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Publication date
2017

Document Version
Final published version

Link to publication

Citation for published version (APA):
Krüger Andersen, P., Andersson, J., Bartkus, G., Baums, T., Clarke, B., Conac, P-H., Corbisier, I., Daskalov, W., Engrácia Antues, J., Fuentes, M., Giudici, P., Hannigan, B., Kalss, S., Kisfaludi, A., de Kluiver, H. J., Opalski, A., Patakyova, M., Perakis, E., Porkona, J., ... de Wulf, H. (2017). *European Model Company Act (EMCA)*. (1st ed.) (Nordic & European Company Law : LSN Research Paper SeriesLSN Research Paper Series :Nordic; No. 16-26). SSRN. https://ssrn.com/abstract=2929348

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DEPARTMENT OF LAW
AARHUS UNIVERSITY

NORDIC & EUROPEAN COMPANY LAW

LSN Research Paper Series

No. 16-26

European Model Companies Act

First edition, 2017

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EUROPEAN MODEL COMPANIES ACT (EMCA)

2017

1ST EDITION

CONTENT

INTRODUCTION **1**

CHAPTER 1
GENERAL PROVISIONS AND PRINCIPLES **19**

CHAPTER 2
FORMATION OF COMPANIES **37**

CHAPTER 3
REGISTRATION AND THE ROLE OF THE REGISTRAR **57**

CHAPTER 4
FORMATION BY TRANSFORMATION AND RE-REGISTRATION **71**

CHAPTER 5
SHARES **77**

CHAPTER 6
FINANCING OF COMPANIES **109**

CHAPTER 7
CAPITAL OF COMPANIES **125**

CHAPTER 8
MANAGEMENT OF THE COMPANY **165**

CHAPTER 9
DIRECTORS' DUTIES **201**

CHAPTER 10
DIRECTORS' LIABILITY **219**

CHAPTER 11
GENERAL MEETING AND MINORITY PROTECTION **227**

CHAPTER 12
ANNUAL ACCOUNTING AND AUDITING **269**

CHAPTER 13
RESTRUCTURINGS **283**

CHAPTER 14
DISSOLUTION AND LIQUIDATION **345**

CHAPTER 15
GROUPS OF COMPANIES **369**

CHAPTER 16
BRANCHES OF FOREIGN COMPANIES **391**

INTRODUCTION

1. The Aims of the EMCA

While harmonization or convergence of European Company Law can be achieved by a toolbox of measures, until now the tools have been confined largely to Regulations, Directives, Recommendations and Corporate Governance Codes. It is submitted that there is a need to provide new measures to develop future European company law and that a European Model Act (EMCA) would be a useful tool for European integration in this area. The objective of the EMCA project thus is to establish, on a solid scientific foundation, a new way forward in European company law inspired by the US Model Business Corporation Act (MBCA).

The EMCA is designed as a free-standing general company statute that can be enacted by Member States either substantially in its entirety or by the adoption of selected provisions.

This approach differs from previous European company law initiatives, as it is a general settlement of the debate on which of the two regulatory approaches is superior – regulatory competition or harmonization. The EMCA offers the Member States a harmonized company law, but leaves it to each Member State to decide whether it will offer its businesses the advantages given by harmonization. The major benefit from an integrated company law framework is that it establishes similar conditions for company shareholders and third parties all over the EU, thus facilitating cross-border investment and trading by ensuring shareholder rights and rebuilding investor confidence. The EMCA is not a mandatory harmonization instrument, as Member States are not bound to follow the Model Act. Thus the EMCA can promote regulatory competition, but can also act as a tool for a harmonization of, and convergence between, Member States' company laws.

At the same time the EMCA allows for special local considerations and for experimentation with new or different ideas, as Member States are free to opt out of parts of the Model Act in order to implement national company law innovations.

The EMCA can be regarded as a tool for better regulation in the EU since it provides a coherent, dynamic and responsive European legislative framework. Member States can benefit from using the Model Act as a company law paradigm, as it will be a modern competitive Companies Act. Moreover, the project allows the EU Commission the opportunity to take part in, or to support, a continuous modernization of the Model Act, without forcing legislation on the Member States.

The EMCA may be viewed as a dynamic piece of legislation capable of being continuously developed in response to the changing environment and market conditions that modern businesses face. The EMCA may thus overcome some of the criticism of traditional inflexible law-making, as it will offer a more informal and organic convergence of European company law.

2. The European Model Act Group

The implementation of the project is coordinated by the European Model Companies Act Group (the EMCA Group), which was officially formed at a meeting at Aarhus University (Denmark) in September 2007. Since then additional members joined and the Group currently consists of prominent company law scholars from 22 Member States. The group members have been almost consistent during the period of preparation, see the list of members below.

Information on the EMCA group and the EMCA project can be found here:

http://law.au.dk/en/research/projects/european-model-company-act-emca

The Group is independent from business organizations as well as from the governments of the Member States and the European Commission. It was financed exclusively through academic funding. The EMCA does not have – nor is it intended to have – political authority. Its impact will thus ultimately depend on its quality and usefulness. In this sense, the EMCA is close to the MBCA but also, as noted, to the "Principles of Corporate Governance: Analysis and Recommendations" (ALI Principles), written over a 15-year period beginning in the late 1970s by a committee of academics and practitioners, under the auspices of the American Law Institute (ALI).[1]

The European Commission has expressed its support for the project, and the representatives of the Commission were invited to attend the meetings of the Group as an observer and discussion partner.[2]

Although designed mostly for Member States, a clear decision was taken at the outset however that the EMCA would not be restricted by existing EU-legislation. Thus, where the Group considered that provisions of existing EU law are not appropriate or efficient, the EMCA reflects the preferred alternative.

[1] M. Klausner, *A US view of the European Model Companies Act*, ECFR 2015, p. 363; C. Teichmann, *Modellgesetze für Kapitalgesellschaften in den USA (MBCA) und Europa (EMCA)*, Festschrift für Theodor Baums, 2017, p. 1227.

[2] See also the Report of the Reflection Group on the Future of European Company Law (http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf), 5 April 2011, p.12 (recommendation 4).

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The members of the Group are recognized and experienced company law professors with extensive experience in drafting company regulations at national and EU levels.

The work of the Group has been coordinated by a chairman: Professor Paul Krüger Andersen from Aarhus University (Denmark). Aarhus University also hosts the secretariat. Since the publication of the EMCA in 2017, Professor Pierre-Henri Conac from the University of Luxembourg is the chairman.

The Authors of the EMCA:

Due to the fact that the EMCA took 10 years to be drafted, not all Members of the EMCA Group could take part from the start to the end of the project. Therefore, there is a difference between the Members and the authors.

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3. Theory and Methodology

3.1. Legal Theory on Different Legal Tools for Regulation

In its 2003 Action Plan, the European Commission called for "alternative tools for regulation", in other words alternatives to EU Directives implemented in national company laws.[3] One alternative is "soft law", such as corporate governance codes and other self-regulatory measures.

Usual Companies Acts and soft law are sources of law placed in the hierarchy of national sources of law.[4] Companies Acts as well as soft law are both aimed at the authorities applying the law and at the persons, legal or otherwise, applying them. Model Acts are different, but it is not quite clear how to categorize them. They may contain "principles" in the way used, for example, in the Definitions and Model Rules of European Private Law (DCFR)[5], defined as "principles [...] intended to be applied as general rules (on contract law) in the European Union." As such, principles can have a normative function in the Member States. Partly the EMCA conforms with such a view: The EMCA seeks to promote basic principles of European company law, such as equal rights for shareholders, and other rules on minority protection, principles on directors' duties of loyalty and care and principles of creditor protection.[6] A number of basic principles are defined in the EMCA Chapter 1 on General Company Law Principles.

However, the EMCA also seeks to provide a model for a full text Companies Act, which can be used as a model for future or partial legislation in Member States, for candidate countries to the European Union (especially currently in the Balkan area) and, if interested, to other European or neighbouring countries (Norway, Russia, Switzerland, Ukraine…).

As mentioned above, the purpose of the EMCA is to offer Member States and all European countries, at a low cost, a tool for the convergence of European company legislation that is simultaneously flexible and capable of allowing Member States and all European countries to deal with new developments in the economy. Being inspired by the best solutions in each Member States, the EMCA should contribute to the circulation of models and legal transplants in the EU.[7]

Beyond this goal, the purpose of the EMCA is also to offer a source of inspiration to all countries in the world that are looking to modernize their company law. The EMCA represents an European vision of company law and offers an alternative to countries who do not wish to only refer or be influenced by the United States approach to corporate law, whether the MBCA (Model Business Corporation Act), the Delaware General Corporate Law (DGCL) or the ALI *Principles of Corporate Governance: Analysis and Recommendations*.[8]

3.2. Some Fundamental Problems and Approaches

When analyzing company regulation in Member States and developing the EMCA, a number of fundamental problems appeared and a number of approaches had to be clearly defined.

As a superior criterion for the choice of the regulatory method, the Group has accepted that the EMCA should be based on an appreciation of the following policies:

- Simplification of regulation,

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[3] Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward (COM(2003) 284 final). See also the Commission's follow-up consultation on future priorities for the Action Plan on Company Law and Corporate Governance, available at: http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf.

[4] See e.g. R. Nielsen and C. D. Tvarnø, *Retskilder & Retsteorier*, 2nd ed. (2008), p. 56; P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials,* 4th ed. (Oxford University Press, 2008), Chapter 3; D. Chalmers, G. Davies and G. Monti, *European Union Law - Text and Materials,* 2nd ed. (Cambridge University Press, 2010), Chapter 3.

[5] C. von Bar, E. Clive and H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Outline Edition (2008), p. 9.

[6] E. Ferran, *The Place for Creditor Protection on the Agenda for Modernisation of Company Law in the European Union*, ECFR 2006, pp. 178-221.

[7] See H. Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, ECFR, 2005, pp. 378-397.

[8] See M. Klausner, *A US view of the European Model Companies Act*, ECFR, 2015, pp. 363-369.

- Flexibility of regulation,
- Reducing agency and transaction costs.

These same policies have also been accepted by the EU Commission as part of its 2006 Strategic Review of Better Regulation.[9]

In recent years, the Commission has worked on assessing initiatives within the area of Company Law. Among others, this has resulted in a report of the Reflection Group "On the Future of EU Company Law" (April 5 2011), the Commission's Green Paper (COM(2011) 164 final), and the Commission's 2012 Action Plan (COM(2012) 740 final).

In the Commission's 2012 Action Plan, three main lines of action are identified; enhancing transparency, engaging shareholders and supporting companies' growth and their competitiveness.[10]

The Commission's work and plans have been taken into account by the EMCA Group's assessment and design of the Model Act. Thus, for example, the Group has emphasized recommendations stating that regulation should promote the company's long term planning and an increased weighting of the management's observation of risk management. Dealing with national differences in company regulation and legal traditions, the EMCA takes a functional approach, meaning that the starting point for the analysis is company problems regardless of whether a problem is, for example, dealt with in the national Companies Act or the national insolvency act. For example, the duty of a director to ensure that a company does not continue to operate once it is foreseeable that the company cannot survive is regulated in the Insolvency Act 1986 as wrongful trading in the UK and in the Companies Act 2009 under the law of liability in Denmark. Further, the regulation of private companies (AG/SA/Plc. etc.) vs. public companies (GmbH/Sarl, Ltd. etc.)/traded companies is based on how typical companies of each type function. Among other things, this is reflected in the Chapter on management which allows different management structures.

In line with the principles on simplification, flexibility and reduced agency costs, there are some necessary considerations on

- the choice between mandatory and non-mandatory (default) rules,
- the use of disclosure rules vs. substantive rules,
- the choice between codes/self-regulation and substantive (Model Act) rules.

In general, prior to the 2008 financial crisis, non-mandatory rules, EU Recommendations and codes/self-regulation were considered preferable, but the Group examined in detail, if and how these general principles should be used in the EMCA, and whether the 2008 financial crisis has altered the formerly preferred general view on this question.

With respect to simplification, the Group took the view that the EMCA needs to contain rules on all relevant company law matters. The various Companies Acts of the EU Members States vary in size. For example, large and detailed regulation can be found in France, Germany, Sweden and the UK, while shorter and less detailed regulation can be found in Denmark, Greece, Luxembourg and Poland. The EMCA aims to reach a balance between general and detailed regulation. In reaching this balance, the Group has taken into consideration the Member States' practical experience of their domestic legislation as well as the huge theoretical work, history and cultural influence behind the different Companies Acts. However, those aspects of the Acts which were too closely related to national traditions (and not of widespread application) were not considered. The intention thus was to avoid overly detailed regulation in the EMCA.

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[9] See COM(2006) 689.

[10] K. Hopt, *Corporate Governance in Europe: A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance*, NYU Journal of Law & Business 12 (2015), pp. 139-213.

The Group gave particular consideration to the choice between mandatory and non-mandatory (default) rules. The EMCA proceeds on the accepted European tradition in company law that an important goal of the EMCA is the protection not only of outside shareholders but also of creditors. This remains the case even if this goal is supplemented with new goals, such as the use of company law as a tool for economic efficiency and competitiveness or a tool to promote other societal goals (see Section 3.4 below). Thus, rules on creditor and shareholder protection are mandatory rules. These include for example a large number of the rules on capital protection which are contained in the Chapters on formation, companies' capital, general meeting and minority protection. However, the approach of the Group is to avoid drafting overly burdensome and costly rules.

Other rules, in particular with respect to the organization of the company, take the approach of non-mandatory rules allowing companies to organize themselves with flexibility according to their actual needs, within the framework provided by the EMCA.

Generally, there is a need for a proper mix of mandatory, default and soft (i.e. comply or explain) rules with more room for default rules applicable to private companies. Corporate scandals and the recent financial crisis neither justify a radical deregulation nor a hastily adoption of burdensome and untested formalities.

Special consideration is taken with respect to the division between private and public companies (see Section 6 below).

In determining whether an issue should be regulated in the EMCA or dealt with by Member States in the form of self-regulation, a number of issues were considered. An examination of national corporate governance codes indicated that the codes differ in many ways. Some are very detailed and others are shorter and focus primarily on principles. Also, standards of what is considered as good corporate governance vary. Furthermore, EU Recommendations, such as the Recommendation on Directors' Remuneration in Listed Companies (2009/385/EC), have been implemented differently in the various Member States. There is no short answer or formula as to how to deal with these issues. In the EMCA the approach is considered Chapter-by-Chapter and Section-by-Section, see below Section 3.4.

Finally, the EMCA, as a model Companies Act, does not purport to deal with securities regulation/capital markets law, nor with all kinds of regulatory rules that can be seen as flanking measures of corporate law and that are often intended to combat abuses in the area of tax or social security or economic crime.

3.3. Use of Comparative Method

The most important working method to be used during the preparation of the EMCA was the comparative method. Since the members of the Group have solid knowledge – both as academics and in practice – of the Companies Acts of the various Member State, it was possible to use a combination of the "*Länderbericht*" (national report) method and the analytic method.[11]

The comparative process started with questionnaires on each topic in order to gain a general view of similarities, differences, new ways to deal with problems and recent issues. At the same time, a collection of Companies Acts was established for specific analyses of problems and solutions. The analyses were carried out by working groups, chaired by one member, and representing more than one Member State (old/new Member States, common law/civil law countries etc.). The chair and members of each working group was also chosen considering that their national law, could serve as references for the EMCA on this topic. The reasons were the success of the national Member State law in this area, or its modernity. However, all national Companies Acts were analysed when drafting the chapters in order to have a blend of national traditions (civil law countries/Nordic countries etc.). It was considered also that using national law on certain issues would allow courts and practitioners in Member States adopting parts or the whole of the EMCA, to easily refer to the case law developed under the provisions which served as inspiration.

In certain circumstances, external company law experts were invited by the Group.

[11] See e.g. K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed., (Oxford University Press, 1998), p. 32; and O. Lando*, Kort Indføring i Komparativ Ret*, 3rd ed., (DJØF Publishing, 2009), pp. 206-207. The *Länderbericht* method compares *national* legal systems to each other. When applying the *analytical method* one parameter at a time is dealt with from the perspective of the two or more legal settings.

The working groups prepared the first drafts of the respective Chapters. The drafts were discussed, revised and agreed on in meetings (at least twice a year) by the entire Group.

3.4. Use of Law and Economic Theories

Over the last decade or two there has been a paradigm shift in European company law. In short, under the influence of the US, the aim of company legislation/regulation has shifted from being exclusively shareholder and creditor protection to explicitly including the promotion of economic efficiency.[12] The former is reflected primarily, but not exclusively, in the maximization of profits for shareholders (see further below). Use of economic theory and law and economy studies have become a natural part of the development of company regulation[13] particularly in the areas of corporate governance, financing of companies and takeovers.

The project aims to ensure that the contribution, which law and economics have made to company law and corporate governance in recent years, is incorporated and exploited in the EMCA.

As noted earlier, traditional company law is aimed at protecting a company's shareholders and creditors. The shareholders must be ensured influence and profit, and creditors must be protected against losses which are not a result of taking reasonable commercial risks. These goals remain important for any Companies Act.

In order to ensure that the shareholders are able to play an active role in the company's decision–making process, a growing number of measures have been adopted both at national and EU levels. For example, the EU Shareholders' Rights Directive (2007/36/EC) provides new rights for shareholders of listed companies to attend and vote at general meetings remotely, to raise questions and to gain access to relevant information. The amendments to the shareholders' rights directive adopted in 2017 reinforce this approach, for instance on the issue of compensation of directors and managers ("say on pay").[14] Similarly, the Directive on Takeover Bids (2004/25/EC) regulates takeovers of public listed companies and provides for the protection of minority shareholders by implementing a mandatory bid rule as well as requiring the disclosure of adequate information to the shareholders of the target companies. The purpose of these measures is to ensure an improvement of the corporate governance system. In its 2011 Corporate Governance Green Paper, the Commission stated that shareholders need to take a more active role and concludes "It therefore seems useful to consider whether more shareholders can be encouraged to take an interest in sustainable returns and longer term performance, and how to encourage them to be more active on corporate governance issues".[15] To underline that the Group shares this view, Chapter 1 of the EMCA contains a provision on the principle of shareholder democracy.

[12] See e.g. the Lisbon Treaty and several revisions of national Companies Act, such as Denmark, Finland, the Netherlands, and the UK. The overall purpose of the regulation is described as "*the tandem of improving the competitiveness of EU Company and better regulation"*.

[13] See e.g. the Danish "*Debatoplæg om Aktivt Ejerskab*" from 1999, drafted by the *Ministry of Trade and Industry*. In the Commission's Action Plan 2003, the main objectives are 1) strengthening shareholders' rights, and 2) to foster efficiency and competitiveness of business. The words efficiency and competitiveness are the basic principles in Company Law reforms, e.g. in Denmark, Finland and the UK. The tracks that were laid down with the 2003 Action Plan has been continued and developed with the Commission's 2012 Action Plan, the 2011 Reflection Group's Report and the Commission's 2011 Green Paper. The Green Paper cites the Commission's Communication "Towards a Single Market Act" as saying that "*[i]t is of paramount importance that European businesses demonstrate the utmost responsibility towards not only their employees and their shareholders but also towards society at large.*" The 2011 Green Paper further cites that these elements "*also contribute to the competitiveness of European business, because well run, sustainable companies are best placed to contribute to the ambitious growth targets set by 'Agenda 2020.'*"

[14] Proposal of Directive of the European Parliament and the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, COM(2014) 213 final.

[15] Green Paper on *The EU corporate governance framework* (COM (2011) 164 final), p. 3.

The debate has dealt with the possibility of constructing company law rules that encompass incentives for more active involvement by shareholders. In particular, recent experience of the lack of control of directors' remuneration in the form of share options and bonus schemes has illustrated the importance of shareholders' activism. According to Recommendation (2009/385/EC), the structure of directors' remuneration should promote the long-term sustainability of the company and ensure that remuneration is based on performance. As this Recommendation can be implemented into national Companies Acts or corporate governance codes building on the experiences in the Member States, the Group considered whether the Recommendation should be implemented legally in the EMCA or if it is sufficient to deal with the problem in the national corporate governance codes. Some basic principles of the Recommendations are implemented in Chapter 8 of the EMCA on management of the company.

The economic theory which arguably has had, and still has, the largest impact on company law is the principal/agent theory.[16] The main focus of this theory is on the company's organization. The theory concerns the interaction between owners and managers and, in particular, how the owners can control the managers. The shareholders must expend time and resources to control the managers and defray the so-called "agency costs". The EMCA seeks to improve shareholders' opportunities to control managers and to reduce agency costs. (see Chapter 9 on directors' duties and Chapter 11 on general meetings.)

The traditional principal/agent theory focuses on shareholders as principals; however, especially in continental Europe it is recognized that there are additional principals such as employees, creditors and the society as a whole. Following that trend, the EMCA also encompasses the relationship between companies and such stakeholders.[17] (see Chapter 9 on directors' duties).

Another economic theory, which has had a great impact on the regulation of takeovers, is the theory on "market for corporate control".[18] This theory suggests that takeovers, and the threat of a takeover, have a disciplinary effect on managers and thus incentivize them to operate their companies more efficiently. The EU's Takeover Bid Directive (Directive 2004/25/EC) is based in part on an acceptance of this theory. While the theory is not without its weaknesses, the EMCA also acknowledges the importance of this theory. While the Takeover Bid Directive (the 13th Directive) was considered as a part of company law directives it is now considered as a part of securities regulation. Thus, the EMCA only considers issues that are of importance with respect to company law matters (see Chapter 13).

Recently, questions have been asked about the economic foundation of takeover regulation and, in a broader sense, on the fundamental objectives of European company law. It has been argued that European companies should have further legal obligations such as taking into account human and environmental interests, corporate social responsibilities and sustainable development.[19]

[16] See M. C. Jensen and W. H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, Journal of Financial Economics 3 (1976), pp. 305-360.
[17] Cf. J. Armour, L. Enriques et. al., *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3rd edition (Oxford University Press, 2017), p. 22: "the appropriate goal of corporate law is to advance the aggregate welfare of all who are affected by a firm's activities, including the firm's shareholders, employees, suppliers, and customers, as well as third parties such as local communities and beneficiaries of the natural environment." See also G. Roth and P. Kindler, *The Spirit of Corporate Law*, 2013, p. 7, stressing the importance of protecting creditors and shareholders by mandatory rules.
[18] H. G. Manne, *Mergers and the market for corporate control*, Journal of Political Economy, (1965), p. 110.
[19] See e.g. D. E. Merrick, *For whom are corporate managers trustees?,* Harvard Law Review 45 (1932), p. 1145; M. C. Jensen, *Value maximization, stakeholder theory, and the corporate objective function*, Journal of Applied Corporate Finance 14 (2001), pp. 235-256; M. Blair and L. Stout, *A team production theory of corporate law*, Virginia Law Review 85 (1999), p. 247; J. Parkinson, *The legal context of corporate social responsibility*, Business Ethics: A European Review 3 (1994), pp. 16–22; P. K. Andersen and E. J. B. Sørensen (2011): *The Principle of Shareholder Primacy in Company Law from a Nordic and European Regulatory Perspective*, in: Neville, Mette et al.: The European Financial Market in Transition (Kluiver Publishing, 2012).

Many of these interests have been safeguarded by Member States in their own domestic legislation. An example of this would be the "enlightened shareholder value" perspective of directors' fiduciary duties in Section 172 of the UK Companies Act 2006.[20] The Group has further examined in which way these objectives should be implemented in the EMCA. Generally, the Group agreed that companies must take developments in society and changes in society's goals into account. Securing environment, sustainable development (CSR) is not considered as the fundamental and mandatory objective of company law but should primarily be considered by special regulation in the various fields. However, there is a clear tendency that such goals are also recognized in company law, accounting law and corporate governance codes. See in particular Chapter 8 on directors' duties and Chapter 13 on reorganization of companies.

Corporate finance theorists have since the 1960's developed a series of models, the aim of which is to develop an optimal capital structure of companies. This theory has also had a considerable influence on company law. These theories have also been considered and taken into account by the EMCA Group. Company law rules must facilitate a flexible adjustment of the company's capital. The Group shares the view that companies should be allowed wide discretion in deciding how to organize the capital structure of the company. Such rules must at the same time secure shareholder influence and control without ignoring the interests of creditors. (see Chapter 6 on financing the company and Chapter 7 on companies' capital.)

Economic theories represent a necessary foundation for the configuration of single provisions of the EMCA. A main theme of the EMCA project is to consider the effect which the 2008 financial crisis has had on the aforementioned theories. For example, the financial crisis gives rise to questions as to whether the previous trend to "optimize" the optimal capital structure needs to be corrected. The trend in the ten or so years before the financial crisis was to operate companies with less equity capital and more debt. A predominant view held by economic theorists has justified that approach. In some Member States thus company law as well as accounting regulation is built on economic theory which has underlined the advantage of a high debt ratio. However, it is appropriate to re-examine this balance between risk and return on the one hand, and the protection of creditors and other constituencies in company law and accounting rules on the other. Risk management, focusing on directors' duties, provides for an example of this view (see Chapter 8).

The group is aware of the fact that particular types of conflicts may arise within private companies.[21] A private company usually is composed by a small number of shareholders. Agency problems in relation to the directors are thereby reduced, in most cases there is no clear separation between ownership and management. Instead, conflicts amongst shareholders become more important with particular attention to be paid to the conflict between minority and majority shareholders. The EMCA is following the one-law model (see Section 8 below) aiming at both public and private companies thereby taking into account the particular needs of typical private companies (see Section 7 below).

4. Comments to the Act

Most chapters include general comments as an introduction which explain the rationale behind the choices made. Also, after each provision of the EMCA, a description and explanation is given of the content of the provision. The existing EU regulation on each particular issue is described, and where the Group agreed to deviate from the EU position, the rationale for doing so is set out clearly in the Comments.

The Comments to the Sections also identify and explain important differences in national rules among Member States. The Comments also include sometimes references to key judicial decisions in Member States, which had an influence on the provisions adopted in the EMCA.

Further, the Comments make it clear, if necessary, whether single provisions of the EMCA are mandatory or non-mandatory.

[20] Explanatory comments on Section 172 of the UK Companies Act 2006 are given by B. Hannigan, *Company Law*, 4th ed. (Oxford University Press, 2016), pp. 220–227 and P. L. Davies, *Gower and Davies' Principles of Modern Company Law*, 9th ed. (London, Sweet & Maxwell, 2012), p. 540.

[21] See for example G. Bachmann, H. Eidenmüller, A. Engert, H. Fleischer and W. Schön, *Regulating the Closed Corporation* (De Gruyter, 2013) as well as J. McCahery, E. Vermeulen, *Corporate Governance of non-listed companies*, 2008.

5. International Aspects of Company Law

The EMCA addresses the international dimension of company law. According to the EMCA Chapter 1 Section 13, the EMCA reflects the principle of freedom of movement within Europe. Thus, the EMCA contains chapters on cross-border mergers and divisions and further on cross-border transfers of seat and branches.

6. Output and Working Method

6.1. Output

As noted above, the Group believes that the EMCA can be a tool for better regulation in the EU. Member States will benefit from using the Model Act as a company law paradigm. The EMCA will be easy to use as an alternative to drafting national Companies Acts, not least for newer Member States which may more easily adopt the European standard. Individual Member States can also benefit from the comparative dimension of the project, and the project can allow all Member States to take advantage of the experiences of the individual States and newest regulatory practices.

The EMCA will contribute to disseminating standards of best practice throughout the Member States as well as fundamental principles of European Company Law. The EMCA is not to be understood a simple restatement of the prevailing legal solutions found in the majority of the EU company laws. It embraces innovative concepts found only in some jurisdictions or legislative proposals which work well.

An EMCA drafted and continuously developed by the Group will, as mentioned above, be able to respond rapidly to the changing circumstances and market conditions that modern businesses face.

Thus, the EMCA has the potential to prove as an effective catalyst to improve European company law. The success of the US Model Business Corporation Act (MBCA) in improving the single states' Companies Acts supports this expectation.[22]

6.2. Working Method

The project was broken down into a number of sub-projects based on the different areas of company law. Thus the project covers all parts of company law issues regarding public as well as private companies (see below Comments to Chapter 1, Section 3).

The EMCA regulates the following issues:

- general company law principles
- the formation of companies
- the duties of directors, the organization of companies (corporate governance issues)
- Shares
- Shareholder meetings and protection (including minority protection)
- The financing of companies
- Share capital structures (capital protection)
- The re-structuring of companies (mergers, divisions, conversions)
- Liquidation, bankruptcy, etc.
- Liability of directors, shareholders and others
- Cross-border issues
- Accounting and auditing
- Employee representation

[22] See on Model Acts in the United States Th. Baums and P. K. Andersen, *The European Model Company Law Act Project*, Essays in Honour of Eddy Wymeersch, 2009, p. 12-14 (ECGI Working Paper Series in Law, p. 9) with references.

- Groups of companies
- Branches
- Registrar and the registration process

The approach to each sub-project is the same. Each sub-project started with a comparative analysis of the existing company laws of the Member States in the given area. The comparative analysis considered the harmonization that had been carried out at EU level and included studies of how EU company law had been implemented in each Member State, as well as studies of national law on non-harmonized areas. The analysis also included studies of special national, legal and/or business considerations.

Members of the Group prepared national reports for the comparative study. The national reports were analyzed with a view to establishing trends and original solutions and establishing what EU law requires as a minimum standard in each area. The reports served as working material for the drafting of the EMCA. Special working groups were formed for drafting different parts of the Model Act. A Postdoctoral researcher and a number of ad hoc company law experts were also involved in research which supported the project.

The Group met biannually for two days in various places in Europe and drafts were continuously discussed and approved by the Group during these meetings. The progress of the Group was published on the EMCA website:

http://law.au.dk/en/research/projects/european-model-company-act-emca

The goals of the EMCA and the progress of the Group were also published in international and national journals.

It has also been an aim of the project to generate research on different parts of the EMCA and some of the more fundamental issues raised such as the impact of model acts, the choice of regulatory methods, law and economics of the suggested model acts etc. For that purpose, the Group presented the EMCA at a number of international seminars and conferences. Furthermore, after the first draft was finished in 2015, the public was invited to comment on the draft chapters (see Section 8 below).

The first draft was presented at an international conference in September 2015 at the *Wirtschaftsuniversität* in Vienna hosted by Professors Martin Winner and Susanne Kalss. The goal of the conference was to receive comments from high-level experts from Europe and the United States in order to improve the draft. Several colleagues from the United States were invited in order to provide comments from the US and MBCA perspectives:

- Ron J. Gilson, Columbia Law School, Stanford Law School, EMCA Associated Company Law Expert
- Jill E. Fisch, University of Pennsylvania Law School
- Mike Klausner, Stanford Law School
- Hillary A. Sale, Washington University Law, Member of the ABA Corporate Law Committee

The nature and results of the discussions was published in the European Company and Financial Law Conference (ECFR) in order to ensure transparency of the adoption process.[23]

After the presentation of the first draft of the EMCA in Vienna in September 2015, the Group revised the published draft in order to take into account all comments and drew up the final Act. After this, the EMCA was officially disclosed at a ceremony in Rome, as a symbolic place of European unity and construction, at the University La Sapienza on the 30st of March 2017. This date was chosen to take place on the same month of the 60th anniversary of the Treaty of Rome. The Ministries of Justice of Italy and of Lithuania were represented and delivered speeches.

[23] See ECFR 2016, pp. 193-374.

The EMCA is available for download on the SSRN (https://www.ssrn.com/en) and on ECGI (http://www.ecgi.org).

The EMCA Group will continue as an organization on an on-going basis to meet to discuss legal developments, review and offer proposed revisions to various parts of the Model Act, take into account comments received and expand the comment sections. This is similar to the mission of the Corporate Laws Committee of the American Bar Assocation (ABA) in the US which is to adopt amendments to and provide expert commentary on the MBCA.

Therefore, the EMCA Group calls academics, young researchers, companies, business associations, judges, notaries, experts and the general public to make comments to this edition. Comments can be sent to any member of the EMCA. In each chapter, the main reporter and members of the working group have been indicated so that comments relating to specific chapters should be sent to them. Comments will be taken into account in the next edition.

7. The EMCA covers both private and public companies

The Companies Acts of almost all EU Member States divide companies in two categories: public companies (AG/Plc. etc.) and private companies (GmbH/Ltd. etc.), with sometimes sub-categories. The distinction is not based on the size of the company but primarily on the fact whether its shares can be offered to the public/be publicly traded.[24]

The private company is the dominant company form in all Member States. Thus, the Group is aware that the EMCA must be designed in a way that recognizes the need for a flexible regulatory framework covering private companies.

The current EU regulation covers only some of the issues that are regulated in the Companies Acts of the Member States. For example, most of the issues relating to company management structure and directors' duties are not covered by EU Directives and the draft for the 5th Company Law Directive on company structure has been abandoned.[25] In addition, like most of the other EU Directives, the proposed 5th Directive only dealt with public companies, and in general the regulation of private companies is left to the Member States.

Some Member States have decided to keep the regulation of private companies close to that of public companies, by for instance extending the application of EU directives to them. This applies especially to mandatory rules protecting creditors and shareholders. Other Member States have implemented the Directives to apply to public companies only. Since the EMCA prefers a simple and flexible framework, a number of rules contained in the EMCA apply to both public and private companies.

In particular, as concerns the management structures of small and medium sized companies (SMEs), there is a need for simple and flexible provisions. Such provisions can be freely implemented by the individual Member States, and the EMCA as well is free to choose which regulation is preferred, to the extent that the private company form is chosen.

Even if flexibility is an overall aim for private companies as well as for public companies, it is appropriate to provide for different requirements regarding management systems as for private and for public companies. With respect to the choice of a management system, there should be even more flexibility provided for private companies. However, it seems possible to formulate provisions on directors' duties which are equally applicable to SMEs as well as large companies (see Chapter 9).

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[24] See, for example, the Danish Companies Act, paragraph 6, Swedish Companies Act, Chapter 12, Sections 7-8. The former Danish Act on private companies (*anpartsselskaber*) aimed at regulating companies with only a little capital and few members. The Danish *White Paper 1498/2008 on Modernizing Company Law*, p. 32 states that both the public company form and the private company form are used by small and medium size companies. The committee therefore decided not to use a distinction based on the criterion of size. See also the SPE proposal, Article 3(1)(d).

[25] Proposal for a Fifth Directive on the coordination of safeguards which, for the protection of the interests of members and outsiders, are required by Member States of companies within the meaning of Article 59, second paragraph, with respect to company structure and to the power and responsibilities of company boards, COM(1972) 887 final. The proposal was officially withdrawn in 2001. Also a preliminary draft of a Directive on groups of companies has been abandoned.

With its 2008 proposal for a Regulation on the Statute for a European private company (*Societas Privata Europaea* – SPE)[26], the EU Commission started an initiative in the field of small and medium sized companies. The SPE proposal aimed to create a new European legal form, which was intended to enhance the competitiveness of SMEs by facilitating their establishment and operation across the single market. If the SPE Statute had been adopted, the SPE would have been an alternative to establishing and carrying on businesses by means of national companies. The proposals in the Statute were not limited by restrictions in the company law Directives. For example, the provisions on capital (minimum capital/distribution) did not need to follow the requirements in the Second Council Directive. The draft SPE Statute would thus have put pressure on national lawmakers to establish company legislation that could match the SPE Statute. A main problem with drafting an SPE Statute was however that it remained necessary to refer to the different national company law legislations. Therefore and also for other reasons such as the issue of the real seat and co-determination, the SPE Statute was not adopted. The fact that Regulations must be adopted by unanimous vote also prevented the adoption of the SPE which underlines the limits of EU harmonisation. The 2014 proposal of directive on the single-member private limited liability company, creating the *Societas Unius Personae* (SUP) tried to achieve a more limited harmonisation.[27] The SUP is targeted only at private companies.[28]

As said, the recommendations of the EMCA provide for a complete text covering both public and private companies. Thus, the EMCA makes another attempt to achieve European convergence in this area.

Even though most small companies in fact choose the private company form, there are also some SMEs that are public companies. There are also large companies organized as private companies. However, the *raison d'être* for having two different company forms is to allow each company to choose a form which works best for the company. Thus, in certain areas more flexible rules are needed for small companies and/or companies with few shareholders (close companies). On the other hand, there are special demands for shareholder protection in close companies compared to public companies (especially listed companies). This is for example the case regarding minority protection (see Chapter 11 on general meeting and minority protection).

Although public companies can offer shares to the public, most large companies have only a few shareholders and are not financed by the market. If such companies prefer a more flexible company form it is possible for them to adopt the private company form as an alternative.

The general view taken in the EMCA is that the provisions covering private companies are tailored to fit the needs of typical private companies as they exist in the different Member States. Even if the distinction between public and private companies generally is not based on size or number of shareholders, this will not exclude the possibility that certain provisions would apply depending on the size of the company or the number of shareholders as a criterion. The Group considered, with respect to each provision, whether the provision should apply to private companies and public companies respectively.

The following method of interpretation of the EMCA should therefore be used: unless otherwise stated, a provision applies to both private and public companies. The EMCA is constructed in a way which draws very clear lines between provisions which apply to private, public and publicly traded companies (see Section 8 below).

8. The EMCA uses a one law model

Almost all Member States have two company forms but the legislations vary.[29]

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[26] COM(2008) 396 final, p. 4.

[27] COM(2014) 212 final.

[28] See P.H. Conac, *The Societas Unius Personae (SUP): A "Passport" for Job Creation and Growth*, ECFR 2015, pp. 139-176; J. Lau Hansen, *The SUP Proposal : Registration and Capital*, *idem*, pp. 177-190; V. Knapp, *Directive on Single-Member Private Limited Liability Companies: Distributions*, *idem*, pp. 191-200; C. Teichmann, *Corporate Groups within the Legal Framework of the European Union: The Group-Related Aspects of the SUP Proposal and the EU Freedom of Establishment*, *idem*, p.202-229; S. Harbarth, *From SPE to SMC: The German Political Debate on the Reform of the "Small Company"*, *idem*, pp. 230-237; C. Malberti, *The relationship between the Societas Unius Personae proposal and the acquis: Creeping Toward an Abrogation of EU Company Law?*, *idem*, pp. 238-279.

[29] E. Wymeersch, *Comparative Study of the Company Types in Selected EU States*, ECFR 2009, pp. 71-124.

From a formal perspective, a number of Member States have two-law-systems such as Austria, Germany, Italy and Spain. A large number of Member States such as Denmark, Finland, Ireland, Lithuania, Luxembourg, the Netherlands, Sweden and the UK use a one-law model. Other Member States have adopted a Commercial Code or a general Act on Business Associations, regulating all types of companies, such as is the case in the Czech Republic, France, Hungary, Latvia, Poland and Slovakia. The structure of these Acts takes both the form of a division into special subjects or a division into a general and a special Section.

The Group has considered whether to draft a one-law or a two-law model. Arguments in favor of a one-law model are that the distinction between the two traditional company forms (private and public companies) is becoming less significant and is being replaced by a more apt distinction which differentiates between companies whose shares are traded on regulated or alternative market (listed companies) and companies that are not. A large number of provisions should therefore be directed at all limited liability companies or only at listed companies. Further, experiences in some Member States have shown difficulties with the interpretation of two company laws with similar -but not exactly the same – regulations covering private companies and public companies respectively. Especially, in smaller Member States, it can take time before courts decide on the interpretation of a single provision. Therefore, it is more cost effective that the interpretation applies to both public and private companies.

Arguments regarding interpretation can, however, be used both in favor or against the drafting of a one-law model.

Arguments against a one-law model are that the overwhelming majority of the EU legal systems regulate public and private companies independently (both those influenced by the German and French traditions). Moreover, main EU directives and national company law regulations regulate the two types of companies independently.

The Model Law Group has decided to use a one-law model in the first place, for the sake of simplicity, to increase flexibility as the private company law model would be the default one, and to anticipate current development that private and public companies are becoming closer in terms of substantive regulation in the Member States.

The EMCA therefore contains regulation on three categories of companies:

- the private company
- the public company
- the publicly traded company

Definitions and Comments to these different categories are stated in Chapter 1, Sections 1.02 and 1.03. Regarding public traded companies, there is a borderline between securities regulation and company law. The EMCA does not deal with securities regulation in general, but since public traded companies are public companies, certain parts of the regulation are a natural part of Companies Acts. This is in particular the case concerning directors' duties, general meetings and minority protection.

9. The EMCA is largely enabling

As noted from a US perspective, the EMCA contains some mandatory terms but is largely enabling.[30] If the EMCA is adopted by a Member State or any country, partially or fully, it provides companies operating with a wide range of choice with respect to either adopting the EMCA's terms or customizing provisions to suit their circumstances. Therefore, the EMCA is flexible enough to be adapted to the unique needs of each country.

[30] M. Klausner, *A US view of the European Model Companies Act*, ECFR 2016, p. 363.

10. The EMCA consists of broad standards.

Key provisions of the EMCA consist of broad standards as opposed to specific rules. The issue of whether to have specific rules or broad standards was discussed intensively in the EMCA Group as both provide advantages and disadvantages. Specific rules provide legal certainty but reduce the flexibility of the Act which was a key goal of the EMCA. Broad standards make protection of minority shareholders and creditors very dependent on the quality of the judiciary in each country, which may vary considerably. Also, ex-post protection is less effective than ex ante protection if the judiciary is not effective. As Professor Paolo Giudici (whose roots are from Sicily) remarked, any rule contained in the EMCA should take into account business practices and court capabilities from Helsinki and Aarhus to Palermo. This was dubbed by the Group as the "Palermo Rule". Indeed, the issue of the judiciary is key and it has been advocated for Member States who would adopt the EMCA to adopt also a Model Corporate Court.[31] This is unlikely to occur in Europe despite the fact that their track record is excellent, as proved by the Delaware Chancery Court in the US and the Amsterdam Enterprise Court in the Netherlands.

Therefore, in the EMCA itself and in each chapter a balance was struck. Overall, it was decided that flexibility should prevail so that specific rules would only apply if imposed by company law directives or because of the risk of having a too broad standards. However, a Member State, or any country, might adopt more specific regulations in order to fit its unique situation and historical legal background and to compensate for a weak judicial system. Therefore, again, the EMCA is flexible enough to be adapted to the unique needs of each country.

11. IT

The EMCA recommends the use of IT as much as possible. This is in line with the Commission's Action Plan and Directive (2009/101/EC)[32] on the exercise of certain rights of shareholders in listed companies. The EMCA contains pertinent provisions, for example on formation by online registration, electronic communications between companies and shareholders and electronic general meetings. However, it is also taken into account that the opportunities to use information technology vary between the Member States.

[31] R. Gilson, *A Model Companies Act and A Model Company Court*, ECFR 2016, pp. 351–362.
[32] Directive 2009/101/EC of the European Parliament and of the Council on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (codified version). The purpose of this Directive is to undertake a codification of First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.

CHAPTER 1
GENERAL PROVISIONS AND PRINCIPLES

PART 1
GENERAL PROVISIONS

Section 1.01
Short Title and Scope 23

Section 1.02
Definitions 23

Section 1.03
Private and Public Companies 25

Section 1.04
Legal Personality and Limited Liability of Shareholders 27

PART 2
GENERAL PRINCIPLES

Section 1.05
Capital and the Maintenance of Capital 29

Section 1.06
Purpose of the Company 29

Section 1.07
Transferability of Shares 30

Section 1.08
Equality of Shares 31

Section 1.09
Equal Treatment of Shareholders and Minority Protection 32

Section 1.10
The Majority Principle 32

Section 1.11
Directors' Duty of Loyalty and Care 33

Section 1.12
Shareholder Democracy 33

Section 1.13
Freedom of Movement within Europe 34

General Comments[33]

1. EU law

Chapter 1 includes a differentiation between the different types of companies, regulated by the EMCA and some general principles which are explained in this Chapter.

Most of the EU company law Directives deal with public companies and listed companies. However, as stated in Section 3, the EMCA deals with public and private companies.

Generally, the EMCA deals with limited liability companies as outlined in Article 2(1)(a) of Directive 2005/56/EC (cf. Article 1 in Directive 2009/101/EC).

Chapter 1 contains a number of General Principles which echo certain fundamental principles of company law set out in Directives including Directive 2009/101/EC on coordination of safeguards which, for the protection of the interests of members and third parties (originally the 1st Company Law Directive), the Takeovers Bid Directive (2004/25/EC), the Cross-border Merger Directive (2005/56/EC), the Shareholders Rights Directive (2007/36/EC) and Directive 2012/30/EU. An example is the principle of equality.

2. National law

Most directives, except Directive 2009/101/EC, only apply to public companies. The national company laws of the Member States take different positions to the question whether the rules provided for by the company law Directives should apply to private companies as well. In Belgium, Denmark, Finland and Sweden, the company law Directives for the most part also apply to private companies, whereas the UK, Netherlands (since the 2012 Flex BV) and Luxembourg for example, which are economically liberal countries, have taken the opposite position and hence do not apply the company law Directives to private companies. In most of the other countries, the regulation of private companies is only to some extent inspired by the EU Directives applying to public companies.

3. Considerations

The EMCA contains rules for both private and public companies, including listed companies. The EMCA is organized such that the sections, if not otherwise indicated, deal with both private and public companies. It is made clear in the specific sections and the appertaining comments whether there are special rules concerning private companies and listed companies. The Group does not have a clear-cut stance on whether the Directives concerning public companies should also concern private companies. This matter is dealt with in the specific parts of the EMCA. Generally, the Group aims to draw up a flexible and not too onerous Model Law. Hence, it is continuously considered whether the rules concerning public companies could be more flexible, for example by exploiting the Directives' possibilities of derogation. Within a number of legal areas, the difference between the regulation concerning public and private companies will be smaller, which partly explains the structure of the Model Law.

The Group has found it suitable to commence the EMCA by establishing a number of general principles, which partly define the overriding purpose of the regulation in the EMCA, and partly serve as a means for interpretation of the specific rules of the EMCA.

In this respect, the EMCA Group has been especially inspired by the Finnish Companies Act.

[33] The working group on Chapter 1 was chaired by Professor Paul Kruger Andersen (University of Aarhus, Denmark).

PART 1
GENERAL PROVISIONS

Section 1.01
Short Title and Scope

(1) This Model Act shall be known and cited as the European Model Companies Act ("EMCA").

(2) The EMCA applies to companies as indicated in this Act.

Comments

Re 1) The short title provided by Section 1 creates a convenient name for a European Model Law applying to companies. See the Introduction for a general description of the development of this Act, the purposes it is intended to serve and the principles under which it was prepared.

Re 2) See comments to Section 3 in regard to the type of companies covered by the EMCA.

Section 1.02
Definitions

(1) "*Company*": A limited liability company formed and registered under the EMCA.

(2) "*Offer to the public*": A communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. This definition shall also be applicable to the placing of securities through financial intermediaries.

(3) "*Management board*": In countries with a one-tier board system, the board of directors; in countries with a two-tier board system, the management board being responsible for the management of the company.

(4) "*Supervisory board*": the body being responsible for the supervision of the management body in countries with a two-tier board system.

(5) "*Director*": A member of the management body or of the supervisory body of a company.

(6) "*Board":* The single board of directors in the one-tier system and the supervisory and management board in the two-tier system if not stated explicitly otherwise.

(7) "*Subscription price*": The price to be paid to the company for each share issued by the company.

(8) "*Securities*": Transferable financial instrument as defined by Article 4(15) of Directive 2014/65/EU.

(9) "*Traded Company*": A publicly traded company whose securities are listed or on traded on a regulated market or a multilateral trading facility, as defined respectively by Article 4(21) and (22) of Directive 2014/65/EU, in one or more Member States.

(10) "*Registrar*": The natural or legal person responsible for receiving the documentation set out in Chapter 3 of the EMCA and issuing the certificate of incorporation.

Comments

Re 1) Section 1 determines which company forms are covered by the EMCA.

A limited liability company is a company in which the liability of members is limited by its instrument of incorporation. The definition of *limited liability company* should be understood in accordance with the definition in Article 2(1)(a) of Directive 2005/56/EC on cross-border mergers of limited liability companies, i.e. a company as referred to in Article 1 of Directive 2009/101/EC, see Section 3 of Chapter 1.

The EMCA deals with public and private limited liability companies. Private companies are typically small or medium companies that require limited liability and legal personality but do not require access to public funding through the general capital markets although they can sometimes sell bonds by private placement. Usually, financing comes from contributions by the members themselves or alternatively by bank finance. Therefore, the disclosure requirements for these companies are less onerous and the regulation is generally more flexible, see Introduction point 3.1 of the EMCA.

Public companies exist in all EU Member States. This company form is designed for larger enterprises, which generally have access to the capital markets in order to raise finance, both in terms of equity capital from shareholders and loan capital from bondholders. These companies are genuinely capital companies in that they usually have a large and diverse number of shareholders. Such companies often give rise to agency problems as a result of the perceived separation of ownership and control.

However, large companies are not restricted to the public company form and small companies are not restricted to the private company form. Thus, the legal distinction between public and private companies stated in the EMCA is not based on the company's size, but rather on whether shares can be offered to the public and be publicly traded.

The distinction is consistent with the proposal for the European Private Company (SPE) Statute Article 3(d) and the Companies Acts of a number of Member States, among them Belgium, Czech Republic, Denmark, Finland, Germany, Ireland, Lithuania, Poland, and Sweden.

Re 2) The definition of the term "offer to the public" is derived from the Prospectus Directive 2003/71/EC, Article 1(d).

Re 3 and 4) The comments to EMCA Chapter 8 on management refer in detail to the definitions of the terms "director", "managing body" and "supervisory body".

Re 5) As discussed in greater detail in Chapter 8, Member States operate on the basis of a one- tier system, a two-tier board system or a variant. This organisation applies for public and sometimes also for private companies. In Ireland and the UK, each company has only one board of directors which may comprise both executive and non-executive directors. In these Member States, the term "director" refers to members belonging to this board. In other Member States, like Germany, there is both a management board charged with carrying out executive functions and a supervisory board charged with supervising the former. In such jurisdictions, the managing director may not be a member of either board. In a growing number of Member States, among them Lithuania, Denmark, Finland, France, Italy, Luxembourg, the Netherlands and Portugal, companies can choose between different board models. When using the term director, the EMCA refers to the members of the management body as well as a supervisory body of a company. Thus, the term director is used in sections where the duties of directors rest with the management body as well as the supervisory body, for example in cases of conflict of interest.

Re 9) Traded companies can be further classified depending on where they are publicly traded. With respect to publicly traded companies there are two main categories regulated in the EU:

- a listed company is a publicly traded company whose securities are listed on or are traded on a regulated market as defined by Article 4(14) of Directive 2004/39/EC
- a listed company is a publicly traded company, whose securities are listed on or traded on a multilateral trading facility according to the definitions in Article 4(15) of Directive 2004/39/EC

Only a small percentage of public companies registered in EU Member States trade their securities on a regulated market and fall into the first category above. Companies traded on a regulated market are generally subject to the full application of EU Directives whereas companies trading on alternative markets are subject to the relevant (usually less onerous) regulations of the relevant exchange.

The various sections of the EMCA indicate whether they apply to *public companies trading on a regulated market* and also to *public companies traded on a multilateral trading facility (MTF)*.

Section 1.03
Private and Public Companies

(1) A company may be public or private.

(2) The shares of a private company may not be offered to the public.

(3) Unless otherwise prescribed, this Act shall apply to private as well as public companies.

Comments

The EMCA deals with public and private companies limited by shares, as these types of companies are the ones most commonly used within the EU. Other types of limited liability business structures such as limited partnerships, co-operative limited companies and European companies are not addressed by the EMCA.

The drafters of the EMCA had in mind the following types of companies (as enumerated in Directive 2009/101/EC) as a guide for legislators:

- in Austria:

die Gesellschaft mit beschränkter Haftung; die Aktiengesellschaft;

- in Belgium:

naamloze vennootschap/société anonyme, commanditaire vennootschap op aandelen/société en commandite par actions, personenvennootschap met beperkte aansprakelijkheit/société de personnes à responsabilité limitée;

- in Bulgaria:

акционерно дружество, дружество с ограничена отговорност, командитно дружество с акции;

- in Croatia:

dioničko društvo, društvo s ograničenom odgovornošću

- in Cyprus:

δημόσιες εταιρείες περιορισμένης ευθύνης με μετοχές ή με εγγύηση, ιδιωτικές εταιρείες περιορισμένης ευθύνης με μετοχές ή με εγγύηση;

- in the Czech Republic:

společnost s ručením omezeným, akciová společnost;

- in Denmark:

aktieselskab, kommanditaktieselskab, anpartsselskab;

- in Estonia:

Osaühing, aktsiaselts;

- in France:

la société anonyme, la société en commandite par actions, la société à responsabilité limitée, la société par actions simplifiée;

- in Finland:

yksityinen osakeyhtiö/privata aktiebolag, julkinen osakeyhtiö/publikta aktiebolag;

- in Germany:

die Aktiengesellschaft, die Kommanditgesellschaft auf Aktien, die Gesellschaft mit beschränkter Haftung;

- in Greece:

ανώνυμη εταιρία, εταιρία περιωρισμένης ευθύνης, ετερόρρυθμη κατά μετοχές εταιρία;

- in Hungary:

Korlátolt felelősségű társaság, nyilvánosan működő részvénytársaság;

- in Ireland:

companies incorporated with limited liability;

- in Italy:

società per azioni, società in accomandita per azioni, società a responsabilità limitata;

- in Latvia:

akciju sabiedrība, sabiedrība ar ierobežotu atbildību, komanditsabiedrība;

- in Lithuania:

akcinė bendrovė, uždaroji akcinė bendrovė;

- in Luxembourg:

la société anonyme, la société en commandite par actions, la société à responsabilité limitée, la société par actions simplifiée;

- in Malta:

kumpannija pubblika/public limited liability company, kumpannija privata/private limited liability company;

- in the Netherlands:

de naamloze vennootschap, de besloten vennootschap met beperkte aansprakelijkheid;

- in Poland:

spółka z ograniczoną odpowiedzialnością, spółka komandytowo-akcyjna, spółka akcyjna;

- in Portugal:

sociedade anónima, sociedade em comandita por acções, sociedade por quotas;

- in Romania:

societate pe acțiuni, societate cu răspundere limitată, societate în comandită pe acțiuni;

- in Slovakia:

akciová spoločnosť, spoločnosť s ručením obmedzeným;

- in Slovenia:

delniška družba, družba z omejeno odgovornostjo, komaditna delniška družba;

- in Spain:

la sociedad de responsabilidad limitada, la sociedad anónima;

- in Sweden:

privata aktiebolag, publika aktiebolag;

- in the United Kingdom:

companies incorporated with limited liability.

The EMCA regulates both public and private companies within one Act but within its Chapters it distinguishes, where appropriate, between provisions dealing only with public companies or only with private companies. In the latter case, where justifiable, the EMCA relaxes the regulatory requirements and looks to formulate rules that take special consideration of the typical ownership structure of private companies.

The philosophy behind the implementation of the GmbH in Germany in 1892 was that the risk of misuse might be reduced if a company could not ask the public for financial support. As a consequence, a private company will usually have fewer shareholders than a public company. A decisive factor in private companies is the owners' personal relations among each other and the relations to the management rather than the number of owners. The same philosophy lies behind the Directive 2012/30/EU on capital – which is also reflected in most of the Member States classification of companies with respect to public and private companies. Section 3 carries on this tradition taking into account the special need of owners of a private company.

Section 1.04

Legal Personality and Limited Liability of Shareholders

(1) A company shall acquire legal personality upon registration.

(2) Save as otherwise provided in the EMCA or in the articles of association, a shareholder shall not be liable for more than the amount of share capital for which the shareholder has subscribed or agreed to subscribe.

Comments

Legal personality means that a company is a legal entity distinct from its shareholders. A number of the EU Directives and Regulations refer to companies with legal personality and the acquisition of legal personality. For example, Article 8 of Directive 2009/101/EC provides for actions undertaken "before a company being formed has acquired legal personality". Article 1(3) of Council Regulation (No 2157/2001) on the Statute for a European Company ("SE") provides that an SE shall have "legal personality". However, EU regulation does not provide for a definition or a definitive rule concerning the meaning of the term. Council Regulation (No 2137/85) on the European Economic Interest Grouping (EEIG) states in Article 1(2) that a formed group shall from the date of its registration have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued.

While EU legislation and the domestic legislation of a number of Member States such as Finland, Portugal and Sweden expressly provide that a company has legal personality, other Member States like Denmark, Ireland and the UK do not use the term "legal personality" in their Companies Acts.

In most Member States, the company is incorporated as a separate legal person upon registration. This is also the case in the SE Regulation (cf. Article 16(2)) and stated in the previous EPC proposal (cf. Article 9). In Luxembourg, the parties to the contract may decide to delay the acquisition of corporate personality and incorporation occurs upon the entering into of a contract for the formation of the company by notarial deed. Likewise, in the Netherlands, legal personality commences upon the execution of a notarial deed, which is to be registered later.

In some Member States such as Austria, Germany, Poland, Slovakia, Spain and Sweden companies (i.e. companies not yet registered, termed "Vorgesellschaft" in Germany) can enter into contracts, acquire/transfer property, sue and be sued upon signing the articles of association or upon granting the notarial deed (see further EMCA Chapter 2.). Hence, before registration, these companies enjoy legal status similar to a registered company. Registration remains relevant however for the purpose of determining the liability of the promoters and managers.

In the view of the EMCA Group, the deciding factor is not whether the law applies the term *"legal person"* but when certain provisions are applicable, such as in the case of signing the instrument of incorporation and registration.

In the EMCA, registration means that the company not only has full legal personality but also that shareholders and managers have no personal liability for the obligations of the company arising after registration. The concept of a company as a legally distinct entity in the EMCA means that the company has capacity to enter contracts, own property and sue or be sued (see Section 4). The company possesses these powers and duties in its own name.

Under the EMCA, the company does not exist as such before registration. However, the subscribers and shareholders become bound when they sign the instrument of incorporation, see Chapter 2, Section 3. In that sense, it can be said that the company is formed upon signing the instrument of incorporation (cf. the Swedish Companies Act 2005, hereafter Swedish Companies Act ,2:4). Thus, the fact that a company first receives legal personality on the day of registration does not mean that it may not start its activities before then. The instrument of incorporation must state the date when the formation of the company becomes effective, see Chapter 2, Sections 4 and 5.

The managers may carry out activities on behalf of the company in anticipation of registration. These activities are regulated by Chapter 3 (see Section 2) of the EMCA which sets out the legal consequences of measures taken on behalf of a company before registration. This provides an incentive to the persons who agree to form a company to complete the registration process.

The instrument of incorporation must identify the date at which the formation becomes legally effective. Legally effective means that the income from this date is the company's income and similarly the expenses are then the company's expenses. The company can choose a date before the date of the instrument of incorporation where the company's formation becomes legally effective. This is especially relevant when the company takes over an existing business. According to Chapter 2 sections 3 (2)(k) and 5, the company must state the date when the formation becomes legally effective. In the case where a company takes over an existing business, the company also needs to choose a date for which the formation starts regarding accounting. National accounting laws decide the companies' first accounting period and thereby the day of takeover. When choosing the date where the formation becomes legally effective, the company must respect the accounting rules. Similarly, national tax rules may limit the extent to which the company can be formed with retroactive effect. According to the EMCA it is also possible to choose a date ahead in time, see comments to EMCA Chapter 2, Section 3 (2)(k).

Off-the-shelf companies are permitted or at least not prohibited in all Member States. However certain Member States regulate their operation. For example, in Germany, the Federal High Court of Justice has required that rules on the formation of companies be applied *per analogiam* at the time the off-shelf company becomes active. Member States such as Luxembourg and Greece provide for the application of the judicial dissolution of dormant companies to off-the-shelf companies

Off-the-shelf companies can be used to avoid long registration procedures and the personal liability arising from activities before registration takes place (see above). The EMCA has no provisions on off-the-shelf-companies but assumes that they are legal according to national law. It should also be noted that if only a short period of time is required to register a company, for example because online registration is available, this obviates the need for such companies see Chapter 3, Section 34.

PART 2
GENERAL PRINCIPLES

Section 1.05

Capital and the Maintenance of Capital

(1) The company must have a share capital. The share capital shall be denominated in the company's accounting currency (which may be any currency).

(2) The assets of the company may be distributed to the shareholders only as provided in this Act.

Comments

Re 1) In the UK, larger companies often have classes of shares in different currencies, usually dollars and euros in addition to sterling. However, in most Member States there may only be one currency and the Group prefers this. Some Member States, such as the Netherlands for the Flex BV, allow the use of the national of a single foreign currency. The EMCA also allows this possibility in order to increase flexibility.

Re 2) The fundamental principle of distribution of the company's capital is expressed in Section 5(2). Detailed provisions can be found in EMCA Chapter 7 on capital of companies. A distribution can take place in the form of: a dividend (EMCA Chapter 7), a reduction of share capital (EMCA Chapter 7), an acquisition of own shares (EMCA Chapter 7) and on a dissolution of the company (EMCA Chapter 14).

In many Member States, a concealed distribution is seen as an illegal circumvention of the rules on distribution, see further Chapter 7 on capital.

Section 1.06

Purpose of the Company

(1) Unless otherwise provided in the articles of association, the purpose of the company is to increase its value.

(2) A company may only be formed to pursue a lawful object.

Comments

Re 1) Normally, the purpose of the company is to maximize the value of the company. It is important to ensure that both investment in and management of companies is carried out with a long-term and sustainable view, which is essentially a question of perspective, whereas the actual duration of any investment or management effort is less relevant as it is possible to act with beneficial long-term consequences within a short-time frame just as it is possible to harm the long term prospects of a company by continued mismanagement or by remaining passive over an extended period.

It is also important to differentiate between the stakeholders. A long-term perspective from management and board members is particularly important for the viability of companies. This is consistent with the view of the EU Commission that the primary responsibility of a company is to promote long-term viability.[34] It is also the accepted position of all Member States. That is also why it is important for example that directors' remuneration schemes encourage this. On the other hand, it seems more difficult and less sensible to try to promote a long-term perspective from shareholders by simply focusing on the duration of their investment. The very act of selling their shares in a company encourages liquidity and may also be a very potent warning to incumbent management that it is failing and may ultimately help takeovers that promote a more efficient use of the resources. To reward shareholders simply because they endure may be a disservice to the company. Lock-in effects should therefore be avoided.

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[34] See 2011 Green Paper on 'The EU corporate governance framework' (COM(2011) 164 final) and the Report of the Reflection Group on the Future of EU Company Law (the report is available at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf). See further the "Action Plan: European Company Law and Corporate Governance – A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies" (COM(2012) 740/2).

A path to promote long-term viability could involve encouraging corporate social responsibility (CSR), transparency and active ownership, and developing tools to support a constructive dialogue between shareholders and companies. For that purpose, there is a need to reduce costs and remove legal obstacles and regulatory barriers that preclude shareholders from actively engaging in companies. However, it should be recognized that even prudent long-term planning cannot guarantee future success. Consequently, it seems that the law should foremost focus on providing companies the necessary flexibility to ensure their long- term viability under rapidly changing business conditions while taking into account the interest of stakeholders. It should not attempt to block the necessary failure of inefficient companies.

The exception in Section 6(1) provides for companies established for non-profit making or altruistic purposes. The Group considers that Section 6(1) is not inconsistent with the view that companies at the same time can contribute to social and environmental objectives, through integrating corporate social responsibility as a strategic investment as an integral component of their core business strategy, their management instruments and their operations. This is in line with the UN-Principles (UN Global Compact and UN PRIX).[35] In Denmark, for example, the 2013 Companies Act covers companies that solely have altruistic purposes, and the requirement that companies should pursue economic profit has been removed.

There is an obvious connection between the purpose of the company and the powers and duties of the directors. Directors must exercise the powers granted to them for a proper purpose. They owe a duty of good faith to the company to act in the company's best interest. While these matters are dealt with in Chapter 9 of the EMCA on directors' duties, it is worth noting that wider factors are likely to be considered relevant to an assessment of proper conduct in this regard. For example, Section 172 of the UK Companies Act 2006 introduces wider corporate social responsibility into a director's decision-making process. See further Chapter 9 of the EMCA on directors' duties and Chapter 11 of the EMCA on general meetings.

In addition, accounting rules in Member States like Belgium, the Czech Republic, Denmark, France, Ireland and the UK demand that the annual accounts of traded companies include narrative reports which, while giving an account of the company's business and performance, also address broader environmental, social and community issues affecting the company. In other countries, like Austria and Germany, this obligation is confined to companies of a certain size.

Re 2) The purpose of a company is distinct from the objects which set out the parameters of permitted corporate activity. The latter is set out in the articles of association in accordance with Chapter 2, Section 4(e). A company may restrict the objects of the company in the articles of association but that is not a requirement. The objects of a company and economic profit will be discussed further in the comments to Chapter 2, Section 3(2) and Section 4 below.

Section 1.07
Transferability of Shares

A share may be transferred and acquired without restrictions, unless otherwise provided in the articles of association.

Comments

Article 3(d) of the 2nd Company Law Directive 2012/30/EU provides that information on "the special conditions if any limiting the transfer of shares" must appear in the statutes, the instrument of incorporation or a separate document published in accordance with the procedure laid down in the laws of each Member State. This gives flexibility regarding the free transferability of shares. This is also reflected in Section 7. Any limitation on transferability will have to be expressly provided for in the articles, the memorandum or a separate document open to public inspection and is subject to the requirement of Chapter 5 on shares. A subscriber for shares of limited transferability should thus have full knowledge of this fact at the time the company is formed.

[35] On United Nations Global Compact see http://www.unglobalcompact.org.

In a number of Member States the Companies Acts may provide for the option that transfers of shares in private companies require board approval or even shareholder approval. Transfers of shares are substantially less restricted in public companies. This reflects the fact that in practice, restrictions are more needed in close companies. As a common principle, the EMCA provides for a principle of transferability.

According to securities regulation, shares which are traded on the regulated market must be freely transferable (see Article 45 of Directive 2001/34/EC on the admission of securities to listing and on information to be published on those securities).

Chapter 5 deals with different kinds of restrictions on the transfer of shares.

Chapter 11 deals with the possibility of introducing restrictions on transfer after the formation of a company.

Section 1.08

Equality of Shares

All shares shall carry equal rights in the company, unless otherwise provided in the articles of association.

Comments

Section 8 concerns private as well as public companies.

Section 8 concerns the question of issuing various classes of shares. There has been a widespread discussion in recent years about proportionality between risk and control. In 1990, the Commission came forward with a proposal to the 5th Company Law Directive[36] that aimed to remove a number of voting restrictions. This proposal was included as an amendment to the proposed 5th Company Law Directive dealing with the structure of the public company. The debate has primarily focused on the "one-share, one-vote" (OS/OV) system. The proposed Directive was withdrawn and Member States have the freedom to allow different classes of shares. Since then the Commission has given up on the attempt to achieve a "one share, one vote" system, but the debate has continued. The High Level Group of Company Law Experts on issues related to Takeover Bids (2002) proposed that proportionality between ultimate economic risk and control meant that share capital which has an unlimited right to participate in the profits of the company or in the residue on liquidation, and only such share capital, should normally carry control rights, in proportion to the risk carried.[37] Thus recommendations were made to deal with pre-bid defenses which led directly to Article 11 of the Takeovers Directive (2004/25/EC). Article 11 introduces the break-through rule which was designed to increase the number of takeovers in the EU by eliminating governance arrangements which might otherwise impede takeovers. This provision recognizes that disparate voting rights are a feature of European company law and gives Member States the option of making provision for them in the context of a takeover of a company.

There are substantial differences in the various Member States regarding the right to have share classes and voting limitations. Germany and Poland, for example, have chosen the system of "one-share, one vote" as a principle which however also admits non-voting preference shares.

The Group is of the opinion that systems which allow share classes and voting limitations are not less efficient than systems which do not allow such differentiation. In a number of cases the market can – and will – force companies to have only one class of shares. In general shares are financial instruments among others. Thus, investors must decide which kind of instrument they want to buy.

According to the EMCA, shareholders are allowed to opt into a system of share classes and voting limitations once this is provided for in the articles of association. In such cases, the articles of association must describe the rights of different classes of shares, see Chapter 2, Section 4(2)(j).

See further on shares, voting rights and economic rights in the EMCA Chapter 5.

[36] The original proposal dates from 1972, OJ 1972, C7. Amendments: OJ 1983, C 240 and OJ 1991, C7.

[37] Final Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe (04.11.2002), p. 39.

Section 1.09

Equal Treatment of Shareholders and Minority Protection

All shareholders who are in the same position must be afforded equal treatment by the company.

Comments

In order to protect minority shareholders, particularly where decisions are made by a simple majority (see Chapter 11), it is essential that safeguards are introduced. Article 46 of the 2nd Company Law Directive provides that for the purposes of the implementation of that Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position. Article 33 of the same Directive provides an example of this principle in operation in its requirement that pre-emption rights apply whenever share capital is increased for cash consideration. The pre-emption right is found in the EMCA Chapter 6 on financing.

The equal treatment principle is also set out in the Shareholders Rights Directive (2007/36/EEC) Article 4 of which provides that companies that have their registered office in a Member State and whose shares are admitted for trading on a regulated market situated or operating within a Member State, must ensure "equal treatment for all shareholders who are in the same position with regard to participation and the exercise of voting rights in the general meeting". In the EMCA, the term "equal" has the same meaning as the term "equality".

In the shortest form the principle of minority protection is expressed, for example, in a general clause as formulated similarly in the Danish, Finish and Swedish Companies Acts: The general meeting, the board of directors and the managing body shall not make decisions or take other measures that are conducive to conferring an undue benefit to a shareholder or another person at the expense of the company or another shareholder. The German Stock Corporation Act (§ 53a), the Greek Law on companies limited by shares (Article 30), and the Polish Commercial Companies Code (Article 20) state explicitly that shareholders in the same position have to be treated equally.

EMCA Chapter 11 on general meeting provides for a general clause. A basic principle of equal rights can also be found in Chapter 5 (on shares).

The equal treatment principle is not absolute. For example, Article 33 of Directive 2012/30/EU itself sets out the circumstances in which pre-emption rights may be avoided. As will be clear from subsequent chapters, the EMCA also provides for circumstances in which deviations from the principle will be permitted. (see for example Chapter 6 on the pre-emption right.)

Section 1.10

The Majority Principle

The right of the shareholders to take decisions regarding the affairs of the company is exercised at the general meeting. Unless otherwise decided in law or in the articles of association, decisions shall be taken by simple majority of the votes cast.

Comments

It is necessary to allow a determined majority to manage the company's business operations. But in order to prevent the majority from being able to oppress the minority, the EMCA also contains general and specific mandatory rules which limit the majority's freedom of action. For example, it allows companies to have supplementary rules in the articles of association demanding super majority voting etc. It also establishes the principle of equal treatment in Section 9 above. Similarly, the majority principle and other provisions on minority protection are contained in Chapter 11 on general meetings.

The term "general meeting" in this Section does not require that decisions should always be taken at a physical meeting. On the contrary, Chapter 11 on general meetings allows the company to have electronic meetings, to make determinations on the basis of written resolutions etc. These decisions will be regarded as decisions made by a "general meeting". Therefore, "general meeting" also designate collective decisions by the shareholders.

Section 1.11
Directors' Duty of Loyalty and Care

A director of a company has a duty of care and a duty of loyalty.

Comments

The duties of directors include mainly two general principles. Firstly, the directors must exercise care in avoiding harm to the company. And secondly, the directors have a duty of loyalty in placing the company's interests ahead of their own.

The two principles are broadly recognized in European company law, but most of the Member States' Companies Acts have no provision directly expressing the two principles. An exception is the UK Companies Act part 10, Chapter 2, which has a statutory statement of directors' duties. A statutory statement is also included in Ireland in the Companies Act 2014.

The precise contents of the principles of duty of care and duty of loyalty are explained in Chapter 9 on directors' duties.

Section 1.12
Shareholder Democracy

(1) The general meeting is the highest authority of the company.

(2) Shareholders may include provisions in the articles of association establishing the manner in which the company will operate. Provisions contrary to a mandatory provision of this Act or some other Act, or contrary to the rules of appropriate conduct, are void.

Comments

Re 1) As noted in Section 10, shareholders take decisions at the general meetings. The board of directors runs the company. The division of tasks between the general meetings and board of directors is found in Chapter 8 (Management of the Company) and Chapter 11 (General Meeting). The systems of division in various Member States are different. In some Member States, the general meeting may take any decision regarding company matters. This is in principle the situation in the Nordic countries. In other Member States such as Germany, however, there is a strong division between the power of directors and the general meeting. It is important, however, to understand that the ultimate power in companies belongs to shareholders at the general meeting. The provisions in the EMCA should support and promote shareholders' opportunities to monitor the management and to take decisions regarding the company. This approach is in line with modern corporate governance thinking.[38]Thus, the principle of shareholder democracy should be understood as an overall goal or direction when considering the individual provisions of the EMCA. To a large extent it follows the intention expressed by the EU Commission that there is a case for aiming to establish a real shareholder democracy in the EU. It should not be seen as a specific rule, for instance to follow the principle of "one share – one vote" – which has been abandoned by the Commission. Further, the principle is not a principle that all decisions should be taken by the general meeting. The EMCA aims at ensuring that the most fundamental and important decisions should be agreed on by the general meeting and that the shareholders have effective means to exercise their rights at the general meeting and to be active shareholders.

Re 2) The provision in Section 12(2) is inspired by the Finnish Companies Act (624/2006) Chapter 1 Section 9.

The principle indicates that Section 12 determines that shareholders have the freedom to design the company according to their preferences. Restrictions on this freedom arise due to mandatory requirements of shareholder protection, creditor protection and possibly other legislation in the fields of employment, safety etc. The principle can also be seen as a supplement to the majority rule described in Section 10. Section 12 determines that shareholders have the final say within the company.

[38] See Green Paper on The EU corporate governance framework (COM(2011) 164 final).

The principle set out in Section 12 does not indicate that shareholder value in the narrowest sense is a mandatory aim for companies (see also comments to Section 6). What Section 12 does imply is that it is an overall principle and aim of the EMCA is that the EMCA should be designed and interpreted in a way as to allow and encourage shareholders to exercise their rights as shareholders.

The Commission has set about enhancing shareholders' rights particularly in listed companies. Thus, the Shareholders Rights Directive (2007/36/EC) and the Commission's Green Paper[39] and the 2012 Action Plan establish requirements in relation to the exercise of certain shareholder rights attaching to voting shares in general meetings of companies whose shares are admitted to trading on a regulated market situated or operating within a Member State. The reason behind the Directive is to reduce the problems for shareholders in companies with large numbers of shareholders and with (typically) a separation between shareholders and the management. In typical private companies it is even more obvious that it is appropriate for the shareholders to decide on company matters.

Section 1.13

Freedom of Movement within Europe

Unless otherwise prohibited in law, private and public companies are allowed to establish in or move their activities or seat, real or statutory, to other Member States of the EU without interruption of legal personality.

Comments

Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU) contain the principle of free establishment for persons and companies. Thus, private and public companies can establish branches and subsidiaries in other Member States.

Furthermore, EU case law (C-411/03, Sevic) states that restrictions on mergers between companies in different Member States are contrary to Article 49 TFEU.

The Cross-border Merger Directive (2005/56/EC) allows cross-border mergers. The Directive is implemented in most Member States and the implementation in a number of Member States also includes cross-border divisions.

The transfer of the main seat was included in the proposal of the 14th Company Law Directive. However, the adoption of this Directive is postponed. On 2 February 2012 the European Parliament adopted a resolution making recommendations to the Commission on a 14th Company Law Directive on the cross-border transfer of company seats.[40]

An alternative to cross-border mergers, the transfer of the main seat etc. would be the formation of a European Company (SE) and a European Private Company (SPE). The SE has only been of limited interest in most of the Member States. In addition, the project on the SPE has not yet been realized.

Access to cross-border business activity, including cross-border corporate mobility, is at the core of the fundamental freedoms provided to companies by the Treaty. It is also a fact that it is important for the integration of the European markets and the competitiveness of European businesses to have such access in an efficient way.[41] This cross-border framework cannot be completed sufficiently by contract, soft law or national legislation alone. A common EU-framework is needed to facilitate cross border activity and mobility, and to reduce costs and increase legal certainty when conducting business across borders.

A cross-border context normally calls for a common cross-border solution and this solution can be different from what applies to purely national settings. In a cross-border context the most important thing is to ensure that an appropriate degree of protection is found taking into account the cross-border element and taking into account already acquired rights.

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[39] See Green Paper on The EU corporate governance framework (COM(2011) 164 final).

[40] For a text of the European Parliament resolution see: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0019&language=EN&ring=A7-2012-0008.

[41] Report of the Reflection Group on the Future of EU Company Law of 2012 (the report is available at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf).

Company law is rarely the decisive factor for a company in its considerations in relation to cross-border corporate mobility. The stakeholder responses to the Commission consultation on the results of the study on the operation and the impacts of the statute for an SE-Company showed that it is normally a combination of different factors that dictates where a company chooses to locate and relocate.[42] It should be acknowledged that corporate mobility is already possible, but the tools at hand are not as cost-efficient as they could be.

Thus, from a user perspective the most important contribution that company law can provide is a clear and cost-efficient framework to facilitate companies' cross-border mobility and restructuring needs. An appropriate degree of protection of relevant stakeholders needs to be included in the framework, balancing the interests of businesses with the interests of stakeholders.

The Group considers that there is a need – in support of the Treaty's principle on freedom of establishment – to formulate a principle on free movement of companies within the EU in relation to company law.

In addition, this principle should be given substance, for example, by means of rules on international mergers and divisions and by means of rules on transfer of seat (see Chapter 13).

[42] The most important factors seem to include: efficient tax rules, flexible employment law, legal certainty, transparency and simplicity in company law as well as low registration costs and efficient and reliable regulatory authorities. The importance of an economic approach to location decisions was also stressed and some went as far as suggesting that company law has little relevance, as compared to the market itself. These views generally correspond to the majority of the views expressed at the Conference on the future of EU company law "European Company Law: The way forward" 16-17 May 2011, Brussels. Cf. also public consultations held by the European Commission, available at: http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_en.htm#market.

CHAPTER 2
FORMATION OF COMPANIES

PART 1
FORMATION OF COMPANIES

Section 2.01
Method of Formation 41

Section 2.02
Subscribers 41

Section 2.03
Instrument of Incorporation 42

Section 2.04
Articles of Association 45

Section 2.05
Time of Formation 46

Section 2.06
Name 47

Section 2.07
Share Capital 48

Section 2.08
Nominal Value or No-par Value 49

PART 2
PAYMENT FOR SHARES

Section 2.09
Consideration for Shares 51

Section 2.10
Payment in Cash 51

Section 2.11
Contributions in Kind 52

Section 2.12
Subscription Price 54

Section 2.13
Substantial Acquisitions after Registration 54

PART 1
FORMATION OF COMPANIES

Section 2.01
Method of Formation 41

Section 2.02
Subscribers 41

Section 2.03
Instrument of Incorporation 42

Section 2.04
Articles of Association ... 45

Section 2.05
Time of Formation ... 46

Section 2.06
Name ... 47

Section 2.07
Share Capital ... 48

Section 2.08
Nominal Value or No-par Value ... 49

PART 2
PAYMENT FOR SHARES

Section 2.09
Consideration for Shares ... 51

Section 2.10
Payment in Cash ... 51

Section 2.11
Contributions in Kind ... 52

Section 2.12
Subscription Price ... 54

Section 2.13
Substantial Acquisitions after Registration ... 54

General Comments

1. EU law

Directive 2009/101/EC (recasting the 1st Company Law Directive of 1968) includes provisions for the protection of the interests of members and third parties such as the disclosure of a company's registered office and its objects. Directive 2009/101/EC applies to private as well as public companies.

Directive 2012/30/EU (recasting the Directive 77/91/EEC or 2nd Company Law Directive) as amended by Directive 2006/68/EC) coordinates national provisions concerning the formation of public companies, such as minimum capital requirements, distributions to shareholders, and increases and reductions in capital.

The requirements include the following:

- the articles of association must include certain information as stated in Articles 2 and 3 of Directive 2012/30/EU;
- the minimum subscribed share capital must not be less than € 25,000, and
- shares may not be issued at a price lower than their nominal value, and where there is no nominal value, their accountable par as stated in Articles 8 of Directive 2012/30/EU.

The provisions of Directive 2012/30/EU apply exclusively to public companies and as there are no equivalent EU provisions applying to private companies, the EMCA Group is free to decide whether to adopt the provisions stated in Directive 2012/30/EU to private companies. It considered this question on a section by section basis. Where such rules are imposed on private companies in the EMCA, modifications may have been introduced in order to avoid unnecessary burdens being imposed on private companies.

2. National law

Member States have taken different views regarding the implementation of secondary EU legislation. As to public companies, all Member States were obliged to implement the mandatory provisions of Directive 2012/30/EU. However, there are differences regarding the implementation of the non-mandatory provisions of the Directive. Directive 2012/30/EU, relaxes some of the capital rules, such as the rules on formation, own shares (see EMCA Chapter 5 on shares), shareholder loans and financial assistance (see EMCA Chapter 7 on companies' capital). Generally, the EMCA contains similar relaxations in respect of public companies.

As to private companies the situation is quite different in the various Member States. As noted above, Member States are free to apply concepts similar to those applicable to public companies or they may adopt their own national measures.

See further explanations in the comments to the sections of Chapter 2.

3. Considerations

As noted above, there are different positions in Member States regarding private companies. A number of Member States, among them the Nordic countries and Poland, apply most of the rules in Directive 2012/30/EU to private companies. This for example is the case regarding the rules on contributions in kind. Member States such as Ireland, the Netherlands and the UK, on the other hand, have moved away from the Directive. All Member States derogate from the Directive's requirement of minimum capital.

The objective of Directive 2012/30/EU is to provide various safeguards to protect the rights and interests of shareholders and creditors of public companies. This is achieved through clarification, codification and coordination of national provisions relating to the formation of public companies.

It should be noted that the amendments in 2006 and 2012 relax some of the original rules of the former 2nd Company Law Directive. The EMCA makes use of this trend to relax formal requirements. However, generally, it is the view of the Group that the fundamental principles of Directive 2012/30/EU should also apply to private companies.

Regarding the method of company formation, there are two different approaches: the *successive method* and the *simultaneous method*. The EMCA Group has decided to use the latter, see Comments to Section 3(5).

The EMCA Group has discussed whether it should be possible to use so-called real non-par value shares. There has been a degree of uncertainty as to whether non-par value shares comply with EU law. However, such shares have been introduced in the Finnish Companies Act and the Group considers that non-par value shares should be allowed, see below Section 8.

Further, the EMCA Group has considered the Directive´s enumeration of the contents of the Instrument of Incorporation and the articles of association. The Group has chosen a simplified solution, which is connected with the fact that the EMCA is derogating from the Directive´s rules on lapse of incorporation.

PART 1
FORMATION OF COMPANIES

Section 2.01
Method of Formation

A company may be formed by:

(a) the creation of a company in accordance with the EMCA;

(b) the transformation of an association or other legal entity if allowed by legislation applying to such entities;

(c) the merger of existing companies;

(d) the division of an existing company.

Comments

Section 1 lists the different means by which a company which is to be governed by the EMCA may be established The most common way is to establish a company following the procedure described in this Chapter of the EMCA.

Article 15 of Directive 2012/30/EU states that pending coordination of national laws at a subsequent date, Member States shall adopt the measures necessary to require provision of at least the same safeguards as are laid down in Articles 2 to 12 in the event of conversion of another type of company into a public company (Section 1 (2)). The approach of the EMCA is consistent with this (see Chapter 4, Section 1 on transformation).

Formation by the transformation (Section 1 (2)) from a company without corporate status shall be governed by national law applicable to the transforming company.

In many Member States, there are restrictions on the type of entity which may become a private or public company (see EMCA Chapter 4, Section 1 on transformation).

In the event of a merger (Section 1(3)) or a division (Section 1 (4)), one or more new companies are created. Chapter 13 deals with mergers and divisions of companies established under the EMCA.

A private company can be converted to a public company and vice versa ("re-registered"). This will not give rise to the winding up of the company or lead to any loss or interruption of its legal personality, see Chapter 4, Sections 2-4.

Section 2.02
Subscribers

A company may be formed by one or more persons, legal or natural. Persons who do not have a contractual capacity according to national law may not be subscribers.

Comments

A number of different persons are involved in the formation of a company. The term "promoter" is often used to refer to persons who undertake to form a company and to take the necessary steps to accomplish this task. The term would not normally include professional service providers such as lawyers, accountants and notaries. Promoters are considered to be fiduciaries and various duties and responsibilities are imposed upon promoters in different jurisdictions pursuant to common law and statute. Another group of persons who are crucial to the formation of a company is the "subscribers". These persons subscribe to the Instrument of Incorporation thus agreeing to become its initial members on the company's registration. Once the company's shares are issued to them, they become "shareholders".

In most Member States only one person is needed to form a company. Private companies are subject to the Directive 2009/102EC (12th Company Law Directive) on single-member private limited liability companies which require that Member States allow a private company to have a sole member when it is formed unless its legislation provides that an individual entrepreneur may set up an undertaking the liability of which is limited to a sum dedicated to a stated activity. As to public companies, Member States are free to decide on a minimum number of shareholders. In many countries, the requirement to have more than one subscriber in public companies reflects historical rules with seven being the usual number. This figure originates from the UK 1846 Companies Act. For example, in Belgium, seven persons are required. In Portugal, five persons are required, unless the State owns the majority of the share capital. France followed the UK model but reduced in 2015 the minimum number of shareholders for public companies, from seven to two. In Ireland, traditionally seven subscribers were required but the Irish Company Law Review Group noted that this requirement "originated in the early life of company law and has survived without analysis or review rather than as a consequence of analysis and review". The new Irish Companies Act 2014 thus requires only one subscriber for private companies limited by shares which is the Irish model company (Irish Companies Act 2014, Section 17). The trend in Europe is clearly in eliminating any minimum number of shareholders. The Group also considers that there is no convincing reason to restrict the number of subscribers to a minimum number.

In a small number of Member States, there are further restrictions on the type of persons who may establish a company. In Poland, for example, private and public companies may not be formed solely by another single-shareholder (Polish Commercial Companies Code, Section 151(1) and Section 301(1)). No such limitations are imposed by the EMCA.

Some Member States require that subscribers must be domiciled within the EU. The EMCA does not contain such a requirement in Section 2(1). The subscriber's domicile must, however, be disclosed to the registration authority, see Section 3(2)(a)).

National law may differ regarding the contractual capacity of persons such as minors, bankrupts etc. but this is considered to be a matter of contract law and not regulated in the EMCA.

Section 2.03
Instrument of Incorporation

(1) The subscribers are responsible for, and must sign, the Instrument of Incorporation.

(2) The Instrument of Incorporation must contain at least the following information:

(a) the company's proposed name;

(b) the name and domicile of the subscriber(s) ;

(c) the date of the Instrument of Incorporation;

(d) the number of shares subscribed for by each subscriber;

(e) the price to be paid by the subscribers to the company for each share;

(f) the terms of payment by the subscribers for the shares;

(g) the amount of subscribed capital and the amount of capital which will be paid up at the time the company is registered;

(h) the total amount, or at least an estimate, of all the costs payable by the company or chargeable to it by reason of the formation;

(j) any special advantage agreed or arranged, at the time the company is formed for anyone who has taken part in the formation of the company or in transactions leading to the grant of such advantage;

(k) the proposed members of the management body and, if a supervisory body is required, the supervisory body;

(l) the proposed auditors of the company, where auditors are required; and

(m) the date the formation of the company becomes legally effective pursuant to Section 5.

(3) Agreements on matters that are dealt with but not approved in the Instrument of Incorporation are not enforceable against the limited liability company.

(4) The proposed articles of association shall be included in or attached to the Instrument of Incorporation.

(5) By signing the Instrument of Incorporation or authorizing its signature, the subscriber subscribes for the number of shares indicated in the Instrument of Incorporation.

(6) The term and duties of the proposed directors and, if already appointed, the auditors shall begin as of the signing of the Instrument of Incorporation. The formation of a company shall lapse where no application for registration has been made by the company within 4 weeks of the signing of the Instrument of Incorporation, or where the Registrar through a decision which has become final, has refused registration.

(7) If the formation lapses the amount paid for subscribed shares shall be repaid. The subscribers and members of the management and supervisory bodies shall be jointly and severally liable for such repayments.

Comments

Section 3 of the EMCA covers private as well as public companies.

The EU Company Directives do not define the term "Instrument of Incorporation" and Article 2 of Directive 2012/30/EU merely covers the contents of the instrument of incorporation, which is similar to the approach taken in this Section. The primary purpose of the Instrument of Incorporation is to evidence the intention of the subscribers to form a company and become members of that company on formation, see Section 3(5). The key information for investors and creditors regarding the internal allocation of powers between the directors and members of a company will be set out in one place, namely the articles of association set out in Section 4.

Re 1) In most cases, the promoters of the company will become subscribers of the company. However, this is not necessary. Their task is to prepare the Instrument of Incorporation and to identify subscribers, see below. However, individuals who wish to participate in the formation of a company must subscribe their names to the Instrument of Incorporation and they become the company's founding members.

Re 2) Article 2 of Directive 2012/30/EU provides for a minimum amount of information to be disclosed in the Instrument of Incorporation thus allowing Member States to require other elements to be added to the documents to be disclosed. Since the EMCA provides for simultaneous formation, all the necessary documents including the articles of association must be prepared at the outset. Thus, there is no reason to duplicate the requirements in the Instrument of Incorporation and articles of association. Therefore, aside from the company's name which is cited for identification purposes, the instrument of incorporation only includes issues which are not mentioned in the articles of association. The division between the contents of the Instrument of Incorporation and the articles of association is such that the issues that determine the company´s enduring organization are in the articles of association, while all the other information which is relevant to the company at the time of formation is in the instrument of incorporation. This is important as the articles of association will then provide shareholders and external stakeholders with a single accessible constitutional document. This is consistent with the approach taken in the UK and following the recommendations of the Company Law Reform Steering Group in its final report (paragraph 9.4).

The Instrument of Incorporation should indicate the price to be paid by the subscribers on formation for each shares. This includes information as to whether the capital should be paid in cash or in kind, see also Section 9 below. Further information can be found in the articles of association, see Section 4.

Article 2(c) of Directive 2012/30/EU provides that the Instrument of Incorporation should include the amount of the authorized capital or where there was none, the amount of the subscribed capital. The term "authorized share capital" refers to the amount of share capital stated in the Instrument of Incorporation with which the company proposes to be registered. Until this capital has been allotted, it will not show the assets of the company and could even serve to mislead investors. In practice, it acts more as a restriction on directors' actions as directors need to seek shareholder approval to increase the authorized amount. The UK Companies Act 2006 removed this distinction upon the recommendation of the Company Law Review Steering Group (Final Report, paragraph 10.6). The Group believes that authorized capital is not necessary to protect shareholders and therefore the EMCA makes no reference to authorized capital.

Section 3(2) contains information about fundamental issues regarding the company structure. Further regulation on different issues can be found in the different Chapters of the EMCA: on share capital see Chapter 3, Section 7; on terms of payment see Chapter 3, Sections 7(5) and 10; on price to be paid for the shares see Chapter 3, Section 12; and on the need for auditors (a number of Member States do not mandate auditors in small companies in keeping with the 4th Company Law Directive (78/660/EEC)) see Chapter 12.

Re 3) The Instrument of Incorporation should constitute the complete basis for share subscription. Therefore agreements on matters that are dealt with but not approved in the Instrument of Incorporation should not be enforceable against the limited liability company. Section 3(3) is inspired by Section 27(4) of the Danish Companies Act and Chapter 2 Section 11 of the Swedish Companies Act.

Re 4) There may be one document or two depending on whether the articles of association are included in the Instrument of Incorporation or attached thereto. In any event, the articles of association must contain the information set out in Section 4 below.

EU law leaves it to national law to determine whether a company is "established" by the "simultaneous method" or by the "successive method". The former means that the drawing up of the Instrument of Incorporation and other necessary documentation and the subscription for shares is accomplished at the same time. The subscribers may sign for the majority of the shares and they together with such other persons as may from time to time acquire shares become members of the company. The subscribers can stipulate the content of the statutes and the organization of the company. There is no need to arrange any further organisational meeting of subscribers. This method is adopted for example in Denmark, Finland, Sweden and in the UK. By contrast, with the "successive method" there are separate stages for the signing of the Instrument of Incorporation, the subscription for shares and the original general meeting. The EMCA provides for simultaneous formation.

As noted above there may be shareholders other than the original founding members. In public companies there may be an offer to the public and even in private companies it is possible to invite others to subscribe for shares to a limited extent.

According to the general principles of contract law, subscribers for shares are treated as offerors to the company and the company may subsequently decide whether to accept the offer and allot the shares or to reject the offer. In order to avoid the fact of the subscribers' offers misleading future shareholders or creditors, the shares subscribed for must subsequently be allocated to the subscribers and they may not be allotted a lower amount of shares, see Section 7(4).

Re 6) Although the company does not possess a separate legal personality until registration (see Chapter 1, Section 4(1) and Chapter 3, Section 2), directors are appointed at the time the Instrument of Incorporation is signed (see Section 3(2)(j)) and thus their duties commence at this time (see Section 3(6)). Chapter 3, Section 2 deals with operations before registration.

If auditors have been appointed by the time the Instrument of Incorporation has been signed, their duties commence at this time. However, there may be no need for an auditor to be appointed at this point of time (see Section 3(2)(k)).

The complete status of persons as directors is achieved at the point of registration. For example, registration implies that they are able to bind the company by contracts (see Chapter 1, comments to Section 4).

Re 7) Section 3(7) is derived from Chapter 2 Section 24 of the Swedish Companies Act 2005. If the application is filed after the four-week period post signing of the Instrument of Incorporation or if an application does not fulfil the formation procedure, the Registrar will refuse registration and the registration process will be required to re-commence. In such a case, the share capital contributed will be repaid.

The time limit for application varies between the various Member States. For example, Section 40(1) of the Danish Companies Act provides for 2 weeks and Chapter 2 Section 22 of the Swedish Companies Act provides for 6 months. Other Member States such as France for example do not foresee a time limit for application. The necessity to have a four-week period has been questioned by some EMCA commentators who argued that it was excessive and this period may warrant shortening depending on the circumstances of the different jurisdictions.

Section 2.04
Articles of Association

(1) The articles of association must contain at least the following information:

(a) the name of a company;

(b) whether the company is private or public;

(c) in so far as they are not legally determined, the rules governing the number of, and the procedure for appointing, members of the bodies responsible for representing the company with regard to third parties, the management bodies and the allocation of power among those bodies;

(d) the duration of the company, if it is limited;

(e) the objects of the company

(f) the share capital of the company

(g) the nominal value, if any, of the shares subscribed and the number thereof;

(h) the number of shares subscribed without stating the nominal value;

(j) the special conditions, if any, limiting the transfer of shares;

(k) where there are several classes of shares, the information under ((g), (h) and (i)) for each class and the particular rights attaching to the shares of each class;

(l) whether the shares are registered or bearer, and any provisions relating to the conversion of such shares unless the procedure is laid down by law;

(m) the nominal value of the shares or, where there is no nominal value, the number of shares issued for a consideration other than in cash, together with the nature of the consideration and the name of the person providing this consideration;

(2) The articles of association shall, when registered, bind the company and the members of it.

Comments

The EMCA uses the term "articles of association" to refer to the document which makes up the "constitution" that every registered company must have and follow. In some jurisdictions such as Ireland the term "constitution" in relation to a private company limited by shares is used to refer to this document. In other jurisdictions such as the UK, the term "constitution" has a broader meaning referring not just to the articles of association but also to certain other shareholders' resolutions.

The EMCA requires the same minimum information as is required by Article 3 of Directive 2012/30/EU. Hence, the requirements in Section 4(1)(a)-(m) are mandatory. Section 4(1)(a)-(m) refers to later provisions stated in the various chapters of the EMCA, such as to Section 6 on name, Section 7 on share capital, and Section 8 on shares with nominal value or no-par value shares. In addition, the articles of association may contain further provisions regarding matters set out in other chapters of EMCA (cf. Chapter 5).

Article 2(b) of Directive 2012/30/EU requires companies to state their objects in the statutes or the Instrument of Incorporation and these objects determine the company's capacity. A statement of the company's object clause may have legal consequences in three ways. Firstly, the directors only have the authority to act within the stated object (see directors' authorities and right to representation in Chapter 8 on management). Secondly, the object is a limitation regarding the rules on representation. Finally, in order to protect minorities, the directors have a duty to act within the stated objects. Where they do not do so, they may be liable to the minority (see Chapter 11 on minority protection). The requirement to disclose the object must be understood in line with this provision. The objects of the company determine the kind of business in which the company can engage. Thus it is a permanent limitation of the company's business. It may be changed however according to the rules of changing the articles of association.

It is commonly acknowledged in Member States, that shareholders can make *shareholder agreements* which contain supplementary provisions to the articles of association, for example on the transfer of shares and shareholder voting. Shareholder agreements bind the shareholders but not the company. Unlike articles of association, shareholder agreements are not generally disclosed to the public (unless market rules so require of listed companies). The EMCA does not contain any regulation on shareholder agreements but assumes that shareholder agreements are recognized in the Member States' national laws.

According to Article 3(a) of Directive 2012/30/EU, information concerning the company's registered office must be made public. The Directive does not require that the information appear in the articles of association or in the Instrument of Incorporation as it can also made public in a "*separate document published in accordance with the procedure laid down in the laws of each Member State*". Thus, the address should be stated in the executive order of the national authorities. The EMCA does not prescribe the contents of the executive orders because of the existence of these different systems. Thus, for example, the Danish authorities have moved the demand for location and address to the executive order in order to make it simpler to change the address of an office without requiring a change to the articles of association.

Re 2) The shareholders have a right to expect that the company will operate within the framework set by the articles of association. The articles are thus binding. A similar provision exists in the UK and Ireland. There, a company's constitution forms a statutory contract between the company and its members, and between each of the members in their capacity as members to the same extent as if there were covenants on the part of the company and each member to observe those provisions (Sec. 31 Irish Companies Act 2014 and Sec. 33 UK Companies Act 2006).

Chapter 11 of the EMCA provides that the articles of association can only be altered by a super majority decision at a general meeting of shareholders.

The purpose of Sections 3 and 4 is to ensure that potential shareholders receive all information needed to invest in the company. Further information may be made available subsequently pursuant to the requirements of the Prospectus Directive and national rules on prospectuses in securities law.

Section 2.05
Time of Formation

The company shall be deemed formed when the Instrument of Incorporation has been signed by all its subscribers or upon such other date as is set out pursuant to Section 3(2)(l) in the Instrument of Incorporation.

Comments

Section 5 prescribes the time the company is formed. The company will be formed either upon the signature by the subscribers of the Instrument of Incorporation or upon such later date as is set out in the Instrument of Incorporation.

The freedom provided for in Section 5 to choose the date upon which formation becomes effective is consistent with the national law in a number of Member States (see comments to Chapter 1, Section 4). As noted in Section 3(2)(l), the Instrument of Incorporation may decide that the company is formed either before or after the Instrument of Incorporation has been signed. It is important to note that formation in this context does not denote the time the company is incorporated and becomes a separate legal entity able to exercise all the functions of an incorporated company as this does not occur until the company is registered (see Chapter 1, Section 4). Instead it refers to the time when an operational entity is established and business may be conducted in its name. From this time, the company's management may undertake certain activities without incurring personal liability in order to prepare for the incorporation and subsequent functioning of the company (see Chapter 3, Section 2(4)). This is the time the contract between the subscribers is formed and the obligations arising thereunder come into existence. In addition, the time of formation determines the time when the company's income from business transactions is considered as company income and thus it has an effect on the commencement of the accounting period.

Certain limitations may apply to the chosen date arising from national tax law and accounting provisions when capital is paid up by way of cash contributions, etc. (see for example Danish Companies Act Section 40(3)-(6)).

Section 2 of Chapter 3 provides for the regulation of operations prior to registration when the company is in the process of being registered.

Section 2.06
Name

(1) Companies shall be under an obligation to, and shall have an exclusive right to, use the term "private" or "public limited company" or any abbreviations derived therefrom.

(2) The names of companies must differ from each other. The registration of a name is without prejudice to any claim which another person may have with respect to the improper use of a name in a manner contrary to national law.

(3) The name of a company must not be likely to mislead the public as to the nature of its business activities.

Comments

Re 1) Article 2(a) of Directive 2012/30/EU requires public companies to disclose information about their legal organisational form and name. However, EU law does not provide for rules authorizing abbreviations of the two company types or prohibiting names which may be confused with existing registered companies. Section 6 deals with names belonging to both private and public companies.

Pre-clearance by the Registrar is not required in the majority of Member States. However, registration may be refused if the name is similar to an existing name or if it is potentially misleading according to the files at the Registrar. In considering the company's name, the Registrar is not required to consult information from trademark registers etc. Consequently, most Member States advise applicants to conduct their own checks on their choice of name for the company in order to avoid a refusal on the grounds that the name has been used before. It is not intended that registration be conclusive evidence that a name is unique.

Chapter 3 of the EMCA sets out the registration rules for companies and describes the role of the Registrar.

Re 2) The company name must not include surnames, names of firms, specific names of real property, trademarks, logos, etc., that do not belong to the company or anything which may be confused therewith. National law on trademarks and national marketing etc include more detailed provisions on names. The rules in Section 6(2) and (3) should be understood as a part of these regulations.

Re 3) The name must not include any specification of undertakings which have no connection with the objects of the company. If the name describes a specific activity, it must not be maintained in that form if the nature of the activities changes significantly.

Article 12 of Directive 2009/101/EC contains provisions relating to the nullity of companies. Among the cases where the nullity of a company may be ordered under the Directive is where the Instrument of Incorporation and the articles of association do not state the name of the company. If a company name turns out to be misleading or otherwise illegal, the consequence should not be nullity of the company but rather a court decision on the legality of the name. See further in Chapter 3.

Section 2.07
Share Capital

(1) Public companies and private companies shall have a share capital. The share capital in public companies shall be at least € 25,000 or the equivalent in any other currency. Private companies may decide on the amount of their minimum share capital.

(2) The minimum capital of the company must be fully subscribed. If the minimum capital has not been fully subscribed, the formation of the company and the obligations of the subscribers shall lapse.

(3) Subscriptions for shares shall be listed in the Instrument of Incorporation. If shares have been subscribed subject to reservations, the subscription shall be void.

(4) No subscriber may be allotted shares of a smaller amount than that subscribed for by that subscriber in the Instrument of Incorporation.

Comments

Re 1) There has been much debate about the necessity to have a minimum capital. Article 6(1) of Directive 2012/30/EU requires that a minimum share capital of € 25,000 be subscribed for public companies. Under Directive 2009/101/EC, two alternative time periods are set for having this minimum capital - the time the company is incorporated or the time the company is authorized to commence business. There is no similar requirement for private companies. Private companies may for example choose a share capital of €1.

The requirements of the EMCA regarding share capital for public companies are consistent with Directive 2012/30/EU both with respect to minimum capital and with respect to the requirements to provide for evidence that capital is paid up. Payment for shares of a company is governed by Sections 10 and 11.

With respect to share capital in private companies, not all Member States have adopted the minimum capital requirement stated in Directive 2012/30/EU. While, the majority of Member States apply minimum capital requirements to private companies, France, Ireland, the Netherlands, Portugal and the UK do not. In several Member States such as Denmark and Sweden, the minimum capital in private companies has been reduced in recent years. In Spain, for instance, a minimum capital of only €3,000 is required. In Germany the minimum capital requirement for the GmbH is as a regular matter € 25,000 (§ 5 I GmbH). But if the form and name of an "*Unternehmergesellschaft*" (UG) is chosen which is also a private limited liability company, there is only a capital requirement of € 1 (§ 5a I GmbH). However, for the UG there are strict rules to build up reserves up to € 25,000 (§ 5a III, V GmbH). Also, the Greek "private company" introduced in 2012 as an alternative to the Greek "EPE" (GmbH) can have a zero capital. In Poland, the minimum share capital in private companies has been reduced to approximately €1200 but a new draft of the applicable law provides for 1 zloty minimum coupled with a solvency test and other instruments to protect the company and its creditors. In the Netherlands, since the revision of the law on private companies in 2012, creditors (and other stakeholders of the company) are protected by a distribution test while the minimal capital and the system of capital maintenance have been abolished. In Luxembourg, a simplified private limited company (*société à responsabilité limitée simplifiée* or sarl-s) has been introduced in 2016 and can have a capital of € 1. Like in Germany, it needs to build up reserves up to € 12,000 which is the minimum capital for private companies.

Article 19 of the SPE proposal also stated a capital requirement for the SPE of at least € 1.

In reality minimum capital requirements are arbitrary and do not take into account the riskiness of the business. They may also send inappropriate signals to the marketplace. The fact that money was available on a particular date does not mean that it remained with the company beyond that date. It is thus arguable whether a minimum capital rule offers creditors any real form of protection. If too high a figure is determined, it may deter persons from incorporating, impede capital rising and lead to forum shopping. On the other hand it might be considered that the requirement to raise a specified amount of finance may focus the minds of the subscribers on the business risks associated with their venture and in many cases put them to the effort of convincing a third party as to the viability of the project. On balance, the Group recommends that both private and public companies should have a share capital but that the requisite minimum level, according to Directive 2012/30/EU, applies only to public companies.

Re 2) In terms of the time period, the EMCA applies the minimum capital requirement at the time the company is incorporated, i.e. registered in the meaning of the EMCA (see EMCA Chapter 3, Section 1).

In some Member States, there is a limit to the number of shareholder for private companies. In Ireland the current limit is 149 (Section 17(4) Irish Companies Act 2014), in France (Article L. 223-3 Commercial Code) and Luxembourg (Article 181 of the Luxembourg Companies Act) it is 100. Companies with shareholders above this limit can only be public companies. In the majority of Member States, however, there is no limit and that is the option adopted by the EMCA, see above Section 3.

Although only public companies may offer shares to the public, companies are free to choose either a private or a public company. Thus, the EMCA does not prescribe a maximum number of shareholders in either public or private companies.

Re 4) Subscriptions for shares are considered to be offers to subscribe for shares. In order to avoid misleading creditors and future investors, subscribers are not allowed to subscribe for a large amount of capital and subsequently withdraw their subscriptions before allotment.

Section 2.08
Nominal Value or No-par Value

(1) The shares of a company may have a nominal value or a no-par value as provided in the Instrument of Incorporation.

(2) If the shares have a nominal value, all shares of that class in the company shall have the same nominal value. Accountable par may differ between shares.

(3) If the shares in the company have a nominal value, the amount to be credited to the share capital for each share at incorporation shall be at least equal to the nominal value.

Comments

Article 3 (b) of Directive 2012/30/EU provides that the statutes, the Instrument of Incorporation or a separate document published in accordance with the procedure laid down in the laws of each Member State in accordance with Article 3 of Directive 2009/101/EC must state the nominal value of the shares subscribed, and, at least once a year, the number thereof. The “nominal value”, in relation to a share, refers to a monetary amount, expressed as an amount, multiple, fraction or percentage of a currency. However, Article 3 (h) confirms that there is no requirement to issue shares with a nominal or “par” value and companies may issue shares with non-par value.

The majority of Member States allow companies the same choice. This is for example the case in Denmark (*stykkapitalandele*), Germany (*Stückaktien*) and Sweden (*kvotaktier*). According to the Swedish Companies Act 1:6 only “*kvotaktier*” are allowed. If the share capital is divided into several shares, each share represents a certain proportion (quotient) of the share capital; the portion constitutes the share’s quotient value. In other words, the quotient value can be calculated by dividing the registered share capital by the numbers of shares issued by the company. Other countries such as Greece, Ireland, the Netherlands, Spain and the UK require shares to have a fixed nominal value.

The EMCA allows companies to choose between nominal value and no-par value.

The argument for allowing no-par value share varies. First, the Finnish justification of the adoption of no-par value shares is that the nominal price does not reflect the issue price or the market price and thus it is of dubious value. Second, it is argued that no-par value shares give companies more flexibility, gives shareholders a better understanding of the shares' actual value, and allows for an easier transfer for non-Euro Member States from the national currency to the Euro. Third, it is argued that it is easier to carry out an increase in share capital because in a no-par value system, paper share certificates need not be changed. Finally, the preparatory works to the Finnish Companies Act point out that systems using nominal values are problematic with respect to IAS/IFRS-standards.

Apart from Finland, the European systems that purport to allow no-par values are however not to be considered as *real no-par value* systems. This is because these countries have kept a prohibition on selling shares below par. This is the case for example in the Swedish Companies Act where Section 2:15 states: "the payment for a share may not be less than the shareholder's quotation value." The prohibition on selling shares below par stems from Article 8 of Directive 2012/30/EU which provides that shares in a public company "may not be issued at a price lower than their nominal value, or where there is no nominal value, their accountable par". The term "accountable par" refers to the value obtained by dividing nominal capital by the number of shares outstanding.

The Swedish and the UK authorities have considered that Directive 2012/30/EU hinders a complete transition to a real non-par value system in which there would not be any ban on issuing shares below the nominal value or any legal provisions regarding the book value.

The Finnish authorities, in turn, have taken a different position which is in keeping with US developments (starting in California (Cal. Corp. Code 409) leading to the U.S. Model Business Corporation Act (MBCA §6.21)) where the whole concept of par value has been abolished. According to the Finnish Companies Act (Section 3:5), a company can choose to continue stating the nominal value/book value. In such a case, the prohibition on selling shares below par is kept. The new draft aimed at amending the Polish Commercial Companies Code is similar to the Finnish Companies Act allowing the companies to choose "real" non-par value shares or continue to retain the traditional nominal value system. The Finnish Companies Act also permits and actually prefers a system of shares without any reference to either nominal or fractional value. This assumes that there is no prohibition on selling shares below par. The Finnish Companies Act allows the subscription price of share issues to be entered into the unrestricted equity- capital fund. The EMCA Group considers that the Finnish system is in compliance with Article 8 of Directive 2012/30/EU although this is a moot point. More than 90 % of Finnish companies now choose a non-par value system.

The EMCA Group agrees that the real non-par value system should be allowed or at least be optional. Accordingly, Section 8(3) only prohibits selling shares below par where companies choose a system with a nominal value (see Section 12 below). One possibility raised within the Group is the requirement for the name of the company to reflect the fact that a real non-par system applies.

The rules in relation to share issuance etc. are covered in Chapter 6.

PART 2
PAYMENT FOR SHARES

Section 2.09
Consideration for Shares

Shareholders shall pay the agreed consideration in cash or provide the agreed consideration in kind in accordance with the Instrument of Incorporation.

Comments

Directive 2012/30/EU regulates the form of consideration to be paid upon the issue of shares. The EMCA allows for payment in cash or in kind. The following sections regulate the quality of the consideration and the level of consideration which must be provided. Sections 9-11 are in line with Directive 2012/30/EU.

Section 2.10
Payment in Cash

(1) In public companies, at least 25 per cent of the nominal value of the company's capital or, in the absence of a nominal value their accountable par and any premium, shall be paid up before registration.

(2) In public companies, unless otherwise provided in the articles of association or the terms of allotment, payment of the remaining capital can be demanded by the company at any time.

(3) In public companies, upon transfer of a share, which is not fully paid up, the transferee and the transferor shall be jointly and severally liable for the payment.

(4) The share subscription – in public as well as private companies - shall be binding on the subscriber when the Instrument of Incorporation has been signed. The subscribers shall not be released from the obligation to pay up their contribution. After registration of the company, a subscriber may not claim on the basis of the invalidity of the share subscription, that the terms of the Instruments Incorporation of the company have not been fulfilled.

Comments

As paragraphs 1-3 concern the situation where the entire capital has not been paid up, they only apply to public companies. Paragraph 4 deals with both private and public companies.

Re1) Although Directive 2012/30/EU requires a minimum capital for public companies, the full amount need not be paid up immediately. Article 9(1) provides that only 25 per cent of the nominal value or accountable par of the shares issued must be paid up at the time the company is incorporated or is authorized to commence business. In the majority of Member States the whole of any premium due must also be paid. On contributions in kind, see Section 11(2).

Re 3) In compliance with Article 14 of Directive 2012/30/EU, Section 10(3) states that the shareholders may not be released from the obligation to pay up their contributions. This applies to the amount of capital that has to be paid at the time the company is incorporated and to the remaining capital. This requirement seeks to protect other shareholders and the company's creditors. The EU Directives do not set out the consequences of late payment.

Section 10(3) applies to the transfer of shares that are not fully paid up and states that both the transferee and the transferor shall be held liable for paying capital contributions. There is no requirement that the company must give its consent to the transfer or other conditions. Such requirements can, however, be specified in the articles of association. See Chapter 5 on transferability of shares.

Directive 2012/30/EU includes no provisions as to when the remaining capital must be paid. The provision in Section 10(3) of the EMCA is similar to provisions in the company statutes in Denmark, France, Germany, Ireland, Spain and the UK. The problem does not exist in Member States such as Finland and Sweden as they require that the capital must be fully paid before registration.

A company is entitled to set out provisions for late payment in the articles of association or in the terms of allotment. Alternatively, the company could decide to rely solely on general principles of contract law.

Re 4) Section 10(4) refers to original subscribers. The problem mainly arises where there is a period between the time of subscription and the time of registration of the company. As long as companies can be registered online (see Chapter 3, Sections 1 and 8), this problem should be eliminated.

In contract law, the principles of invalidity involve a consideration of the relationship between the contracting parties. With respect to company law, there is a need to take into account the special interests of creditors. The consequence of this is that the rules of invalidity in contract law cannot be applied directly to company law.

Section 2.11

Contributions in Kind

(1) Any contribution of assets other than cash - a "non-cash contribution" - shall have a value that can be expressed as a monetary equivalent and shall not consist of an obligation to do work or perform services.

(2) A public company shall not allot shares as fully or partly paid up if the consideration for the allotment is, or includes, an undertaking which does not need to be performed until at least five years from the date of the allotment. If the undertaking should have been performed within five years but is not, payment in cash becomes due immediately.

(3) In private companies, where all or part of the share capital is paid up by way of contributions in kind, the entire share capital shall be paid up.

(4) Where shares in a public company have been paid for in kind, a statement shall be attached to the registration from an independent expert appointed or approved by an administrative or judicial authority commenting on whether the assets had a financial value to the company at least equal to the nominal value of the shares and any premium due.

(5) Section 11(3) will not apply to transferable securities and money-market instruments in the circumstances set out in Article 11 of Directive 2012/30/EU. The obligation to draw up an expert statement shall not apply to considerations of:

(a) Assets, which are individually measured and presented in annual or consolidated financial statements for the preceding financial year prepared in accordance with the provisions of the EMCA or the international accounting standards (e.g. Regulation 1606/2002/EC on the application of international accounting standards, the accounting rules laid down by legislation for financial firms, or the rules laid down in the 4th Company Law Directive (78/660/EEC) or in the 7th Company Law Directive (83/349/EEC)) and fitted with an audit report;

(b) Transferable securities or money market instruments, valued at the weighted average market price at which they have been traded on one or more regulated markets in the 4 weeks preceding the signing of the articles of association. A valuation report shall be prepared if the company's management board considers that this average price is affected by exceptional circumstances or otherwise cannot be assumed to reflect the current value of the securities.

(6) The company's management board is responsible for ensuring that deposits made in accordance with Section 11(5) do not damage the company, its shareholders or its creditors, and it shall prepare a declaration containing

(a) a description of the asset and its value,

(b) information about the procedure used for the assessment,

(c) a statement that the specified values are at least equivalent to the value of and, where appropriate, the premium on the shares to be issued as consideration, and

(d) a statement that no new circumstances arise which are relevant to the original assessment.

(7) The company shall publish the declaration provided for in Section 11(6) at the Register, at the latest in connection with the registration or notification of the registration of the company.

Comments

This Section regulates contributions in kind in order to ensure that the value placed on a non- cash asset is not inflated. In such a case, a real risk would exist that the Instruments of Incorporation would mislead creditors and future shareholders as to the capital value of the company.

Almost all Member States have provisions on contributions in kind to ensure that capital is paid up effectively. However, in Ireland and the UK, there are no statutory constraints for private companies, but directors are still bound by their duties when allotting shares for a non-cash consideration and transactions can be challenged on the ground that the consideration was illusory. Regarding formation, Directive 2012/30/EU seeks to facilitate capital related measures and eliminate specific formal requirements.

The EMCA contains rules on contribution in kind similar to the rules of Directive 2012/30/EU.

The provisions in Section 11, following Directive 2012/30/EU, are only mandatory for public companies. Some Member States have chosen to implement similar provisions for private companies. This is the case for example in Denmark, Finland, France (where even stricter rules apply), Germany, Italy, the Netherlands and Sweden. On the contrary this does not apply in Ireland and the UK. In the UK, where shares are allotted for a non-cash consideration in a private company, the directors are subject to the constraints imposed by their general duties (which would require them to obtain an appropriate value for the company) and the ability of the court to review allotments for an illusory consideration.

Generally, the EMCA Group considers that the provisions on contribution in kind in the EMCA shall apply – in accordance with the rules in the majority of Member States – to both private and public companies. If it follows from the articles of association that contributions may be made in kind, the Group assumes that there is a need to ensure that the consideration is not overvalued.

Re 1) Section 11(1) is consistent with Article 7 of Directive 2012/30/EU which provides that the subscribed capital may be formed only of assets capable of economic assessment. Not all Member States apply minimum capital requirements for private companies and if no capital is contributed at the time of formation, Section 11 clearly does not apply. Therefore, the provision in Section 11(1) only applies if there is a *contribution in kind* in a private company.

Contributions in kind may consist of any kind of assets. A question arises regarding whether claims against subscribers or shareholders may be included regardless of whether the claims are secured by a charge. The EMCA recommends that claims should be included provided that they have the value provided for in Section 11(1), for example if a claim is secured by mortgage.

Re 2) Section 11(2) is consistent with Article 9(2) of Directive 2012/30/EU which provides that where shares are issued for a non-cash consideration at the time the company is incorporated or is authorized to commence business, the consideration must be transferred in full within five years of that time. A similar provision is set out in §36a of the German AktG and in Section 587(1) and (4) of the UK Companies Act 2006. Article 9(2) indicates the difficulties which can stem from postponing payment of contributions in kind. For this reason, the Danish Companies Act 2009 requires that contributions in kind must be fully paid and this rule applies both to private and public companies. Similar provisions can be found in the Czech Republic and in the German AktG.

Section 11(2) applies only to public companies.

Re 3) With respect to private companies, the EMCA Group has considered whether contributions in kind must be fully paid up. The majority of the Group considered that Section 11(3) should also apply to private companies. This is justified on the basis that there is a greater potential for abuse in private companies and also because it prevents a lot of problems which may subsequently arise such as a change in value of the contributions in kind or the extinction of the object of the contribution. A minority of the Group considered that Section 11(3) should not apply to private companies, because it would constitute an obstacle to contributions in kind.

Re 4, 5, 6 and 7) These Subsections are consistent with Article 10 and 11 of Directive 2012/30/EU. Subsection 7 sets out the manner of publication provided for in Article 3 of Directive 2009/101/EC.

Article 10(4) of Directive 2012/30/EU permits Member States to exempt the requirement to have an experts' valuation report if not less than 90 per cent of the shares in the company are subscribed against non-cash contributions from one or several other companies and certain other requirements are met. The majority of Member States do not use this exemption and the EMCA Group assessed that there are no strong reasons to utilize the exemption in the EMCA.

The Group considers it unnecessary to define the term "independent expert" in Section 11(4). The type of expert considered most appropriate varies amongst the different Member States and the EMCA should not thus be prescriptive. In the majority of Member States, the expert will be an approved external auditor (for example, in Denmark, France, Finland, Germany and Sweden) or a public notary. In Greece, for example, an expert Committee is appointed by the Ministry (see Greek Companies Act Article 9). The EMCA leaves to the Member States to determine which expert is considered appropriate. There can also be exceptions in the Member States to the appointment of an expert for certain types of companies and for contributions in kind below a certain level.

Section 2.12
Subscription Price

(1) Shares with a nominal value shall not be allotted for a discount.

(2) If a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premium on those shares shall be transferred to free reserves.

Comments

The prohibition on issuing shares at a discount has been enforced since the 19th century. The prohibition is part of the capital maintenance rules designed to protect creditors. It is set out in Article 8 of Directive 2012/30/EU which provides that shares may not be issued at amounts below their nominal value. Where a Member State allows the issuing of shares without nominal value ("no-par value") such shares may be issued at a price lower than their "accountable value", see Section 8(3) above.

The issuance of shares at a discount is prohibited but of course this presents no bar to subscription at a premium. As shares generally trade at prices above their nominal value, the protection afforded by this prohibition is often limited. Nevertheless, the prohibition is thought to be of some value in Member States with the nominal value system and it is thus retained in the EMCA.

Article 8 of Directive 2012/30/EU allows Member States to derogate from the prohibition to allow those who undertake to place shares in the exercise of their profession to pay a discounted price for the shares for which they subscribe in the course of this transaction. The Group has decided not to provide for such derogation in the EMCA.

Section 2.13
Substantial Acquisitions after Registration

(1) If a public company acquires, otherwise than on the basis of a term of the Instrument of Incorporation, assets from a signatory of the Instrument of Incorporation within two years of the registration of the company, and the consideration paid by the company is no less than one tenth of the share capital at the time of acquisition, and if the acquisition does not fall within the normal course of the company's business nor occur in the public trading of securities, the acquisition shall be submitted to the general meeting for approval.

(2) The general meeting shall be presented with a report regarding the acquired asset and the consideration paid, as well as the statement of an approved auditor or similar independent expert on the report and on whether the value of the acquired asset is at least equal to the consideration paid for it. The decision of the general meeting shall be notified for registration within six months of the meeting. The report and statement referred to above shall be attached to the registration notification.

Comments

Article 13 of Directive 2012/30/EU contains inter alia a rule on hidden contributions in the form of substantial acquisitions after registration. A number of Member States such as the Czech Republic, France, Finland, Greece, Italy, Luxembourg, Poland, Slovakia and Sweden have provisions on such hidden contribution in kind, requiring shareholder approval for transactions between the company and shareholders where the transactions exceed a specific amount within a set period of time. Germany has even stricter rules on hidden contributions in kind for the public company (AG) as well as for the private company (GmbH).

Section 13 is consistent with Article 13 of Directive 2012/30/EU. Article 13 provides that if, before the expiry of a time limit laid down by national law of at least two years from the time the company is incorporated or is authorized to commence business, the company acquires any asset belonging to a subscriber for a consideration of not less than one-tenth of the subscribed capital, the acquisition shall be examined and details of it published in the manner provided for in the Directive and it shall be submitted for the approval of the general meeting. Furthermore, the Member States may also require these provisions to be applied when the assets belong to a shareholder or to any other person. It follows from Section 13(1) that Section 13 does not apply where the acquisition takes place on a regulated market or as part of the company's day-to-day business.

The rules in Article 13 of Directive 2012/30/EU apply only to public companies, and the EMCA Group considered whether they should also apply to private companies. In some Member States such as Italy, this is the case but other Member States including Austria, Denmark, Finland, Germany, Greece, Sweden and the UK apply these rules only to public companies. In Ireland and the UK, common law rules on "substantial property transactions" would also apply to such transactions.

The Group considered that the rule in Section 13 should only apply to public companies on the basis that a fixed two-year rule would be too inflexible and might easily be circumvented. Therefore, Section 13 should not apply to private companies. In private companies the problem on substantial acquisitions after registration is partly addressed by Chapter 9 on director's duties and Chapter 10 on director's liability.

CHAPTER 3
REGISTRATION AND THE ROLE OF THE REGISTRAR

Section 3.01
Registration of Formation 61

Section 3.02
Operations before Registration 62

Section 3.03
Changes to Information Already Registered........ 64

Section 3.04
Other Registrable Information 64

Section 3.05
Time of Registration 64

Section 3.06
The Register of Companies........ 65

Section 3.07
Interconnection of Companies Registers 65

Section 3.08
Electronic Registration........ 66

Section 3.09
The Language to Be Used........ 67

Section 3.10
The Duty to Disclose the Company's Identity........ 68

Section 3.11
The Role of the Registrar........ 68

Section 3.12
Remedying of Defects........ 69

Section 3.13
Subsequent Cancellation of Registration 69

General Comments

1. EU law

Directive 2009/101/EC (amending the 1st Company Law Directive) includes provisions on the registration of companies. It requires that basic company documents should be disclosed by way of filing with a company registry and by the publication in the national gazette either of the full or partial text of the document or by reference to the document deposited in the company registry, and that such documents should be available for inspection. In addition, Directive 2009/101/EC specifies the minimum information that companies must include in their letters and order forms. The Directive also includes provisions for the electronic filing of documents. The provisions stated in the Directive are included in this Chapter. The comments to the provisions indicate when a Directive provision has been adopted by the EMCA.

Most of the provisions of the Directive relate to both the formation of companies and the subsequent conduct of the affairs of the company. These matters are in general covered in this Chapter.

The Instrument of Incorporation cannot be changed after registration. However, the articles of association may be changed and any change should be registered.

Directive 2012/17/EU seeks to increase legal certainty and to improve the performance of public administration by promoting cooperation between business registers in Europe, setting out procedures for cross-border mergers, providing for seat transfers and updating the registration of foreign branches where cooperation mechanisms are lacking or limited. Moreover, the amendments aim to facilitate cross-border access to official business information by setting up an electronic network of registers and determining a common minimum set of up-to-date information to be made available to third parties by electronic means in every Member State.

2. National law

Article 11 of Directive 2009/101/EC states that “in all Member States whose laws do not provide for preventive administrative or judicial control, at the time of formation of a company, the instrument of constitution, the company statutes and any amendments to those documents shall be drawn up and certified in due legal form.” The preventive control is exercised by a Registrar or the court. In the majority of Member States there is also a requirement to involve a notary (see further below).

The agency or person responsible for registration differs among Member States. In some Member States such as Belgium, France, and Germany, a judicial body is responsible whereas in others such as Cyprus, Czech Republic, Denmark, Finland, Ireland, Malta, the Netherlands, Spain, Sweden and the UK, responsibility lies with an administrative entity. In Spain the Registrar is a highly legal qualified person.

In Bulgaria, Denmark, Finland, Ireland, Sweden and the UK there is no requirement to have a notary. In many other Member States however, such as the Czech Republic, Germany, Italy, Luxembourg and Spain there is a requirement to involve a notary to advise the subscribers, to clarify the content of the articles of association and other documentation and to verify legal compliance. This provides legal certainty and may make the task of the Registrar easier. On the other hand, it may also result in additional costs due to the potential overlap between the role of the notary and the Registrar or the court. Such an overlap may arise for example with respect to the consideration of the company’s name. Article 11 mentions a “preventive administrative or judicial control” but it does not contain any more specific provisions on the contents of this control.

In Greece, the incorporation document is drawn up by a notary and the registration is made in a Registry maintained by the local chambers of commerce. In the Czech Republic and Poland, registration courts exercise the function of the Registrar but within their authority they only inquire whether all the formal requirements have been met. It is a notary, who is entrusted with the power to draw up the deed and to verify its legal compliance. In Poland, certain documents such as the articles of association must be executed in a "notarial form." The registration court performs the content checking only in cases where a notary is not involved. In France and Portugal, the notary is mandatory only in the case of companies formed with contributions in kind. The UK allows the Registrar to accept a statement by those forming the company that they have complied with the registration requirements (which minimizes the need for checking) while making it a criminal offence to knowingly or recklessly make misleading or false or deceptive statements to the Registrar. The latter is a general provision applicable to all statements made to the Registrar.

The EMCA Group recommends that where notaries or other independent experts are used, there should not be a duplication of functions. For example if there is a requirement in national law that a notary confirms a property valuation, the same requirement should not be imposed on the Registrar. In connection with online registration, notaries could be permitted to make online submission (see Section 8).

3. Considerations

To a certain extent, the EMCA follows the provisions in Directive 2009/101/EC and the amendments while taking into account the experience of the various Member States. Thus, a departure from the Directive is made in Section 13 (see the comments to this below).

It should be noted that Article 11 of Directive 2009/101/EC is not applicable. Article 3 allows electronic filing of all documents at the Register. The EMCA Section 8 goes further and contains a provision on mandatory electronic registration. Even if electronic registration has the consequence that the Registrar does not normally check the filings, Section 1(4) allows the Registrar to check that the requirements for a registration have been met.

The EMCA Section 7 is also consistent with Directive 2012/17/EU as regards the interconnection of central, commercial and companies registers.

Section 3.01
Registration of Formation

(1) The directors are responsible for lodging the following with the Registrar:

(a) the required forms,

(b) confirmation that the contributions payable in cash or in kind have been made,

(c) a declaration by the directors that they have formed the view that the company has sufficient financial resources to meet obligations that are likely to arise until the end of the first financial year.

(2) The documents referred to in paragraph 1 shall be submitted electronically.

(3) The documents referred to in paragraph 1 shall be less than 6 months old at the time of lodgment.

(4) If the requirements in paragraphs 1-3 are complied with, the Registrar shall register the company and furnish a confirmation of registration.

Comments

The duration of the incorporation process varies to a great extent in the different Member States from a few days up to a month. A long process of incorporation may cause problems for example with respect to liability for contracts entered into during the pre-registration period. It is therefore important to shorten the incorporation process and to make it less costly.

An electronic formation procedure would constitute a solution to these problems. According to Directive 2009/14/EC, Member States have to ensure that all the documents can be filed electronically. However, Member States can go further and require the companies to file all information electronically. The EMCA has chosen the latter option, see Sections 1(2) and 8.

Re 1) Section 1(1) applies the obligations imposed on Member States pursuant to Article 6 of Directive 2009/101/EC. According to Article 6, Member States may decide which persons are responsible for taking care of the publication formalities. Hence, Section 1(1) identifies the persons responsible for registering the documents.

The required forms include a variety of information which should be filed with the Registrar. The list of forms and the contents of each vary substantially between Member States. In many cases, however, the information may be the same but the location in which the information may be found differs. In some cases, for example, the information is included in the notarized deed or the appended documents and in others it is in the application form itself. It may also be listed in an executive order, as is the case in Denmark.

The confirmation referred to in Section 1(1)(b) should be sufficient to satisfy the Registrar that the appropriate contributions have been made. It may take the form, for example, of a declaration by all directors, a declaration by a public notary or a formal confirmation from a financial institution. In terms of the time period, the EMCA applies the minimum capital requirement (see Chapter 2, Section 7) at the time the company is incorporated, i.e. registered within the meaning of the EMCA. The reason for this is that few Member States require specific authorization to be granted from a third party to commence business after registration. These exceptions are Belgium, Ireland, Luxembourg, Slovakia and the UK where authorization is required from the Registrar, but only where a public company is formed. Applying the requirement at the time of incorporation is thus more logical. See the provisions on payment in Chapter 2, Section 10.

Section 1(1)(c) goes further than Directive 2009/101/EC. It is inspired by Belgian law. It is part of a general provision which requires directors to ensure the company is solvent.

Because of the capital requirement in connection with formation, it is important to ensure that the management has considered the need for capital to support the future activities of the company. The EMCA does not demand a certain ratio of capital to activity, but instead it seeks to ensure that management continuously assesses the need for capital (see further below in Chapter 9 on directors' duties). While compliance by management with this obligation may become particularly important if a liability suit is filed in connection with bankruptcy, it can also become important for shareholders.

Re 2) Article 3(2) of Directive (2009/101/EC) states that companies must have the option of submitting documents by electronic means. Member States may even require that it is mandatory to file all or certain types of documents by electronic means. The EMCA (see Section 1(2)) incorporates a duty to use electronic means noting that the introduction of such a duty obliges Member States to provide the necessary means to fulfill this duty. The EMCA also includes mandatory provisions on online submissions (see Section 8).

Section 1(2) is consistent with Section 8, dealing with online registration.

Re 4) The function of the Registrar in determining whether to register a company is purely administrative (see further below in Section 11).

The registration is conclusive evidence that the requirements of EMCA as to registration have been complied with and that the company is duly registered under the Act as of the date stated on the Certificate of Incorporation. Once the company is registered, the registration cannot be cancelled by the Registrar (see below in Section 13).

Directive (2009/101/EC) Article 3 requires that, in each Member State a file shall be opened in a central register, commercial register or companies register, for each of the companies, both public and private, registered therein. The Directive does not stipulate whether a register must be carried out by a public authority and Member States have thus chosen different procedures.

As an overall term for public authority the EMCA refers to "Registrar" (see Chapter 1, Section 2(12)). The European Commission refers to the term "business register" (see the Commission's Green Paper on "The interconnection of business registers" COM (2009) 614 final and Directive 2012/17/EC as regards the interconnection of central, commercial and companies registers).

Section 3.02
Operations before Registration

(1) Anyone who has undertaken an obligation on behalf of the company after the date on which the Instrument of Incorporation is signed, but before the date of registration, or who has joint responsibility in this respect, shall be jointly and severally liable for that obligation.

(2) The company shall add the words "in the process of registration" to its name during the period referred to in paragraph (1).

(3) Upon registration, the company acquires the rights and obligations stipulated in the Instrument of Incorporation or conferred on the company after the signing of the Instrument of Incorporation.

(4) The management board may act for the company without personal liability in matters relating to the incorporation of the company, as well as take measures for the collection of the payment for shares.

(5) Where a party enters into a contract subject to a condition precedent that the company be registered, that party may, unless it has been otherwise agreed, withdraw from the contract if the registration application has not been submitted within the time limit or if registration is refused. If a party contracting with the company does not know that the company has not been registered, it may withdraw from any contract purportedly entered into by the company until the registration of the company.

Comments

Re 1) Chapter 1, Section 4(1) provides that a company acquires legal personality upon registration. Before registration, the company as such cannot acquire rights or enter into obligations, nor can it appear as a party in court or in dealings with other authorities. This does not mean, however, that for example an individual enterprise which is converted to a company cannot start or continue its business activity.

Even though the company only acquires legal personality upon registration, it is often necessary that a company conducts business before registration (see also EMCA Chapter 1, comments to Section 4). Article 8 of Directive 2009/101/EC states that *"if, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action the persons who acted shall, without limit, be jointly and severally liable therefore, unless otherwise agreed."* This is in line with the US Uniform Commercial Code (UCC 2.04) which deals with liability for pre-incorporated contracts.

Section 2(1) provides that, in such situations, the person acting on behalf of the company will be liable for any obligations incurred.

Re 2) The provision in Section 2(2) is similar to Section 41(1) of the Danish Companies Act.

Re 3) The provision in Article 8 of Directive 2009/101/EC must be understood as meaning that the Directive has two possible solutions as to transfer of liability. One is that the assumption of liability requires approval from the company upon incorporation and the other is that the assumption of liability is transferred automatically if the contracting party is aware that the deal is made with a company in the process of registration. Some Member States such as the Nordic countries have chosen automatic transfer of liability, whereas other Members States including Belgium, France and Holland have chosen subsequent approval.

Section 2 contains a system of automatic transfer of liability, which means that at the time of registration, liability is automatically transferred to the company. Thus, the person acting on behalf of the company is no longer liable for the obligations he or she incurred. This is in line with the Danish, Finnish, and Swedish Companies Acts and is justified on the basis that the subscribers to the Instrument of Incorporation are aware of this automatic transfer and by signing agree to be bound by it when the company is registered.

Sections 2(1) and (2) do not deal with all the situations in which promoters, subscribers or the management of the company may become liable. For example, in Austria and Germany, subscribers and directors will be liable for incomplete statements and in Slovakia, subscribers and directors will be liable for failing to execute a list of acts to be approved by the company. In common law jurisdictions, liability will be determined by applying general duties of care in tort and fiduciary duties to the company. This is also the case for Denmark, Finland and Sweden. This approach widens the net of potential liability to comprise other parties such as advisers or valuators.

Article 4 of Directive 2012/30/EU determines that if the laws of a Member State provide that a company may not commence business without authorization, they shall also make provision for responsibility for liabilities incurred by, or on behalf of, the company during the period before such authorization is granted or refused. This shall not apply to liabilities under contracts concluded by the company conditionally upon its being granted authorization to commence business. As the EMCA anticipates a company commencing business following incorporation without further authorization; Article 4 does not apply.

Re 5) A contracting party who was unaware that the company was not yet registered may withdraw from the contract until the company has been registered. The purpose of Section 2(3) is to protect contracting parties acting in good faith. The provision in Section 2(4) is similar to Section 41(3) of the Danish Companies Act and Section 2:27 of the Swedish Companies Act.

In almost all Member States, it is recognized that a company can start its business prior to registration. Even though the company cannot acquire rights or assume obligations prior to registration, it may acquire a right conditional on the subsequent registration taking place. According to the national laws of Member States, the holder of an interest in an asset must undertake an act of perfection in order to protect his or her interest. The EMCA does not contain provisions on acts of perfection. Assets that have been acquired prior to registration are secured against creditors, provided that there is compliance with the national rules on safeguard procedures. However, in Ireland and the UK, a company has no existence prior to incorporation by registration and any acts done by a person in advance are done solely in a personal capacity.

Operations prior to registration may cause a number of problems leading to litigation in many Member States. The EMCA Group recommends that these problems should be avoided as far as possible by shortening or eliminating the time period of the registration procedure. Therefore, the Group recommends that Member States implement a mandatory electronic registration system (cf. the EMCA Section 8 below) and also shorten the period between the signing the instrument of incorporation and the registration (see Section 5 and comments hereto).

Section 3.03

Changes to Information Already Registered

Any amendment to the articles of association of a limited liability company or changes to any other information registered with the Registrar shall be registered directly in the Registrar's IT system or submitted to the Registrar for registration.

Comments

Section 3 implements Article 2 and 3 of Directive 2009/101/EC. This provision is to ensure that the registered and published information remains up-to-date so that it is possible for stakeholders to rely, make decisions, and act on the basis thereof.

Section 3.04

Other Registrable Information

(1) All members of the management board of a limited liability company as well as the company's auditor, if applicable, shall be registered in the Registrar's IT system.

(2) If an auditor resigns or is removed before the end of term, the registration of that information or the application for registration shall be accompanied by an adequate account by the management board of the reason for such termination of office.

Comments

Re 1) Section 4(1) implements the requirement stated in Directive 2009/101/EC for publicity regarding the management of a limited liability company.

Re 2) Section 4(1) originates in Article 38(2) of the 8thCompany Law Directive (84/253/EEC) on statutory audits of annual accounts and consolidated accounts (now Directive 2006/43/EC). According to Article 38, the company as well as the auditor must inform the appropriate authority if an auditor resigns or is removed before the end of term. An adequate account of the reason for such termination of office must be provided by the central governing body. What is implied in "adequate account" depends on the specific situation. The central governing body must further ensure that registration regarding the change of auditor is performed (see further on auditors below in Chapter 12). The trend in Europe is towards exempting small companies from the auditing requirement (see further on auditors below in Chapter 12).

Section 3.05

Time of Registration

All information to be registered under the EMCA shall be recorded in the Registrars IT system no later than four weeks after the date of the operative resolution, unless otherwise provided by the EMCA.

Comments

It is important that the registrable information is published as quickly as possible. Thus, there should only be a short time-limit for registration of the registrable information, pursuant to the Sections 1, 2, 3 and 4 above.

Directive 2009/101/EC contains no time-limits for the registration of registrable information. However, the EMCA has chosen a short time-limit of four weeks as stated in this Section. The time-limit is the same concerning both formation and subsequent decisions about registrable matters. An example of a subsequent decision about a registrable matter is a decision of the general meeting regarding changes to the management. If such a change is not registered quickly, there is a risk that former management members can enter into a contract of behalf of the company (cf. the rules on representation).

Not all decisions need to be registered within a short time-limit. For this reason, the EMCA contains longer time-limits regarding decisions about capital increases and decisions about divisions and mergers (cf. Chapters 6 and 13).

Section 3.06

The Register of Companies

(1) The Registrar shall keep a register of companies registered under the EMCA. All registrations and publications under the EMCA shall be made in the Registrar's IT system.

(2) All information published in the IT system is deemed to have been communicated to third parties save in the case of transactions made on or before the 16th day after the date of publication where it is established that the third party could not have known about the published information.

(3) Information that is required to be registered and published cannot be enforced against third parties until it has been published in the IT system, save in cases where it is established that the third party knew about the information. Third parties are not prevented from relying on information that has not yet been published.

Comments

Section 5 implements Article 3 of Directive 2009/101/EC.

Re 2) As the information is registered in the IT system, third parties can no longer be in good faith as to the published information (cf. comments to EMCA Chapter 1, Section 4 and EMCA Chapter 3, Section 2 on agreements on behalf of the company). If a transaction is made on or before the 16th day after the date of publication, it will not be deemed to have been communicated if it is established that the third party could not have known about the published information. The burden of proof that the third party could not have known about the published information rests with the third party.

Re 3) Information, which is not duly published cannot be invoked to the detriment of the third party unless it is established that the third party was acting in bad faith (cf. Article 3 (5) of Directive 2009/101/EC).

Section 3.07

Interconnection of Companies Registers

(1) Through the European system of interconnection of registers, the following particulars should be available across borders:

(a) the name and legal form of the company;

(b) the registered office of the company and the Member State where it is registered;

(c) the registration number of the company;

(d) the opening and termination of liquidation and insolvency proceedings of the company and the cancelling of a company from the national register; and

(e) the completion of a cross-border merger or division

(2) The technical requirements for the establishment of a European system of interconnection of registers should be established by legislation or executive orders in the individual Member States. The Member States can choose to make additional information available.

Comments

Increasingly, Companies Act beyond national borders by establishing branches and subsidiaries and by engaging in cross-border mergers and divisions. Consequently, there is an increasing demand for access to information on companies in a cross-border context. Directive 2012/17/EC contains rules on the interconnection of national company registers by establishing a system of interconnection of registers, through which central information about the companies in the individual Member States is made available across borders.

This requires that both the individual Member States as well as the EU set up the technical requirements for the establishment of a European system of interconnection of registers. The Directive describes the technical requirements further. These requirements will be different in the various Members States depending on the structure of the registration authorities in the Member States. Therefore, it should be left to the Member States to determine exactly how they wish to apply the technical requirements of the Directive. This is stipulated in Section 7(2).

Section 7(1) stipulates the minimum requirements for the information, which is to be made available. Section 7(1) sums up the requirements enumerated in the Directive's Article 1 concerning the amendments to Directive 89/666/EEC on branches, the Directive's Article 2 concerning the amendments to Directive 2005/56/EC on cross-border mergers, and the Directive's Article 3 concerning amendments to Directive 2009/101/EC on coordination of safeguards.

Directive 2012/17/EC does not refer to cross-border divisions. This is because no directives have been enacted on this subject. However, EMCA Chapter 13 contains rules on cross- border divisions, and information on this is consequently included in the list of mandatory information (see Section 7(1)(e)). As already mentioned, the list of mandatory information in Section 7(1) only contains minimum requirements. Section 7(2) of the EMCA therefore authorizes the Member States to require additional information.

Section 3.08
Electronic Registration

(1) A newly formed company shall be registered electronically. A registration that is performed electronically shall be carried out according to the law.

(2) Access to electronic registration requires an authorization from the Registrar.

(3) The Registrar may prescribe rules governing electronic registration including:

(a) the information which the applicant can, or must, register;

(b) the form of the documents to be filed, the requirements of the electronic systems to be used, and the use of electronic signatures;

(c) the disclosure of information to the public;

(d) fees payable for the performance of any of the Registrar's functions and the provision by the Registrar of any services in connection with any of the Registrar's functions; and

(e) conditions for the use of, and registration in, the Registrar's IT system.

Comments

Directive 2009/101/EC requires that electronic registration be possible.

Online registration is currently feasible in the majority of Member States, other than Finland, Ireland and Luxembourg. In some Member States, such as Germany, Hungary and Italy, electronic registration is mandatory. There has been a very significant increase since 2014 in Member States which allow online registration. Some Member States allow cross-border online registration (e.g. Estonia, Portugal). The 2014 proposal of directive creating the *Societas Unius Personae* (SUP) was especially designed to facilitate cross-border online registration.

In some Member States electronic registration means only that documents for registration can be filed electronically. The system mentioned in Section 8 of the EMCA goes further as it allows certain qualified users to register in the company's register and thus constitutes real electronic registration. This of course saves a lot of time, but it also requires safeguards against misuse. Such safeguards are stated in Section 8(3). National law may specify or expand the requirements in supplementary regulations to the national Companies Acts.

Section 8 of the EMCA includes a mandatory electronic registration system although the EMCA Group is aware that not all countries currently have IT-systems which would make such a mandatory rule possible. Those Member States may apply a default rule until sufficient IT-systems have been employed. Section 8 is inspired by the Companies Act in Denmark where allows electronic registration which has worked without problems for several years.

Section 8 states that national law determines which persons are permitted to make electronic submissions. This can be restricted to professionals such as lawyers, auditors or notaries but also subscribers and others may be allowed to register. However, the national law should not give freedom to register and change documents without some guarantees being put in place. The guarantee in the Danish system is that those who are able to register must have a license and must fulfil the demands prescribed by the Registrar. Thus, an executive order includes the guarantees chosen by the Danish Registrar. The executive order also includes sanctions for misusing the right to register online. Non-compliance with the duties regarding electronic registration can entail the denial of access to electronic registration and in certain circumstances may lead to civil or criminal liability.

It should be noted that any applicant registering information directly or filing an application for registration in the IT system of the Registrar warrants that the registration or application is lawful, including that the applicant is duly authorized, and that the documentation required for the registration or application is valid (cf. Section 11(2)).

Electronic registration means that the Registrar does not have an opportunity to immediately verify the registration or application. This, however, does not preclude the Registrar from verifying the lawfulness of the registration or application at a later time or on a random basis.

Section 3.09

The Language to Be Used

(1) The Registrar may prescribe rules stipulating the language to be used in the documentation submitted in connection with registrations or applications for registration by limited liability companies.

(2) The Registrar may prescribe rules stipulating that voluntary registration and publication of company information may also be made in any other official language of the European Union in addition to the statutory publication in one of the languages permitted in paragraph 1.

(3) If there is any inconsistency between the documents and information that are subject to compulsory registration and publication under paragraph (1) and any translations of such documents and information that have been voluntarily published under paragraph (2), the company cannot rely on the translations as against third parties. However, third parties may rely on the text that has been voluntarily published as against the company, unless it is established that the third party had knowledge of the registrable version published in the IT system of the Registrar. Paragraph (1) does not apply to non-mandatory documents.

Comments

Section 9(2) and (3) implements Article 4 of Directive 2009/101/EC.

Re 1) It is a matter of national law as to whether languages other than the national language may be used. In connection with the establishment of the interconnection of companies registers (see Directive 2012/17/EC above) the Commission publishes the registered information in all the official languages of the Union (cf. the inserted Article 3(a) of Directive 2009/101/EC). To ease the implementation of the interconnection of companies registers, it would therefore be appropriate to require documentation submitted in connection with registrations and applications to be in, at least, the official languages of the Union.

Re 2) Section 9(2) allows Member States to voluntarily publish registrable information also in one or more of the official languages of the Union. The application must, however, always satisfy the rules stipulating the language to be used, which are set in accordance with Section 9(1).

By allowing Member States to publish registrable information in the official languages of the European Union voluntarily, this can contribute to the promotion of cross-border cooperation by removing the linguistic barriers regarding information searches for companies.

Section 3.10

The Duty to Disclose the Company's Identity

(1) The company's letters, order forms and other official documents, whether they are in paper form or in any other medium, shall state the following particulars:

(a) the registration number under which the company is filed in the register; and

(b) the location of the company's registered office and whether the company form is public or private;

(2) Where, in the documents referred to in the first paragraph, mention is made of the capital of the company, the reference shall be to the capital subscribed and paid up.

(3) If the company has a website, it shall contain at least the particulars mentioned in the first paragraph.

Comments

Section 10 implements Article 5 of Directive 2009/101/EC.

During the process of formation, the company must make clear that it is not yet registered and add the words "in the process of registration" to its name (cf. Section 2 above).

It should be made clear if the company has entered into liquidation, compulsory dissolution, examinership or bankruptcy.

Section 3.11

The Role of the Registrar

(1) Information shall not be registered if it does not comply with the provisions made pursuant to the EMCA, or the company's articles of association. The subject matter of any resolution shall not be registered if the resolution has not been passed in accordance with the provisions made pursuant to the EMCA, or the company's articles of association.

(2) Any applicant registering information directly or filing an application for registration in the IT system of the Registrar warrants that the registration or application is lawful, including that the applicant is duly authorized, and that the documentation required for the registration or application is valid.

Comments

Section 11 does not implement EU legislation.

Re 1) Section 11(1) specifies that the Registrar may request proof that the registered information complies with the law or with the company's articles of association. The Registrar has no general duty to determine whether the registered information or application is lawful. For remedy of defects see Section 12 below.

Re 2) The applicant or the person authorized by the applicant has a special duty to make sure that the information stated in the application is correct, and that the application is in accordance with the subject matter of any decision. The duty involves the applicant or the person authorized by the applicant ensuring that any decision is made in accordance with the relevant legislation, the articles of association and other agreements which in the given circumstances should be considered. The Registrar may carry out spot checks to ensure that electronic registration is lawfully made.

Section 3.12
Remedying of Defects

(1) If the Registrar believes that there is an error or defect in any information that has been filed for registration, and the error or defect can be rectified by a resolution of the general meeting or the central governing body of the limited liability company, the Registrar shall set a deadline for the matter to be remedied. If the defect is not remedied within the time stipulated, registration shall not be made.

(2) If registration is refused under paragraph (1), the applicant shall be notified in writing to such effect, including the reason for non-registration.

(3) If the Registrar becomes aware that the legality of any registration, whether pending or completed, is questionable, the Registrar shall discontinue registration under paragraph (1) until the matter has been clarified. The applicant shall be notified in writing that registration cannot take place, including the reason for non-registration. The Registrar shall also publish a statement on its IT system explaining the reason for the decision.

(4) For matters falling within paragraph (3), the Registrar may also register any resignations of the members of the board.

Comments

Section 12 does not implement EU legislation.

Normally the Registrar does not check electronic registrations, but if the Registrar is made aware that there are errors or defects in any information that has been filed for registration, Section 12 contains rules on the applicant's ability to remedy the errors.

Re 4) Conflicts regarding ownership within the company may occur which could cause disputes about who is able to manage the company and to be registered as the board. In such cases, Section 12(4) makes it possible for the Registrar to register a resignation of members of the board in order to avoid insecurity concerning the right to represent the company.

Section 3.13
Subsequent Cancellation of Registration

(1) If anyone asserts that the registration of a resolution passed by the general meeting or the management of a company is detrimental to them, the question of deregistration shall be determined by the courts.

(2) Such legal proceedings shall be commenced against the company within six months of the date of publication of the registration in the Registrar's IT system. The court shall send a transcript of the judgement to the Registrar for publication of the outcome of the case on the Registrar's IT system.

Comments

Article 12 of Directive 2009/101/EC contains provisions on the nullity of the company. Article 12 makes it clear that the Registrar does not have the competence to decide whether a company can be declared void after registration. Only a court decision can do this (cf. Article 13(a) of the Directive). This principle is stated in Section 13(1).

Section 13(2) sets a deadline for instituting proceedings concerning nullity. Article 12(b) of Directive 2009/101/EC contains an exhaustive enumeration of the circumstances which can cause nullity. Where a person believes that a registration has taken place contrary to the law or wishes to have the registration cancelled, they must apply to the courts who will deal with such claims.

The registration of any given matter such as a decision by the general meeting to change the articles of association is not a guarantee that the matter is lawful. Legal proceedings regarding lawfulness can be taken by the shareholders according to the rules in Chapter 11. Such a legal proceeding does not, however, affect the issue regarding the validity of the company. The same should apply to part of the grounds, which according to Article 12(b) of the Directive *can* cause nullity of the company. The EMCA Group considered the grounds provided in Article 12(b) and it is of the opinion that most of the grounds should not give rise to the company's nullity but only lead to the remedying of the defects. This applies to defects regarding the Instrument of Incorporation or entries in the articles of association regarding name, the size of the subscribed capital and other procedural defects in connection with the formation. It also applies to the provision in Article 12(b)(vi) concerning the number of subscribers. (This provision is not necessary, as Chapter 2, Section 1.02 states that only one subscriber is necessary.)

Consequently, the EMCA contains no special provisions on situations where a company should be declared null and void. As a result thereof, the EMCA does not contain provisions on the effects of the nullity. However, it does not prevent a situation where a company post registration can be declared null by a court decision. Article 13 of the Directive 2009/101/EC contains rules in such a case and makes it clear inter alia that the nullity shall entail the winding-up of the company as may dissolution. Likewise nullity itself will not affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company being wound up.

CHAPTER 4
FORMATION BY TRANSFORMATION AND RE-REGISTRATION

Section 4.01
Formation by Transformation 74

Section 4.02
General Provision 74

Section 4.03
Private Company Becoming a Public Company 74

Section 4.04
Public Company Becoming a Private Company 75

General Comments

1. EU law

Article 15 of Directive 2012/30/EU on capital requirements of public limited liability companies (replacing the former 2nd Company Law Directive 77/91/EEC) states that "*pending coordination of national laws at a subsequent date, Member States shall adopt the measures necessary to require provision of at least the same safeguards as are laid down in Articles 2 to 14 in the event of the conversion of another type of company into a public limited liability company*".

Directive 2012/30/EU solely deals with re-registrations from other entities to a public company. The Directive does not regulate re-registrations from public companies to private companies, nor re-registrations from public companies to other entities.

2. National law

Chapter 4 applies to a number of different situations.

First, the Chapter deals with the question of whether different kinds of legal entities including partnerships, co-operatives, mutual insurance associations and other forms of private associations as well as public entities may be transformed into private or public companies. The situation differs in the various Member States. In many Member States, transformation of partnerships and co-operatives is possible (Denmark, France, Finland, Germany, Greece, Luxembourg, Poland and Spain). In other Member States, certain entities such as partnerships (e.g. Austria and the Netherlands) and agricultural entities (e.g. Belgium) cannot be converted. In the majority of Member States, transformation of certain kinds of associations or legal entities, are governed outside national Companies Acts. This applies, for example, to transformation of financial institutions/associations which are governed by other legislation. In addition, foundations by nature cannot be transformed to public or private companies (they do not have an owner). In all Member States, companies can be formed either by incorporation or by transformation of other entities other than public or private companies. See further below in Section 1.

Second, the Chapter deals with re-registration of companies. Re-registration means an alteration of status when a private company decides to re-register as a public company and when a public company decides to re-register as a private company.

3. Considerations

The EMCA Group has decided that the EMCA should not include any limitations as to whether legal entities can be transformed into a private or public company. Such limitations should be found in national legislation governing these entities.

National law is different regarding which entities can be transformed into a public or private company. Therefore, the EMCA cannot choose the same rule for all Member States.

More Member States have rules on re-registration from public or private companies to other company forms, such as partnerships, cooperatives etc. The EMCA does not deal with these situations because of the disparity in treatment in national laws.

Section 4.01
Formation by Transformation

(1) Unless otherwise provided by national law or the entity's articles of association, any legal entity may be transformed into a public or private company taking in account the relevant provisions of the EMCA on formation.

(2) The transformation should be considered as an in kind payment of the share capital and as such must fulfil the requirements of Section 24 of the EMCA.

Comments

Re 2) Section 1(2) only applies to situations where a contribution in kind takes place. This is consistent with Article 15 of Directive 2012/30/EU on capital requirements of public limited liability companies which determines that *"pending coordination of national laws at a subsequent date, Member States shall adopt the measures necessary to require provision of at least the same safeguards as are laid down in Articles 2 to 14 in the event of the conversion of another type of company into a public limited liability company."* This means that the safeguards in EMCA Chapter 2 on valuation, information and demand for a prospectus apply.

Section 4.02
General Provision

A private company can be re-registered to a public limited company and vice versa. Re-registration of a company will not alter the legal personality of the company.

Comments

Section 2 confirms that the re-registration of a company will not alter the company's legal personality. Thus, following re-registration and notwithstanding the issue of a new certificate of incorporation to reflect the altered circumstances, the entity continues in existence without any loss of legal continuity and with its rights and obligations entirely unaffected.

Section 4.03
Private Company Becoming a Public Company

(1) The shareholders may, with the same majority required to amend the articles of association, resolve to re-register a private company into a public company.

(2) Re-registration of a private company into a public company will be deemed to be implemented when the company's articles of association have been amended to comply with the requirements for public companies and when the re-registration has been registered in the Registrar's IT system.

(3) The rules on minimum capital, contributions in kind, acquisitions after registration and other applicable provisions in the EMCA Chapter 2 also apply.

Comments

Re-registration from a private company to a public company must involve fulfilment of the requirements set out in Article 15 of the Directive 2012/30/EU, see above. Thus, all the safeguards in EMCA Chapter 2 apply, including Section 11 on contribution in kind and Section 13 on acquisitions after registration. Further, the requirements for minimum share capital must also be fulfilled. To re-register a private company as a public company, all the requirements in the EMCA concerning public companies must be complied with and any necessary changes to the articles of association must be made. The re-registration may be implemented without the consent of creditors.

Section 4.04
Public Company Becoming a Private Company

(1) The general meeting may, with the same majority required to amend the articles of association, resolve to re-register a public limited company into a private company. The re-registration may be implemented without the consent of creditors.

(2) Re-registration of a public company into a private company will be deemed implemented when the company's articles of association have been amended to comply with the requirements for private companies and when the re-registration has been registered in the Registrar's IT system.

Comments

The re-registration of a public company to a private company entails the company after the re-registration being subject to the requirements of the EMCA regarding private companies. In some ways, these requirements are more flexible than the requirements regarding public companies, for example, with respect to the requirement for a minimum capital. The company must make all necessary changes to the articles consequential on the change in the company's status.

CHAPTER 5
SHARES

Section 5.01
Definition of Share 86

Section 5.02
Types of Shares: Bearer and Registered 88

Section 5.03
Form of Shares: Paper or Dematerialized 89

Section 5.04
Change of Form of Shares 90

Section 5.05
No-par Value or Nominal Value of Shares 91

Section 5.06
Voting Rights Attached to Shares 95

Section 5.07
Profit Rights Attached to a Share 99

Section 5.08
Classes of Shares 99

Section 5.09
Change to the Rights of a Class 100

Section 5.10
Multiple Claimants on Shares 101

Section 5.11
Share Register for Registered Shares 102

Section 5.12
Access to the Share Register 103

Section 5.13
Transfer of Shares 104

Section 5.14
Limitations on Free Transferability of Shares 106

Section 5.15
Redeemable Shares 107

General Comments[43]

1. EU law

The EU company law Directives do not contain many rules that limit the discretion of national regulators in respect of shares –particularly so in the case of private companies but also for public companies.

1.1. Nominal value and accountable par

It is sometimes argued that the 2nd Company Law Directive forces Member States only to allow for their public companies either nominal value shares or par value shares. This would mean that true no par value shares would therefore not be allowed. It seems that there was a view in the UK during the developmental stages of the Companies Act 2006 that true no-par value shares could not be introduced because of the Directive. This interpretation of the directive is almost certainly wrong. Nowhere does the Directive contain an explicit rule concerning nominal or par value. The argument that there is a requirement to choose between nominal value and par value is usually derived from the provision in Article 8 of the Directive: "*Shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par.*" The concept of accountable par was introduced into the Directive of 1976 because since 1913 Belgium had allowed shares with what Belgian legislation described as a "fractional value". Whatever the original intention of the Belgian legislator, this type of shares has long since evolved into a true no par value share system in all but name and with some procedural complications. Since the 2nd Company Law Directive is based on the Belgian system, it seems fair to argue that the Directive does allow true no par value shares. This has in any case been the interpretation of the Finnish legislator, who introduced such shares, also for public companies, in the new 2006 Finnish Companies Act.

[43] The working group on Chapter 5 was chaired by Professor Hans de Wulf (University of Gent, Belgium).

It may be useful to briefly illustrate the Belgian system with an example. Suppose a company has a legal capital of 1000 divided into 100 shares without nominal value. The par value/accountable par/"fractional value" of these shares is "1/100th" of capital, in this case: of a legal capital of 1000 which can also be expressed as 10. In a true no par value system, this "10" can change over time even while the 1/100th stays the same, or additional shares can be issued and each share will be deemed, as a rule, to represent 1/nth of the legal capital, "n" being the total number of shares that has been issued. The Belgian system is a true no par value system, but procedurally more complicated than systems that were true no par value systems from the 1st Article. Suppose our model company wants to perform a capital increase because it needs new funds as a result of losses, and the company has found an investor willing to provide those funds. Assume that the net asset value of the existing 100 shares is lower than legal capital (because of the losses), say it is 800, i.e. 8/share. Assume the new investor is prepared to buy 100 additional shares at a price of 8 per share. Under Belgian law what will happen is that the company increases its share capital through a decision of the general meeting to 1800, represented by 200 shares (100 old ones, 100 newly issued). For a legal second, the company will have two groups of shares (not considered classes in the legal sense by Belgian law): one group representing the original legal capital and with a fractional value of 10 and the group of newly issued shares with a fractional value of 8. Immediately after approving the principle of the capital increase, the general meeting will take a second decision, unifying both groups of shares. This will result in a legal capital of 1800 divided by 200 shares with an accountable par/par value/ fractional value of 9 each. Since each share represents an equal fraction of legal capital, they will normally have the same rights (Belgian law provides that in public companies, voting rights are mandatorily proportionate to fractional value; for profit rights this is merely the default rule). All that needs to happen for this transaction to be lawful under Belgian law is that (a) the general meeting, not the board using authorized capital, must take the decision (b) as indicated, the general meeting must explicitly decide to unify the two categories of shares (c) the board must present a report to the general meeting in advance of the general meeting deciding on the capital increase in which it explains the financial implications of the transaction for present and future shareholders. The only - unimportant- differences between the Belgian approach and an approach in which par value/ accountable par plays no role at all are that, first, under such a true no par value system, there is probably no need for a general meeting decision unifying the two categories of shares – but note that under Belgian law, too, these categories are not seen as classes and their unification therefore does not need to happen under the rules for unification of or changes to class rights- and second, that under a true no par value system, the rights attached to shares are not even theoretically linked to the par value/accountable par of the share but are, as a rule equal for every share (whereas in Belgium this equality theoretically takes the form of proportionality between rights and fractional value/accountable par, with the rule being mandatory for voting rights).

It is important to note that since the Directive allows the Belgian system, and the Belgian system is a true no par value system in all but name, true no par value systems cannot be deemed incompatible with the 2nd Company Law Directive. EMCA proposes to adopt such a system.

1.2. Equality

The principle of equality is expressed in Article 46 of the 2nd Company Law Directive for public companies, and in Article 4 of the 2007/36/EC Shareholder Rights Directive for listed companies. Article 46 states: "*For the purposes of the implementation of this Directive, the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position.*" This is essentially an anti-discrimination provision. It does not mean that shareholders should all have the same rights. On the contrary, the default rule in corporate law is that rights are proportionate to investment, leading to albeit proportionate inequalities. More importantly and to the point, the rule of equality in the directives does not preclude disproportionate shareholder rights (preferential dividends, multiple voting rights, non-voting stock). It is nothing more than a ban on discriminatory treatment of shareholders by the company (and hence company organs like the board). The European Court of Justice has ruled that EU company law does not contain a general principle of equal treatment of (minority) shareholders, only discrete (but important) illustrations limited to specific situations such as, in the 2nd Company Law Directive, capital increases and capital reductions.[44]

[44] ECJ, 15 October 2009, case C–101/08, Audiolux and others v. GBL and others, Bertelsmann AG and others.

1.3. Voting rights

There is no EU legislation regarding classes of shares. Under Internal Market Commissioner McCreevy (2004-2010), the Commission considered the issue of one share/one vote and for a while considered making this rule mandatory for listed companies. In 2007 several studies of the issue, commissioned by the EU Commission were published[45] and based on these and the feedback from stakeholders, the Commission decided to drop its plan for legislation in the area. Even for listed companies, no convincing rationale could be found for an across the board enforcement of a one share one vote rule. EMCA therefore favors allowing multiple voting rights.

1.4. Transferability of shares

The 2nd Company Law Directive mentions restrictions to transferability. Article 3 of the Directive contains a provision stating that either the instrument of incorporation or the articles of association must include information concerning any restrictions to transferability. Article 3 also states that the instrument of incorporation or the articles of association should decide the form of the shares. However, there is only a duty to provide information on the restrictions in question and not substantive restrictions. The question of restrictions is thus regulated by national law.

Directive 2004/25/EC on Takeover Bids contains rules on squeeze-out and sell-out. Article 15 and 16 contain rules on the rights of squeeze-out and sell-out for offerors and offerees, respectively. The rules in Article 15 apply where the offeror holds securities representing not less than 90 % of the capital carrying voting rights and 90 % of the voting rights in the offeree company. According to the Directive, the rules apply only to companies whose shares are traded on a regulated market.

1.5. Information on shareholders

Regarding registration and publication of information on shareholders, the 2007/36/EC Shareholder Rights Directive contains provisions on the company's register of shareholders, see Article 13. The Article requires inter alia a list disclosing to the company the identity of each client and the number of shares voted on his behalf (power of attorney). The provision deals with the shareholders' exercise of voting rights at the company's general meeting (see the EMCA Chapter 11 on general meeting.)

Regarding shareholder identification there are two main approaches. First, there is a need to provide investors with information on ownership of the company. This is needed especially in listed companies in order to clarify the ownership structure for all involved so that creeping acquisitions of control are prevented and investors know what type of power structure they are buying into. Article 10 of the Takeover Directive is crucial in this respect as is the disclosure requirements of the Transparency Directive 2004/109/EC. Article 12 of the latter contains provisions which force the shareholders owning major holdings, i.e. 5, 10, 15, 20, 25, 30, 50 and 75 % of the voting rights to notify the company of the acquisition or disposal of shares (cf. Article9 and the following). The Transparency Directive applies to companies traded on a regulated market. Therefore, the Directive is usually implemented in the Member States' securities laws.

The second approach is the company law approach. The question is whether the company and the shareholder need mechanisms to help issuers identify their shareholders in order to facilitate dialogue on corporate governance issues, and further to enhance the shareholders' possibilities to safeguard their interests in relation to the company. There are currently no rules on this at EU level but the amendments to the Shareholder Rights Directive adopted in 2017 will introduce rules on "shareholder engagement" which seek to foster a long term approach by shareholders to their relationship with companies. As part of this approach, the Directive also will introduce in Member States law additional measures to allow companies to identify their shareholders, so that effective communication between company and shareholders would be enabled.

[45] See http://ec.europa.eu/internal_market/company/shareholders/indexb_en.htm

2. National law

Shares may have different form and contents. Shares may be registered shares (name shares) or bearer shares. Further, the shares may either be transferable or non-transferable. Shares may be dematerialized or non-dematerialized. If shares are dematerialized, they are issued through a special register and therefore they are not paper-based. Shares, which are not dematerialized, may be issued using a share certificate (ie paper-based) or without issuing certificates. In some Member States, for example Denmark, it is possible to issue share certificates in respect of registered shares as well as bearer shares conditioned so that they are not dematerialized.

In the majority of Member States, shares in private companies are uncertificated (ie not paper- based), with the managing directors/board of directors generally assuming responsibility for maintaining a share/shareholders' register. In Denmark, Finland, Germany, Greece, Lithuania and Sweden, it is possible for company shares to be certificated (though in practice this is rarely done) whilst certification of registered shares is the norm in private companies in the UK and those Member States with Anglo Saxon legal roots. Bearer shares issued by private companies in the EU are uncommon and are possible only in a small number of jurisdictions. For example, bearer shares are not allowed – in private as well as public companies - in Sweden, the Netherlands and Belgium.

The majority of Member States allow domestic public companies to issue either registered or bearer shares. However, they vary as to the certification requirements. While there are Member States providing for obligatory or voluntary certification, other Member States, such as France (since 1981) – or in case of a traded company – Sweden and the UK, oblige traded companies to have dematerialized shares.

A large number of Member States permit shares in a private company to be transferred only by way of a notarial deed or in written form with signatures certified by a public notary, whilst the remaining Member States do not require such a level of formality and allow shares to be transferred pursuant to simple agreements or written declarations. It is often the case that the company must, as a minimum, be notified so that the relevant share/shareholders' register can be updated (e.g. France, Germany, Greece, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, and Slovakia). Many Member States allow the articles to set out the exact mechanisms of transfer, and in some cases, to adopt a more relaxed (e.g. Czech Republic) or stricter (e.g. Austria, Belgium, and Italy) approach than provided by law.

The transfer requirements regarding shares in public companies are more varied and can differ substantially from Member State to Member State. Probably the greatest similarity in approach lies with bearer shares, when they are not dematerialized, where physical delivery of the certificate will generally be sufficient to transfer title. In Germany, where certification is obligatory, the individual unregistered shares will normally be represented by a global share certificate which is held by a depository and in which case the individual share will be transferred by way of the assignment of a delivery claim against the depository. The transfer of registered shares can be effected in most Member States through endorsing the certificate (e.g. Austria, Czech Republic, Germany, the Netherlands, Poland, Slovakia and Slovenia) whilst other Member States (e.g. Greece) allows transfers to be effected by way of a simple transfer document which, in contrast to the general position for private companies, does not need to be notarized. Dematerialized shares may be transferred by written agreement and, in almost all Member States the transferor or transferee must ensure that the share register is updated.

The company laws in all Member States include provisions which demand the company to keep a share register. There are substantial differences regarding the contents of and the access to the register (shareholder identification). This is both related to the question of whether companies are allowed to issue name shares/bearer shares and who has access to the register. As mentioned above, the company may choose to issue either registered shares or bearer shares. If the company issues bearer shares, the identity of the shareholder does not appear from the register.

Most Member States' Companies Acts include a provision which states that shares in principle are freely transferable for public companies while the transfer of shares in private companies require approval by the board or by the shareholders in some Member States. To some extent, all Member States also allow restrictions on the transferability of shares. However, there are substantial differences regarding which restrictions are allowed. Thus, on the one hand the Danish Companies Act (Section 48), the Dutch Companies Act (Section 2:195, for private companies) and the UK Companies Act allow all restrictions, whereas for example Finland and Sweden only allow limitations which are explicitly provided in the law (in Sweden post-sale purchase right, right of first refusal and consent clause). In Greece (Article 3 of the Companies Act) all restrictions are allowed, provided that the transfer does not become totally impossible. In Belgium the rules (see Article 510 Companies Act for public companies) vary depending on the kind of restriction and some have to be compatible with the interests of the company, others are restricted in time and still others are unregulated and therefore permitted).

Generally, it is recognized in the company law Directives that there can be varying voting rights attached to the different kinds of shares, including non-voting shares. However, there is no actual EU regulation on either non-voting shares or possible limitations to the issuance of non-voting shares. Issuing non-voting shares as well as creating larger voting differences than 1/10 is allowed in accordance with the rules of most Member States. The EMCA Group is of the opinion that the EMCA should allow non-voting rights as well as voting differences of any kind.

The shareholders' exercise of voting rights at the company's general meeting will be dealt with in Chapter 11 on general meeting.

The articles of association may include provisions on redemption. It is voluntary for companies to include provisions on redemption and in order to redeem shares, the articles of association must include provisions specifying the terms of redemption. There is difference between redeemable shares and rights of squeeze-out. As noted earlier provisions on squeeze-out/sell-out give major shareholders a right to squeeze out minority shareholders and the minority shareholders a right to sell out their shares. Such provisions are, according to their nature, mandatory and should therefore be included in the EMCA. Rights on squeeze-out and sell-out are found below in EMCA Chapter 11 and there is also a reference to them in Chapter 15 on groups since they are part of the regime on groups.

3. Considerations

The EMCA grants the companies the freedom to choose the capital structure and share structure they want. Companies should be free to choose their financing structure and should be allowed to issue a whole range of financial instruments to finance themselves. The EMCA Group is of the opinion that there should be no *numerus clausus* for issuing new types of financial instrument, nor a system of state (sponsored) oversight of financial instruments. In other words, no permission should be needed to create new instruments; this should be left to the market and freedom of contract. New types of debt instruments in particular can be created as long as the new instrument does not contravene mandatory rules in existing (civil) law.

The present Chapter only deals with shares, that is bundles of membership rights issued (as a rule) in exchange for a contribution. These rights almost always entitle the holder to a share of the profits of the company and often, but not necessarily always, give governance rights to the holder especially voting rights at the general meeting of shareholders. The Chapter does not deal with bonds or other debt instruments or convertible and mezzanine financial instruments. It also does not deal with what constitutes valid consideration for shares, nor does it contain rules on the minimum amounts to be paid up upon issuance of shares. This is dealt with in the Chapter on formation.

The main questions facing someone regulating shares are

- To what extent should companies be free to determine the rights attached to the shares and especially whether multiple voting rights are allowed? Should the rights be proportionate to the percentage of legal capital a share represents? This latter question only makes sense in an environment where at least limited liability companies have legal capital and where shares have a par value, which is still an important concept in Europe. What, in this context, is the exact meaning of the concept of "class" of shares and how should one deal with changes to class rights? What indeed exactly is a change to class rights?

- Should shares have a par value or are true no par value shares along the Finnish and US (Delaware) model allowed?
- What forms can shares take? Is it a good idea to still allow bearer shares or should all shares be registered in someone's name? Should one allow paper share certificates or even make them mandatory? What about book-entry shares ("dematerialized", "electronic" shares)?
- Are there reasons to limit the possibility of articles of association or perhaps also shareholder agreements to limit the free transferability of shares? Should there be mandatory statutory limitations to the free transfer of shares in private companies/companies that legally are considered "close(d) companies"?
- Should certain countries allow either the company or the shareholder (in certain company types) to redeem shares in the sense that the shares will be annulled and their value will be paid out? Is it wise policy to provide for redeemable shares and under what circumstances?

In addition there are of course many practically important but less fundamental questions, such as how to deal with cases where several persons claim to have – or legally have – voting rights based on one and the same share e.g. spouses or cases of beneficial ownership; what the value of the share register is in ownership disputes (does the register create presumptions about civil law ownership, or only about who can claim to be a shareholder and therefore exercise the rights attached to the share ?); and how someone can prove that he or she is a shareholder/ can exercise the rights attached to shares in order to attend the annual or other general meetings.

When dealing with these issues, two guiding principles have animated the work of the EMCA Group:

- Contractual freedom, that is freedom to deal with issues in the articles of the company, should be the starting point and the default position, and should only be limited when there are clear indications that the interests of stakeholders (from shareholders, managers and workers to the State and public interest because of for example environmental implications) need to be protected; this is especially true regarding the rights, including voting rights, attached to shares and their transferability
- As a rule, Companies Acts should not deal with civil law in the sense of (primarily) contract and property law concerning transactions in which the company is involved; specifically, this means EMCA does not deal with the contractual aspects of share transfers but does, on the other hand, determine the conditions under which a share transfer can be relied upon against the company and clarifies that the share register is not an instrument to prove ownership of shares, but simply creates a presumption that someone registered as shareholder in that register is presumed to be the shareholder and can therefore exercise the rights attached to the shares
- In addition to these guiding principles, it should be borne in mind that EMCA as a model Companies Act does not purport to deal with securities regulation/capital markets law, nor with all kinds of regulatory rules that can be seen as flanking measures of corporate law and that are often intended to combat abuses in the area of tax or social security or economic crime. Often these rules regulate economic activities, whereas the focus of Companies Acts is to be organisational law, which is an additional reason (in addition to maintaining legibility of Companies Acts) for not incorporating these rules into Companies Acts. Hence EMCA does not contain rules mimicking rules on shareholding transparency as set forth in the Transparency Directive, rules on transparency with a view to combating money laundering or rules on the organization of the (national) central securities depositary that is the central node in the system of transfer of book-entry ("electronic", "dematerialized") shares. We do acknowledge that some Member States take a different approach. For example, in Denmark the rules in Directive 2005/60/EC on money laundering have been partially implemented in the Companies Acts (Article 55 on notification of major share holdings). But the EMCA Group thinks it is better to deal with such issues outside the Companies Act and in any case it is, as indicated, not the purpose of a model act to deal with these issues. In the same vein, as a rule EMCA does not contain rules specific to listed companies, for instance rules on shareholder engagement similar to what is being proposed in the aforementioned amendments to the Shareholders' Rights Directive.

Shareholder identification

As noted above, there is currently a European and world-wide debate about shareholder identification and particularly about identifying the ultimate owner/beneficiary of shares. This has to be seen against the background of an increased desire to combat tax evasion, corruption, money- laundering and financial fraud. In June 2013 the G8 leaders agreed on a set of principles on beneficial ownership transparency. These were followed by FATF –Financial Action Task Force, the international anti-money-laundering standards body- "Guidance on Transparency and beneficial ownership (October 2014) and the "High level Principles on beneficial Ownership" adopted by the G20 in November 2014. More concrete and specific action was undertaken by the UK with its March 27 2015 "Small Business, Enterprise and Employment Act 2015" which organizes a public register listing the beneficial owners also of private companies (as well as requiring that company directors are natural persons). Denmark has announced plans for similar legislation and the 4th EU Anti Money Laundering Directive of 2015, adopted the obligation for all EU Member States to organize a register where all corporate entities will have to file information about beneficial ownership (see Article 30 of directive (EU) 2015/849 of 20 May 2015). For the same reasons, there has been worldwide pressure on the use of bearer shares (at least in physical form), and some Member States have either, like Belgium, completely outlawed the use of bearer shares, or limited their use to public companies (where free transferability of shares, which, outside a system of book-entry shares, is easier with bearer than with registered shares). EMCA does not deal with administrative, regulatory rules that impact companies but are not part of organisational law and therefore contains no rules on ownership transparency. The EMCA Group considered advocating a ban on bearer shares along the Belgian model, but in the end refrained from doing so because in several countries a deep attachment to bearer shares exists, based notably on the protection of privacy, at least for certain company types. It remains to be seen whether this will survive the international regulatory tide. For the time being, the Group thinks a balance can be struck between the desire for more transparency while still allowing bearer shares by a system of mandatory disclosure of large (more than 3 or 5 %) shareholdings, as it has been organized for listed companies by the EU Transparency Directive. Such a system could be expanded to non- listed, including private companies.

Section 5.01
Definition of Share

In this Act, “Share” means an equity participation entitling the holder to be a member of the company.

Comments

EMCA tries to adopt a definition of “share” which is as neutral as possible without being completely devoid of meaning.

The definition is neutral in that it does not define which rights a share must at a minimum entail for its holder. For instance, since in certain countries companies must always be for profit whereas in other jurisdictions companies may be non-profit entities, the definition does not refer to an entitlement to part of the profits generated by the company (i.e., in the first place, declared dividends) as an essential feature of any share. Some shares may be non- profit-sharing, others may have no voting rights. The Dutch law on closed companies provides that shares in such a company (“B.V.”) must at least either entitle the holder to a vote, or to a part of the profits. The aim of the reference to “membership” in the EMCA-definition is similar: it is impossible (and useless) to create shares to which no rights at all are attached. But the definition leaves it to national legal systems to determine what the minimum content of membership rights should be.

Entitlement to membership of the company is the first essential feature of any share. The second is that the share represents equity, the claims of which on the company’s assets are subordinated to those of debtholders. Both in finance and accounting and in a legal context, an essential distinction is made between equity and debt instruments. Of course there are many securities that have features of both debt and equity, or that can be converted from debt into equity, or of which it is difficult to determine whether they should be regarded as debt or equity (“mezzanine finance”). The distinction between debt and equity is fundamental nevertheless. Essentially, holders of equity do not have the right to claim any assets or pay-out of the company for which they can take the unilateral initiative. Normally, the shareholders have no right to receive back their contribution as long as the company exists without complying with the procedure of reducing the share capital or the procedure of liquidation. Certain types of preference shares with fixed claims and “redeemable shares” are the most important exceptions to these rules, hence debates about whether such shares should be regarded as debt for accounting or certain regulatory purposes. In any case, any claim to the company’s assets that a shareholder might have, is subordinated to that of debt- holders.

Securities that receive a pay-out or at least claim that is not conditional on the company making an accounting profit are, as a rule, debt instruments. This is also the case regarding so- called profit sharing debt instruments, see EMCA Chapter 6, Section 16. An important legal consequence of the distinction between debt instruments and shares is that the issuing of shares should be decided by the general meeting of the company while issuing debt instruments as a rule is decided by the board of the company.

Under certain circumstances, at least in certain legal systems, it is possible to create new shares without any additional contribution being made to the company, or even without an increase in its equity. That is why the EMCA does not define a share as a security issued in exchange for a contribution to the company’s equity. Nevertheless, this conforms to the usual definition of share and the most common way of creating shares. All shares in any case “represent” equity –and this would be the case even in a legal system without legal capital-in that (a) they do not represent debt and (b) they almost always entail a contingent claim on a part of any positive liquidation surplus that may exist when the company has been liquidated.

Section 1 only defines “share” and does not deal with other securities that companies may issue. The EMCA Group is of the opinion that companies should be allowed to issue all types of equity and debt instruments that are not outlawed by the laws applicable to the company. In other words, there is no “*numerus clausus*” concerning securities. This Chapter only deals with shares and therefore does not contain any rules on other types of securities, hence also no definitions. EMCA Chapter 6, which deals with financing techniques, does contain some rules on debt securities (but not on straight loans that do not take the form of debt securities).

The definition in Section 1 applies the English term ”shares”, which is also applied in the UK Companies Act 2006 as a term for shares in both public and private companies. In a number of Member States, there are different terms for shares in private and public companies, respectively. Thus, for example, the German Companies Act uses the term "*Anteil*" for shares in private companies and "*Aktie*" for shares in public companies. The same is the case in Denmark, which uses the term "*anpart*" for shares in private companies, and the term "*Aktie*" for shares in public companies. In France, shares in private companies are called "*Parts sociales*" while shares in public companies are called "*Actions*". In Greece shares in public companies (SAs) are called "*μετοχές*", whereas shares in private companies, namely limited liability companies (Sarl) and the more recent "private companies" (IKE), are named "εταιρικά μερίδια". Such terminological distinctions have little relevance and are mainly explained by the fact that when public companies in their modern form were created, in most countries, in the 19th century, the free transferability of their shares was a novelty. In addition, these shares were then novel forms of securities (in the sense of the German "*Wertpapier*", French "*valeur mobilière*") which incorporated the rights of the holder/beneficiary/owner to an extent that was not true to the holders of shares of closed companies, where the personal bond between shareholders was deemed more important and where the transfer of the rights entailed in shares was to a larger extent governed by civil law than in public companies, where the shares themselves fully incorporate the rights and duties associated with them.

Belgian and Dutch companies have a practice of creating "*aandelencertificaten*", literally translated "share certificates" but perhaps better called "share depositary receipts" (SDRs-, although they are not to be confused with the SDRs issued to allow non-American issuers to get exposure to investors on American stock exchanges without listing their actual shares there). They are securities created on a contractual basis when a shareholder swaps his shares for the SDRs issued by the foundation or other entity that will henceforth hold a stake in the company that issued the original shares. Institutional investors do not like these SDRs in listed companies, but they are quite often used in both private and public companies, including in listed companies, and can be very useful for example to deal with family succession issues. They are used, among other things, to split up the voting rights attached to shares and the financial rights. The issuer (typically a foundation) of the SDR is a shareholder in a company, and therefore its board determines how to vote the shares it owns. Dividends are also paid to the issuer, but the issuer has a contractual obligation to immediately pay them through to the receipt holders (former shareholders). The issuer is fiscally transparent (payments to it by the company are tax neutral as a result of Belgian and Dutch legislation).

The EMCA Group has considered whether the EMCA should have a provision on SDRs, but it decided not to deal with SDRs as the use of SDRs would require that other national laws such as tax laws would possibly need to be changed. This should not be interpreted as a limitation of the practice of SDRs, which the Group feels should be allowed.

Some Member States also have special kinds of non-debt instruments called, in Belgium, "*winstbewijs*"/ "*Part bénéficiaire*". The same instrument exist also in Luxembourg company law, while France (where they were known as *"Parts de fondateurs"*) prohibited their issuance in 1966 because of previous abuses. These are "shares" which someone receives in exchange for a contribution that is not booked as capital. Hence the rules on capital formation do not apply when these "shares" are issued (e.g. no independent expert valuation of contribution) and the rights attached to these "shares" are, within the limits set by the Companies Act, determined by the articles, and not in relation to the share of the capital they represent (since they do not represent any fraction of the capital). The EMCA Group does not see the need for such shares especially since EMCA has opted for no-par value shares whose rights are determined in the articles anyway.