THE EUROPEAN MODEL COMPANY ACT (EMCA) DRAFT 2015
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EUROPEAN MODEL COMPANY ACT (EMCA)

INTRODUCTION

1. The Aims of the EMCA

While harmonisation 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.

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 harmonisation. The EMCA offers the Member States a harmonised company law, but leaves it to each Member State to decide whether it will offer its businesses the advantages given by harmonisation. 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 harmonisation 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 harmonisation of, and convergence between, Member States’ company laws.

However, 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 Company 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 Company Act Group (the Group), which was officially formed at a meeting at Aarhus University in September 2007. Since then additional members have joined and the Group currently consists of prominent company law scholars from 22 Member States.

The Group is independent of business organisations as well as the governments of the Member States and the European Commission. The EMCA does not have – nor is it intended to have – political authority. Its impact will thus ultimately depend on its quality and usefulness.

The European Commission has expressed its support for the project, and the Commission is invited to meetings of the Group as an observer and discussion partner.¹ A clear decision was taken at the outset however that the EMCA would not be restricted by existing EU-regulation. Thus where the Group considered that provisions of existing EU law are not appropriate or efficient, the EMCA reflects the preferred alternative.

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¹ See also the Report of the Reflection Group, p.12 (recommendation 4).
The members of the group are:

- Professor Paul Krüger Andersen, Denmark (Chairman)
- Professor José Engrácia Antunes, Portugal
- Professor Gintautas Bartkus, Lithuania
- Professor Theodor Baums, Germany
- Professor Christoph Teichmann, Germany
- Professor Blanaid Clarke, Ireland
- Professor Waltschin Daskalov, Bulgaria
- Professor Paul Davies, U.K. (until May 2010)
- Professor Guido Ferrarini, Italy
- Professor Paulo Guidici, Italy
- Professor Brenda Hannigan, U.K. (as of January 2011)
- Professor Susanne Kalss, Austria
- Professor Martin Winner, Austria
- Professor András Kisfaludi, Hungary
- Professor Harm-Jan de Kluiver, The Netherlands
- Professor Joti Roest, The Netherlands
- Professor Adam Opalski, Poland (as of April 2013)
- Professor Isabelle Urbain-Parleani, France
- Professor Maria Patakyova, Slovakia
- Professor Evanghelos Perakis, Greece
- Professor Jarmila Porkoná, Czech Republic
- Professor André Prüm, Luxembourg
- Professor Pierre-Henri Conac, Luxembourg
- Professor Juan Sanchez-Calero, Spain
- Professor Monica Fuentes Naharro, Spain
- Professor Matti Sillanpää, Finland
- Professor Rolf Skog, Sweden (until April 2013)
- Professor Stanislaw Soltysinski, Poland (until April 2013)
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 is coordinated by a chairman - Professor Paul Krüger Andersen from Aarhus University. Aarhus University also hosts the secretariat.
4. **Theory and Methodology**

4.1. **Legal theory on different legal tools for regulation**

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

Usual company acts and soft law are sources of law placed in the hierarchy of national sources of law. Company acts as well as soft law are aimed both 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 categorise them. They may contain “principles” in the way used, for example, in the *Definitions and Model Rules of European Private Law (DCFR)*, 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. 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 legislation in Member States.

As mentioned above, the purpose of EMCA is to offer Member States at a low cost, a tool for the convergence of European company legislation which is simultaneously capable of adapting to allow Member States deal with new developments in the economy, such as the financial crisis.

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4.3. Some fundamental problems and approaches

Analysing company regulation in Member States and developing the EMCA, a number of fundamental problems appear and a number of approaches must be clearly defined.

As superior criterion for the choice of regulatory method, the Group accepts that the EMCA shall be based on an appreciation of the following policies:

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

These same policies are also accepted by the EU Commission as part of its Strategic Review of Better Regulation.\(^5\)

In recent years, the Commission has worked on assessing initiatives within the area of Company Law. Among others, this has resulted in a report from the Reflection Group “On the Future of EU Company Law” (April 5 2011), the Commission’s Green Paper (COM(2011) 164 final), and latest 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.

The Commission’s work and plans are obviously part of 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 analysis 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 at a stage where 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 vs companies/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.

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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 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. In addition, it took into consideration the manner in which the financial crisis has altered this general view.

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 Member States vary in size. For example, large and detailed regulation can be found in the UK, Germany and Sweden while shorter and less detailed regulation can be found in Poland, Greece and Denmark. The EMCA aims to reach a balance between general and detailed regulation. In reaching this balance, the Group has taken into consideration Member States’ practical experience of their domestic legislation as well as the huge theoretical work behind the different Companies Acts. However, aspects of these Acts too closely related to national traditions [and not of widespread application] were not considered. The intention thus is to avoid overly detailed regulation in the EMCA.

The Group gave particular consideration to the choice between mandatory and non-mandatory (default) rules. The EMCA continues on accepted European traditions in that an important goal of the EMCA is the protection of shareholders and 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 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, on 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.

4.4. Use of comparative method

The most important working method to be used during the preparation of the EMCA is the comparative method. Since the members of the Group have solid knowledge – both in academics and in practice - of the Companies Acts of the various Member States, it is possible to use a combination of the “Länderbericht” method and the analytic method.6

The comparative process starts with questionnaires on each topic in order to gain a general view of similarities, differences, new ways to deal with problems and recent problems. At the same time, a collection of Companies Acts is established for specific analyses of problems and solutions. The analyses are carried out by working groups, representing more than one Member States (old/new Member States, common law/civil law countries etc.) and in certain circumstances including external company law experts invited by the Group. The working groups have prepared the first drafts of the respective chapters. The drafts are discussed, revised and agreed on in meetings (at least twice a year) by the entire Group.

4.5. Use of law and economic theories

Over the last decade or two there has been a paradigm shift in European company law. In short, the aim of company legislation/regulation has shifted from being exclusively shareholder and creditor protection to including the promotion of economic efficiency.7 The latter 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

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7 See e.g. Lisbon Treaty and several revisions of national Companies Act, such as U.K., the Netherlands, Denmark and Finland. The overall purpose of the regulation is described as “the tandem of improving the competitiveness of EU Company and better regulation”
have become a natural part of the development of company regulation, particularly in the areas of corporate governance, financing 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 commercial risk. 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 level, 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. 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 latest 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”.

To underline that the Group shares this view, Chapter 1 of the EMCA contains a provision on the principle of shareholder democracy.

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

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8 See e.g. the Danish “Debatoplæg om Aktivt Ejerskab” from 1999, drafted by the Ministry of Trade and Industry. The Commission’s Action Plan, 2003, which main objectives are 1) strengthening shareholders’ rights, and 2) to foster efficiency and competiveness of business. The words efficiency and competiveness are the basic principles in Company Law reforms, e.g. in the U.K., Finland and Denmark. The tracks that were laid down with the 2003 Action Plan has been continued and developed with the Commission’s 2012 Action Plan, the 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 “It 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.”

the long-term sustainability of the company and ensure that remuneration is based on performance. 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. 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 EMCA 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 more principals such as employees, creditors and the society as a whole. Following that trend, the EMCA also encompasses the relationship between companies and such companies’ stakeholders. (See EMCA 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”. 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 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 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 of the EMCA).

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

11 Cf. R. Kraakman et. al. (2006): The Anatomy of Corporate Law: a Comparative and Functional Approach, Oxford University Press, 2006, p. 18: “the appropriate goal of corporate law is to advance the aggregate welfare of a firm’s shareholders, employees, suppliers, and customers without undue sacrifice — and, if possible, with benefit — to third parties such as local communities and beneficiaries of the natural environment.”
into account human and environmental interests, corporate social responsibilities and sustainable development.  

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. 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 EMCA Chapter 8 on directors’ duties and Chapter 13 on reorganisation of companies.

The economic-financial 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. Company law rules must facilitate a flexible adjustment of the company capital. The Group shares the view that companies should be allowed wide discretion in deciding how to organise 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 EMCA 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 the financial crisis has had on the aforementioned theories. For example, it is obvious that the financial crisis questions whether the focus in discussions on an optimal capital structure is correct. The trend in the ten or so years before the financial crisis was to operate companies with less equity capital and more debt. The dominant economic theory has justified that. In many 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 in company law and accounting rules and to focus more on risk and less on return. Risk management, focusing on directors’ duties, provides for an example of this view (see EMCA Chapter 8).

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The group is aware of the fact that particular types of conflicts may arise within private companies.\textsuperscript{15} 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 7 below) aiming at both public and private companies thereby taking into account the particular needs of typical private companies (see Section 6 below).

5. \textit{Comments to the Act}

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.

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

6. \textit{International aspects of company law}

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

\textsuperscript{15} See for example Bachmann, G. Eidenmüller, H., Engert A., Fleischer, H. and Schön W., Rechtsregeln für die geschlossene Kapitalgesellschaft, De Gruyter, 2013, p. 6 et seq.
7. Expected output and working plan

7.1. 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 Project should not be understood as a simple restatement of the prevailing legal solutions found in the majority of the EU company laws. It also embraces innovative concepts found only in various 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 can be an effective catalyst to improve European company law. The success of the US Model Business Corporation Act in improving the single states’ Companies Acts supports this expectation.\textsuperscript{16}

7.2. Working Plan

The project has been carried out over a total period of 5 years and concludes upon the development of the first EMCA. The first draft will be presented at an international Conference in autumn 2015.

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

The project contains the following issues:

- general company law principles
- the formation of companies
- the duties of directors, the organisation 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)
- Liquidation, bankruptcy, etc.
- Liability of directors, shareholders and others
- Cross-border issues
- Accounting and auditing
- Employee representation
- Groups of companies
- Branches
- Registrar and the registration process

The approach to each sub-project is the same. Each sub-project starts with a comparative analysis of the existing company laws of the Member States in the given area. The comparative analysis considers the harmonisation that has been carried out at EU level and includes studies of how EU company law has been implemented in each Member State, as well as studies of national law on non-harmonised areas. The analysis also includes studies of special national legal and/or business conditions.

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

The Group met biannually, and drafts was continuously discussed and approved by the Group during these meetings. The progress of the Group is published on the EMCA website and/or in international journals/books.

The final aim of the process is a complete EMCA covering all aspects of company law. After public presentation of the first draft of the EMCA, the Group will revise the published results and draw up the final Act.

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 has presented the EMCA at a number of international seminars and conferences. Furthermore, the public is invited to comment on the draft chapters (see Section 8 below).

Once the first EMCA has been finalised, it is expected that the Group will continue as an organisation on an on-going basis to meet to review and offer proposed revisions to various parts of the Model Act.

8. **The EMCA covers both private and public companies**

The Companies Acts of almost all EU Member States (except Greece) divide companies in two categories: public companies (AG/Plc. etc.) and private companies (GmbH/Ltd. etc.). The distinction is not based on the size of the company but primarily on the fact that its shares can be offered to the public/be publicly traded.\(^\text{17}\)

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

Current EU regulation only covers some of the issues that are regulated in the Companies Acts of the Member States. For example, most of the problems related to company management structure and directors’ duties are not covered by EU Directives and the draft for the Fifth Company Law Directive, on company structure, has been abandoned.\(^\text{18}\) In addition, like most of the other EU Directives, the proposed Fifth 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. This especially applies 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

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17 See, for example, the Danish Companies Act, paragraph 6, Swedish Companies Act, Chapter 12, paragraph 7. The former Danish Act on private companies (anpartsselskaber) aimed at regulating companies with only a little capital and few members. The Danish White Paper on Modernising Company Law 1498:2008 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).

18 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.
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 impose different requirements regarding management systems as between private and public companies. With respect to the choice of a management system, there should be even more flexibility provided for private companies. However, it seems to be possible to formulate provisions on directors’ duties which are equally applicable to SMEs as well as large companies (see Chapter 9 of the EMCA).

With its proposal for a Regulation on the Statute for a European private company (Societas Privata Europaea - SPE)\textsuperscript{19} in 2008, the EU Commission started an initiative in the field of small and medium sized companies. The SPE proposal aims to create a new European legal form, which is intended to enhance the competitiveness of SMEs by facilitating their establishment and operation across the single market. If the SPE Statute is adopted, the SPE will be an alternative to establishing and carrying on businesses by means of national companies. The proposals in the Statute are not limited by restrictions in the Company Law Directives. For example, the provisions on capital (minimum capital/distribution) do not need to follow the requirements in the Second Council Directive. The draft SPE Statute will thus put pressure on national lawmakers to establish company legislation that can match the SPE Statute. A main problem with drafting a SPE Statute is that it is necessary to refer to the different national company law legislations. Therefore and also for other reasons, it is not sure whether the SPE Statute will be adopted. The recommendations of the EMCA provide for a completed text. Thus, the EMCA takes another approach compared to the SPE project to adhere 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 organised as private companies. However, the \textit{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 EMCA Chapter 11 on general meeting and minority protection).

Although public companies can offer shares to the public, most of the 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

\textsuperscript{19} COM(2008) 396 final.
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 in certain provisions the EMCA could apply the size of the company or the number of shareholders as a criterion. The Group has in every provision considered 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 should apply 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 7 below).

9. **The EMCA uses a one law model**

Almost all Member States have two company forms but the legislations differ: A number of Member States have a two-law-system such as Austria, Germany, and Spain. Member States such as Denmark, Finland, Ireland, Italy, 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 type 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 favour 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.

Arguments regarding interpretation can, however, be used both in favour 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 independently public and private companies (both those influenced by the German and French traditions). Moreover, main EU directives and national company law regulations regulate independently the two types of companies.

The Model Law Group has decided to use a one-law model in the first place. Once the first full draft is completed the EMCA Group will consider the possibility of splitting up the draft into a supplementary two-law-model to make the EMCA more useful for jurisdictions that apply a two-law system.\(^\text{20}\).

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\(^{20}\) Paul Davies, for example, describes it as „persistence of national laws“. See the SPE: Uniformity, Flexibility, Competition and the Persistence of National Law, K.J. Hopt’s Festschrift (2010), v. 1, at 479 et seq.
The EMCA will therefore contain regulation on three categories of companies:

1. The private company
2. The public company
3. The publicly traded company

Definitions and Comments to these different categories are stated in Chapter 1, Section 2 and 3 of the EMCA. Regarding public traded companies there is a borderline between securities regulation and company law. The EMCA will 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 meeting and minority protection.

10. Consultation process

Drafts of the EMCA is published on the EMCA website (at http://law.au.dk/emca/) and reviewed in international journals. (A list of articles concerning the project and the EMCA can be found on the EMCA website.) Thus, the public is invited to comment on the drafts. Moreover, drafts have been sent to the EU Commission for information as well as for comment. Finally, the project has been, and will continue to be, presented and discussed at international conferences, most recently in Vienna, September 2015.

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) on the exercise of certain rights of shareholders in listed companies. The EMCA contains 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 there are different possibilities to use information technology in the different Member States. It is also taken into account that the potential for use of IT various as between the Member States.

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21 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    Short title and Scope
Section 2    Definitions
Section 3    Private and public companies
Section 4    Legal personality and limited liability of shareholders

PART 2

GENERAL PRINCIPLES

Section 5    Capital and the Maintenance of Capital
Section 6    Purpose and Objects of the Company
Section 7    Transferability of shares
Section 8    Equality of shares
Section 9    Equal treatment of shareholders and minority protection
Section 10   The Majority Principle
Section 11   Directors’ duty of loyalty and care
Section 12   Shareholder democracy
Section 13   Freedom of Movement within Europe