entry into force of the Act on Management and Supervision of Legal Entities (*Wet bestuur en toezicht rechtspersonen* (***WBTR***)). For the foundation, as from that moment a largely similar regime will apply.

5 Division of duties

Supervisory board members are required to exercise their supervision of the management board jointly. The supervisory board is collectively responsible, as a result of which supervisory board members are, in principle, jointly and severally liable for shortcomings in supervision (see chapter 15: *Liability towards the company*).

Although supervisory board members are free to divide up duties among themselves, the supervisory board must always jointly assess the main aspects of general and financial policy pursued by the management board and other far-reaching resolutions. It is advisable to set out a division of duties in writing (e.g., in supervisory board rules).

6 Supervision and compiling a file

As already explained above in chapter 1, the supervisory board supervises the policy pursued by the management board and the general course of affairs of the company. This does not mean, of course, that the supervisory board supervises the conduct of management board members on a daily basis. The intensity of supervision depends on the type of company and its situation (financial or otherwise). The supervisory board is required to ensure that the information it receives from management board members is complete and accurate. The supervisory board should:

- document agreements with the management board in writing;
- take steps to avoid a situation where the agreements made with the management board are only documented in writing once discussions about the implementation of and/or compliance with duties have come to an end. Experience shows that this leads to unpleasant situations where 'a file is compiled', causing the parties to take opposing positions; and
- monitor the implementation of and/or compliance with the arrangements documented at the frequency required.

7 Appointment of supervisory board members

Supervisory board members of NV's or BV's are appointed by the general meeting. A company's articles of association may provide for a binding recommendation by the supervisory board itself or by the holders of shares of a certain type. For a BV, the company's articles of association may grant a (direct) power to appoint supervisory board members to holders of shares of a certain type or designation or, for a maximum of a third of the total number, to third parties. By law, the recommendation or nomination of a supervisory board member requires the candidate to provide certain personal information and also explain the recommendation or nomination. Except where a company's articles of association provide otherwise, a binding recommendation will require at least one candidate.

For a Dutch "large company", the works council has a right of recommendation in relation to one-third of the seats on the supervisory board. The supervisory board must submit the recommendation to the general meeting, except where it is of the view that the person who has been recommended is unsuitable for the

position or that the composition of the supervisory board will not be adequate following the appointment of the candidate. The supervisory board then draws up a non-binding nomination (based on the recommendations of the general meeting and the works council) for the remaining two-thirds of the seats.
The general meeting decides on nominations and may reject nominations by both the works council and the supervisory board by an absolute majority of votes (half plus one) that represent at least one-third of the issued share capital.

If the amount of one-third of the issued share capital is not attained, a second meeting must be held; the minimum attendance requirement will not apply at the second meeting. If the general meeting rejects a nomination, it must prepare a nomination again, in accordance with the procedure outlined above.
The company's articles of association may provide otherwise, provided this is done with the approval of the works council and the prior approval of the supervisory board.

Consideration must be given to the rule under which a supervisory board member is not permitted to be a member of more than five supervisory boards (or similar positions, such as that of non-executive director in what is referred to as a "one-tier board") in large entities simultaneously. In practice, these limitation regulations are referred to as the 'points regulations', while the points associated with a certain position are referred to as 'Irrgang points'.

These regulations permit a supervisory board member to have a maximum of five Irrgang points. As such, the supervisory board members, non-executive directors and supervisory officers of five or more other large entities may not be appointed as supervisory board members. The position of chairman of the supervisory board counts twice. Moreover, a supervisory board member who already is a member of more than two 'major' supervisory boards (or similar positions) or who holds the position of chairman of a supervisory board of a one-tier board may not be appointed as the executive director of a large entity. Positions held in group companies may be disregarded in this respect. If an individual hold more than the maximum number of positions permitted in large entities, this may render appointment resolutions invalid. An exemption applies to positions accepted prior to the entry into force of the Management and Supervision (Public and Private Companies) Act on 1 January 2013.
Until 1 January 2020 a target for a balanced number of male and female board members applied for management and supervisory boards of large entities. Although no sanction was attached to not complying with this target figure,

the company was required to explain any non-compliance of this nature in its management report. As explained in Chapter 14 of Part I, there is no less focus on the subject of diversity, as is also apparent from the Notification of Diversity Policy Decree (*Besluit bekendmaking diversiteitsbeleid*) (Bulletin of Acts and Decrees 2016, no. 559). September 2019 also saw the publication of advice by the Social and Economic Council (SER): *'Diversiteit in de top'*, and three motions were carried in the Lower House to adopt the recommendations of the SER's advice. Based on a consultation in April/May 2020 (www.internetconsultatie.nl), this is expected to lead to legislation, as a result of which certain legal entitles will be legally obliged have at least one-third of supervisory board positions held by women ('statutory quota').

A large entity in the sense of the limitation regime set out above is understood to mean an NV or BV that does not meet two of the three requirements taken into consideration when applying the annual account exemption for small legal entities.

8 Legal relationship between supervisory board members and the company

A supervisory board member has a contractual relationship with the company, usually on the basis of a contract for professional services. The duties and powers conferred on a supervisory board member may also be elaborated on further in the company's articles of association. Since supervisory board members are not in the employment of the company, the statutory provisions designed to protect the interests of employees do not apply to supervisory board members.

With effect from 1 January 2017, the notional employment relationship (for wage tax) of supervisory board members has been abolished. The company is therefore under no obligation to withhold taxes. The law does, however, provide for the possibility for the company and supervisory board members to choose voluntarily to withhold wage tax. This is the 'opting-in' scheme. This is mainly used by foreign supervisory board members. The main reasons for this are the application of the 30% rule (see chapter 28) and administrative convenience for the supervisory board member, who will generally be able to avoid having to file income tax returns in the Netherlands with the payment of wage tax.

9 Remuneration paid to supervisory board members

The general meeting may decide to grant remuneration to a supervisory board member. This authority to do so cannot be delegated to another body. In the Netherlands, supervisory board members are generally not rewarded on a variable basis; the remuneration usually involves the payment of a fixed amount. Any additional profit-sharing bonuses will often be subject to a maximum.

According to the Corporate Governance Code, any remuneration paid to a supervisory board member may not depend on the results achieved by the company and the supervisory board member will not be granted shares as part of his/her remuneration.

Dutch listed public and private companies must also have a remuneration policy for supervisory board members. The remuneration policy must be submitted to the general meeting for adoption at least once every four years. A majority of ¾ of the votes cast is required, unless the articles of association prescribe a lower majority. The works council has a right to advise[11] in adopting the policy. The remuneration policy must be clear and easy to understand. Furthermore, the remuneration policy must contain a number of elements,[12] such as an explanation of the way in which the policy contributes to the company strategy, the long-term interests and the sustainability of the company. In addition, a remuneration report must be drawn up each year with an overview of all remunerations awarded or owed to individual directors.[13] The remuneration policy must be submitted each year to the general meeting for an advisory vote.

As discussed in Chapter 16 part 1, the Senior Executives in the Public and Semi-Public Sector (Standards for Remuneration) Act sets the maximum remuneration, just as for management board members, for supervisory board members in the public and semi-public sector.

11 If the advice of the works council is not, or not fully, followed, a written explanation for deviating from the advice must be submitted to the general meeting. The works council has no right of appeal.

12 Section 2:135a of the Dutch Civil Code contains a list of subjects that must at any rate be included in the remuneration policy.

13 Section 2:135b of the Dutch Civil Code contains a list with elements that must at any rate be included in the remuneration report, such as the relative proportion of fixed and variable remuneration, the number of shares and share options awarded and offered, and the most important conditions for exercising the rights.

10 Absence and inability to act

On the basis of the current provisions of Book 2 of the Dutch Civil Code, the articles of association for a BV must provide for how the company will be managed temporarily in the absence, or inability to act, of all supervisory board members. For a NV, there is currently no obligation to provide for this in the articles of association.

With the entry into force of the WBTR, both NV's and BV's will be required to include rules in the articles of association in the event of the absence or inability to act of all supervisory board members; inclusion of rules in the event of absence or inability to act of one or more supervisory board members is optional.

'Inability to act' refers to the situation where a supervisory board member is unable to perform his/her supervisory duties for a shorter or longer period of time (e.g., due to illness). When drawing up rules of this nature, the company will have a great deal of freedom to make arrangements that are in keeping with the company itself and the company's nature.

Under current law, a BVs' articles of association may define the term 'inability to act' further. It is generally assumed that this can also be done in the articles of association of an NV, even though there is no legal basis for this at present. The legal basis will be established for the NV (and also for the association, foundation, cooperative and mutual insurance association) with the entry into force of the WBTR.

In the articles of association, one could think of an extension to the term 'inability to act', such as by determining that an officer is unable to act if he has declared this in writing. The articles of association can also provide that an officer qualifies as being unable to act if he is deemed to have a conflicting interest.

The WBTR clarifies that the person who is appointed to act temporarily as a supervisory board member in the case of absence or inability to act, will be equated with a supervisory board member as regards these duties.

11 Suspension of supervisory board members

The corporate body that originally appointed a supervisory board member is authorised to suspend that supervisory board member. For a Dutch "large company", the supervisory board also is authorised to suspend individual supervisory board members. If a particular supervisory board member was not appointed by the general meeting but, in the case of a BV, was appointed for example by the meeting of holders of a certain type of share, this corporate body alone may suspend that supervisory board member. Furthermore, for a BV, its articles of association may provide that the general meeting may also suspend a supervisory board member.

A supervisory board member must be heard before he/she is suspended. When suspending a supervisory board member, the same points must be in taken into consideration as those applicable when suspending a management board member (see chapter 18 of Part I: *Suspension of management board members*).

12 Dismissal of supervisory board members

The starting point for Dutch legislation is that supervisory board members are appointed for an indefinite period of time. A supervisory board membership of an NV or BV may be terminated in five different ways:

- the period for which the supervisory board member was appointed has expired. There is often a rotation schedule, as a result of which the Corporate Governance Code presumes that a supervisory board member may be a member of the supervisory board for a maximum of three four-year terms. After two four-year terms of appointment, a re-appointment must be substantiated;
- dismissal by the general meeting, possibly on the basis of a binding recommendation;
- dismissal by the holders of shares of a certain type or designation if the articles of association of a BV have granted a direct right of dismissal;
- by the Enterprise Chamber of the Amsterdam Court of Appeal if mismanagement has become evident in inquiry proceedings;
- when the supervisory board member resigns voluntarily.

The task of a supervisory board member of a Dutch “large company” may be terminated in four different ways:

- the supervisory board member must resign within four years of his/her appointment. Although the individual may make himself/herself available for re-election, the appointment procedure outlined above will first need to be carried out again
- the supervisory board, the general meeting or the works council may ask the Enterprise Chamber of the Amsterdam Court of Appeal to dismiss the supervisory board member based on the argument that:
  - that supervisory board member has been negligent in fulfilling his/her duties
  - there is a serious reason (e.g., involvement in a scandal)
  - there is a far-reaching change in circumstances
  - when inquiry proceedings reveal mismanagement
- the general meeting dismisses all supervisory board members collectively in the event of a breach of trust. The general meeting may not - like a supervisory board member of a non-large company - dismiss an individual supervisory board
- a supervisory board member may resign voluntarily.

13 Severance payment

The dismissal of a supervisory board member must be followed by the termination of the contractual relationship with that supervisory board member. If a notice period has been agreed, this period must be observed. A supervisory board member will not, in principle, be entitled to a severance payment. Although a court cannot reverse a termination, it can, under very special circumstances, oblige the company to pay a supervisory board member damages. A court may award damages to a supervisory board member if the reasons asserted for his dismissal, for example, were incorrect and/or these reasons have been insufficiently substantiated by facts.

14 Supervisory board members and the works council

In principle, contacts with the works council take place via the management board (see chapter 21 of Part I. However, the members of the supervisory board must be involved with the works council, for instance:

- when important management decisions are taken
- when management board members[14] and supervisory board members are to be appointed, suspended or dismissed
- when adopting the remuneration policy of the management board
- during the meeting (at least twice a year) on the general affairs of the company, at which, in principle, at least one supervisory board member should be present
- during the compulsory meeting in the context of a request for advice one of the supervisory board members should, in principle, also be present
- (if a supervisory board member is nominated by the works council of a Dutch "large company") during the consultation with the works council in connection with the - non-binding - input to the supervisory board.

The works council of a listed NV or listed BV has the right to be consulted when adopting the remuneration policy of management board members and supervisory board members. In the case that the advice of the works council is not followed, or not followed in full, this must be explained to the general meeting in writing. In addition, the chairman of the works council (or another member of the works council) must be given the opportunity to explain the advice. The works council has no right of appeal.

Finally, the supervisory board member recommended by the works council must be a member of the remuneration committee (if this has been formed).

14 Other than with a management board member (see Chapter 21 of part 1), on the basis of the Works Councils Act the works council does not have the right to be consulted regarding the appointment or dismissal of a supervisory board member.

15 Liability towards the company

As already explained above in chapter 2: *Supervisory board members and financial reporting*, the supervisory board has collective responsibility, as a result of which supervisory board members are - in principle - jointly and severally liable for shortcomings in supervision. Although supervisory board members are free to divide up duties among themselves, supervisory board members must perform their duties 'properly' and will only be liable if serious culpability can be attributed to them with regard to how they have fulfilled their duties.

Supervisory board members can avert liability (exculpating themselves individually) if they are able to demonstrate that the failure to perform duties properly cannot be attributed to them (a division of duties is relevant in this context) and that they have not been negligent in acting to prevent the consequences of shortcomings in supervision. With this in mind, it is vital to ensure that the activities, decisions and considerations of the supervisory board are documented properly. If a supervisory board member disagrees with how matters are handled by the supervisory board, he/she may choose to resign in extreme cases.

16 Liability towards third parties

A supervisory board member may also be held liable for shortcomings in supervision by third parties, such as trade creditors and financiers, etc.

To illustrate this, two examples are given:

- if the annual accounts that have been filed and published misrepresent the situation in the company and third parties sustain losses as a result, the management board members and supervisory board members will be jointly and severally liable for those losses
- if the company becomes bankrupt, the bankruptcy trustee may, under certain circumstances, hold the supervisory board members liable for the entire deficit in the assets on behalf of all creditors. However, there must have been 'manifestly improper performance' in the three years prior to bankruptcy. This manifestly improper performance must have been a major factor in the company's bankruptcy

Far-reaching liability of this nature will only exist if 'no reasonable supervisory board member would have acted in the same manner in the same circumstances'. Fortunately, not all cases of inadequate supervision constitute manifestly improper performance of duties.

If an individual supervisory board member is able to demonstrate that manifestly improper performance cannot be attributed to him/her and that he/she was not negligent in taking measures to prevent the consequences of that manifestly improper performance, that supervisory board member will not be liable. A division of duties within the supervisory board may be important in this situation.

The risk of liability will increase significantly if the duty to keep accurate books and records or to file the annual accounts within the statutory time limit has not been fulfilled. In principle, the manifestly improper performance of duties is an established fact. In this situation, the supervisory board member will be required to demonstrate that improper supervision was not a major factor in the bankruptcy and that a cause other than inadequate supervision was a major factor instead.

17 Criminal liability of a supervisory board member

Dutch criminal law provides for various forms of liability. First, a supervisory board member, just as any other individual, may perpetrate or be a co-perpetrator in a crime and be held criminally liable as such. For example, it may occur that a supervisory board member is prosecuted for fraud or forgery of documents.
The Dutch Penal Code also contains provisions that focus specifically on supervisory board members, such as in relation to prejudice to creditors in bankruptcies.

In addition, a supervisory board member may be held criminally liable for criminal offences committed by the legal entity, if he was the actual manager of or ordered such conduct. In practice, giving instructions is rarely prosecuted, but criminal liability of actual managers does often occur, certainly with respect to financial, economic and tax crimes. We note that supervisory board members are less likely than management board members to be liable as an actual manager in view of their more distant involvement in the business affairs of the legal entity.

Actual manager: If it has been established that a particular criminal offence can be attributed to a legal entity, it will then be considered whether an individual can be held criminally liable for this as the actual manager. The linguistic meaning of the term already implies that it concerns who 'actually' managed what had happened, not who was formally authorised. Directors under the articles of association and department heads may be considered actual managers, as well as, for example, supervisory board members. The formal position is not the deciding factor. A less senior manager may also be the actual manager.

An individual may undisputedly be considered the actual manager if he has actively and effectively encouraged the prohibited conduct of the legal entity. An actual manager may also be relevant if the person concerned has pursued a general policy, the prohibited conduct of which has been the unavoidable consequence. Or the person concerned has made such a contribution to a complex of conduct that has led to the prohibited conduct and has taken such an initiative that he must be deemed to have actually managed that prohibited conduct.

A more passive role can also result in being considered the actual manager. The threshold for liability as a manager is met when a person, while he was authorised and reasonably obliged to prevent or terminate the prohibited conduct, has failed to take measures to that end. By failing to do so while he could and should have intervened, the manager is deemed to have deliberately promoted the prohibited conduct. 'Conditional intent' is sufficient here: the manager must at least have accepted the significant likelihood that the prohibited (or similar) conduct of the legal entity occurred. He must therefore have been aware of this.

The criminal liability as an actual manager is strongly dependent on the responsibilities and control of the person in question and the actual knowledge and involvement with regard to the offence committed by the legal entity.

The supervisory board member as actual manager: Supervisory board members are generally less likely to be regarded as actual managers compared to management board members, because the possibilities and influence of a supervisory board member are often limited to the exercise of supervision and, moreover, supervisory board members are generally not involved in the day-to-day management of the company. However, there are circumstances conceivable in which a supervisory board member may be regarded as a de

facto manager, for example in the event of an atypical division of duties or special involvement of the supervisory board member in the (day-to-day running of the) company. Whether a supervisory board member may be considered competent and reasonably required to take measures to prevent or end the criminal conduct is a factual assessment, in which the articles of association, special agreements but also factual authority may be relevant.

18 Liability towards supervisors

Under certain circumstances, a supervisory board member may be held liable by supervisors such as the ACM, AFM, DNB, AP and the Dutch Tax and Customs Administration for violations committed by the company. The supervisors may impose an administrative fine on a supervisory board member if he can be considered as the actual manager of the offence committed by the legal entity.

Examples

A former DMS, after reaching pensionable age, has become the chairman of the supervisory board. The actual control of this chairman is great (he 'holds the reins') and is perfectly aware of what is going on in the company. The chairman has been informed by the accountant that the procedures followed for VAT refunds have not been properly followed, as a result of which standard incorrect turnover tax returns have been submitted. Inaction and failure to intervene can lead to a fine.

If on the grounds of a particular agreement a supervisory board member has been assigned a specific task with the company to supervise compliance with ACM regulations, and he is aware of acts in violation of these regulations, the supervisory board member must take measures to stop these violations and to prevent them in the future.

19 Discharge, insurance and indemnification

19.1 Discharge as protection against liability

Discharge is when a supervisory board member is released by the general meeting of shareholders from (potential) liability towards the company. It should be observed that discharge is different to indemnification (see below chapter 19.3: *Indemnification as protection against liability*). A discharge will usually be granted at the annual general meeting and although able to discharge a supervisory board member, the annual general meeting is not obliged to do so. Discharge must be included as a separate agenda item for the (annual) general meeting.

Once a supervisory board member has been granted discharge in principle, the company may no longer hold him/her liable - in principle - even in the event of (seriously) culpable conduct. However, certain liability risks will continue to apply for the supervisory board member, even when discharge has been granted, since:

- discharge only releases a supervisory board member from liability for his/her actions regarding the company insofar as these are apparent from the annual accounts and/or were matters for discussion at the annual meeting
- third parties, such as trade creditors or banks, may completely disregard any discharge that has been granted
- discharge may not be enforced either against a receiver who holds a management board member liable for manifestly improper performance
- a resolution to discharge may be annulled under certain circumstances

If a supervisory board member resigns before the (annual) general meeting, he/she would be wise, before leaving, to stipulate in writing that a specific discharge is granted as per the date of resignation or that his/her discharge as a former supervisory board member is included as an agenda item for the (annual) general meeting.

19.2 Insurance as protection against liability

Directors' and officers' (**D&O**) insurance offers the most effective protection against liability. The company is the policyholder and pays the premiums, while management board members and supervisory board members are the insured parties. D&O insurance usually covers all acts on the part of management board members and supervisory board members, with the exception of wilful misconduct and fraud.

The insurance provided is often based on the 'claims made' principle. In this situation, the policy only covers claims made within the term of the insurance policy and/or (depending on the terms and conditions of the insurance policy) that have been reported to the insurer. The consequences of an insurance policy based on the 'claims made' principle can be mitigated by taking out run-off cover. Always ensure that:

- the insurance covers liability towards the company, third parties and government supervisors;
- the cost of legal representation is also insured;
- no detrimental exclusions have been included;
- claims are always filed on time;
- a supervisory board member receives the policy conditions and that these correspond with the agreements that the supervisory board member has made with the company;
- the company pays the premiums due; and
- in the event of liquidation of the legal entity, "run-off cover" can be purchased by the receiver, but also by the insured supervisory board member. This often has to be done within a short period of time.

19.3 Indemnification as protection against liability

In addition to D&O insurance, a supervisory board member may also be offered protection by the company in the form of a contractual indemnification or indemnification under the company's articles of association. Indemnification will often involve the company compensating the supervisory board member if a claim is asserted by third parties in relation to his/her activities as a supervisory board member.

In this situation, the supervisory board member will be protected against any losses that a third party tries to recover from that supervisory board member and against the cost of legal representation. Protection provided by an indemnification is limited. For example, a supervisory board member will not (in principle) be able to invoke indemnification if held liable for gross negligence.

In addition to the above, claims for liability are often brought against management board members in bankruptcy situations. However, the company is no longer in a position to pay compensation to supervisory board members in this situation. As a result, indemnification will be of little use at this time.

Having said this, indemnification can be useful in protecting a supervisory board member against the consequences of liability (in addition to D&O insurance). It could be used to cover lawyer's fees, for example. D&O insurance only covers claims in a certain period and up to a specific amount, while these limitations do not generally apply in relation to indemnification. In addition, there is always a risk that an insurer will refuse to provide cover under your D&O insurance. In this situation, it is wise to have an alternative in reserve.

20 Supervisory board members of Dutch listed companies

The Corporate Governance Code stipulates that a supervisory board member is appointed for a period of four years and thereafter can be re-appointed once more for a period of four years. The supervisory board member can once again be re-appointed for a term of two years which can be extended thereafter for a maximum of two more years. Re-appointment after a period of eight years must be substantiated in the report of the supervisory board.

The Corporate Governance Code states that all supervisory board members, with the exception of a maximum of one person, must be independent in the sense of best practice provision 2.1.8 under (i) through (v) of the Corporate Governance Code. More supervisory board members, but less than half the total number of supervisory board members, may be "independent" in the sense that they may own a block of shares in the company of at least ten percent or may be a director or supervisory board member of a legal entity with such a shareholding. The chairman of the supervisory board may not be a former director of the company and must be independent.

With regard to the remuneration of supervisory board members, the Corporate Governance Code stipulates that this should stimulate an adequate performance of the position and should not depend on the results of the company. No shares and/or rights to shares will be awarded to supervisory board members. The remuneration paid to supervisory board members reflects the time and responsibilities that the position involves.

Based on the sectoral governance codes too, inspired by the Corporate Governance Code, restrictions also apply with regard to appointment terms and requirements are set with regard to independence.

21 Tax position of supervisory board members

As of 1 January 2017, the notional employment relationship for supervisory board members was abolished from the Wages and Salaries Act (*Wet op de loonbelasting*). This means that with regard to withholding wage tax, a supervisory board member is no longer regarded as an employee and the company may pay a supervisory board member without deducting wage tax.

In anticipation of the abolition of the notional employment relationship, the Decree of the Minister of Finance already approved that if the supervisory board member chose this option, companies could cease to deduct wage tax with effect from 1 May 2016 and that income-related healthcare insurance contributions would no longer be due with effect from this date.

Supervisory board members will in principle be required to account for their remuneration as supervisory board members on their income tax returns as resulting from other activities. With the lapse of the withholding obligation, the contribution obligation applicable under the Healthcare Insurance Act (*Zorgverzekeringswet*) will shift from the company to supervisory board members which means that the supervisory board members must pay the contribution themselves.

Depending on the situation of the supervisory board member, the remuneration could also qualify as profits from business activities. Furthermore, it is sometimes the case that supervisory board members perform the activities from their own companies.

With the lapse of the notional employment relationship for supervisory board members, it will no longer be possible in principle to utilise the tax facilities offered in relation to wage tax such as the 30% ruling. However, subject to certain conditions, a supervisory board member (together with the company) will be able to choose to 'opt in', as a result of which the company may be obliged to withhold taxes for the supervisory board member's remuneration and the 30% ruling can be applied.

In the case of a supervisory board member living abroad, it will be necessary to examine to what extent the Netherlands is allowed to levy tax on the basis of the applicable tax treaty. Under almost all treaties, the Netherlands, as the state in which the company has its registered office, is entitled to levy tax on the entire supervisory board member's fee. However, the treaties with the US and the UK have very different arrangements.

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