

Legal Entities Management and Supervision Act



About Us



Fieldfisher Law Firm

Fieldfisher is a European law firm with market leading practices in many of the world's most dynamic sectors. We are an exciting, forward-thinking organisation with a particular focus on technology, financial services, energy & natural resources and life sciences.

Our Amsterdam office goes the extra mile for clients by offering dedicated support both domestically and internationally. Our highly experienced partners and associates advise clients on all manner of legal, regulatory and compliance issues relevant to organisations in Netherlands and the EU.

Legal Services

We are a law firm built around people with all their diversity and we strike a healthy balance between legal excellence and a down-to-earth practical approach to our clients' needs.

We believe The Future is Human, so we choose a collaborative approach with an intense focus on the end-user and consider carefully how to shape our services to add the most value to our clients.

Many of our lawyers are top-ranked in various legal directories and we are widely respected thought leaders, digging deep into the issues that matter most to our clients. We provide answers and opinions not just legalese.

Our growing European network of offices supports an international client base alongside our strategic bases in Silicon Valley and China. Among our clients, we count technology companies providing internet-related services and products, consulting and digital services, pharmaceutical, life sciences and medical devices companies, energy suppliers, infrastructure and chemicals companies, as well as banks and financial institutions.

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On 1 July 2021, the Legal Entities Management and Supervision Act (LEMSA) came into force. This has resulted into an amendment of the rules regarding management and supervision of associations, cooperatives (and mutual societies) or foundations.

The purpose of the LEMSA is to improve the quality of the management and supervision of associations, cooperatives or foundations and thus aligning the statutory regulations regarding management and supervision of all legal entities to those of limited liability companies.

In this article we will explain the most important changes resulting from the LEMSA.

Powers, duties and responsibilities of managing directors and supervisory directors

The LEMSA provides rules for the establishment of a supervisory board for associations and foundations and makes it possible to choose for a one-tier governance model for all legal entities. Dutch law already provided for rules and regulations for setting up a supervisory board for the N.V., B.V. and the cooperative, and for applying a one-tier governance model for the NV. and a B.V.. However, Dutch law did not yet provide for such rules and regulations for foundations and associations.

In practice, many associations and foundations already have a supervisory board and also know a distinction between general management and a daily management. The LEMSA now provides a description of the powers, duties and responsibilities for the members of the supervisory board for each legal entity. For example, the LEMSA now provides that the supervisory board has the task of supervising the policies of the management board

and the general course of affairs of the entities and its affiliated business.

As a result of the LEMSA, the members of the general board of an association, which pursuant to the articles of association have a supervisory role, could qualify as a non-executive director. In those situations, it is advisable to consider to amend the articles of association accordingly and as such to amend the statutory regulations with the one-tier governance model.

Furthermore, in the same way as for N.V.s and B.V.s, the LEMSA explicitises when members of the supervisory board and non-executive directors of associations and foundations are liable for damages resulting from improper performance of duties and when the performance of duties is improper (where there must be serious culpability).

Conflict of interest

The LEMSA provides that managing directors and supervisory directors of associations, cooperatives and foundations with a conflict of interest may not participate in the deliberations and the decision-making. Until 1 July 2021 Dutch law did not provide for the situation in which a conflict of interest arises of a managing director or a supervisory director of a foundation. Furthermore, the conflict of interest rules for associations were very outdated. Especially for foundations it is very important to apply certain rules and regulations regarding the conflict of interest for foundations, as in principle foundations don't have a corporate body - such as the general meeting -, to whom the management board is accountable for its management. The same rules regarding the conflict of interest as applicable for N.V.s and B.V.s now equally apply to the foundation and the association. The conflict of interest of a managing director with the foundation or the association no longer affects the external power to represent such foundation or association. As said above, in case of a conflict of interest the respective managing director or supervisory director may not participate in the deliberations and the decision-making. If as a result thereof the management board can't adopt a resolution, the resolution is adopted by the supervisory board. If no supervisory board has been established, the resolution will be adopted by the general meeting. In the event the foundation doesn't have a supervisory board, the management board shall still authorised to adopt the resolution.

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From 1 July 2021, for associations the prior statutory provisions regarding a conflict of interest no longer apply. To avoid any misunderstanding and inconveniences, it is therefore recommended to revise the articles of association in accordance with LEMSA. In practice, associations and foundations that apply certain industry-specific governance codes often already have provisions regarding a conflict of interest in the articles of association or regulations.

Absence or inability

Associations, cooperatives and foundations are obliged to include in their articles of association a clause regarding absence or inability of all managing directors or of all supervisory directors. Absence relates to situations in which a vacancy arises, for example, due to resignation. Inability refers to a situation in which a board member is temporarily unable to perform his duties due to, for example, a suspension, long-term illness or inaccessibility.

The clauses under the articles of association governing absence and inability should provide for continuity within the management board and the supervisory board in case of absence or inability of all managing directors or all supervisory directors. The articles of association may provide further details on the absence of one or more managing directors or supervisory directors. Furthermore, it is also possible to qualify conflict of interest as a form of inability.

Liability of managing directors and supervisors directors

The LEMSA provides rules for liability of managing directors and supervisory directors of associations and foundations in the event of bankruptcy due to improper performance of duties. At present, the trustee in a bankruptcy is not yet able to take action against managing directors and supervisory directors of informal associations and non-commercial associations and foundations in the event of bankruptcy for improper performance of performance of duties. The LEMSA now regulates that managing directors and supervisory directors of informal and (non-commercial) associations and foundations are liable in case of bankruptcy of the legal entity if they have improperly performed their duties. The LEMSA also contains provisions on the basis of which managing directors and supervisory directors of

associations and foundations can be held liable both in and out of bankruptcy.

If the association or foundation goes bankrupt as a result of improper performance of duties of the director and supervisory director, and whereby its creditors or employees are prejudiced, the trustee in a bankruptcy must have adequate resources to recover the damage suffered from these managing directors and supervisory directors who have seriously neglected their duties.

The LEMSA introduces, similar to the N.V. and the B.V., a presumption of proof for managing directors and supervisory directors of semi-governmental institutions in the event of non-compliance with mandatory bookkeeping obligations. Based on this provision, an improper performance of duties is presumed if the association or foundation did not meet their annual reporting obligations and it is plausible that this improper performance of duties is a major cause of the bankruptcy. The managing director or supervisory director is then personally liable for the deficit in bankruptcy, unless he proves that the bankruptcy hasn't been caused of the improper performance of duties. A similar rule already applies to the N.V. and the B.V. This presumption of proof does not apply to managing directors and supervisory directors of non-commercial foundations.

Judicial dismissal of managing directors or supervisory directors

The judge will have more discretion to dismiss a managing director or supervisory director of a foundation if the public prosecutor or an interested party requests it. Foundations have no general meeting and often no supervisory board that have the power to dismiss managing directors or supervisory directors. For this reason, the LEMSA has a special regulation on the judicial dismissal of managing directors of foundations at the request of the public prosecutor's office or an interested party in cases of mismanagement and other shortcomings of managing directors. Dismissal by the court leads to disqualification as a managing director or a supervisory director for a period of five years.

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Effective date of some changes postponed

A decision confirming the effective date of the LEMSA by the Minister of Justice and Security, as published on 18 June 2021, shows that some changes to the LEMSA will not enter into force until a later date.

The introduction of the one-tier governance model, in which the management board consists of executive directors and non-executive directors, for associations, cooperatives and foundations is postponed to a later date; this date shall be fixed by royal decree. The reason for this is that it is currently not technically possible to register with the trade register whether a director is an executive director or a non-executive director of said legal entities. Associations, cooperatives and foundations that already apply any form of one-tier governance model may continue to do so; if such legal entities consider a one-tier governance model, they should preferably defer implementation until this later effective date.

What does the introduction of the new rules of LEMSA mean for associations, cooperatives and foundation?

The articles of association of the association, the cooperative and the foundation will have to be amended on the next occasion, so as to determine in what way the duties and powers of the managing directors and the supervisory directors will be performed temporarily in the event of the absence or inability of all managing directors or all supervisory directors. In addition, the articles of association may of course also provide for a temporary performance of duties and powers of the managing directors and the supervisory directors in the event it would concern only some but not all managing directors or supervisory directors.

Associations with a general board, which pursuant to the articles of association has a supervisory role, should consider amending the statutory regulation of the general board by replacing that by the one-tier board governance model. Finally, the regulations of the legal person must then be amended in line with the new

articles of association.

Contact us

Should you require further clarification on the implications of the LEMSA for your organisation, or want to review your organisation's governance structure with an expert, please contact one of us.



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