EUROPEAN MODEL COMPANY ACT (EMCA)

CHAPTER 1

GENERAL PROVISIONS AND PRINCIPLES

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GENERAL PROVISIONS

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General Comments

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

Most of the EU Directives deal with public companies and listed companies. 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).


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 Denmark, Sweden and Finland, the Company Law Directives also apply to private companies, whereas the UK has taken the opposite position and hence does 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 so 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 Group has been inspired by the Finnish Companies Act.
PART 1
GENERAL PROVISIONS

Section 1
Short title and Scope

(1) This Model Act shall be known and cited as the European Model Companies Act ("the 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 2
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 securities as defined by Article 4(18) of Directive 2004/39/EC.
(9) “Traded Company”: A publicly traded company whose securities are listed or traded on a regulated market or a multilateral trading facility, as defined respectively by Article 4(14) and (15) of Directive 2004/39/EC, in one or more Member States.

(10) “Registrar”: The natural or legal person responsible for receiving the documentation set out in section 27 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. 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 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, Poland, Ireland 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. 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 Denmark, Finland, France, Italy, Portugal, and the Netherlands, companies can choose between different board models. When using the term director, the EMCA refer 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) 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

- b) 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 restrictive) regulation of the relevant exchange.

The various sections of the EMCA decide if they apply to **public companies trading on a regulated market** and also to **public companies traded on a multilateral trading facility (MTF)**.
Chapter 1 General provisions and Principles is subject to a public consultation: http://law.au.dk/emca

Section 3
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 had in mind the following types of companies (companies as enumerated in Directive 2009/101/EC)

To be of use 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 aansprakelijkheid; société de personnes à responsabilité limitée;

— **in Bulgaria**:
  
акционерно дружество, дружество с ограниченна отговорност, командитно дружество с акции;

— **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 περιορισμένης ευθύνης, ετερόρρυθμη κατά μετοχές εταιρία;

— In Hungary:
  Korlátolt felelősségű társaság, nyilvános 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;

— 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 acţiuni, societate cu răspundere limitată, societate în comandită pe acţiuni;

— in Slovakia:   
akciová spoločnosť, spoločnosť s ručením obmedzeným;

— in Slovenia:   
delniška družba, družba z omejeno odgovornostjo, komaditna delniška družba;

— in Spain:   
lasociedad 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 – which is also reflected in most of the Member States classification of companies with respect to public and private companies. Section 3 carry on this tradition taking into account the special need of owners of a private company.
Section 4
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 U.K. 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. 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, Sweden and Spain pre-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 founders 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 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 founders and shareholders become bound when the instrument of incorporation has been signed by the founder, 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 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 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 for off-the-shelf companies

Off-the-shelf companies can be used to avoid long registration procedures and the personal liability connected to operations 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 5
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.

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 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 6
Purpose of the company

(1) Unless otherwise provided in the articles of association, the purpose of the company is to perform economic activity.

(2) A company can only be formed for a lawful purpose.

Comments

Re 1) Normally, the purpose of the company is to maximise 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.\(^1\) It is also the accepted position of all Member States. That is also why it is important for example that 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 encourage 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 disservice to the company. Lock-in effects should therefore be avoided.

A path to promote long-term viability could involve encouraging corporate social responsibility, 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 recognised 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).\(^2\) In Denmark, for example, the Companies Act 2013 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

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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 7
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 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 in accordance with Article 3(d) of the Directive 2012/30/EU. 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.

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 Directive 2001/34/EC on the admission of securities to official stock exchange 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 8
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\(^3\) 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” system. The proposed Directive was withdrawn and Member States were given the liberty to allow different classes of shares. Since then the Commission has given up on the attempt to make a “one share, one vote” system, but the debate 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.\(^4\) Thus recommendations were made to deal with pre-bid defences 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 corporate 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

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example, have chosen the system of “one-share, one vote”. The Group is of the opinion that systems which allow share classes and voting limitations do not work less efficiently 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.

Section 9
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 shareholder, 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 on shares 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 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”.
Section 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 Act’s 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 has also been proposed in Ireland in the Companies Bill 2012.  
The precise contents of the principles of duty of care and duty of loyalty are explained in Chapter 9 on directors’ duties.  

Section 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.\(^5\) Thus, the principle of shareholder democracy should be

understood as an overall goal or direction for preparing the individual provision in 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 should ensure that the most fundamental and important decisions should be agreed on by the general meeting and that the shareholders get effective means to exploit their rights at the general meeting 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 on 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.

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 have established 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.

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Section 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.

An alternative to cross-border mergers, transfer of main seat etc. is 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 realised.

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. 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

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degree of protection is found taking into account the cross-border element and taking into account already acquired rights.

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 decide where a company chooses to locate and relocate.\(^9\) 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 to – in support of the Treaty’s principle on freedom of establishment – 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).

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\(^9\) 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 meaning, 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. Also public consultations held by the European Commission, available at: [http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_en.htm#market](http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_en.htm#market)