DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS
34

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ANDRES VUTT

Legal capital rules as a measure for creditor and shareholder protection

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Supervisor: Prof. Irene Kull (University of Tartu)

Opponents: Prof. Erik van den Haute (Universitè Libre de Bruxelles)
Prof. Enn Listra (Tallinn University of Technology)

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1. A Vutt 'Some Features of Legal Capital Regulation in Estonia' 15 (2005) European Business Law Review 1385–1392.
2. A Vutt 'Transformation of Legal Capital Rules in Estonia – Inevitability or Permanent Misunderstanding?' 11 (2006) Juridica International Law Review 111–117.
3. A Vutt 'Subordination of Shareholder Loans in Estonian Law' 15 (2008) Juridica International Law Review 86–93.
4. A Vutt 'Dividend Payments and Protection of Minority Shareholders' 16 (2009) Juridica International Law Review 135–140.

ANALYTICAL COMPENDUM TO A CUMULATIVE DISSERTATION

1. Introduction

A. The Essence of the Problem

As any other legal rules, the company law rules are not set without a purpose but they have to offer protection to the persons related to the companies (stakeholders). As it has been mentioned, the goal of the corporate law is to advance the aggregate welfare of all who are affected by a firm's activities (shareholders, employees, suppliers, customers, other third parties).[1] The task of every national legislator is to find appropriate measures to provide effective and proportionate protection in balance with the interests of the company, its creditors and the shareholders.

One of the basic rules of continental European company law are the legal capital rules. The purpose of these rules is the protection of the creditors of companies which reflects in the prohibition of the repayment of contributions to shareholders during the lifetime of a company. The second group of stakeholders protected by capital rules are the shareholders. These objectives are declared in the preamble of the 2nd Company Law Directive[2] and if to add the equal treatment of shareholders[3], then one can find the general objectives of the legal capital regulation.

The primary source of legal capital regulation for EU Member States is the 2nd directive, which has been valid over 20 years now and which has been remained mostly unchanged irrespective of the changes of the other company law concepts, regulations and paradigms. The changes in company law during last decade have been caused by several occurrences. The first shake was the wave of the companies scandal, that started with Enron in 2001 and ruined the belief in a success of market self-regulation, uncovered the regulatory problems in accounting, audit, managerial compensation, and director's independence[4], and followed by the tremendous amount of regulation. The paradigm has also been

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[1] John Armour, Henry Hansmann, Reinier Kraakman. What is Corporate Law? – The Anatomy of Corporate Law. A Comparative and Functional Approach. Second Edition. Oxford University Press 2009, p. 28.

[2] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. OJ L 26, 31.1.1977, pp. 1–13. Hereinafter: 2nd directive.

[3] Andreas Engert. Life Without Legal Capital: Lessons from American Law. – Legal Capital in Europe. Ed by M. Lutter. Berlin, De Gruyter Recht 2006, p. 654–656.

[4] John J. Coffee. What Cause Enron? A Capsule Social and Economic History of the 1990s. – Cornell Law Review 2004 (89), p. 308–309.

changed after financial crisis. Even though the company law has not caused the financial crisis[5], the changes in overall legal thinking had reflected the company law too. In the beginning of 2000-s the main trend in EU was to ask for deregulation of company law taking US law as a model limiting the amount of *ex ante* rules, nowadays such a goal is not so obvious anymore. Third most important effect to the company law rules has come from the EJC decisions (started with the *Centros*[6] in 1999) recognising the free movement of companies in EU. It wiped out many national borders and forced EU member states to deregulate private companies. In fact, one of the most substantial changes has been made as regards the legal capital regulation of private companies, specially related to the minimum capital requirement. As has been noted about the German private company reform in 2008, it was "the most fundamental reform of GmbH since its inception in the nineteenth century"[7]. Another good example of the so-called "new thinking" is France, where the private companies' minimum capital requirement was abolished in 2003. It was done without major discussions; in fact the only discussion had previously been about sufficiency of the previous minimum capital requirement.[8] And last but not least – one general change was also the adoption of IAS/IFRS by EU.[9]

The 2nd directive has repeatedly been criticised by academics, whereas the position that the directive is too regulative, unreasonably strict and also ineffective, is quite unanimous.[10] This criticism has though never initiated any principle reform. On EU level the possible amendments of EU company law rules were analysed in 1999 by SLIM expert group who presented proposals for

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[5] Emmanuel Lokin, Levinus Timmermann, Maarten Kroeze. The credit crisis and Dutch company Law. – Ondernemingsrecht 2009–14, p. 576.

[6] Judgment of the Court of 9 March 1999 in case C-212/97: Centros Ltd v Erhvervs- og Selskabsstyrelsen. ECR 1999, I–01459.

[7] Ulrich Noach, Michael Beurskens. Modernising the German GmbH – Mere Window Dressing or Fundamental Redesign? – European Business Organization Law Review (9) 2008, p. 98.

[8] Wolfgang Schön. The Future of Legal Capital. – European Business Organization Law Review 2004 (3), p. 436.

[9] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards. OJ L 243, 11.9.2002, pp. 1–4.

[10] Charlotte Villiers. European Company Law – Towards Democracy? Aldershot, Dartmouth 1998, p. 28–29; John Armour. Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law. – Modern Law Review 2000 (63) 3, pp. 375–378; Luca Enriques, Jonathan R. Macey. Creditors versus Capital Formation: The Case against the European Legal Capital Rules. – Cornell Law Review 2001 (86), pp. 1165–1204; Friedrich Kübler. The Rules of Capital Under Pressure of the Securities Markets. – Capital Markets and Company Law. Ed. by K. Hopt, E. Wymeersch. Oxford, OUP 2003, p. 95–114; Eilís Ferran. Legal Capital Rules and Modern Securities Markets – The Case For Reform, as Illustrated by the UK Equity Markets. – K. J. Hopt, E. Wymeersch (eds.). Capital Markets and Company Law. Oxford: OUP 2003, pp. 115–143; Wolfgang Schön. The Future of Legal Capital. – European Business Organization Law Review 2004 (3), pp. 429–448.

simplification of 1st and 2nd directive.[11] These proposals were reflected at the Commission report.[12] More comprehensive analysis of the company law problems was presented by the High Level Group of Company Law Experts in November 2002.[13] It was followed by the Commission Action Plan foreseeing the simplification of capital rules and finding out the possibility of alternative legal capital regulation.[14] The draft of amendments of the 2nd directive was presented in September 2004[15] and adopted in 2006[16]. The amendments were incomplete, only concerning the valuation of contribution in kind, financial assistance and pre-emptive rights but nothing more substantial.

During last years some comprehensive analyses on legal capital have been published. Two of them have been more or less critical of the current system (Rickford Group[17] and Dutch Group[18]), one, on the other hand, expresses the opinion that the legal capital is a justified concept (Lutter Group[19]). In order to clear some problems a special analysis on request of European Commission was

[11] Recommendations by The Company Law SLIM Working Group On The Simplification of The First and Second Company Law Directives. Conclusions submitted by the Company Law SLIM Working Group. Available:
http://ec.europa.eu/internal_market/company/docs/official/6037en.pdf.

[12] Report from the Commission to the European Parliament and the Council. Results of the Fourth Phase of SLIM. Commission of the European Communities. Brussels, 04.02.2000 COM(2000) 56 final. Available:
http://ec.europa.eu/internal_market/simplification/docs/com2000-56/com2000-56_en.pdf.

[13] Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe. Brussels, 4 November 2002. Available:
http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf.

[14] Commission Of The European Communities. Communication From The Commission To The Council And The European Parliament. Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward**.** Brussels, 21.5.2003. COM (2003) 284 final. Available:
http://www.ecgi.org/commission/documents/com2003_0284en01.pdf.

[15] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation of public limited liability companies and the maintenance and alteration of their capital (presented by the Commission). Brussels, 21.9.2004 COM(2004)final. Available:
http://ec.europa.eu/internal_market/company/docs/capital/2004-proposal/proposal_en.pdf.

[16] Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital. OJ L 264, 25.9.2006, pp. 32–36.

[17] Jonathan Rickford. Reforming Capital. Report of the Interdisciplinary Group on Capital Maintenance. – European Business Law Review 2004 (14), pp. 919–1027.

[18] Hanny Schutte-Veenstra, Hylda Boschma, Marie-Louise Lennarts. Alternative systems for capital protection. Final report dated 18. august 2005. Institute for Company Law, Groningen. Available: http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2005/08/18/alternative-systems-for-capital-protection/wodcfinalreportenglish.pdf.

[19] Legal Capital in Europe. Ed by M. Lutter. Berlin, De Gruyter Recht 2006.

competed by KPMG[20]. The final inference on EU level was that "in the light of the conclusions of the external study, the view of DG Internal Market and Services is that the current capital maintenance regime under the Second Company Law Directive does not seem to cause significant operational problems for companies. Therefore no follow-up measures or changes to the Second Company law Directive are foreseen in the immediate future"[21]. So, in spite of all the critical opinions the maintenance of existing system was declared and this means that all solutions to make regulations more effective must be found in the frames of the current system.

The 2nd directive has also been a source for Estonian contemporary company law from the enforcement of Commercial Code[22] (ÄS) in 1995. Today, when Estonia is a member of EU, it is elementary, but in the mid of 1990-s the situation was different and taking EU directives as a basis of our national law was not that obvious.[23] Such choice was generally successful as the Estonian law share the same platform with other European countries and as regards the company law joining the EU in 2004 was absolutely "painless" to Estonia. On the other hand it means that Estonian legal capital rules are the same old-fashioned rules as those in other EU member states. But this is not the only problem. As the directive sets only minimum rules and does not give a consistent regulation, the task of each member state is to find for itself a reasonable comprehensive way of regulation. As it has been pointed out, much of the criticism levelled at the 2nd directive relates to the additional rules that national legislators have adopted when implementing the directive and the national legislators tend to behave in an overcautious way, especially in those member states where a strong legal capital is perceived as a key instrument of creditor protection.[24] It is exactly a case of the Estonian company law. Another question is about consistency of the rules. Current legal capital rules are valid in Estonia since 1995, there have been some reforms but basically all has remained the same. The problem is that ÄS was the first legal act of company law in meaning of the contemporary company law in Estonia, therefore its main task was to

[20] KPMG. Feasibility study on an alternative to the capital maintenance regime established by the Second Company Law Directive 77/91/EEC of 13 December 1976 and an examination of the impact on profit distribution of the new EU-accounting regime. Main report. January 2008. Available:
http://ec.europa.eu/internal_market/company/docs/capital/feasbility/study_en.pdf.

[21] Results of the external study on the feasibility of an alternative to the Capital Maintenance Regime of the Second Company Law Directive and the impact of the adoption of IFRS on profit distribution. Position of DG Internal Market and Services. Available: http://ec.europa.eu/internal_market/company/docs/capital/feasbility/markt-position_en.pdf, p. 2.

[22] Äriseadustik 15.02.1995. – RT I 1995, 26, 355; 31.12.2010, 19.

[23] Villu Kõve. 10-aastane äriseadustik – tagasivaade senisele arengule. Juridica 2005, 9, lk 598.

[24] Paolo Santella, Riccardo Turrini. Capital Maintenance in EU: Is the Second Company Law Directive Really That Restrictive? – European Business Organization Law Review 2008 (9), p. 431.

provide a basic regulation and to amend it in future. It is true, that amendments have been made, another question is have they been necessary, efficient and adequate. The aim of author of this thesis is to find out are the Estonian company law rules regarding legal capital in accordance of these objectives.

The first amendment of Estonian legal capital rules was made in 1998 when the conditions for financial assistance were relieved. The second group of the more important amendments are valid since 2006 and they concerned the valuation of contribution in kind and acquisition of company's own shares. Amendment of 2008 was made in order to introduce the amendments of the 2nd directive. In 2011 a "competitive private company" regulation was introduced. The character of these amendments has been different, some have been made for liberalisation of regulations, some have *vice versa* made rules stricter. Anyway, it is distinctive for those amendments that no substantial change has been made and basic concepts are still the same. Such a situation may be handled as an obeisance of the high quality of the primary law text, but it would be more exact to say that this area has never been under the interest of a legislator. It seems to be typical that company law has been amended in Estonia mostly due to changes in EU law. It is clear that the 2nd directive is very normative and leaves the member states only limited discretion.[25] But even in the frames of such normativity the solutions in Estonian law for application of the directive are sometimes questionable. A severe problem is that Estonian law does not deal with the problems out of the scope of directive.

B. Research Questions and Arguments Set Forth for Defence

The author's aim is to find an answer to the following research questions:

1. Do the rules on capital payment terms, methods of monetary contributions, valuation of the contribution of kind, loss of equity capital and acquisition of company's own shares provide real and efficient protection to the creditors and the shareholders of the company?
2. Would it be necessary to amend the Estonian company law and to impose the rules on subordination of shareholder loans and minority dividend claims for providing the better creditor and shareholder protection?

The hypothesis is that the analysed rules of the current Estonian law are excessive, they should be a subject of change or abolishment and there are some problems that have to be additionally regulated by the law. As a result of the research the author will present the proposals for amendments of the law in the field where it is considered to be necessary. The objective of the dissertation is not to propose entirely new regulation but to find the solutions for making the existing regulation better. Dissertation is based on four articles dealing with

[25] Charlotte Villiers. European Company Law – Towards Democracy? Aldershot, Dartmouth 1998, p. 28–29.

different rules, therefore the purpose of the dissertation is not to provide a comprehensive analysis of all the legal capital rules.

C. Methods

The thesis bases mainly on the analysis of the Estonian law. The main methods used are the comparative and historical method. The analysis consists of the comparative research – Estonian law has been compared to the relevant regulations of other member states an EU. The choice of these countries has been made on the basis of the analysed problems as not all of these problems have clear legal solutions in every country. As Estonian company law (and especially the legal capital rules) is a kind of symbiosis of Continental-European and Nordic law, then the law of Germany, the Netherlands and Sweden has been compared. The law of UK and US has also been analyzed at some extent.

As the thesis bases on four earlier published articles of the author, then it consist of two parts: analytical compendium and the published articles. The purpose of the compendium is to summarize the main analysis and authors opinions expressed in the articles and to go further with the analysis and proposals for amending the law if it is possible and necessary.

The topics are divided into three groups according to the essence of the problems. The first one is about capital formation and it deals with the problems of payment terms, monetary payments and valuation of the contribution in kind. The second part is about capital maintenance rules in which three main problems are analysed: equity capital test and its application, acquisition of company's own shares and the problem of subordinated debts. The third part is about minority dividend rights and their possible application in Estonia.

There are two types of limited companies on Estonia: private company (*osaühing*) and public company (*aktsiaselts*). Both of these forms use the same legal platform but as they are intended to serve different types of businesses, then some questions are regulated differently. Current dissertation deals with both types of companies as the object of the dissertation is determined not by the legal form of the companies but by the problems which are similar for both types of companies.

2. CAPITAL FORMATION RULES

2.1. Payment Terms

The principle that a public company must have a minimum capital at least 25 000 EUR derives from the art. 6 (1) of the 2nd directive. Minimum capital requirement sets the rate of the minimum investment to the company and therefore it may restrain the choice of the company's form if it is too inconvenient or expensive.[26] In other words, the minimum capital requirement determines the price of incorporation. Therefore it might be supposed that this price is lower in the countries with a lower minimum capital requirement. But if one adds to the minimum capital requirement the conditions of payments for shares, then the picture will be quite different.

There are two different approaches to payment terms in European countries. The first one follows the scheme of directive – in case of monetary payments at least 25% (or some other percentage) of the subscribed capital has to be paid in before registration of the company. This regulation is in use in most EU member states. The second approach requires that the capital has to be fully paid in immediately. The latter is characteristic for Nordic countries and Estonia has accepted this concept.

There were practically no capital rules in Estonia before 1995 and one aim of the new regulation was to establish a simple system to achieve the more effective application of the new law. The positive effect of immediate payment concept is certainly the clarity in relations. In principle this system secures the full capitalisation of the company and avoids disputes. Actually there have been no cases in Estonian courts on unpaid capital. But such system has also a negative effect that reflects in the fact that under immediate payment system the founders of the company are required to make payments which are much bigger than in the countries that allow spread out the payments. If to take an example, then in Germany the statutory minimum capital is 50 000 EUR and law requires that at least 25% of the capital has to be paid in before registration of the company (AktG § 7, 36a (1)). It means that in Germany it is possible to establish a public company having only 12 500 EUR. In Estonia the statutory minimum capital of a public company is 25 000 EUR and this sum has to be paid in before registration. So, the German statutory minimum is two times higher than in Estonia, but the actual required investment is two times smaller.

Such situation might be seen as discriminative and it gives rise to a question how can these differences be accepted in the light of the harmonisation of corresponding rules. The problem is probably in the regulatory method of the directive. The text of the 2nd directive is normative, the directive does not declare the purposes but consists of exact rules and these rules might give surprising results in different combinations. Initially the first concept of the draft of

[26] Detlev F. Vagts. Law and Accounting in Business Associations. – International Encyclopedia of Comparative Law. Vol. XIII: Business and Private Organizations. Chapter 12A, p. 7.

the 2nd directive was even strict. The initial purpose was to provide a minimum capital 20 000 ECU or to allow Member States to impose it in range 20 000–50 000 ECU. The first draft contained an uniform standard of 25 000 ECU, however it was allowed either to increase or decrease it for 10% (first of all due to exchange rates of national currencies) and it was planned to provide payment terms not as an option but as a rule.[27] The adopted directive regulates minimum capital by minimum standard, i.e. member states are free to impose any size higher. Similarly are the payment terms regulated by the minimum standard. The preliminary idea was to assure the equality between member states; the adopted directive sets minimum requirements and not equality. To be more particular – equality exists only in minimum standard for establishing public company (i.e. it is not possible to establish it for a price less than 25 000 EUR) but it does not mean much in reality as the member states are free to decide any requirement higher of the minimum and most member states fix the rate at a higher minimum amount.[28]

It has to be pointed out, that this is not only a problem of national legal forms but the *Societas Europaea* as well. As is stated in the article 5 of the SE Regulation[29], the capital of an SE, its maintenance and changes thereto, together with its shares, bonds and other similar securities shall be governed by the provisions which would apply to a public limited-liability company with a registered office in the Member State in which the SE is registered. The same principle stands in the § 2 of the Act on Application of SE Regulation[30]. In fact the problem may arise only in case of formation of a subsidiary SE as in all other cases the capital shall be paid in using the contribution in kind. As the statutory minimum capital of SE is 120 000 EUR and it is the same all over EU (SE Regulation art. 4 (2)), the actual difference is visible in this case too.

It is also important to analyse, whether the above-mentioned irregularities are a real problem and if they are, what kind of remedies should be used in order to eliminate them. At first it has to be taken into account that a public company is not a form for everyone but only for large businesses and in case one chooses this form the immediate payment requirement should not be a real problem. The trend of incorporation of public companies is downward in

[27] Eric Stein. Harmonization of European Company Laws: National reform and transnational coordination. Indianapolis, Kansas City, New York, The Bobbs-Merrill Company, Inc 1971, pp. 318–320.

[28] Eddy Wymeersch. Current Company Law Reform Initiatives in the OECD Countries. Challenges and Opportunities. Financial Law Institute Working Paper Series. WP 2001–4, 2001. Available: http://ssrn.com/abstract=27386, p. 39.

[29] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). OJ L 294, 10.11.2001, pp. 1–21.

[30] Euroopa Liidu Nõukogu määruse (EÜ) nr 2157/2001 «Euroopa äriühingu (SE) põhikirja kohta» rakendamise seadus. RT I 2004, 81, 543; 2010, 22, 108.

Estonia,[31] that shows this form has been used only in case there is a real need for it. Since there is no need to encourage the entrepreneurs to choose the form of public company for carrying out their businesses, there is no need for a change. The second question is that the minimum capital and its payment requirements in 2nd directive are today really low. The size of the minimum capital at the 2nd directive has remained unchanged since adoption of the directive at 1976. It means that the real value of this requirement has carried substantial losses; with an inflation rate 2% the amount should be today 45 000 EUR and with 5% 100 000 EUR.[32] Considering that public company is a legal form for large businesses, it is evident that it is impossible to build up such business only disposing some thousands Euros.

The author is at the opinion that the most positive feature of Estonian current system is its simplicity (one can even call it primitivity). In case when from a point of view of the economical effectiveness one system cannot be preferred to another, the overall influence of the legal rules must undoubtedly be taken into account. In case there has been established the rule of the immediate payment the possibility of disputes between the company and its shareholders as regards refusal to pay in the capital is minimal. Estonian court practice is lacking the above-mentioned cases, yet during the period of economical recession the overall number of court cases where persons try to "get rid of" obligations taken by them earlier, has increased. Theoretically there can arise some disputes during the foundation of the company or during the capital increase in case the agreed contributions will not be paid in or in case the terms of the payments are unclear. In Sweden, where the rules of the same type have been established, the payment must be made immediately after signing the memorandum of association.[33] According to Estonian law the principle of payment within reasonable time (VÕS[34] § 82 (2)) is applicable.

One can therefore conclude that no significant disputes have arisen in the field of capital payments between the companies and its shareholders in Estonia as this type of court cases are inefficient and in case shareholders refuse to make their contributions the foundation of a company or the capital increase simply would not take place.[35]

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[31] In March 2001 there were 4782 public companies in Estonia, five years earlier the number was 5919. See: E-äriregister. Statistika. Märts 2011. Kättesaadav: http://www.rik.ee/e-ariregister/statistika.

[32] Horst Eidenmüller, Barbara Grunewald, Ulrich Noack. Minimum Capital in the System of Legal Capital. – Legal Capital in Europe. Ed by M. Lutter. Berlin, De Gruyter Recht 2006, pp. 33–34.

[33] Torsten Sandström. Svensk aktiebolagsrätt. Stockholm, Norstedts Juridik 2007, s. 69.

[34] Võlaõigusseadus 26.09.2001. – RT I 2001, 81, 487; 04.02.2011, 2.

[35] There has been one case in Supreme Court about capital payments (3-2-1-97-10) but in this case the court ascertained that the subscription of shares did not take place and therefore nobody could claim anything.

The time limit to make capital payments can be considered an important issue as regards the private companies, as this type of a company lies outside the regulatory area of the 2nd directive. It means that every member state can freely choose its rules and therefore it can be considered as an even more important question to deal with as it allows us to set the minimum terms for using limited liability. So the member states actually should be interested to set minimal and not too burdensome requirements because if the rules are too rigid and unattractive the company would simply not be founded. Setting up a system that is too burdensome the freedom of incorporation could be jeopardised significantly.

Until 2011 the Estonian system of payments was uniform for private and public companies. In 2011 so-called "competitive private company" amendments were enforced introducing the possibility to establish a private company without immediate payment for shares (ÄS § 140^1 (1)). Use of such a choice is limited, it is allowed only when all founders are physical persons and the share capital does not exceed 25 000 EUR. The idea of this subtype of the private company looks like a German *Unternehmergesellschaft* (GmbHG § 5a) but actually the concept is different as UG is allowed to have a share capital smaller than is the general statutory minimum for GmbH, Estonian prototype must have a share capital at least 2500 EUR (i.e. common statutory minimum) and the sole difference between the new form and the ordinary private company is that the payments can be postponed.

There are different ways to regulate minimum capital requirements for private companies. In some countries the requirement exists for all private companies (e.g. Nordic and most of the East-European countries), in some countries the law provides a minimum capital requirement but it is possible to establish a "start-up company" (so-called 1-euro company) without following this requirement at the establishment of a company (e.g. Germany, Belgium, the Netherlands, Latvia) and in some countries there is no such requirement (e.g. UK, France). The difference between the two last models is that in case of absence of the minimum capital requirement it is not required to raise the capital up to some rate and it can stay at the level of 1 euro (or 1 pound in UK) indefinitely. Proposed SPE regulation follows also the model without minimum capital requirement.[36] Estonian law is not following any of these concepts and therefore we can find out the system which is totally original.

Even there is no direct pressure to lower the requirements for establishing of the private company in Estonia as there have not been any so-called Centros-

[36] Proposal for a Council Regulation on the Statute for a European Private Company (presented by Commission). SEC(2008) 2098, SEC (2008) 2099. Available: http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf, p. 7.
Estonian Government has approved the proposed SPE statute. See: Vabariigi Valitsuse 25.09.2008 istungi kommenteeritud päevakord. Kättesaadav: http://www.valitsus.ee/et/uudised/istungid/istungite-paevakorrad/6504.

type incorporations[37], the "competitive private company" reform was basically a good idea as it follows the European mainstream trends. But the question is, did we make the best choice. The main problem is that Estonian law signalizes that there is a requirement of minimum capital. One must admit that this requirement has been found to be relatively low[38], but this fact should not be overestimated. Important is that the minimum capital requirement as such exists at all. New rules have definitely ruined the previous simple order of payments what can easily give a rise to the court cases about payments and the claims of the company against shareholders would be often inefficient[39]. It is of course questionable, whether avoiding certain types of disputes can be an argument against some legal rule if some extra value will derive from it. But if the only aim we have is to make the foundation of a small company cheaper, then there would be an easier solution – to abolish the minimum capital requirement for a private company and to restore the previous payment system. The author admits that the abolishing of the minimum capital rule is a separate topic, but factually no study has ever proved that legal or economical environment would significantly suffer from such a step.

2.2. Blocked Account

2nd directive does not set any rules about technique of payments what means that every member state has an opportunity to provide its own rules. In case of monetary payments Estonian law provides the blocked account system. It means that upon the establishment of a company the monetary payments for shares have to be paid to the bank account and it is prohibited to dispose this account before the registration of a company (ÄS §§ 141, 247, 520 (4)). The control over performance of payments through bank account is not an original solution, the same method is in use in several other countries too (e.g. Sweden, the Netherlands). So, the principle to use a bank account as a control measure in such situation should be generally accepted. But this is only one question. The second one is about blocking the account until the registration of the company. The main question is who is to be protected by such a regulation and is such a principle justified from the point of view of stakeholder protection?

The reason of such regulation is primarily historical. Before 1995 there was no regulation on contributions, the control was absent at all and similarly there

[37] Andres Vutt. Corporate Mobility in Europe and its Consequences for Estonian Law. – Development of Estonian Contract and Company Law in the Context of the Harmonized EU Law I. Ed. by I. Kull. Tartu 2007, p. 183.

[38] Marco Becht, Colin Mayer, Hannes. F. Wagner. Where Do Firms Incorporate? Deregulation and the Cost of Entry. ECGI Working Paper No. 70/2006. Available: http://ssrn.com/abstract=906066, p. 17.

[39] Andreas Pentz, Hans-Joachim Priester, André Schwanna. Raising Cash and Contributions in Kind when forming a Company and for Capital Increases. – Legal Capital in Europe. Ed by M. Lutter. Berlin, De Gruyter Recht 2006, p. 59.

were no rules about the liability of incorporators or directors.[40] The result of such a situation was that on one hand the company had a limited liability and on the other hand there was no counterbalance for protection of creditors and incorporators at the foundation of the company. Such a lack of regulation causes in many cases extremities in the following regulation and this particular situation is a good example for that.

One function of the share capital is to be an investment at the establishment of the company. The minimum capital requirements set only a minimum of this investment, it does not constitute a fund separated from the other assets of the company but it should be used as an operating fund.[41] It means that according to the nature of the share capital it has to be used as any other investment made to the company and all limitations, first of all the prohibition of the payback to shareholders, should be provided without prohibiting the company to dispose the property that has been transferred to the company as a contribution. The question is, should the company have unlimited power to run a business before registration without substantial limitations and as there is not any limitations in law. The object of the company in foundation is completing the foundation[42] (i.e. achievement of the registration) and the blocked account does not help to get this result. So, the company must have the power to dispose its property before registration without excessive limitations.

The question is, should the commercial register have a power to control performance of shareholder's obligation to pay for shares? Then it is obvious that all measures granting this control have to be balanced with the economic interests of the company, they have to be necessary and proportional to the objective of the control. Main function of capital formation rules is to protect creditors and therefore the question is what measures are necessary for granting this objective. These rules itself does not protect founders of the company what does not mean that there is no their protection: if the property of the founded company is wasted by the directors they will be liable for the deficit (ÄS § 146, 252).

If to take into account creditor protection, it seems to be complicated to justify a blocked account system. The power to manage the company is given to directors who have unlimited power to govern everything in the company. Under the rule of the blocked account the money paid by shareholders to the bank account will be at the disposal of the directors after the registration of the company as only after the registration of the company the directors have unlimited power to dispose the company's property. So, the blocked account

[40] Aktsiaseltsi põhimäärus: Kinnitatud ENSV Ministrite Nõukogu 23.11.1989 määrusega. ENSV ÜVT 1989, 37, 573; RT I 1994, 62, 1043.

[41] Horst Eidenmüller, Barbara Grunewald, Ulrich Noack. Minimum Capital in the System of Legal Capital. – Legal Capital in Europe. Ed by M. Lutter. Berlin, De Gruyter Recht 2006, pp. 26.

[42] Paul Varul, Irene Kull, Villu Kõve, Martin Käerdi (koost.). Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne. Tallinn, Juura 2010, § 24 komm. 3.3.2.

seems to give the company the protection against its wrongdoing directors, but it really should be a task of appropriate rules on director duties and liabilities.

The rules on monetary payments for shares differ in different countries. For example, in Germany there is no obligation to pay the money to the bank account of the company. In Germany upon the registration of a company the directors have to confirm that contributions are at their unconditional disposal. The commercial register is entitled to demand presentation of additional documents only in the case of reasonable doubt (GmbHG § 8 (2), AktG § 37 (2)). In the case of monetary contribution a bank confirmation can be used as a proof that the payment is done.[43] In Sweden the monetary contribution for shares has to be paid to bank account but the disposal of the money is limited up to time until all payments are done and the memorandum of association has been signed by all founders (ABL § 2:17). Third example of different regulation is the Netherlands, where the law provides two solutions. It is possible to make the payments to the bank account what will be at the unlimited disposal of the directors after the incorporation. The second possibility is that the bank issues a confirmation that the paid in sums will be at the disposal of the company after the incorporation. In the latter case the bank can act as a guarantor and such confirmation could have no connection with the actual payments.[44] The disadvantage of the Dutch system is that the bank declaration does not assure that the shareholders have really paid for the shares. There is a proposal to do away with such declaration and to replace it with the institute of liability of incorporators and directors.[45]

One more question is how substantial the problem is at all? It is obvious that such a problem could have very practical nature in the situation where terms for registration of the company are long. According to Estonian law the term for registration of the company is 5 business days, in case of accelerated proceedings the entry has to be done on the next business day from the application for registration latest (ÄS § 53 (4)). In practice there is no problem with following these terms by the commercial registers. However the term for registration is not the only fact to take into account. First of all these terms are applicable in the case when the formation of the company is uncomplicated. In case errors are made during the formation proceedings, the commercial register has to give to established company a term to eliminate the deficiencies. The duration of such a term is not stipulated by the law; in practice it is usually a couple of months. In such case the real duration of the company's formation could be

[43] Adolf Baumbach, Alfred Hueck (Bearb.). Gesetz betreffend die Gesellschaften mit beschränkter Haftung. Beck'sche Kurzkommentare. 19. Auflage. München 2010, § 8 2d Rn 15.

[44] P. J. Dortmond. Statutory controls on contributions to capital. – Vennootschapsrecht in EG-perspectief. Deventer, Kluwer 1993, p. 289–290.

[45] Harm-Jan de Kluiver, Stephan F. G. Rammeloo. Capital and Capital Protection in the Netherlands: A Doctrine in Flux. – Legal Capital in Europe. Ed by M. Lutter. Berlin, De Gruyter Recht 2006, p. 566.

much longer than some days. But the term of the registration is not the only argument to be taken into account, more important is the principle.

One more thing has to be taken into account as regards an accelerated foundation proceeding. In this case the term of registration is only one business day and due to such a short term the blocking is not a real problem. Regarding the monetary payments the main problem is different here. In case of accelerated foundation the monetary payments can be paid either to the bank account of the founded company or to the deposit of the register. Both cases are regulated by the same principles, but the difference is that in the latter option the company has to apply to the register to transfer the money to the company's account after the registration and the term for such an application is only one year (ÄS § 520 (4^2)). In principle it means that if the company does not apply for transferring the money timely, the state will simply expropriate it. If the objective of this regulation is to simplify the work of the register and to diminish the administration then such principle is understandable. But the problem is that such an objective is not correct and in fact the expropriation might violate the interest of company's creditors. Therefore it has to be admitted that the rule that is supposed to be a creditor protection rule might damage creditor's interests in reality. The general expiration term for monetary claims arising from transaction is three years in Estonia (TsÜS[46] § 146 (1)), the same term for claims arising from law is 10 years (TsÜS § 149) and it is absolutely not understandable why we could not use the same term in the current case.

Resuming the problem of the blocked account it has to be stated that the blocked account is a superfluous instrument. It really gives no actual protection to anyone, this means that the system is a subject of change and the question only is which way will be the best. At first there is no need to drop out existing system as it is generally working. It means that the German system should not be taken as a basis of amendments. The Dutch system seems to be good but there is one difference – the control over payments is a power of commercial register in Estonia, but in the Netherlands the main control is exercised by a notary. The substance of the control by these institutions is different, the commercial register has to act more formally, the control by the notary is not regulated by strict procedural rules and is more flexible in this point. Besides, the Dutch system is a subject of a reform itself. The Swedish system has been a "donor" for Estonian and due to this relationship it could be used as an example. When accepting it, we do not need to reform all existing principles but we can eliminate the sole problem we have – the blocked account system. To avoid a possibility to pay in the same amount of money several times, the requirement that all monetary payments must be at the bank account at one moment should be introduced, but this should be the only limitation. One might ask what will be the result of such deregulation. The author of the thesis is on the opinion that no damage could be caused to anybody. But there is one important thing –

[46] Tsiviilseadustiku üldosa seadus 27.03.2002. – RTI 2002, 35, 216; 06.12.2010, 12.

today's blocked account regime does not protect any stakeholder but some sort of public order and its renounce would be a clear sign of simplification of company law rules.

2.3. Valuation of Contribution in Kind

The problems related to the valuation of the contribution in kind were analysed in two articles: problems with the amendments of the 2nd directive in the article "Some Features of Legal Capital Regulation in Estonia" and problems of private companies arising from the amendments of the Commercial Code in 2006 in the article "Transformation of Legal Capital Rules in Estonia – Inevitability or Permanent misunderstanding?". At first it has to be stated that the rules on valuation of the contribution in kind have been amended for today and therefore some of the problems analyzed in these article have been solved.

The valuation of contribution in kind is regulated by Article 10 of the 2nd Directive: a report on any contribution in kind must be drawn up before a public limited company is incorporated or is authorized to commence business, by one or more independent experts, who may be legal persons as well as natural persons. The experts' report must contain at least a description of the assets, the methods of valuation and an opinion that the value of the assets corresponds at least to the par value and, where appropriate, to the premium on the shares to be issued for them. The expert's report must be disclosed in the manner laid down by the laws of each Member State.

Estonian law on valuation of contribution in kind (ÄS §§ 143, 249) has been modelled according to the directive. Historically there have been several different regulations of valuation of contribution in kind. First one required that the contribution in kind has to be evaluated in the manner provided by the articles of association and the valuation has to be controlled by an auditor. The reform of 2006 added a requirement that the generally accepted experts have to be used upon the valuation if such experts are available at explicit area. In 2008 an amendment was made according to the directive 2006/68/EC and a separate optional order for valuation of transferable securities was added. From 2011 the procedure for private companies was amended: the obligation to use an expert was abolished, the valuation was given to the powers of the directors of the company and the separate order for valuation of transferable securities was repealed as well. The regulation of public companies remained unchanged. As in a public company the rules on valuation of contribution in kind are applicable in all cases, in private company the law requires the control by an auditor only in limited cases and these margins were raised since 2011. One can therefore conclude that the development of the rules in question has been desultory: in 2006 the requirements were significantly raised for both types of limited

liability companies and in 2011 a large-scale liberalisation of the rules of private companies took place.[47]

In the article, published in 2006, the steps Estonian legislation took to increase the strictness of the above-mentioned rules were criticised. It was found that the requirement to use the experts as it was introduced in 2006 was not well-reasoned. Today we can conclude that the unnecessary rules have been abolished as regards private companies and the proposals, made in the article, have become an Estonian law.

One can therefore note that the critical remarks towards the choiceless implementation of strict rules were grounded and the reform was (at least partly) unreasonable. In 2006 it was stated that it is not reasonable to valuate contribution in kind "pursuant to the procedure prescribed by the articles of association" in a situation where generally recognised experts are available.[48] In 2011, in order to explain why the obligation to use an expert has been abolished it has been stated that "the rules should become more general and the management board will obtain discretionary powers to carry out the valuation"[49]. There is no doubt that the aim is to simplify the rules, but the explanations are unfortunately quite arbitrary and casual.

The question is, can we be satisfied with the current rules. At first it has to be stated that the order of valuation of contribution in kind is quite clear in practice today and there is no major problems. If after the application of the obligation to use an independent expert the commercial registers required them in most cases then today the use of experts is practically limited with the valuation of real estate as it was declared at the explanatory memorandum of the bill.[50] But the real problem is the requirement of compulsory double-check – one must use both – an expert and an auditor. Such a requirement can be considered unreasonable mainly because every valuation, either by an expert or by an auditor, will be billed. It has been stated that even the directive rules on

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[47] It has to be noted that with the same amendments an option to use for valuation the special order in case of transferable securities (2nd directive art. 10a) was abolished from the private companies regulation. This amendment has no actual effect as the abolished regulation was never used in practice and the regulation of the directive has to be considered as unfortunate. See: Eddy Wymeersch. Reforming the Second Company Law Directive. Financial Law Institute Working Paper Series WP 2006–15, November 2006. Available: http://ssrn.com/abstract=957981, p. 8; Mario Notari. The Appraisal Regime of Contributions in Kind in the Light of Amendments to the Second EEC Directive. – European Company and Financial Law Review 2010 (7), p. 69–70.

[48] Seletuskiri äriseadustiku muutmise seaduse eelnõu juurde. 552 SE I. 13.12.2004. http://www.riigikogu.ee/?op=emsplain&content_type=text/html&page=mgetdoc&itemid=043510004.

[49] Äriseadustiku muutmise seaduse eelnõu seletuskiri. 733 SE I. 12.04.2010. http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&eid=992707&u=20110412133048, lk 14.

[50] Andres Vutt, Margit Vutt. Osaühingu asutamine. – Äriõigus. Näidised ja kommentaarid. Toim. M. Kairjak. Tallinn, Äripäev, märts 2011, lk 4–5.

valuation of contribution in kind make the incorporation of a company and increasing of share capital too costly[51], then the requirement of double-check increases costs even more. Therefore is there certainly a problem that has to be solved.

If to take a look at the solution of this problem in other countries, then usually the system of "one-time" check has been used. In Germany, the valuation of assets must be carried out by independent experts (*Gründungsprüfer*) (AktG § 33 (2) 4), who are chosen by the court, from among of auditors. Swedish law provides that an auditor must give an opinion about a contribution in kind (*Aktiebolagslag* 2:19). And in the Netherlands there is also an obligation to use an auditor, but it is not mandatory in case all founders agree otherwise, the contribution in kind is transferred by a company whose reports are disclosed, the founding company has non-distributable reserves at its disposal in the amount of the contribution in kind or the founding company issues a warranty in the amount of the contribution valid for at least one year (BW art. 94a). One must admit that compared to the above-mentioned rules, Estonian requirements are higher.

One possibility to avoid the double-check is to abolish the requirement of an auditor if the contribution in kind has already been evaluated by an expert. Basically this will not be in contradiction with the 2nd directive as the directive requires only some independent valuation. In case of such solution the law has to include the references to those exact cases when the expert is accepted and probably the only case should be the valuation of the real estate. Another problem is that in this case the person who can act as an expert has to be regulated more exactly as the valuation of real estate has not sufficiently regulated itself and basically anyone can do it. The weakness of such a regulation is that it will probably be undefined and it is questionable whether it is reasonable to have different evaluation proceedings for different property.

The second option is to abolish the requirement of expert at all. As the auditor is not a valuation expert then it is very likely that any auditor will ask for such a valuation what means that the expert will be used anyway. The weakness of this possibility has been proved in the practice already and sometimes the low professionalism of an auditor can be a problem. Unfortunately there have been cases in practice when the auditor had obviously over-valuated the contribution in kind. The law, though, provides the liability of an evaluator and the auditor who audits the valuation (ÄS § 249 (4)), which should serve as a counterbalance for such cases. On one hand, the problems with the auditors and their duty of care were more likely a relevant issue earlier when this institution was "young" and the surveillance system weak. On the other hand, it is not always easy to assert the compensation claim against the auditor and furthermore, the possibility to demand compensation acts only as *ex post* remedy. One

[51] Friedrich Kübler. The Rules of Capital Under Pressure of the Securities Markets. – Capital Markets and Company Law. Ed. by K. Hopt, E. Wymeersch. Oxford, OUP 2003, p. 101.

can therefore conclude that the author of the thesis is on the opinion that the best possibility to amend the law is to abolish the requirement to use an expert in the public companies too.

It has to be taken into account that the evaluation of the contribution in kind is not presumed to be precise as the result of the valuation should not be to establish the exact value of the property but it has to give an answer to the question whether the value of contribution of kind is sufficient to cover an issue price of the shares or not. If the objective of the law is to reach such valuation, then an obligation to use experts is superfluous. As the valuation of contribution in kind concern other shareholders more than creditors[52], then it is important to get to know the real value of the contribution of kind, but the use of experts does not help to reach that task.

[52] Heribert Hirte, Alexander Schall. Legal Capital and the EU Treaties. – Corporate Finance Law in the UK and EU. Ed. by D. Prentice, A. Raisberg. Oxford OUP, 2011, p. 536.

3. CAPITAL MAINTENANCE RULES

3.1. "Recapitalize or Liquidate" Rule

The problem of the loss of the capital is regulated in article 17(1) of the 2nd directive. It states, that in the case of a serious loss of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States, to consider whether the company should be wound up or any other measures taken. The second paragraph of this article prescribes, that the amount of a loss deemed to be serious within the meaning of paragraph 1 may not be set by the laws of Member States at a figure higher than half the subscribed capital. The wording of this rule is absolutely undefined as the only clear obligation of the company is to convoke the general meeting in case of the capital loss. There is no requirement that general meeting itself must make any decision as there is no such obligation in the directive and due to the substance of the general meeting it is even impossible to impose such an obligation. The obligation to convoke a general meeting is clearly protecting shareholders[53] and therefore it has to be concluded that the protection of the shareholders is the only objective of the directive in the case of capital loss. Enriques&Macey have noted that the above-mentioned regulation of directive does not protect creditors of the company as the shareholders may only discuss the alternatives and they have the right to take no action at all.[54] The opinion that even though the creditor protection is the main object of legal capital rules, the article 17 of the 2nd directive does not protect creditors, is absolutely correct. But the question is, should and could the creditors be protected by the legal regulation based on article 17 and if the law provides some creditor protection, are they really protected?

Estonian company law rules as regards the case of the capital loss are (as they should be) derived from the 2nd directive. They include the director's obligation to convoke a general meeting and the law provides the permissible limits of the loss of the capital (ÄS § 171 (2) 1, 292 (2) 1). In addition to the directive, Estonian law provides that the general meeting has to adopt a decision on capital increase, reduction, merger, division, transform of corporate form, apply for bankruptcy or taking of other measures for solving the problem (ÄS § 176, 301). The last rule follows basically the idea of the 2nd directive as the shareholders have the discretion to choose the content of the corresponding decision and after all, even the law obliges the general meeting to adopt corresponding decision, the adoption itself is not guaranteed. It is absolutely usual in practice that shareholders decide to wait for improvement of the state of the company

[53] Jaan Sootak, Priit Pikamäe (koost.) Karistusseadustik. Kommenteeritud väljaanne. 3., täiendatud ja ümbertöötatud väljaanne. Tallinn, Juura 2009, § 380 komm. 1.

[54] Luca Enriques, Jonathan R. Macey. Creditors versus Capital Formation: The Case against the European Legal Capital Rules. – Cornell Law Review 2001 (86), p. 1174.

and according the law they have done nothing wrong as such decision can be considered as a decision about application of the "other measure".

However the described rules form only one part of the full regulation as the law provides also the consequences if the general meeting does not adopt a proper decision. At the time of publishing the article, the Estonian law provided the deletion of a company from the commercial register in case of the loss of equity capital if the general meeting of the company had not adopted any decision in order to for solve the problem. Such regulation seems to be ridiculous an unreasonable as the deletion of the company with probable financial problems without a consent of the creditors does protect only unfair directors and shareholders and clearly violates the interests of the creditors. One must admit that the deletion of a company from the register has no fatal consequences for creditors as it is possible to apply to court for opening the additional liquidation of the company (ÄS § 218 (2), 381 (2)), what gives to the creditors an opportunity to present the claims against the company. However even though there is such a possibility, it means that an additional court proceeding has to be opened, what causes additional administrative load and additional costs for creditor.

For today the legal situation has been changed as the amendments valid since 2006 provide for such situation a compulsory dissolution of the company instead of the deletion from the commercial registry. But it does not mean that companies are not under control of commercial registers anymore as the law (ÄS § 203 (3) 1 and 366 (3) 1) provides that if the company has equity less than is foreseen in the law, the court has a power to decide at its own discretion the compulsory dissolution of the company. According to law the commercial register checks all annual accounts of the companies and in case there is a problem with equity capital, register has a power to "impose appropriate compulsory measures".[55] In practice it means that the company gets a warning and if it does not respond, the case will be handed over to the judge in order to decide the dissolution. The compulsory dissolution of the company is of course a much better solution than the deletion of the company from the register as in the case of the dissolution the court is obliged at least to organize a hearing of the company's directors (TsMS[56] § 629 (2)). The court has also a power to give a company an additional time to find out a solution of the problem. It means that the current legal situation is guaranteed by the rules of the civil court proceeding and therefore the company's rights are much better protected than they were under the previous regulation. At least the dissolution of an acting and solvent company should be out of question.

The relief in the above-mentioned regulation does not make nonexistent the main question – is the intervention of the state in such situation justified? On one hand the state intervention may prevent the problems for future creditors as

[55] Kohtu registriosakonna kodukord. Justiitsministri 28.08.2002 määrus nr 56. – RT I 2002, 103, 1558; 12.04.2011, 20, § 261 (2) 4, 262 (3).

[56] Tsiviilkohtumenetluse seadustik 20.04.2005. RT I 2005, 26, 197; 30.12.2010, 17.

at least theoretically the regulation restrains the continuing activity of the company in bad sate. But this effect might be disputable as there is not a direct connection between the loss of equity and the continuity of the company. It is not difficult to find companies that have had equity not in accordance with the requirements, being despite of this liquid and continuous. The question about the meaning and use of the rules on capital loss are not clear in Estonia and sometimes these rules are understood in wrong way. The equity capital test itself is certainly an indicator of the economic state of the company. But the consequence of use of these rules are often understood incorrectly and these rules are overestimated and understood as if the company with a lost equity capital is lost the company is certainly insolvent. We can take as an example two opinions from Estonian legal literature. First it has been stated that if the shareholders do not adopt the decision for assuring the restoration of the equity capital, the company has to apply for bankruptcy irrespective of the existence of insolvency.[57] Secondly there is an opinion that if the company's equity capital is under requirement of the law the company is insolvent.[58] Both of the opinions are incorrect as the court shall declare bankruptcy only if the debtor is insolvent (PankrS[59] § 31 (1))[60] and insolvency and the state of the equity capital are not directly linked. It means that the loss of equity capital itself cannot be a basis for the bankruptcy petition and it should be based on the fact of insolvency.[61]

Another question is who will benefit from the compulsory dissolution of the company. The shareholders obviously do not, because if they did not adopt a decision on the dissolution of the company, they definitely have an interest to go on with the company. Creditors can get some advantage only in the situation when the dissolution stops the unsuccessful activities of the company but the effect is *vice versa* when the company as a going concern has a value. After all, in most cases the dissolution causes additional costs for the company. So it should be concluded that the compulsory dissolution of the company not passing the equity capital tests does not benefit neither the shareholders nor the creditors in most cases.

The additional problem is that the compulsory dissolution of the company can have fatal consequences. In case of the voluntary dissolution it is possible to break off the dissolution and restore the activities of the company (ÄS § 217, 380). In case of the compulsory dissolution or the compulsory deletion of the

[57] Priit Manavald. Likvideeriva pankrotimenetluse alternatiivid maksejõuetuse tingimuses. Magistritöö. Tartu, 2004, lk 27.

[58] Margit Kikas. Pankrotimenetluse algatamine ja pakroti väljakuulutamine. Magistritöö. Tartu, 2005, lk 10.

[59] Pankrotiseadus 22.01.2003. – RT I 2003, 17, 95; 14.03.2011, 46.

[60] There is an exeption that if a bankruptcy petition is filed by a debtor, the court shall declare bankruptcy also if insolvency is likely to occur in the future (PankrS § 31 (3)).

[61] Andres Vutt. Netovara säilitamise põhimõte ja selle praktiline rakendamine. – Juridica 1996, 10, lk 553.

company the dissolution is final and the law does not provide the possibility for restoration. This position is confirmed by Supreme Court.[62]

It has to be noted, that in this question the current Estonian law follows the model of Swedish law (ABL § 25:17). It has to be taken into account that this is traditional salvation of the problem in the Nordic company law and in author's opinion it is not accordance with the trends in the contemporary company law. Besides, the application of these rules in practice is absolutely different in Sweden and Estonia.

There is one more problem with the application of the "recapitalise or liquidate" rule in Estonia – the equity capital requirements are set on two conditions: the company must have an equity capital at least in the sum of a half of the actual share capital and the equity capital has to be equal at least to the statutory minimum capital. Such regulation is formally in accordance with the article 17 of the 2nd directive as the directive sets only minimum rules. But if we look at the same rules in other countries, we can find the first but not the second requirement (e.g. ABL § 25:13). Tremendous originality in legal rules gives usually a raise to the question, are these rules really better or has the legislator made a mistake? In practice the application of the rule in question means that for the company with the existing share capital equal to the statutory minimum is it forbidden to act with losses. For example, if a newly established company has any expenses before selling any good or providing services, then the company inevitably breaks the law as even the smallest expense brings its equity capital under the boundary allowed. It is hard to believe that the objective of the law might be to "chastise" companies with smaller share capital, because this rule is obviously discriminative for smaller companies. One can therefore conclude that such a rule is not justified and it should be abolished.

3.2. Acquisition of Own Shares

The acquisition of own shares by the private company was analysed in the article "Transformation of Legal Capital Rules in Estonia – Inevitability or Permanent Misunderstanding?" in the context of amendment of law in 2006 introducing the prohibition to acquire shares more than 10% of the share capital. According to the opinion of the author such a limitation is not justified and can be too restrictive.

The rules on the acquisition of own shares are one part of legal capital rules as the buy-back of shares might be handled as a return of the investment to the shareholder. However, the acquisition of own shares may be necessary in certain cases – for example, in a private limited company, which is a closed company by its nature , it may be necessary to enable a shareholder to exit the com-

[62] Riigikohtu tsiviilkollegiumi 28. aprilli 2008 otsus tsiviilasjas 3-2-1-27-08. – RT III 2008, 19, 129.

pany, solve disputes between shareholders, making the company more attractive to external investors or achieve informal reduction of capital.[63]

There are several justifications to prohibit the acquisition own shares. The first one is capital maintenance as without restrictions the acquisition may cause reduction of undistributable reserves. Other reasons are avoidance of the possible market manipulation and avoidance that managers could determine the identity of the shareholders by share buy-backs or to pay to some shareholder for the shares too high prize.[64] Acquisition of company's own shares means a conflict of interests between shareholders and other interest groups (mainly creditors)[65] and therefore can the capital protection aspect considered as justified. Question of unfair distributions is regulated by distribution rules – the payout can be made only from the equity that is available for distributions to the shareholders (ÄS § 162 (2) 3, 283 (2) 3). The market manipulation might be a case primarily for public companies as the shares of the private companies are not marketable. The question about possible abuse by company's directors is complicated as it is questionable whether the *ex ante* rules could avoid the management to act in bad faith at all. The acquisition of own shares requires authorization from the shareholders as the law requires that acquisition is allowed only if it is provided by the articles of association (ÄS § 162 (2) 1, 283 (2) 1) and this remedy should minimise the risk of abuse. In addition the shareholders have to determine the maximum and minimum consideration paid for shares (ÄS § 162 (2) 3, 283 (2) 3) and it limits the powers of the directors.

If to take a look at the same requirement in other countries, then one can see, that there is no threshold for private companies in Germany (GmbHG § 34) and the Netherlands (BW book 2 art. 98). In this context the Estonian law can be considered restrictive. The situation is different in Sweden as the law allows share buy-backs only by the companies which shares are listed outside EEA (ABL § 19:13) and the threshold in this case is 10% (ABL § 19:15); such regulation has found to be unreasonably strict.[66]

Taking into consideration the above-mentioned comparison a question arises: what is the justification for setting up such a threshold? If one takes into account the objectives of the acquisition of company's own shares, then the only reason could be the avoidance of manipulation with shares. As it was mentioned, the market manipulation might be a problem for listed but not for private companies. One might ask, if law prescribes no threshold, could the company then buy back all the shares and after that have no shareholders? But it could

[63] Eilís Ferran. Principles of Corporate Finance Law. Oxford, Oxford University Press 2008, pp. 203–206.

[64] Eilís Ferran. Company Law and Corporate Finance. Oxford, Oxford University Press 1999, pp. 434–435.

[65] Brian R. Cheffins. Company Law: Theory, Structure and Operation. Oxford: Clarendon Press 1997, p. 79–80.

[66] Jan Andersson. Kapitalskyddet i aktiebolag. En lärobok, femte upplagan. Stockholm, LitteraturCompagniet 2005, s. 123, 138 *et seq*.

not be a big real problem as the obtained shares must be transferred (ÄS § 163, 284) and therefore such situation is temporary. It is interesting to note that the threshold of 10% was introduced in Estonia in 2006 and almost the same time the directive 2006/68/EC amending the 2nd directive changed this requirement *vice versa* as a right to buy back shares was reverted by the amendment: the maximum number of 10% of the subscribed capital that could be acquired by a company is after the amendment the minimum threshold.[67] Three more remarks have to be made. At first, the threshold 10% in the 2nd directive was criticized by the High Level Group, who found the percentage to be arbitrary.[68] For second, the model for Estonian rules on acquisition of company's own shares was the law of the Netherlands and at the same time with our amendments of 2006 the named country had a proposal to abolish a limitation that only 50% of share capital can be bought back.[69] The second remark is, that this problem exists not only in Estonia as in Belgium the previous threshold 10% was increased to 20% in 2009 and even the threshold is bigger now such change has been found to be not clear and sufficient.[70]

In author's opinion the regulation on acquisition of private company's own shares must have only two restrictions: the acquisition has to be approved by the shareholders and the distributions should be made only from the free reserves. The maximum threshold is a pointless restriction and should be abolished. There is one more problem – the 2nd directive prescribes the use of free reserves only but this restriction does not take into account the possibility to compose the accounts using IFRS. Such accounts are more informative but less protective for creditor's interests.[71] This is a problem for Estonia as the Estonian GAAP follows IAS/IFRS[72], there is no separate accounting for distributable sums but the IAS/IFRS-based accounts are not oriented to be a balance sheet aimed at capital maintenance.[73] The second question about the distribution rules is caused by the Estonian unconventional tax law as there is no corporate

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[67] Christoph Van der Elst. The Modified Belgian Framework for Contributions in Kind, Share Buy Backs and Financial Assistance. TILEC Discussion Paper DP 2009–025. February 2009. Available: http://ssrn.com/abstract=1400530, p. 4.

[68] Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe. Brussels, 4 November 2002. Available: http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf, p. 84.

[69] Harm-Jan de Kluiver. Towards a Simpler and More Flexible Law of Private Companies. A New Approach and the Dutch Experience. – European Company and Financial Law Review 2006 (3), p 54.

[70] Van der Elst, *ibid*. p. 15.

[71] John Armour, Gerhard Hertig, Hideki Kanda. Transactions with Creditors. – The Anatomy of Corporate Law. A Comparative and Functional Approach. Second Edition. Oxford University Press 2009, p. 132.

[72] Lehte Alver, Jaan Alver. Finantsarvestus. Põhikursus. Teine, täiendatud trükk. Tallinn, Deebet 2009, lk 58.

[73] Giovanni E. Colombo. International Accounting Principles (IAS/IFRS), Share Capital and Net Worth. – European Company and Financial Law Review 2007 (4), p. 554.

income tax as such in Estonia but the income tax has to be paid from the sums distributed to the shareholders.[74] It means, that basically the last row of the income statement is the profit before taxation, that reflects in the balance sheet as the net profit. This sum would be taken as basis for distribution, but in the case dividend payments the company and not the shareholder has the obligation to pay the income tax and the justified question arises, must the tax sum come from the distributable profit or can it be transferred to the profit/loss of the balance sheet of the year when the dividend is paid. In case of acquisition of own shares by the company the question is the same when the acquisition causes taxation. Estonian law lacks special regulations, but this problem should be considered a special issue that is beyond the research are of this thesis and therefore handled separately.

3.3. Subordination of Shareholder Loans

In the article "Subordination of Shareholder Loans in Estonia" the main analysis is about the question whether the subordination of shareholder loans is possible in Estonian current law and, if not, then should it be possible.

A loan is subordinated when according to its terms the principal amount and sometimes interest as well will be not repaid until some or all the other loans have been paid in full.[75] The question of shareholders' loans arises from the legal structure of the investments made by the shareholders to the company. If the company's activities require such investment, then the shareholders are free to choose its legal form. It means that they can invest to the company through share capital or to provide the company a loan. Even though the source of the capital is the same in both cases, these forms of investment are legally positioned absolutely differently. The equity capital investment and loan have not only formal differences. It is prohibited to pay back the share capital to the shareholders (ÄS § 274 (1)), it is also prohibited to pay interest for the shareholder's contributions to the share capital.[76] The loan that comes from the shareholder is substantially similar to all the other loans. So, in case of equity capital investment the welfare of the shareholder depends on the economic success of the company, in case of the loan there is no such correlation.

The possibility to regulate a form of shareholders' investment is limited. The only regulator as regards the moment of making the investment is today the minimum capital requirement but it is clear that this requirement is not sufficient as it loses the sense in case of investments bigger than the statutory mini-

[74] Tulumaksuseadus 15.12.1999. – RT I 1999, 101, 903; 04.03.2011, 14, § 50 lg 1.

[75] Eilís Ferran. Principles of Corporate Finance Law. Oxford, Oxford University Press 2008, p. 58.

[76] Andreas Pentz, Hans-Joachim Priester, André Schwanna. Raising Cash and Contributions in Kind when forming a Company and for Capital Increases. – Legal Capital in Europe. Ed by M. Lutter. Berlin, De Gruyter Recht 2006, p. 45.

mum capital. One can argue whether such a question should be regulated at all. The author of the thesis is on the opinion that it should be as under certain circumstances the situation when shareholders are treated as usual creditors can be unfair. First at all the problem will be evident in case of insolvency as the treatment of shareholders as ordinary creditors might be unfair in relation to the other creditors. The relation between shareholders and the company is based on the fact that shareholders pay in the capital and get a control over the company. The latter possibility makes difference between shareholders and creditors as the creditors have no power to arrange the inner relations of the company. The concept of the capital itself bases on the principle, that company's assets are constituted by means of share capital, on account of which the creditors can satisfy claims submitted by them against the company.[77] But if to take into account a possibility that the shareholder is entitled to make his investment to the company in the form of a loan, this concept might be affected. It has to be pointed out that the question about shareholders loans is not directly connected with the concept of legal capital, but it exists independently of whether a jurisdiction accepts the principle of fixed capital or not.[78]

The main argument for the subordination of shareholders' loans is that shareholders are probably the first to know when the company is approaching the insolvency. It is understandable that in such a situation they incline to terminate the loan and try to get satisfaction in full.[79] Such behaviour is generally unfair as the shareholders as insiders can be considered to be in the better position in relation to the other creditors. There are also arguments against the subordination. For example, in cases when the other creditors have no wish to afford a company financing, the shareholders could do it as they have more information, allowing adopting the appropriate decision. The shareholders might also be more interested in successful reorganisation of the company compared to other creditors and, thus, they may provide a company a loan in more favourable conditions. And after all, the *ex ante* subordination may cause bigger risks taken by the shareholders as in case of insolvency the payoff they get is lower than in the case of successful reorganisation.[80]

The subordination of loans can be done by the law or by the contract. There can be strict rules in law, but the loan may also be subordinated by the court. In the latter case the court has a power to impose wide legal rule or principle (e.g. good faith, unfair prejudice). The statutory regulation on subordination is valid

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[77] Andrew McGee. Share Capital. London: Butterworths 1999, p. 2.

[78] Marcus Lutter. Legal Capital of public companies in Europe – Executive summary of considerations by the expert group on "Legal Capital in Europe". – Legal Capital in Europe. Ed by M. Lutter. Berlin, De Gruyter Recht 2006, p 13.

[79] Dirk A. Verse. Shareholder Loans in Corporate Insolvency – A New Approach to an Old Problem. – German Law Journal 2006 (9), p. 1116.

[80] Peter O. Mülbert. A Synthetic View of Different Concepts of Creditor Protection, or: A High-Level Framework for Corporate Creditor Protection. – European Business Organisation Law Review 2006 (7), pp. 398–399.

in Germany (InsO § 39), case law solves the problems in US. It has to be pointed out, that before the statutory regulation of the subordination of loans, the German case law accepted that the loan is subordinated if it was provided to the private company experiencing solvency problems.[81] In 1984 the German Federal Supreme Court extended this principle to public companies, if the shareholder who provided a loan has shares more than 25% of share capital.[82]

The situation with the regulation of subordinated loans in Estonia is absolutely clear – neither has there ever been nor is there any current regulation. There have also been no court decisions. The only limitation on repayments of loans are provisions prohibiting the directors to make payments on behalf of the company after insolvency has become evident, except in the case where making the payments in the situation of insolvency conforms to the due diligence requirements (ÄS § 180 (5^1) 306 (3^1)).[83] This is a general rule and not a specific rule for subordination as it concerns all repayments. In practice the contractual subordination is quite common. The problem with the contractual subordination is that the only remedy is that if the shareholders will get their loan from company back before the third party creditor (usually bank), then this creditor has a right to terminate the loan agreement. In addition, the company's directors and/or shareholders can be held liable for the illegal repayment to the shareholder.

Thus, the question is, is there a need for specific statutory rules about subordination of shareholder loans in Estonia? There is no unique answer, but in the opinion of the author, considering all the circumstances the answer would be yes. If to take a look at the evolution of the subsequent legal regulation in Germany, then the situation in Estonia is the same with the situation in Germany before statutory regulation in 1990. It means that there are general provisions on prohibition of repayment of the capital to the shareholders (ÄS § 157 (1), 275 (1)). According to these rules the company is entitled to make distributions to the shareholders only if there are free reserves. The purpose of these articles is to limit dividend payments at first, but the wording allows the wider interpretation. Therefore Estonian company law is in the situation, where a court may easily declare the repayment of a loan by the insolvent company to its shareholder illegal. As a remark it has to be pointed out, that the heading of § 278, regarding a public limited company, is "Amount of dividend"; it is not in

[81] Andreas Cahn. Equitable Subordination of Shareholder Loans? – European Business Organization Law Review 2006 (7), pp. 289.

[82] Ulrich Huber, Mathias Habersack. Special Rules for Shareholder Loans: Which Consequences Would Arise for Shareholder Loans if the System of Legal Capital Should be Abolished? – Legal Capital in Europe. M. Lutter (ed.). Berlin 2006, pp. 309.

[83] The same principle is applicable in Germany (GmbHG § 135 (1)), where it is considered to be one part of regulation on shareholder loans. See: Jochen Vetter, Christian Schwandtner. Cash Pooling Under the Revised German Private Limited Companies Act (*GmbHG*). – German Law Journal 2008 (9), p. 1172–1173.

accordance with the text of the article and is has to be changed irrespective of all other circumstances.

When starting to amend the law respectively, one of the principle questions should probably be: what should we take as an example. It is obvious that we could choose among the countries that have imposed the subordination rules (Germany, Austria, Spain, Italy).[84] At the moment in Austria and Italy the system, used by Germany before the last amendments in 2008, is applicable. Germany and Spain currently share the same (more modern) approach. The main and conceptual difference between those two platforms is that according to German and Spanish law the subordination does not have a prerequisite that the loan must have been provided to the distressed company. The easier regulation usually tends to be better and therefore it would be reasonable to take the German law as an example.

The next question is, should this regulation be applicable to private companies only or for the both types of companies. Regarding that the distinction of these forms is not substantial in Estonia, there is hard to find any argument why should we not apply the regulation to the both types of limited companies. It has to be pointed out that Estonian Supreme Court has found that "there is no justification for treating the same situation differently in a private limited company and a public limited company."[85] In the referred case there was a gap in the law as regards regulating a special issue for a private company and the Supreme Court stated that the rule, regulating the same issue for a public company should be applied. It is important to emphasize, that the applicable rule did not reflect the special characteristics of the public company rather that the characteristics of both types of limited companies. The same situation was in Estonian company law as regards ÄS § 289^2 that was introduced in 2006 for establishing the liability of the "shadow directors". These legal norms were initially (unfortunately) designed only for the public company, though it was obvious that the private company would probably need this regulation even more. Two years later the mistake was corrected by the legislator and ÄS was amended respectively as regards private company (ÄS § 167^1). For making a general rule the principle of subordination should be regulated in bankruptcy law like it is in Germany (InsO § 39).[86]

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[84] See the comparision: Martin Gelter, Jürgen Roth. Subordination of Shareholder Loans from a Legal and Economic Perspective. Harvard Law and Economic Discussion Paper No. 13. 2/2007. Available: http://ssrn.com/abstract=998457, pp. 41–42.

[85] Riigikohtu tsiviilkolleegiumi 29. jaanuari 2003 otsus tsiviilasjas 3-2-1-6-03. – RT III 2003, 4, 41.

[86] There is also a special regulation on recovery claims of the equity replacing loans in Germany (InsO § 135). The purpose of these rules is to supplement the capital maintenance rules. See: Hans-Peter Kirchhof, Hans-Jürgen Lwowski, Rolf Stürner (Herausgg.). Münchener Kommentar zur Insolvenzordnung. 2. Auflage. München, Verlag C.H. Beck 2008, § 135 rn. 1. In author's opinion there is no need for such special regulation in Estonia as the general rules on recovery claims (PankrS § 110 ff) are applicable and will in principle cover this situation.

One additional important question related to the legal situation with subordinated loans is about company's accounts – must such loans be recognised as an equity capital or liabilities? The recognition in accounts has double effect: third parties will be informed and if it is allowed to recognise them as an equity capital, then it may benefit the shareholders. As it was already mentioned earlier, the question about the possibility of subordination of loans by the law is not clear, but it is definitely allowed by agreement. Therefore the question arises – does the legally allowed subordination contract give a ground for recognition of this loan as an equity? The consequences of different recognition may substantially change the state of the balance sheet and even the legal consequences are different. For example, if to allow to recognise the subordinated loan as an equity, it might be used as a possibility to counterbalance the losses and subsequently avoid the problems arising from the loss of equity and potential compulsory liquidation (ÄS § 203 (1) 1, 366 (1) 1). The alternative of that is of course the ordinary increase of share capital (probably with using share premium) but financing by means of a loan is more flexible and might benefit more the interests of the shareholders. Such an investment may be temporary and in case of the increase of share capital the withdrawal of investment requires full procedure of capital reduction. More difficult is the question in case one uses the share premium as it can basically be used only to cover losses exceeding net profits or to increase the share capital (ÄS § 155 (2), 255 (2)).

The answers to the question about the above-mentioned recognition can be found in the Accounting Act[87]. The annex 1 of this act consists the layout of the balance sheet and companies have to draw their accounts using this scheme (Accounting Act § 18 (3)). According to this layout the equity capital consists of share capital, share premium, own shares, statutory reserve, other reserves and profit or loss. As one can see, there stands nothing about subordinated loans. § 18 (3) allows to depart from the balance sheet layout, but only in limited extent – the subdivision of items is allowed if this leads to a greater clarity. It means that modifications are allowed only with the purpose to make accounts more informative and transparent, but the law does not allow to make fundamental modifications and to add anything absolutely new. As the accounting law does not recognize subordinated loans, they have to be handled as ordinary loans and entered into balance sheet as liabilities. However it is not against the law to recognise them as a separate item but only as a subdivision of loans.

One must certainly take notice that the previously described situation affects only the companies that apply Estonian generally accepted accounting principles. In case a company uses international standards, there is no limitation or prohibition to take IAS 32[88] as a basis for evaluating loans. Namely, according

[87] Raamatupidamise seadus 20.11.2002. – RT I 2002, 102, 600; 16.11.2010, 12.

[88] As amended: Commission Regulation (EC) No 53/2009 of 21 January 2009 amending Regulation (EC) No 1126/2008 adopting certain international accounting standards in

to IAS 32 recording of a loan either as a liability or as a part of equity depends upon the pay-back obligation state in the financial instrument in question. One must though take into account not only the stipulations made under issuing the instrument. The validity of such agreements must be estimated as well. According to IAS 32 art 18 the differentiation depends on the substance rather than the legal form of the financial instrument. It does not mean that one should not consider the legal consequences – for example it should probably not be allowed to show shareholders' loans among the equity unless the subordination is clearly agreed.

It has to be noted that after financial crisis there is a lot of companies with inadequate equity capital in Estonia. A lot of them have been additionally financed by the shareholders and as subordinated loans cannot be recognized as an equity capital, a lot of the companies constituted voluntary reserves as a substitute of the subordinated debt.[89] Estonian law lacks special regulations as regards of "facultative" reserves so it is possible for the shareholders to design an appropriate regulation in the articles of association even stipulating the terms of appearing and disappearing of such reserves. Even such a solution is possible, the situation cannot be considered normal as the creation of such "voluntary reserves" is just a technical solution for the situation when the regulations are insufficient.

Summarizing this question we have to admit that the Estonian accounting law has also to be changed and the recognition of the subordinated loans as a part of the equity capital must be clearly allowed.

accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Accounting Standard (IAS) 32 and IAS 1. OJ L 17/23, 22.11.2009.

[89] Andres Vutt. Vabatahtlik reserv kui omakapitali nõuete täitmise üks võimalus. – Maksumaksja 2010, 1, lk 35–36.

4. MINORITY DIVIDEND RIGHTS

Dividend rules are one part of the distribution rules, which main purpose is to protect company's creditors against excessive payments to shareholders. These rules derive from article 15 of the 2nd directive and they determine in principle the maximum distribution rate. The next question about dividend payments is how to share it between the shareholders. Estonian law provides that the dividend shall be paid according to the nominal or par value of the shares, but the articles of association may provide the different classes of shares the different dividend right in public company (ÄS § 276 (2)) or any other rule in private company (ÄS § 157 (2)). The third question is – whether there is an obligation of the company to pay the dividends to the shareholders? There is no such general legal obligation. From the point of view of the financial management there can be two types of companies: the ones that pay dividends and those that do not. In the latter case one can say that there is no problem as the value of the shares will be increased. Unfortunately is this valid only in case of the shares of the listed companies and it is impossible to estimate whether there is a real surplus in the non-listed companies. Distribution rules are set mainly with the purpose to protect the creditors of the company. Creditors have an interest that a company has sufficient cash available after making distributions in order to pay the debts as they fall due (in the coming period) in its ordinary course of business.[90] Interest of the shareholders regarding dividend payment may be different. There could be "bad" shareholders who are led by private benefits, short-term shareholders can prefer to maximize their own short-term benefits and many shareholders are only passive investors.[91] The main conflict in companies might be between majority and minority shareholders and as the majority has a possibility to have a control over the company by using the voting rights, the minority should receive an adequate protection from the law.[92] As the decision of distribution of profits must be made by the shareholders (ÄS § 168 (1) 5, 298 (1) 7), the result will be determined by the votes of the majority who might be not interested in receiving the dividends as they get the benefits form the company by other means.

There have been cases of exploitation of the minority shareholders in Estonia too, the most well-known is the case of AS Norma, the company which was listed at the Tallinn Stock Exchange until 2010. The problem with this company

[90] Hanny Schutte-Veenstra, Hylda Boschma, Marie-Louise Lennarts. Alternative systems for capital protection. Final report dated 18. august 2005. Institute for Company Law, Groningen. Available: http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2005/08/18/alternative-systems-for-capital-protection/wodcfinalreportenglish.pdf., p. 66.

[91] Petri Mäntysaari. The Law of Corporate Finance: General Principles and EU Law. Volume I: Cash Flow, Risk, Agency, Information. Berlin, Heidelberg, Springler 2010, p. 189.

[92] Levinus Timmerman, A. Doorman. A. Rights of Minority Shareholder in the Netherlands. – Electronic Journal of Comparative Law, Vol. 6.4. December 2002. Available: http://www.ejcl.org/64/art64-12.pdf, p. 2.

was that irrespectively of the size of the profits it paid out dividends during many years exactly the same sum per share. As a result of such dividend policy the major part of the earned profits were not distributed and the company was overcapitalized. In addition, during a long time, Norma provided a loan to the majority shareholder. In 2009, for example, the net profits according to balance sheet were over 50 million Euros, the sum paid to dividends was 4,2 million Euros and the loan provided to parent company was 6,7 million Euros.[93] It has to be noted that the last sum has previously been significantly higher and only lately diminished.[94] It has to be pointed out, that in this case one can find not only a possible problem with minority dividend rights but cash pooling[95] as well. Additionally it must be admitted, that the minority right to claim the dividends could not change anything in this company in 2009, but in some years the dividend rate should be bigger in the presence of the minority right provisions.

It has to be noted that this is only one example and it is about a listed company, there has been no court cases in Estonia on this matter but it does not show the real extent of the problem. If to take three main determinants of effectivity of the civil court proceedings – structure, duration and cost[96], one can see that the cause of the lack of the cases may not be the fact that there is no violations, but rather the fact that such a case would definitely be legally complicated, the court proceeding would last for a long time and would be very costly. A shareholder would rather try to sell his shares that to start such a trial.

The minority right to claim dividends can be found in the law of some other countries. The rules granting minority the right to get dividend are set in the other countries by three different models. Swedish model gives a minority shareholders (1/10) a right to request from the general meeting adoption of the resolution on payment of the dividends from the profit of the financial year, which remains after making assignments to cover previous losses, if there are no other available reserves, into mandatory and other reserves that have to be used for purposes other than distributing to the shareholders according to the articles of association. The general meeting is not obliged to decide to pay dividends more than 5% of the equity. (ABL § 18:11). German approach is different as it leaves the salvation of the question to the articles of association. The resolution of payment of dividends is either left to the management board or to the supervisory board and according to the statutory rules they have a right to propose to transfer a part of the net profit, but not over one-half, to other reserves. Basically the articles of association can provide any other regulation as com-

[93] AS Norma 2009. a. majandusaasta aruanne. Kättesaadav: https://newsclient.omxgroup.com/cds/DisclosureAttachmentServlet?messageAttachmentId=298744.

[94] Räpased trikid Norma rahaga. – Eesti Ekspress, 10.07.2008.

[95] In the law on groups of companies it usually means a situation when the companies constituting the group transfer their funds into one (usually parent company's) bank account.

[96] Holger Spamann. Cross-Country Determinants of the Quality of Civil Procedure – Complexity, Formalism, and Legal Origin. 3.03. 2009, p 3. Available. http://isites.harvard.edu/fs/docs/icb.topic503720.files/THursday%203%205%20Paper%202.pdf, p. 2.

pared to law (AktG § 58).[97] If a general meeting adopts a resolution that is in contradiction with the law or articles of association, a shareholder may challenge it (AktG § 254). The approach of the Netherlands is basically the same, the law provides that the profits shall accrue to the shareholders if it is not otherwise provided in the articles of association (BW art. 105, 216). Third and different approach is in UK, where the question about dividend payments is also a subject of articles of association and the shares' issuance terms. In addition there have been some cases in UK on the ground of unfair prejudice.[98]

One of the questions is, of course, whether the current Estonian law lacks the minority's possibility claim dividends in case of abuse by majority? As there is no special norm, the general provisions should be analysed. The main shareholder remedy in Estonian law is a right to contest the resolutions of the corporate bodies conflicting the law or the articles of association.[99] The prerequisite of such a claim is the resolution of the general meeting on non-payment of dividends or payment of too small dividends. As the dividend rate is not determined in law, the base of such claim cannot be a particular legal norm but only the general regulation of abuse of powers (TsÜS § 32). This article provides that the shareholders or members of a legal person and the members of the directing bodies of a legal person shall act in accordance with the principle of good faith and consider each other's legitimate interests in their mutual relations. Basically it is a provision about principle of good faith and remedies in company law, therefore it can be used as a basis of the claim only in case of *ultima ratio*: other legal possibilities to eliminate the violation give no result.[100] In a situation where the minority does not get "fair" dividend the principle of good faith is probably far too abstract for being a basis of the claim. The consequence of the breach of TsÜS § 32 can be primarily the compensation of damage or some other remedy prescribed by the law (e.g. the exclusion of the shareholder)[101] and it is doubtful that court could have a power to make decisions on company's dividend policy on a base of the business judgement. After all, the Supreme Court has stated that the right to challenge the company's resolution does not give a shareholder a power to demand from the company a desirable resolution[102] and this means that the possibility to contest a resolution cannot be used as a remedy in this case. The use of a principle of good faith is similar to

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[97] Hüffer, Uwe (erl.). Beck'sche Kurzkommentare. Band 53. Aktiengesetz. 8., neubearbeitete Auflage, 2008, § 58 rn. 6, 7.

[98] Eilís Ferran. Principles of Corporate Finance Law. Oxford, Oxford University Press 2008, pp. 239–241.

[99] Margit Vutt. Systematics of Shareholder Remedies – Origins and Developments. – Juridica International 2010 (17), p. 195.

[100] Paul Varul, Irene Kull, Villu Kõve, Martin Käerdi (koost.). Võlaõigusseadus I. Üldosa (§§ 1–207). Kommenteeritud väljaanne. Tallinn, Juura 2006, § 6 komm. 4.2.1.

[101] Paul Varul, Irene Kull, Villu Kõve, Martin Käerdi (koost.). Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne. Tallinn, Juura 2010, § 32 komm. 3.3.

[102] Riigikohtu tsiviilkolleegiumi 10. novembri 2010 otsus tsiviilasjas 3-2-1-97-10.

the unfair prejudice concept in UK, but it is doubtful that minority shareholders could actually rely on this principle in such cases in Estonia and therefore the UK system cannot be used as a model.

The situation would be different if the provisions giving a shareholder a right to claim certain amount of dividends exist. In this case there would be a clear bases of the claim, the substance of the claim would be quite simple and the court would make a decision that would act as an replacement of the decision of the shareholders (TsÜS § 68 (5)).

The applicability of German system in Estonia is also doubtful. The problem is that this matter has left to be solved mostly to the articles of association in Germany. Technically it would be possible in Estonia to take over the German model but there is a problem that in practice most of the companies use more or less standardized articles of association and we have no custom to have sophisticated rules in it. After all, the articles of association can also be amended by the majority votes and it will still leave the right to determine dividend rights to the majority. So, the best way is to have legal norms regulating the situation and it brings us to the Swedish model. It might be considered as a quite rigid one, but it is certainly the clearest. It has to be taken into account, that there is not a binding rule to adopt a decision on certain dividends by the company, but the minority has a right to present a claim. Such regulation gives a company some freedom and, from the other side, the minority shareholders have a protection against abuse.

5. CONCLUSIONS AND FURTHER RESEARCH PERSPECTIVES

On the bases of the analysis made above and in the earlier published articles it have to be concluded that some of the Estonian company law rules are not necessary and they have to be amended as they do not protect effectively any stakeholder but impose vacuous obligations for companies. It does not mean that all existing solutions are deficient. The author is in the opinion that the law could be much flexible and entrepreneur-friendly without major changes in the existing concept. The amendment of law is justified only if the existing rules are generally unjustified. As the legal capital rules are regulated by the 2nd directive, some of these rules are a model for EU member states. But as the directive is applicable for public companies only, it has to be considered whether all these rules should be applied to the private companies. It have to be taken into account, that there is a forum shopping in EU regarding the private company as a legal form and this pressure could be stronger after introduction of the SPE regulation. It means that the legal form of private company has to be as flexible as it can be for being competitive with the similar legal forms of the other EU member states and SPE. The second conclusion is that as regards some issues (subordinated loans, minority dividend rights) the Estonian law lacks regulation and in author's opinion the appropriate regulations must be introduced.

a) Payment terms

The requirement of immediate payment in Estonian law might lay our companies virtually in a worse situation as compared to some other countries, but the existing system is functioning well and there is no urgent need to change it. So, the system should remain unchanged. But there is a problem that arises from the amendments made to law as regards private company in 2011. These amendments introduced a possibility to establish a company without actual paying in the capital and it means that for the companies established by using of this option, the payment term is different from the general rule. It is not only a question about term as such but about the introduction of entirely new system. Such new system is actually the main point of the amendments but this solution is not good enough to achieve the desired purpose – to make Estonian private company competitive with the similar legal forms of other countries. The problem can also give a potential rise to the court cases where companies shall demand the late payments from their shareholders. As one of the functions of the law should be the prevention and solving the problems but not increasing the number of trials, then in the opinion of the author the abolishment of private companies' minimum capital requirement would be much better and simpler solution. As the minimum capital requirement is not a researched in this thesis, the problem will be left for the further researches.

b) Blocked account

The existing blocked account principle does not protect neither the creditors nor the shareholders, limits unreasonably the activities of the company and serves only public order. The payment of contributions can be checked effectively without blocking the company's bank account by the requirement that all monetary contributions must be at the bank account at the same time and the law should be amended correspondently.

> § 520. Foundation of company
>
> (4) In order to make monetary contributions to a private limited company or public limited company, the founders shall open a bank account in an Estonian credit institution in the name of the company being founded using the business name, the appendage and the number specified in subsection (1) of this section, which may be disposed of in the name of the company ~~*after entry of the company in the commercial register*~~ *after all monetary contributions are made*.

c) Valuation of contribution in kind

The main problem with the contribution in kind is the requirement of double check in public companies. In this question requirement of Estonian law is higher than the requirement in the 2nd directive, it causes the company additional costs and its positive effect is doubtful. The possible use of expert is a question of self-regulation. Therefore the requirement to use experts for valuation of the contribution in kind should be abolished

> § 249. Valuation of non-monetary contribution
> (1) The valuation method of a non-monetary contribution shall be prescribed in the articles of association. ~~*If generally recognised experts are available for valuation of the item of a non-monetary claim, valuation by such experts of the item shall be arranged.*~~

d) Loss of equity capital

There are two problems in relation to the equity capital test rules. At first, there are two requirements for the state of the equity capital: one connected with the actual size of the company's share capital and the second one connected with the statutory minimum. The last one is discriminative for the companies with smaller share capital. This requirement is also more strict than the requirement of the 2nd directive and there is no reason to impose stricter rule in Estonia as it could be discriminative for Estonian companies compared to the other corresponding legal forms in other states.

The main problem regarding the equity capital requirements is the compulsory dissolution of the company in the case of the breach of the requirements. Such a solution is not justified as it is a superfluous intervention of the state to the private relations and this intervention does not serve in fact a protection of any stakeholder.

One more argument against the compulsory dissolution is that it could be merely considered as a sanction but not as real creditor protection measure. If the court opens the proceeding on compulsory liquidation, it does so on the basis of the information that is at least one year old and if the company has not been bankrupted for this time then there is no problem with the creditors either. If the court will open the proceedings and it will be done without valid ground (i.e. the problem has been solved already), then only the fact of an ongoing court proceeding might be a harmful signal to the market. The supervision of the economical status of all companies brings out also heavy administrative costs to the state and the benefit of these costs is doubtful. Therefore the state supervision really benefits nobody and it should be abolished.

§ 171. Calling meeting of shareholders

(2) The management board shall call a meeting of shareholders if this is necessary in the interests of the private limited company, or if:

1) the net assets (total assets minus total obligations shown under liabilities on a balance sheet) of the private limited company are less than one-half of the share capital ~~*or less than the amount of share capital specified in § 136 of this Code or other minimum amount of share capital provided by law;*~~ or

§ 176. Decrease of assets

If the net assets of a private limited company are less than one-half of the share capital~~*, or less than the amount of share capital specified in § 136 of this Code or another minimum amount of share capital provided by law*~~, the shareholders shall decide on:

1) a reduction or increase of share capital on the condition that the net assets would thereby form at least one-half of the share capital ~~*and at least the share capital specified in § 136 of this Code or other minimum capital provided by law*~~; or

1^{1}) the implementation of other measures as a result of which the net assets of the private limited company would form at least one-half of the share capital ~~*and at least the share capital specified in § 136 of this Code or other minimum capital provided by law*~~; or

§ 203. Compulsory dissolution

(1) A private limited company shall be dissolved by a court ruling if:

1) the shareholders do not adopt a dissolution resolution if its adoption is obligatory pursuant to law or the articles of association~~*, or if the shareholders do not adopt any of the resolutions prescribed in § 176 or if no meeting of shareholders is called to adopt a resolution specified in § 176*~~;

§ 292. Special general meeting

(1) The management board shall call a special general meeting in the cases prescribed by the articles of association, and also if:

1) the net assets of the public limited company are less than one-half of the share capital ~~*or less than the amount of share capital specified in § 222 of this Code or other minimum amount of share capital provided by law*~~;

§ 301. Decrease of assets

If the net assets of a public limited company are less than one-half of the share capital, ~~*or less than the amount of share capital specified in § 222 of this Code or another minimum amount of share capital provided by law,*~~ the general meeting shall decide on:

1) a reduction or increase of share capital on the condition that the net assets would thereby form at least one-half of the share capital ~~*and at least the share capital specified in § 222 of this Code or other minimum share capital provided by law*~~; or

1^{1}) the implementation of other measures as a result of which the net assets of the public limited company would form at least one-half of the share capital ~~*and at least the share capital specified in § 222 of this Code or other minimum share capital provided by law*~~;

§ 366. Compulsory dissolution

(1) A public limited company shall be dissolved by a court ruling if:

1) the general meeting does not adopt a dissolution resolution if its adoption is obligatory pursuant to law or the articles of association~~, *the shareholders have not adopted any of the resolutions prescribed in § 301 or the general meeting has not been called to adopt such a resolution*~~;

e) Acquisition of own shares

The analyzed problem with the acquisition of company's own shares was about the limitation of the amount of acquired shares by the private company with 1/10 of the share capital introduced in 2006. It has to be taken into account that the amendments of the 2nd directive from the same year abolished such mandatory rule as regards the public companies Despite of the amendment of the directive the Estonian law still includes the 1/10 limitation as regards of the public company too. This regulation clearly exceeds the minimum requirements of the directive. In the author's opinion the application of such a limitation is not justified as it does not give more protection to the company's creditors who are protected mostly by the rules on distributions in this case. *Ex ante* rules cannot stop a company and its directors or majority shareholders to decide to give some shareholders advantages or to use the company's assets for financing the share transfer between the shareholders. In such cases the stakeholders of the company are protected by the liability rules. As the limitation on the

threshold of acquired shares does not give a real protection to anyone, it should be abolished.

> § 162. Acquisition or taking as security of own shares
> (2) The acquisition or taking as security of its own shares by the private limited company shall be permitted if:
> ~~*1[1]) the nominal value of the share belonging to the private limited company does not exceed one tenth of the share capital, and*~~

f) Shareholder loans

The main question regarding the shareholder loans is that Estonian law does not include any regulation on this topic. In the author's opinion the corresponding rules are necessary as they would give the company an option to raise the equity capital more flexibly without increasing the share capital. The second reason is that if the law would recognize the shareholder loans as subordinated loans, these loans will be paid back after the other creditors get their sum what is definitely in favour of the creditors and will be more honest regarding the fact that otherwise the undercapitalization of the company will not have any consequences for the shareholders. Summarizing – the subordination would favour interests of both of the stakeholders – the creditors and the shareholders.

As the subordination of shareholder loans is more general and exists not only in the limited companies, it would be more effective to amend the insolvency law respectively. The accounting rules should also be amended correspondingly.

There is one more problem that arises from the fact that the heading of ÄS § 278 is misleading and in fact the article consists of several legal norms which all stand in the same paragraph. The law should be clear and understandable and therefore one should follow the principle that separate legal norms should be grouped to the separate paragraphs. Hence, the law should be amended correspondingly.

> § 278. ~~*Amount of dividend*~~ Payments to shareholders
>
> *(1)* The amount of a dividend shall be approved by the general meeting. The management board shall present a proposal concord with the supervisory board.
>
> *(2)* Payments shall not be made to shareholders if the net assets of the public limited company, as apparent from the annual report approved at the end of the previous financial year of the public limited company, are less than or would be less than the total of share capital and reserves which pursuant to law or the articles of association shall not be paid out to shareholders.
>
> Bankruptcy Act, § 153. Rankings of claims
>
> *(4[1]) Claims arising from the loans provided to the debtor by its shareholders or from the economically equivalent transactions shall be satisfied according to the ranking of this claim after all other claims of the same rating have been satisfied in full.*

Accounting Act, Annex 1
Owner's equity
Minority shareholding
Owner's equity of shareholders or partners of parent undertaking
Share capital (nominal value)
Share premium
Less: Own shares
Legal reserve
Other reserves
Subordinated debt
Retained profit/loss
Net profit/loss for financial year
Total owners' equity

g) Minority dividend

The question whereas the minority shareholders should have a right to claim dividends from the company is arguable question. The current Estonian company law lacks effective measures of the minority protection and the dividend claim will be one granting the minority the protection in the situation where the majority misuses its position. In the author's opinion the regulation granting the minority shareholders right to claim dividend payments should be introduced.

The minority dividend claim does not affect the distribution rules as it will be applicable only in the case a company has distributable profits. Therefore the law should be amended as follows.

§ 157, 278 Payments to shareholders

(–) At the request of shareholders whose shares represent at least 1/10 of the share capital the general meeting must decide to pay dividends in sum at least half of the net profits of the last financial year which remains after transfers to the statutory reserve and other reserves but not more than 1/20 of the equity capital.

One must admit, that the current thesis deals with only some of the problems of Estonian legal capital regulation and therefore there can be named some following topics as further research.

One important problem is about the Estonian concept of the "competitive private company" as the current regulation is not following the models used in the other countries (incl. possible abolishment of the minimum capital requirement) and one must find out whether such original solution is justified or not.

There is one more problem regarding the distribution rules in Estonia, which are formally in accordance with the text of the 2nd directive, but the application of Estonian rules gives probably the different result. There are several problems.

At first, Estonian accounting rules are following IAS/IFRS and it is doubtful to reach the objectives of the directive using IAS/IFRS-based financial reports. One example of such discord is that it is allowed to distribute the unrealized profits to the shareholders. In connection with this problem there arises a question about applicability of general distribution rules for acquisition of company's own shares as it have to be asked whereas should it be allowed to use a net profit of the current year in this case. Secondly, the Estonian income tax regulation is different and the notion of the net profits in balance sheet is therefore different too.

Additionally, there is a legal problem connected with problems analyzed in the current thesis about the application of financial assistance rules as Estonia has accepted 2nd directive rules without exceptions what seems to be unreasonable.

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ABBREVIATIONS

ABL	Aktiebolagslag
AktG	Aktiengesetz
BW	Burgerlijk Wetboek
GmbHG	Gesetz über die Gesellschaften mit beschränkter Haftung
IAS	International Accounting Standard
IFRS	International Financial Reporting Standard
PankrS	Pankrotiseadus (Bankruptcy Act)
TsMS	Tsiviilkohtumenetluse seadustik (Civil Court Proceedings Code)
TsÜS	Tsiviilseadustiku üldosa seadus (General Part of Civil Code Act)
VÕS	Võlaõigusseadus (Law of Obligations Act)
ÄS	Äriseadustik (Commercial Code)

SUMMARY IN ESTONIAN

Osa- ja aktsiakapitali reeglid võlausaldajate ning osanike ja aktsionäride kaitse abinõuna

Kapitalireeglid on olnud pika aja jooksul üheks Euroopa ühinguõiguse nurgakiviks. Need reeglid tulenevad 2. äriühinguõiguse direktiivist, mis on vaatamata olulistele muutustele ümbritsevas maailmas püsinud suures osas samana alates 1976. aastast. Ühinguõiguses on viimase kümnendi jooksul toimunud mitmete sündmuste ajel olulised arengud. Kõigepealt tõi Enroni poolt sisse juhatatud suurte äriühingute kokkukukkumine kaasa muutuse seoses usuga eneseregulatsiooni võimalikkusesse ning eelkõige varasemalt sellise suhtumise lipulaevast Ameerika Ühendriikidest kandus üle maailma reeglite tulv, mis puudutas terveid valdkondi (audit, finantsaruandlus, juhtorgani liikmete tasud ja sõltumatus jms). Kuigi ühinguõigusel puudus otsene side finantskriisiga, on see toonud kaasa mitmete paradigmade muutuse, kusjuures taas on sattunud löögi alla eneseregulatsiooni võimalikkus. Euroopas on avaldanud olulist mõju mitmed Euroopa Kohtu lahendid, millega on tunnustatud ühingute piiriülese tegevuse ja liikumise võimalikkust ning mis on sundinud eelkõige Mandri-Euroopa riikide seadusandjaid oluliselt lihtsustama väikeste piiratud vastutusega ühingute (osaühingute) kohta käivaid reegeid. Lisaks on EL-s põhjustatud olulised muutused seoses IFRS/IAS ülevõtmisega.

Kapitalireeglid on neist reformidest jäänud suures ulatuses puutumata. 2. direktiivi küll täiendati 2006. aastal, kuid see reform ei olnud põhimõtteline. Direktiivi on tänaseks väga palju kritiseeritud, õigusteadlaste poolt on koostatud kolm ulatuslikku uurimust (nn Rickfordi, Lutteri ja Hollandi grupid) ja n.ö ametliku uurimuse on koostanud KPMG, kuid kõige nende tulemuseks on siseturu ja teenuste peadirektoraadi seisukoht, et reformiks puudub vajadus. Seega tuleb arvestada senise süsteemi jätkuva kehtivusega, mis pakub igale liikmesmaale väljakutse enda reeglite mõistlikuks kehtestamiseks. Eesti õiguses on kapitalireeglid olnud põhiolemuselt muutmatud alates ÄS jõustumisest 1995. aastal ning nii aktsiaseltsi kui ka osaühingu reeglid lähtuvad 2. direktiivist. Hiljem on tehtud mõned muudatused, millest olulisemad jõustusid 2006. ja 2011. aastal. Neist esimestega tehti mõned reeglid varasemaga võrreldes rangemaks (nt mitterahalise sissemakse hindamine ja oma osa omandamine), teistega aga jõustati nn "konkurentsivõimelise osaühingu" reeglistik, mille üldine suund on nõuete leevendamine.

Käesolevas töös on esitatud kaks uurimisküsimust:

1. Kas Eestis kehtivad kapitali sissemaksmise tähtaegade, rahaliste sissemaksete tegemise, mitterahalise sissemakse hindamise, omakapitali kaotuse ja oma osade omandamise reeglid tagavad ühingu võlausaldajate ning aktsionäride ja osanike tegeliku kaitse?
2. Kas oleks vaja täiendada Eesti õigust laenude allutamise ja vähemuse dividendinõuete reeglitega?

Töö autor esitab hüpoteesi, et esimeses grupis nimetatud reeglid on kehtivas õiguses ülemääraselt reguleeritud ning neid oleks vaja muuta või mõned neist tühistada, ning et teisena nimetatud küsimuste õiguslik reguleerimine on vajalik.

Doktoritöö põhineb neljal artiklil, milles on käsitletud kapitalireeglitega seotud erinevaid probleeme. Artiklites esitatud teemadega on piiritletud ka uurimisobjekt ning töö eesmärgiks ei ole mitte teha ettepanekuid suuremahuliste muudatuste tegemiseks, vaid üksikküsimuste osas.

Esimeseks töös käsitletud küsimuseks on sissemaksete tasumise tähtaeg. Euroopa riikides on kaks süsteemi: esimene nõuab ühingu asutamisel üksnes mingi osa kapitali sissemaksmist (nt 2. direktiiv kehtestab nõudeks 25% märgitud kapitalist), osa riike nõuab aga kogu kapitali sissemaksmist. Eestis kehtib viimane nõue. Kui vaadata küsimust Euroopa õiguse kontekstis, siis on ta seotud lisaks miinimumkapitali nõudega. 2. direktiiv kehtestab selle miinimum-suuruseks aktsiaseltsile 25 000 eurot, liikmesriigid on vabad otsustama suurema nõude kehtestamist. Ühingu asutamisel on oluline küsimus erinevate riikide võrdlusel ühingu n.ö asutamishind – kui palju on ühingu asutamiseks vaja vahendeid. Tavapärase nähakse suuremas miinimumkapitali nõudes suuremat asutamishinda. Kui aga võtta arvesse ka sissemaksete tasumise tähtajad, siis muutub pilt oluliselt. Näitena võib esitada võrdluse Eesti ja Saksamaa vahel. Miinimumkapitali nõuded on neis maades vastavalt 25 000 ja 50 000 eurot. Samas on Saksamaal asutamisel nõutav üksnes 25% märgitud kapitali sisse-maksmine ja seega on tegelik alginvesteering ühingusse hoopis Eestis kaks korda suurem. Sama probleem tekib ka SE vormi kasutamisel, sest kuigi seal kehtib kõikjal ühesugune miinimumkapitali nõue 120 000 eurot, on tasumis-tähtaegade reeglite kehtestamise õigus antud liikmesriikidele, meil kehtivad üldised aktsiaseltsi normid ning erinevus on samalaadne. See tähendab ühtlasi, et ei ole võimalik rääkida SE ühetaolisusest kõigis liikmesriikides.

Kuigi kohese kapitali sissemaksmise kohustus võib tunduda Eesti ühingute jaoks diskrimineeriv, on süsteemi juures mitmeid eeliseid. Kõige suurem eelis on lihtsus, sest kui osanik või aktsionär ei tasu ettenähtud summat, siis ei ole võimalik ühingut või kapitali suurendamist registrisse kanda ning vastav toiming jääb lihtsalt ära. See tähendab, et praktikas puuduvad sissemaksmata kapitalist tulenevad ühingute nõuded enda osanike või aktsionäride vastu. Võttes arvesse asjaolu, et õigusnormide eesmärgiks ei ole mitte õigusvaidluste tekitamine, vaid pigem nende ärahoidmine, tuleb kehtivat korda pidada õnnes-tunuks ning see tuleks säilitada.

Omaette küsimus on seoses osaühingutega, mille kontseptsiooni muudeti oluliselt 2011. aastast. Nimelt näeb ÄS § 140^1 ette võimaluse, et kui osaühingu asutajad on füüsilised isikud ja osakapital ei ole suurem kui 25 000 eurot, võib osaühingu asutada selliselt, et kapitali ei maksta sisse enne ühingu registrisse kandmist. Vastavate reeglite eesmärgiks on võimaldada osaühingu "odavamat" asutamist; samalaadseid muudatusi on viimastel aastatel tehtud ka teistes Euroopa riikides. Siiski on Eesti reeglistik erilaadne, sest teistes maades on valitud oluliselt teistsugused lahendused. Nii on mõnedes maades (nt Saksamaa,

Belgia, Läti) võimalik asutada ühing ilma miinimumkapitalita, kuid selline ühing peab suurendama kapitali seadusest tuleneva miinimumini juhul, kui tal tekib kasu. Täna endiselt eelnõu staadiumis oleva Euroopa osaühingu määruse eelnõust tuleneb võimalus asutada ühing 1-eurose kapitaliga, kusjuures erinevus eelnevast on võimaluses jätta osakapital alatiseks sellesse suurusesse. Samamoodi puudub miinimumkapitali nõue mitmetes riikides (nt Ühendkuningriik, Prantsusmaa). Meie mudelivalik ei ole ilmselt mitte kõige paremini õnnestunud, kuna miinimumkapitali nõue on endiselt kõigi osaühingute suhtes kehtiv ja kuigi seda ei pea mitte alati sisse maksma, antakse avalikkuse mittesoovitud signaal, et vastav nõue on ikkagi olemas. Seoses küsimusega sissemaksete tähtaegadest tuleb märkida, et uus osaühingu reeglistik muudab olemasolevat korda selle alusel asutatud osaühingute jaoks. Seega on uue korraga kaks probleemi: senine lihtne ja õigusvaidlusi välistav kord asendatakse korraga, mis on olemuslikult vaidlusi tekitav ning miinimumkapitali nõue on endiselt alles. Rõhutades veel kord, et senine süsteem on hästi toiminud, tuleb tehtud valik lugeda ebaõnnestunuks. Vaadates üldisi arengusuundi, võiks pigem tühistada miinimumkapitali nõude ja taastada sissemaksete tasumise tähtaegade varasem reeglistik. Miinimumkapitali nõude kaotamine ei too kaasa mingeid otseseid negatiivseid tagajärgi, vastav nõue puudub täna mitmetes maades ning ühestki uuringust ei ole võimalik järeldada, et see oleks olnud aluseks mingite oluliste probleemide tekkele.

Järgmine töös käsitletud probleem on seoses pangakontoga, millele tuleb tasuda sissemaksed. ÄS §-d 141, 247 ja 520 lg 4 näevad ette, et seda pangakontot ei ole lubatud käsutada enne ühingu registrisse kandmist. Iseenesest on kord, et rahalised sissemaksed tuleb tasuda pangakontole, tuntud ka teistes maades. Samas on pangakonto blokeerimine Eesti eripära. Vastav reegel tuli meie õigusesse 1995. aastal ÄS jõustumisega. Enne seda puudus sissemaksete tasumise üle igasugune kontroll ning sellest tulenevalt võib olla ka mõistetav uute reeglite rangus, kuna mingite reeglite kehtestamisel õigusvaakumisse on ülereguleerimise oht alati olemas ja blokeeritud pangakonto on üks selline näide.

Osa- või aktsiakapitali üheks funktsiooniks on tagada ühingusse investeeringu tegemine. Kapitaliks sissemakstav vara ei moodusta eraldi fondi ja sissemaksena ühingule üleantut saab kasutada ühingu huvides samaväärselt muu varaga. See tähendab, et tegu on varaga, mis on nagu ühingu muu vara juhatuse käsutuses. Asutamisel ühing ei erine antud olukorras registrisse kantud ühingust ja kui võtta aluseks ühingu tavapärane olukord (juhatus juhib ühingut), tekib küsimus, keda blokeeritud pangakontoga kaitstakse. Ühingu võlausaldajad ei saa sellest suuremat kaitset, samuti mitte aktsionärid. Muid huvigruppe antud olukorras ei ole, millest tuleb järeldada, et ÄS § 520 lg 4 ei ole mitte huvigruppide kaitse norm, vaid korrakaitseline norm. Omaette küsimus on muidugi, kas tegu on üldse tõsise probleemiga, kuna ühingute asutamise aeg on Eestis äärmiselt lühike. Seda argumenti ei saa aga olemasoleva korra õigustamiseks kasutada, kuna silmas tuleb pidada, et õigusnormid ei saa olla kehtestatud

lihtsalt niisama, vaid neil peab olema mingi eesmärk. Samuti tuleb arvestada, et kui ühingu asutamisel tekivad tõrked (nt mittesobiva ärinime valikul), võib menetlus võtta oluliselt kauem aega ning selle aja jooksul seisab raha ilma käsutusvõimaluseta pangakontol. Seega on tegu ülemäärase nõudega, mis tuleks tühistada. Et mitte muuta toimivat süsteemi, peaks kontroll rahalise sissemakse tegemise üle jääma endiseks, kuid blokeeritud peaks raha olema kontol mitte registrisse kandmiseni, vaid selle hetkeni, mil kõik sissemaksed on sinna tasutud. Selline ajaline piir on vajalik vältimaks sama rahaga mitu korda tasumist ja on kehtestatud ka Rootsis, kus kontrollisüsteem on Eesti omaga põhimõtteliselt sama. Töö autor teeb ettepaneku muuta seadust järgmiselt.

> § 520 Äriühingu asutamine
> (4) Rahaliste sissemaksete tegemiseks osaühingusse või aktsiaseltsi avavad asutajad asutatava äriühingu nimel käesoleva paragrahvi 1. lõikes nimetatud ärinime, täiendit ja numbrit kasutades pangaarve Eesti krediidiasutuses, mida võib äriühingu nimel käsutada pärast ~~*äriühingu äriregistrisse kandmist*~~ *rahaliste sissemaksete täielikku tasumist*.

Mitterahalise sissemakse hindamisega seoses on töös püstitatud küsimus, kas Eestis kehtiv kord on ikka õigustatud. Vastavad reeglid on ette nähtud 2. direktiivis, mille art 10 nõuab, et mitterahalise sissemakse kohta peab aruande koostama sõltumatu ekspert[103], kusjuures liikmesriigid on vabad otsustama, kes saab selleks isikuks olla. 2006. aastal jõustusid ÄS muudatused, millega jäeti muutmata varasem nõue, et mitterahalise sissemakse väärtuse hindamist peab kontrollima audiitor ning lisati nõue, et kui vara hindamise jaoks on olemas üldtunnustatud eksperdid, tuleb neid kasutada (ÄS § 143 lg 1, 249 lg 1). Sellise nõude kehtestamise põhjenduseks oli eelnõu seletuskirjas esitatud asjaolu, et ei ole mõistlik jätta mitterahalise sissemakse hindamise korra kehtestamist põhikirja lahendada olukorras, kus eksperdid on olemas. Niisugune põhjendus ei ole eriti veenev, kuna sisuliselt on muudatuse tegemist põhjendatud muudatuse endaga, kuid sisulisemad põhjendused paraku puuduvad.

2011. aastast jõustunud ÄS muudatustega seda korda muudeti osaühingute osas nende kohta käivate mitterahalise sissemakse hindamise reeglite põhimõttelise muutmisega. Kõige olulisem muutus on selles, et audiitori kasutamise kohustuse piiri tõsteti oluliselt, mitterahalise sissemakse hindamise kohustus pandi juhatusele ning ekspertide kasutamise kohustus tühistati. Iseenesest on vastav muudatus tervitatav, kuna see jagab sisuliselt käesoleva töö autori varasemat seisukohta, kuid näitab selgelt, et õigusloomes puudub järjepidevus. Kui aastal 2006 leiti, et senine kord on liiga leebe ja nõudeid tõsteti, siis viis

[103] Tuleb märkida, et kuigi sõna "ekspert" kasutatakse nii 2. direktiivi artiklis 10 kui ka ÄS §-s 249 lg 1, on tegu kahe erineva nähtusega. Direktiivi tähenduses on ekspert mistahes sõltumatu erialateadmistega isik, keda liikmesriik peab usaldusväärseks vara hindamist kontrollima, siis ÄS tähenduses on mõiste kitsam tähistades konkreetset liiki vara hindamiseks pädevat isikut.

aastat hiljem langetati nõudeid madalamale eelmiste muudatuste eelsest tasemest. 2006. aasta muudatuste kohta tuleb lisaks märkida, et samal ajal kui Eestis muudeti nõudeid rangemaks, toimus nii mõneski Euroopa riigis diskussioon nõuete leevendamise üle ning vastavalt on need riigid ka oma seadusi viimaste aastate jooksul muutnud.

Vaatamata viimastele seaduse muudatustele ei ole probleem seoses ekspertide kasutamisega Eesti õigusest kadunud, kuna nõue kehtib jätkuvalt aktsiaseltside suhtes. Kui direktiiv kohustab kasutama ühte sõltumatut hindajat, siis Eesti õigus nõuab teatud juhtudel topeltkontrolli. Direktiivi nõuete ületamisel tuleb alati küsida, kas valitud kord on ikka õigustatud, kusjuures arvestades direktiivi enese üsna kõrgeid nõudeid, peab põhjus olema äärmiselt kaalukas. Antud olukorras on kaalukate põhjuste leidmine komplitseeritud. Tuleb märkida, et kapitali moodustamise seisukohast ei nõua seadus mitte vara täpse väärtuse kindlaksmääramist, vaid üksnes seda, et vara väärtusega on kaetud moodustatav kapital (ÄS § 143 lg 3, 249 lg 3). Suuremaid probleeme seoses mitterahalise sissemakse väärtuse hindamisega ei ole praktikas esinenud, kohtupraktikas on olnud vaid mõned kaasused, kus nõude esitamise aluseks on olnud mitterahalise sissemakse ebaõige hindamine ning need hagid ei ole olnud edukad. Ekspertide kasutamise kohustus kõlab, nagu umbusaldataks audiitoreid. Tuleb tunnistada, et 90-ndatel aastatel võis umbusaldusel olla ka teatud alus (kuigi kohtupraktika seda ei kinnita), kuid täna oleks ebaõige teha järeldus, et audiitorite kutsetegevuse kvaliteedis võiks esineda suuremaid probleeme.

Topeltkontrolli vältimiseks on kaks lahendust: piirduda teatud vara (eelkõige kinnisvara) puhul üksnes ekspertidega või tühistada ekspertide kasutamise kohustus ja jätta reeglid kõigi juhtumite jaoks ühesuguseks. Esimene lahendus ei oleks ilmselt väga hea, kuna sel juhul võib tekkida raskusi ekspertide ringi kindlaksmääramisega põhjusel, et nende formaliseeritud riigi poolt tunnustamine seni puudub ning vastava tunnustamise saavutamiseks võib olla vajalik luua mingi üldist halduskoormust suurendav kord. Teise võimaluse kasuks räägib asjaolu, et audiitorid on riiklikult tunnustatud ja selline süsteem on suuremate probleemideta toiminud. Lisaks tuleb märkida, et ilmselt ei kao ekspertide kasutamine ka pärast nende kasutamise kohustuse tühistamist kuhugi, kuna audiitorid ei ole varaeksperdid ning suure tõenäosusega rakendavad nad enda kaitseks hinnangute andmisel eksperte edasi. Oluline vahe on aga selles, kas seadus kehtestab üldise nõude, või saavutame me laias pildis sama tulemuse eneseregulatsiooni tulemusena. Viimane on kindlasti eelistatud, kuna riik ei tohiks sekkuda eraõiguslikesse suhetesse olukorras, kus sekkumine ei ole hädavajalik.

Töö autori arvates ebamõistliku nõude tühistamiseks tuleks seadust muuta järgmiselt:

> § 249. Mitterahalise sissemakse väärtuse hindamine
> (1) Mitterahalise sissemakse hindamise kord nähakse ette põhikirjas. ~~*Kui eseme hindamiseks on olemas üldiselt tunnustatud eksperdid, tuleb mitterahalise sissemakse ese lasta hinnata neil.*~~

2. direktiiv näeb ette abinõud olukorra jaoks, kus aktsiaselts on kapitali kaotanud. Artikkel 17 sätestab, et aktsiakapitali olulise vähenemise korral tuleb kokku kutsuda aktsionäride üldkoosolek liikmesriikide seadustes sätestatud tähtaja jooksul otsustamaks, kas aktsiaselts tuleb lõpetada või peab võtma muid meetmeid, ning et liikmesriikide seadused võivad lõike 1 tähenduses oluliseks peetava vähenemise suuruseks määrata summa, mis ei ole suurem kui pool aktsiakapitalist. Need nõuded on meil täidetud ÄS §-des 292 lg 2 p 1 ja 301, samad reeglid kehtivad ka osaühingute kohta (ÄS § 171 lg 2 p 1, 176). Antud reeglid sisaldavad endas kahte eraldi osa: juhatuse kohustus teatada osanikele või aktsionäridele netovara kaotusest on kehtestatud vastavate isikute kaitseks ning osanikele või aktsionäridele pandud kohustus teha olukorra lahendamiseks mingi otsus peaks kaitsma võlausaldajate huve. Peamine probleem seoses huvigruppide kaitsega on selles, et kui juhatus täidab oma kohustuse teatada netovara kaotusest osanikele või aktsionäridele, ei ole viimased kohustatud tegema mingit otsust või võivad teha otsuse, et olukorra lahendamiseks ei tehta midagi. Seaduse tekst (ÄS § 176, 301) sisaldab küll otsuse tegemise kohustuse, kuid selle kohustuse rikkumisel ei saa osanikke või aktsionäre sundida kindla sisuga otsust tegema ning "parema tuleviku" ootamine osanike või aktsionäride poolt võib olla käsitletav seadusega lubatud muude abinõude rakendamisena. Siit tuleneb küsimus, kas võlausaldajate kaitse eesmärk on ikka täidetud. Töö autori arvates ei saa siin näha probleemi ning ilmselt tuleb antud reeglite juures piirduda sellega, et tunnistada nende normidega kaitstavate isikutena ühingu osanikke või aktsionäre, mitte aga võlausaldajaid. Piiriks, kust tulevad mängu võlausaldajate huvid, peaks olema pankrotiseis. Selle ilmnemisel kohustab seadus juhatust esitama pankrotiavalduse (ÄS § 180 lg 5^1 ja 306 lg 3^1) ning vastav kaitseabinõu peaks olema võlausaldajate jaoks piisav.

Omakapitali (netovara) kaotuse reegleid on ÄS-s mitmel korral muudetud, olulisim neist jõustus 2006. aastal ja muutis nõuete rikkumise tagajärgi. Enne seda oli kord, et kui osaühingu või aktsiaseltsi netovara ei vastanud seadusele ja osanikud või üldkoosolek ei teinud selle taastamiseks vajalikku otsust, võis äriregistri pidaja ühingu registrist kustutada. Niisugune kord oli täiesti ülemäärane ja elementaarselt vastuolus võlausaldajate huvidega. Netovara kaotuse korral on tõenäoline, et ühingul võivad lisaks olla ka makseraskused ning makseraskustes ühingu "ärakaotamine" registrist kustutamise läbi võib parimal juhul olla üksnes selle ühingu ebaausate osanike, aktsionäride või juhtorgani liikmete huvides. Nagu märgitud, on nende normidega võlausaldajate kaitse saavutamine võimatu ja seega oli kogu vastav reeglistik äärmiselt ebaõnnestunud.

Samas ei ole alates 2006. aastast kehtiv kord varasemast oluliselt erinev. Kehtiv õigus näeb ette, et kui netovara kaotuse korral ei tee osanikud või üldkoosolek mingit otsust, võib algatada ühingu sundlõpetamise (ÄS § 203 lg 3 p 2 ja 318 lg 3 p 2). Iseenesest on registrist kustutamise asendamine sundlõpetamisega positiivne muutus, kuna sundlõpetamise otsustamine toimub kohtumenetluses, kohus peab selles menetluses vähemalt sundlõpetatava ühingu

juhatuse ära kuulama (TsMS § 629 lg 2) ning lahendi tegemisel kaaluma piisavalt asjaolusid. Samas on vastava tagajärje ettenägemine ikkagi küsitav. Praktikas toimib asi täna selliselt, et majandusaasta aruannete laekumise järel kontrollib registripidaja netovara nõuete täitmist ning kui ühing neid nõudeid ei täida, saadetakse vastav hoiatus. Kui ühing teatele ei reageeri, peaks registripidaja järgmine samm oleks asja kohtunikule üleandmine sundlõpetamise määramiseks. Lisaks kõigele muule tähendab selline kord registripidajale äärmiselt suure koormuse panemist, kuna kontroll hõlmab kõigi osaühingute ja aktsiaseltside majandusaasta aruandeid. Nagu eespool sai märgitud, ei kaitsnud ühingute registrist kustutamine võlausaldajate huve ning samaväärselt ei pruugi nende huve kaitsta ka ühingute sundlõpetamine. Netovara kaotus ei ole samastatav ühingu maksejõuetuks muutumisega ning praktikast ei ole keeruline leida ühinguid, mille netovara ei vasta juba aastaid seaduse nõuetele, kuid ometi suudavad nad tegevust jätkata (sh nt rahuldada võlausaldajate nõuded).

Eestis kehtivad netovara reeglid koosnevad kahest nõudest: netovara peab olema vähemalt pool aktsia- või osakapitalist ja netovara peab olema vähemalt seaduses sätestatud miinimumkapitali suurune (ÄS § 171 lg 2 p 1, 176, 292 lg 1 p 1, 301). 2. direktiiv sisaldab üksnes esimese nõude, samuti on vastav nõue esitatud teistes riikides. See tähendab, et Eesti õiguse nõuded on kõrgemad. Kui vaadata küsimust sisuliselt, siis on teise reegli näol tegu nõudega, mis diskrimineerib väiksemaid ühinguid ja sisuliselt keelab ühingutel, mille osa- või aktsiakapitali suuruseks on seaduses sätestatud miinimum, kahjumiga tegutsemise. See toob aga praktikas vastava nõude massilise rikkumise, sest kui näiteks ühingu asutamisel tehakse kulutusi enne kaupade müüki või teenuste osutamist, on ühingu netovara seaduse nõuetele mittevastav. Arvestades nimetatud põhjendusi, tuleks vastav nõue tühistada.

Seoses eelnevaga esitab töö autor ettepaneku järgmiste seadusemuudatuste tegemiseks.

§ 171. Osanike koosoleku kokkukutsumine

(2) Juhatus kutsub kokku osanike koosoleku, kui see on osaühingu huvides vajalik, samuti kui:

1) osaühingul on netovara (bilansi aktiva üldsumma miinus passivas näidatud kohustuste üldsumma) järel vähem kui pool osakapitalist ~~*või vähem kui käesoleva seadustiku § s 136 nimetatud osakapitali suurus või muu seaduses sätestatud osakapitali minimaalne suurus*~~ või

§ 176. Vara vähenemine

Kui osaühingul on netovara vähem kui pool osakapitalist ~~*või vähem kui käesoleva seadustiku § s 136 nimetatud osakapitali suurus või muu seaduses sätestatud osakapitali minimaalne suurus*~~, peavad osanikud otsustama:

1) osakapitali vähendamise või suurendamise tingimusel, et netovara suurus moodustaks seeläbi vähemalt poole ~~*osakapitalist ja vähemalt käesoleva seadus-*~~

~~*tiku § s 136 nimetatud osakapitali suuruse või muu seaduses sätestatud osakapitali minimaalse suuruse*~~ või

1^1) muude abinõude tarvitusele võtmise, mille tulemusena osaühingu netovara suurus moodustaks vähemalt poole ~~*osakapitalist ja vähemalt käesoleva seadustiku § s 136 nimetatud osakapitali suuruse või muu seaduses sätestatud osakapitali minimaalse suuruse*~~;

§ 203. Sundlõpetamine

(1) Osaühing lõpetatakse kohtumäärusega, kui:

1) osanikud ei ole võtnud vastu lõpetamise otsust, kui selle vastuvõtmine oli seaduse või põhikirja alusel kohustuslik~~*, samuti juhul, kui osanikud ei ole vastu võtnud ühtegi § s 176 ettenähtud otsust või kui § s 176 nimetatud otsuste tegemiseks ei ole osanike koosolekut kokku kutsutud*~~;

§ 292. Erakorraline üldkoosolek

(1) Juhatus kutsub kokku erakorralise üldkoosoleku põhikirjas ettenähtud juhtudel, samuti siis, kui:

1) aktsiaseltsil on netovara vähem kui pool aktsiakapitalist ~~*või vähem kui käesoleva seadustiku § s 222 nimetatud aktsiakapitali suurus või muu seaduses sätestatud aktsiakapitali minimaalne suurus*~~ või

§ 301. Vara vähenemine

Kui aktsiaseltsil on netovara vähem kui pool ~~aktsiakapitalist *või vähem kui käesoleva seadustiku § s 222 nimetatud aktsiakapitali suurus või muu seaduses sätestatud aktsiakapitali minimaalne suurus*~~, peab üldkoosolek otsustama: 1) aktsiakapitali vähendamise või suurendamise, tingimusel et netovara suurus moodustaks seeläbi vähemalt poole aktsiakapitalist ~~*ja vähemalt käesoleva seadustiku § s 222 nimetatud aktsiakapitali suuruse või muu seaduses sätestatud aktsiakapitali minimaalse suuruse*~~ või

1^1) muude abinõude tarvituselevõtmise, mille tulemusena aktsiaseltsi netovara suurus moodustaks vähemalt poole aktsiakapitalist ~~*ja vähemalt käesoleva seadustiku § s 222 nimetatud aktsiakapitali suuruse või muu seaduses sätestatud aktsiakapitali minimaalse suuruse*~~;

§ 366. Sundlõpetamine

(1) Aktsiaselts lõpetatakse kohtumäärusega, kui:

1) üldkoosolek ei ole võtnud vastu lõpetamise otsust, kui selle vastuvõtmine oli seaduse või põhikirja alusel kohustuslik~~*, samuti juhul, kui aktsionärid ei ole vastu võtnud ühtegi § s 301 ettenähtud otsust või kui nende otsuste tegemiseks ei ole üldkoosolekut kokku kutsutud*~~;

Järgmine töös käsitletud probleem puudutab oma osa omandamise reegleid, eelkõige 2006. aastal jõustunud muutusi, millega keelati osaühingul omandada oma osa suuremas määras kui 1/10 osakapitalist (ÄS § 162 lg 2 p 1^1) . Varem vastav piirang puudus ja osaühing sai oma osasid omandada mahupiiranguteta.

Oma osade ja aktsiate omandamise piirangud on seaduses ettenähtud kolmel põhjusel: kapitali kaitse, st osanikele või aktsionäridele nende sissemaksete tagastamise keelamine, turumanipulatsioonide ärahoidmine oma aktsiatega kauplemisel ning aktsiate või osade omandamisel ühingu ja teiste osanike või aktsionäride arvel ülemäärase tasu maksmine. Neist esimese kaitsenormiks on piirang, et oma osa või aktsia omandamisel võib väljamakse tegemiseks kasutada üksnes vaba omakapitali, millest võib maksta dividende (ÄS § 162 lg 2 p 3, 282 lg 2 p 3). Teine kaitse-eesmärk on olemas üksnes juhul, kui tegu on aktsiaseltsiga, mille aktsiad on avalikult kaubeldavad ning osaühingus ei ole seda eesmärki vaja järgida. Kolmanda eesmärgi saavutamiseks on kehtestatud nõue, et oma aktsiate ja osade omandamiseks peab alati olema luba väljendatud põhikirjas (ÄS § 162 lg 2 p 1, 282 lg 2 p 1) ja kuna põhikirja kinnitavad osanikud või aktsionärid, siis lähtub luba neist, samuti peavad vastava loa andmisel määrama osa eest tasumisele kuuluvad summad, millega on juhatuse vabadus hinna määramisel piiratud. Siit tuleneb küsimus, kelle või mille kaitseks on kehtestatud mahupiirang ning vaadates esitatud eesmärke, saab siin rääkida üksnes turumanipulatsioonidest. Kuna aga osaühingus ei ole selline kuritarvitus võimalik, siis puudub mahupiirangul selles ühingus eesmärk. Töö autori hinnangul on eesmärgitu piirangu kehtestamine lubamatu ning see tuleks tühistada.

> § 162. Oma osa omandamine ja tagatiseks võtmine
>
> (2) Oma osa omandamine või tagatiseks võtmine osaühingu poolt on lubatud, kui:
>
> 1) see on toimunud viie aasta jooksul osanike sellise otsuse vastuvõtmisest arvates, millega on määratud osade omandamise või tagatiseks võtmise tingimused ja tähtaeg ning osade eest tasutavad miinimum- ja maksimumsummad;
>
> ~~*1[1]) osaühingule kuuluva osa nimiväärtus ei ületa 1/10 osakapitalist ja*~~

Küsimus osanike või aktsionäride laenude allutamisest tõusetub seoses asjaoluga, et seadus ei määra osanike või aktsionäride poolt ühingusse tehtavate investeeringute vormi. Ainus kohustus on täita miinimumkapitali reegleid, kuid seda ületavas osas võivad osanikud või aktsionärid ise otsustada, kas investeerida ühingusse osa- või aktsiakapitali kaudu või and hoopis ühingule laenu. Laen ja omakapitaliinvesteering on õigusliku olemuse poolest täiesti erinevad. Nii tuleb laen tagasi maksta, osa- või aktsiakapitali tagastamine on aga keelatud, laenult võib maksta intresse sõltumata ühingu majandustulemustest, omakapitaliinvesteeringult makstakse aga dividende üksnes juhul, kui ühing on teeninud kasumit. Seega muutub osanik või aktsionär laenu osas ühingu tavaliseks võlausaldajaks, mis ei ole aga teiste võlausaldajate seisukohalt õigustatud. Eelnevast tekib küsimus, kas selline valikuvabadus saab olla täielik. Kuna nii laenu andmine kui ka omakapitaliinvesteering on ühingu ja tema võlausaldajate seisukohalt majanduslikult samaväärne investeering, siis investeeringu õigusliku vormi kokkuleppimine ei tohiks olla määrava tähtsusega, vaid tulenevalt

laenuandja isikust tuleks osanike või aktsionäride laene käsitleda allutatud laenudena.

Allutatud laenu defineeritakse tavaliselt kui laenu, mis kuulub võlgniku lõpetamisel tagastamisele pärast kõigi ülejäänud võlausaldajate nõudeid. Allutatud laenu näol on seega tegu laenuandja tingimusliku nõudega ühingu vastu ja võla tagasimaksmise tingimuseks on võlgniku kõigi teiste võlausaldajate nõuete eelnev rahuldamine. Regulatiivselt on võimalik laenu allutamine seadusega, sellisel juhul peavad seaduses olema normid, mis näevad ette teatud laenude kvalifitseerimise allutatud laenuna. Samuti on võimalik muuta laen allutatuks kokkuleppega, mille üheks pooleks peab olema vastava laenu andja.

Osanike või aktsionäride laenude allutamise kohta puuduvad Eesti kehtivas õiguses otsesed normid. Küll on praktikas levinud laenude allutamise kokkulepped. Siiski ei saa väita, et kehtiv õigus ei võimaldaks lugeda neid laene allutatuks, kuna seadus (ÄS § 157 lg 1) sätestab, et osanikule võib teha väljamakseid puhaskasumist või eelmiste majandusaastate jaotamata kasumist, millest on maha arvatud eelmiste aastate katmata kahjum. Sama paragrahvi lg 3 keelab teha osanikele väljamakseid kui ühingu viimase majandusaasta lõppemisel kinnitatud majandusaasta aruandest ilmnev osaühingu netovara on väiksem või jääks väiksemaks osakapitali ja reservide kogusummast, mille väljamaksmine osanikele ei ole lubatud seadusest või põhikirjast tulenevalt. Aktsionäridele väljamaksete tegemist reguleerivad ÄS § 275 lg 1, mis keelab sissemakse tagastamise aktsionärile (sisuliselt sama norm on AktG § 57 lg 1), § 276 lg 1, mis seob väljamaksete tegemise lubatavuse majandusaasta lõpu seisuga, ning § 278 lause 3, mis määrab aktsionäridele maksta lubatud dividendi maksimumsuuruse (aluseks 2. äriühinguõiguse direktiivi art 15). Osaühingu ja aktsiaseltsi kohta käivad normid on küll pisut erinevad, kuid sama eesmärgiga ning need normid peaks olema kohaldatavad igasugustele osanikele või aktsionäridele tehtavatele väljamaksetele. Kuigi paragrahvi pealkiri ei määra normi sisu, tuleb märkida ebatäpsust ÄS § 278 pealkirjas. See on kehtivas seaduses "Dividendi suurus", kuid normi sisu on pealkirjast oluliselt erinev ja laiem, pealkiri ei lähe kokku sätte sisuga ja on eksitav. Samuti peaks selle paragrahvi teksti jagama kahte lõiku, kuna ta sisaldab kahte erinevat õigusnormi.

Ülaltoodud normid jätavad teatud ebaselguse pankrotimenetluses esitatavate nõuete osas. Nimelt puuduvad täna pankrotimenetluses osanike ja aktsionäride laenude kohta erireeglid, mistõttu on nad käsitletavad tavapäraste nõuetena. Sellist olukorda ei saa aga lugeda põhjendatuks, mistõttu tuleks muuta nõuete rahuldamise korda selliselt, et osanike või aktsionäride nõuded kuuluksid rahuldamisele pärast teisi sama järgu nõudeid.

Täiendavaks probleemiks seoses allutatud laenudega on nende kajastamine finantsaruannetes. Aruannete koostamisel Eesti raamatupidamistava alusel tuleb kasutada bilansiskeemi, mis on ette nähtud raamatupidamise seaduse lisas 1 ja selles ei ole ette nähtud allutatud laenude kajastamist omakapitali hulgas. Selline lahendus ei ole aga õige, kuna paneb antud bilansiskeemi kasutavad ühingud halvemasse olukorda võrreldes nendega, kes koostavad aruanded

lähtuvalt rahvusvahelistest standarditest. Samuti ei ole vastav lahendus ühingu ega nende osanike või aktsionäride huvides, kuna isegi kui tegu on õiguslikult selgelt allutatud laenuga, tuleb seda näidata kohustusena ning seega ei aita laenu allutamine tugevdada omakapitali. Töö autori arvates tuleks seadust muuta ja võimaldada ka Eesti raamatupidamistava kasutavatel ühingutel näidata allutatud laene omakapitali hulgas.

Seoses laenude allutamisega teeb töö autor järgmised ettepanekud seaduste muutmiseks.

> § 278. ~~*Dividendi suurus*~~ Väljamaksete tegemine
>
> *(1)* Dividendi suuruse kinnitab üldkoosolek. Nõukoguga kooskõlastatud ettepaneku esitab juhatus.
>
> *(2)* Aktsionäridele ei tohi teha väljamakseid, kui aktsiaseltsi viimase majandusaasta lõppemisel kinnitatud majandusaasta aruandest ilmnev aktsiaseltsi netovara on väiksem või jääks väiksemaks aktsiakapitali ja reservide kogusummast, mille väljamaksmine aktsionäridele ei ole lubatud seadusest või põhikirjast tulenevalt.
>
> Pankrotiseadus § 153. Nõuete rahuldamisjärgud
>
> (4^1) Nõuded, mis tulenevad osaniku või aktsionäri poolt äriühingule antud laenudest või muudest majanduslikult samaväärsetest tehingutest rahuldatakse vastavalt iga nõude järgule pärast kõigi teiste sama järgu nõuete rahuldamist.
>
> Raamatupidamise seadus, lisa 1
>
> Omakapital
>
> Vähemusosalus
>
> Emaettevõtja aktsionäridele või osanikele kuuluv omakapital
>
> Aktsiakapital või osakapital nimiväärtuses
>
> Ülekurss
>
> Oma osad või aktsiad (miinus)
>
> Kohustuslik reservkapital
>
> Muud reservid
>
> *Allutatud kohustused*
>
> Eelmiste perioodide jaotamata kasum (kahjum)
>
> Aruandeaasta kasum (kahjum)

Dividendide maksmise kohta käivad normid reguleerivad mitut erinevat küsimuste ringi. Kõigepealt on küsimus sellest, kui suur on maksimumsumma, mida võib välja maksta, seejärel on küsimus vastava summa jagamisest osanike või aktsionäride vahel ning kolmas on küsimus, kas dividendi maksmine on äriühingu kohustus. Kahele esimesele küsimusele on Eesti õiguses vastused olemas (ÄS § 157 lg 2 ja 3, 276 lg 2, 278), kolmanda kohta reeglid puuduvad ja

järelikult vastav kohustus puudub. Dividendide maksmise otsustavad osanikud või aktsionäride üldkoosolek ning vastav otsus tehakse enamushäältega. Hääletamise puhul on arusaadav, et otsuse sisu lähtub enamuse huvidest. Seega ei ole praktikas sugugi haruldased juhtumid, kus äriühingud ei maksa vaatamata kasumi teenimisele dividende, kusjuures sageli tuleneb enamuse huvi puudus asjaolust, et enamus saab ühingust hüvesid teisiti ning dividendide maksmine tähendaks enamusele neile "kuuluva" jagamist vähemusega.

Teiste riikide õigus suhtub antud küsimusse erinevalt. Põhimõtteliselt on kolm mudelit. Kõigepealt on olemas riigid, kus vähemusel on selge nõudeõigus (nt Rootsi). Teised on riigid, kus jaotamisele kuuluv kasumiosa määratakse seadusega, seda saab muuta põhikirjaga ning kui ühing otsustab maksta ettenähtust vähem, on aktsionäri või osanikul õigus otsus vaidlustada (nt Holland ja Saksamaa). Kolmandaks näiteks on Ühendkuningriik, kus otsesed reeglid puuduvad, kuid äärmuslike vähemuse õiguste rikkumise korral on kohtud otsustanud, et vähemusel on õigus dividende saada. Eesti täna kehtiv õigus sisaldab samuti kaitsenormi enamuse kuritarvituste vastu (TsÜS § 32), kuid ilmselt ei ole sellest normist võimalik tuletada vähemuse nõuet teatud dividendi saamiseks.

Töö autor seisukohal, et Eesti õiguses tuleks vähemuse dividendiõigus seadusega selgelt ette näha konkreetsete nõudenormide kehtestamisega ja seoses vähemuse dividendiõigusega tuleks seadust muuta järgmiselt.

§ 157. Väljamaksete tegemine

(–) Osanike, kelle osadega on esindatud vähemalt 1/10 osakapitalist, nõudel peavad osanikud otsustama maksta dividendideks vähemalt poole viimase majandusaasta kasumist, millest on maha arvatud eraldised reservkapitali ja teistesse seaduse või põhikirjaga ettenähtud reservidesse, kuid mitte rohkem kui 1/10 omakapitalist.

§ 278. Väljamaksete tegemine

(–) Aktsionäride, kelle aktsiatega on esindatud vähemalt 1/10 aktsiakapitalist, nõudel peab üldkoosolek otsustama maksta dividendideks vähemalt poole viimase majandusaasta kasumist, millest on maha arvatud eraldised reservkapitali ja teistesse seaduse või põhikirjaga ettenähtud reservidesse, kuid mitte rohkem kui 1/10 omakapitalist.

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Andres Vutt

Sünniaeg ja koht:	24. august 1969, Tartu
Kodakondsus:	Eesti
Kontakt:	andres.vutt@ut.ee
Töökoht:	Tartu Ülikool, Õigusteaduskond, Eraõiguse instituut
Amet:	tsiviilõiguse lektor

Hariduskäik

1987	Kohtla-Järve 17. Keskkool (hõbemedal)
1993	Tartu Ülikool õigusteaduskond *cum laude*
2005	Tartu Ülikool *magister iuris*

Ametikäik

2006–	Tartu Ülikool Eraõiguse instituut, lektor
2002–	Advokaadibüroo Concordia, jurist
1999–2006	Tartu Ülikool Eraõiguse instituut, assistent
1998–2002	Villu Kõve Advokaadibüroo, jurist
1993–1998	Juristibüroo Fides, jurist
1993–1999	Tartu Ülikool Eraõiguse instituut, lektor
1992–1993	AS Postimees, jurist

Peamised uurimisvaldkonnad

Ühinguõigus, tsiviilõiguse üldküsimused

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CURRICULUM VITAE

Andres Vutt

Date and place of birth:	August 24, 1969, Tartu
Citizenship:	Estonian
Contact:	andres.vutt@ut.ee
Institution:	University of Tartu, Faculty of Law, Institute of Private law
Position:	Lecturer of civil law

Education

1987	17. Secondary School of Kohtla-Järve (silver medal)
1993	Faculty of Law, University of Tartu *cum laude*
2005	University of Tartu *magister iuris*

Professional experience

2006–	University of Tartu, Institute of Private law, lecturer
2002–	Concordia Law Office, lawyer
1999–2006	University of Tartu, Institute of Private law, assistant
1998–2002	Villu Kõve Law Office, lawyer
1993–1998	Law Office Fides, lawyer
1993–1999	University of Tartu, Institute of Private law, lecturer
1992–1993	AS Postimees, lawyer

Areas of research

Company law, general principles of civil law

Activities on the field of law-making

Has been member of the law drafting commissions (Commercial Code, Law of Obligations Act, Property Law Act, General Part of Civil Code Act, Auditors Act, Floating Charge Act, State Property Act)

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