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The share capital requirement

- a comparative study of its functions, problems and future.

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Summary

This thesis aims to clarify the effects of the minimum share capital requirement in relation to Swedish private limited liability companies. The “be or not to be” of a minimum share capital requirement has been debated for a long time, both in Sweden and abroad.

Sweden and many of the European continental countries such as Germany has a tradition of requiring that entrepreneurs wishing to form a private limited company commit capital to it. The reasons are many, but protection for both adjusting and non-adjusting creditors is historically the most prominent one. Other reasons are that the share capital functions as an entry barrier, as capital maintenance rules and are a way of reducing transaction costs since the legal rules create a standard contract. As an entry barrier, the share capital is said to make sure that only serious entrepreneurs have access to the form of corporation and thus preventing the company form from being used for illegal purposes. This is one of the strongest arguments in the Swedish government’s proposition but has been criticized since many entrepreneurs might be lost due to a lack of capital. It has further been discussed, in the context of the share capital as an instrument signalling seriousness, whether financing by share capital or financing by debt creates the most credible companies.

Anglo-Saxon countries such as England and the United States do not express the same belief in the minimum share capital’s function as creditor protection and has therefore abolished these requirements. Instead insolvency law is important and this allows the market itself to determine how to protect itself best, through different agreements.

When looking at the European Union, attempts have been made to harmonize company law and in the Commission’s Draft Statute for the SPE company, the suggested European private limited liability company, the minimum share capital requirement was set to one euro. However, in the now suggested Presidential Compromise, the Member States themselves may choose a share capital requirement of 1-8 000 euros, a compromise that leads to the SPE company losing one of its signalments. Now, the advantage is primarily that the company is able to operate throughout Europe.

The future is very interesting, with increased harmonization within the EU, the SPE company and an increasing amount of European companies incorporating in the UK. Sweden has several decisions to make and paths to choose from, and the minimum share capital requirement is central in this.

This thesis shows that the minimum share capital requirement actually is an outdated concept. It does not ensure creditor protection even to the non-adjustable creditors since the amount of equity has no relation to the amount of potential future tort claims or tax debts. This especially since when a financial crisis is discovered the share capital is probably long gone. The author is further quite fond of using insurances as an alternative to share capital above all to fulfil the demand for non-adjustable creditor protection.

Transaction costs are not something that should be considered when making law, this is strictly business and inquiries have shown that most creditors makes individual arrangements even if there is a share capital in the company. When it comes to an entry barrier, the author finds it very peculiar that it is possible to buy limited liability when it should be earned.

Sammanfattning

Denna uppsats undersöker effekterna av minimikapitalkravet i relation till svenska privata aktiebolag. Aktiekapitalets ”vara eller inte vara” är något som länge debatterats, i Sverige och utanför.

Sverige och många av de kontinentaleuropeiska länderna, såsom Tyskland, har en tradition att kräva att entreprenörer som önskar att starta ett privat aktiebolag bidrar med kapital till detta. Skälen är många, men skyll för frivilliga men framför allt ofrivilliga borgenärer är historiskt sett det mest uttalade. Andra skäl är att aktiekapitalet fungerar som en inträdesbarriär, som regler för att kapital ska stanna kvar i företaget och att det är ett sätt att reducera transaktionskostnader eftersom lagreglerna utgör ett standardkontrakt. Som en inträdesbarriär ska aktiekapitalet bidra till att endast seriösa entreprenörer har tillgång till aktiebolagsformen och möjligen att hindra den från att utnyttjas för mindre lagliga eller lämpliga syften. Detta är ett av de starkaste argumenten i den svenska regeringens proposition men resonemanget har kritiserats eftersom man kan gå miste om många duktiga entreprenörer för att de saknar kapital. Vidare har det diskuterats, i sammanhanget att se aktiekapitalet som ett sätt att signalera seriositet till marknaden, om finansiering via aktiekapital eller skuld skapar de mest trovärdiga företagen.

Anglosaxiska länder såsom England eller USA har inte samma tilltro till minimikapitalkravets funktion som borgenärsskydd och har därför slopat dessa krav. I stället spelar insolvenslagstiftningen en stor roll och detta gör att marknaden själv får avgöra hur den bäst skyddar sig, via olika typer av överenskommelser.

När blicken vänds mot EU så har försök gjorts för att harmonisera bolagsrätten och i kommissionens förslag till stadga för SPE-bolaget, det föreslagna privata europabolaget, sattes minimikapitalet till en euro. Men i den nu aktuella presidentkompromissen kan medlemsstater själva välja vilket kapitalkrav de vill tillämpa, mellan en euro och upp till åtta tusen euros. Kompromissen gör att SPE-bolaget går miste om ett viktigt karaktärsdrag och nu är fördelen främst att bolaget kan driva verksamhet i de olika medlemsländerna.

Framtiden är mycket intressant, med ökad harmonisering i EU, SPE-bolaget och fler och fler bolag från alla europeiska länder som väljer att skapa sitt privata bolag i Storbritannien. Sverige har flera beslut att ta och vägar att välja från och minimikapitalkravet är en central fråga.

Denna uppsats visar att minimikapitalkravet är ett utdaterat koncept. Det ger inte något borgenärsskydd ens till ofrivilliga borgenärer eftersom aktiekapitalets storlek inte har någon relation till framtida skadeståndsanspråk eller skatteskulder, speciellt eftersom aktiekapitalet oftast redan är förbrukat när ett bolags ekonomiska kris uppdragas. Författaren förordar vidare idén om en obligatorisk försäkring som alternativ till aktiekapitalet för att framför allt fullgöra kravet på just säkerhet för ofrivilliga borgenärer.

Transaktionskostnader är inte något som bör övervägas i lagstiftningsprocessen då det gäller affärer och undersökningar har visat att de flesta borgenärer väljer att skapa individuella överenskommelser även om företaget i fråga har ett aktiekapital. När det kommer till en inträdesbarriär finner författaren det udda att det är möjligt att köpa begränsat ansvar. Det bör förtjänas.

Preface

With this thesis, many years in Lund studying law is completed. I will never again study for a 30 credits and eight hours written exam or buy a pencil so small that I have to use an enlargement glass to read what I have written. Never will I wonder why I did not start on the essay earlier than the night before it was due. Never will I experience the horrible three weeks between an exam and when the grade is published.

I will miss it.

A great thank you to my supervisor Henrik Norinder, who has not only made sure I finish this thesis but also made the final advanced courses so much more interesting. Henrik always offers an alternative view to everything, which is as irritating as it is useful.

I also wish to thank the faculty of law in Lund where I have been working since my second semester. I have had a great time and have probably learned more about law during the coffee breaks than during the whole education.

This essay was written while I was doing an internship at Göta hovrätt, an opportunity I am very grateful for. It has given me new insights in law and a great respect of the knowledge and humanity of Swedish courts.

I need not say my good-byes to Juridiska Föreningen and Lundakarnevalen, these two wonderful organizations are always with me and I shall visit them often.

Finally, a thank you to my family and to Fredrik, who has never been anything but supportive, no matter what I do.

Madelene Nilsson

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Abbreviations

ABF	Aktiebolagsförordning (2005:559)
ABL	Aktiebolagslag (2005:551)
BGB	Bürgerliches Gesetzbuch – German civil law
BFL	Bokföringslag (1999:1078)
CA	Companies Act 2006 (The UK)
CC	Code Civil – French civil law
CdC	Code de Commerce – French company law
COMI	Centre of Main Interest (EU Standards)
DGCA	Delaware General Corporation Act
DLLCA	Delaware Limited Liability Company Act
ECJ	European Court of Justice
EIR	European Insolvency Regulation
EURL	Entreprise unipersonnelle à responsabilité limitée
GmbH	Gesellschaft mit beschränkter Haftung – German company form with limited responsibility.
GmbHG	Deutsches Gesetz über die Gesellschaften mit beschränkter Haftung – German law for GmbH:s
IA	Insolvency Act (The UK)
LLC	Limited Liability Company – Company form in the USA with limited responsibility
Ltd	Limited Company – Company form in the UK with limited responsibility
RMBCA	Revised Model Business Corporations Act – company act in the USA implemented by most of the States.
NJA	Nytt Juridiskt Arkiv (Cases from the Swedish Supreme Court)
SA	Société anonyme
SARL	Société à responsabilité limitée
SE	Societas Europea – Public European Company
SPE	Societas Privata Europea – Private European Company
UG	Unternehmersgesellschaft – Special form of GmbH.
UFTA	Uniform Fraudulent Transfer Act, USA
ÅRL	Årsredovisningslag (1995:1554)

1 Introduction

The private limited liability company form exists in almost every country, in different forms. Common for them all is that they bring limited liability to their owners and is thus a company form to be preferred if an entrepreneur wishes to create a company without too much personal risk.

In common in most of these countries when forming a company is that it is necessary to establish some kind of documents, which form the company's constitution. Most often, the company also need to be registered in an official register. What differs between the countries is the amount needed as share capital. In the U.S., no capital at all is required. In the UK the famous and much used company form *Ltd* requires one pound.

In continental Europe, the last decade had been a very interesting one. Many new company forms have arisen and most countries have opened up for the possibility to at least start a company with very little share capital. In Sweden the minimum capital was lowered from 100.000 SEK to 50.000 SEK. Furthermore, the EU has proposed a European private limited company, the SPE company, where the minimum capital requirement can be between one euro to 8.000 euros. Which minimum amount to require is up to the member states themselves.

In the US, almost half of the companies on the New York Stock Exchange are registered in Delaware, since this state is very company friendly with a lot of competence in areas such as company law and of course requires very little from anyone that wishes to start a company. The registration process is swift and there is no capital requirement. The development in the US is sometimes called a race to the bottom and some authors have argued that we will see the same development in Europe.

Sweden is, as an EU member state, in the midst of the debate. As with most legislation today, the European regulation on company law must be taken into account when making national decisions. For private limited liability companies, ABs in Sweden, the minimum share capital required by law is 50.000 SEK. The reasons behind this regulation are, as we shall see, many and comprises of creditor protection, the wish to protect the AB as a serious and trustworthy company form, capital maintenance, reduction of transaction costs and the prevention of the AB being used for illegitimate purposes.

During many lectures and seminars within the advanced course Comparative Company Law during the spring 2011, we have discussed the importance, or non-importance, of a legally required minimum share capital in companies with a limited personal responsibility. The advantages and disadvantages of the minimum share capital rules are the questions that this thesis will focus on. To make it a bit more practical, I focus on the Swedish share capital rules: its functions, problems and future. In order to problematize, I will thus focus on the reasons behind the rules concerning share capital in Sweden – the issues the legal construction is aimed at solving – and then examine how these issues

are solved in countries with a different legal construction and different amounts as their minimum share capital requirement.

1.1 Purpose and outline

The ultimate purpose of the essay is to analyze and discuss whether the Swedish legal construction is the best legal construction concerning minimum share capital requirements or if the rules should be changed.

The **first part** of my thesis is aimed at finding the reasons behind the Swedish construction and the answer(s) to the question: *Why does Sweden have a minimum share capital requirement and why is it set at 50.000 SEK?*

The **second part** of the thesis is aimed at finding how other countries do. I have chosen to look at the EU, some European countries and the U.S. The focus on this study is: *How do countries with different legal constructions than Sweden solve the same issues that Sweden solves using a minimum share capital requirement?*

I will first present the view and many difficulties of the EU when trying to harmonize primarily the company law and as part of this, the minimum requirement rules. This part is important since I will later discuss the Swedish share capital rules in a EU context, and possibly as part of a corporate law competition between the EU Member States. During 2008-2009 the EU proposed a private European company and I will go through the proposed Statute for this company since it may soon be a reality and possibly a true competition for the Swedish AB. I will further present how the US, UK, Germany and France deal with the share capital and problems concerning this. The countries are chosen since they are interesting in Sweden both from a trade perspective and as possible ways to handle corporation law. Regarding the US I will focus on three sets of rules in the U.S. First the RMBCA and UFTA, since these are common corporate law standards in many of the US States. Together with RMBCA, I will focus on U.S. insolvency law since this law is common grounds to the whole U.S. and thus not exposed to competition in the same way as the company law. U.S. insolvency law deals with many issues concerning creditor protection and capital maintenance. Secondly, I will focus on Delaware, since many of the American corporations are incorporated in Delaware.

The **third part** is a study of the theories behind and debates concerning different issues in context to minimum share capital requirements. I will present the different views on the functions of the share capital and the advantages and/or disadvantages with different legal constructions and capital requirements.

In the **final discussion**, I will discuss which legal construction best solves the issues that Sweden today solves using a minimum share capital requirement. I will thus relate back to the findings in chapter two and compare them to how other countries do. Hopefully, the literature I have examined in chapter five will help discussing the different alternatives and the consequences of these. This part will answer the question: *Should Sweden keep the regulation regarding the minimum share capital requirement as it is or should changes be made?*

1.2 Method and material

Throughout the essay, a dogmatic method is applied, meaning that the analysis is based on legal sources such as statute, case law and doctrine. I attempt to give due weight to each source depending what legal system is treated. This means that regarding e.g. the EU great weight is put on case law.

The obvious starting point for this thesis has been legislation. I have looked at the Swedish legislation together with the legislative history in order to get a complete picture of the regulation complex. Regarding the French and German legislations I have used English translations. When unsure, I have read the French legislation in French and thus been able to make sure that I understood everything correctly. I have also made great use of different websites, not as a source but as a means to understand how the legislation works. Since the author does not know German, the German legislation has been read in English. I have double checked the English version using literature and also some websites. The legislations in UK and the US I have read, sometimes with use of examples from websites not used as a source. Regarding the material from the European Union, I have made great use of the EU's website where I have found the documents themselves, guides and general information.

Illuminating cases from primarily the ECJ have been used to further understand the system and to show on a development not always written out in law.

Textbooks and articles have been used for two reasons. The first reason is to further explain the different judicial systems, the consequences of these and certain key issues. The other reason is to get the authors' opinions on issues such as the function of the share capital, transaction costs and how they see the future in Europe regarding company law. All of these opinions are mainly gathered in chapter five. The articles have been published in well renowned journals and are mostly written by professors in company or EC law. The articles are written in Swedish or English. Sometimes the articles have referred to sources in German and these sources I have not been able to check. However, the main argument is seldom based on these sources and thus I am comfortable in using the article anyway.

1.3 Delimitations

To keep the essay focused and relevant, I have chosen only to write about the share capital requirement in Swedish private limited companies. In the comparative study however, it has sometimes been necessary to look at the rules for public limited companies and other times there is no difference between public companies and private companies.

Since this thesis is about the minimum share capital requirement, its functions, and issues and future, I will not, at any depth, discuss rules concerning e.g. creditor protection, transaction costs or capital maintenance. These are functions of the share capital and will at times be given a fair amount of space

and at times simply be mentioned. The purpose of this essay is not to problematize around these functions as themes in their own right, however important and interesting they may be, except when required while discussing the share capital.

2 The Swedish Share Capital rules

This chapter will focus on Swedish company law. I will explain the basics of the Swedish Aktiebolag, AB, the history of the share capital and point on other possible ways to have a limited responsibility. I will thoroughly describe the many reasons behind the requirement of a minimum share capital, using legislative history, literature and some cases. In addition, the reasons for having 50.000 SEK as the minimum amount required will be explained.

The Swedish laws that are relevant in this context are Aktiebolagslagen (ABL), Årsredovisningslagen (ÅRF) and Aktiebolagsförordningen (ABF).

2.1 Why an Aktiebolag?

The limited company form is probably one of the reasons of the economic advances in the west during the last centuries. Its great significance is partly because of the financing of the company and partly because of the limited responsibility. In combination with the opportunity to trade shares, the limited company form is recognized by its economic flexibility.¹ In Sweden, the limited company form is primarily the AB, which can exist as a public or private company.

The point of most limited companies is simply that they grant their owners limited liability. Usually, the only risk an owner (shareholder) in an AB takes is that his or her shares might become worthless and the money ventured might be lost. You do not risk your or your family's private economy.

2.1.1 Other forms of incorporation

In order to better understand the AB, I will shortly describe some alternative forms of corporation available in Sweden. I do not aspire to make a complete list, but simply to present some common possibilities.

If you wish to run a business in Sweden, there are other types of company forms to choose from, with different advantages and disadvantages. However, if you wish to do so with a limited responsibility you can only choose between the following:

- Limited Partner in a Kommanditbolag,
- Member of an Economic Union,
- Shareholder in an Aktiebolag, private or public,
- Shareholder in a limited company in another EU member state, with a branch in Sweden.

¹ Lindskog 2000/2001, page 846

A *Handelsbolag* is a company form with two or more owners. The owners are personally and severally responsible for the company's debts and contracts, which means that a creditor can ask any of the owners to pay and that owner will have to turn to the other owners to be reimbursed. A *Handelsbolag* needs to be registered by the competent Swedish authority². A special kind of *Handelsbolag* is the *Kommanditbolag* where at least one of the owners (partners) has a limited responsibility and at least one has an unlimited responsibility for the company.³

Soon the possibility to start an *SPE-company*, which will be described later on in this thesis, might be available to all Europeans. Today, the SE-company (public limited liability company form) is already in existence as the public limited European company form.

An *Economic Union* is a special company form where the purpose is to take care of the members' common economic interests. The members might be consumers, producers or suppliers of goods or services or contribute to the union in other similar ways. An Economic Union need to be registered and have a board. Its members' responsibility is limited to their share or effort. Anyone who fulfils the membership requirements shall be allowed as a member.⁴

Another type of very common company is the *Enskild Firma*, a company form with a single owner. The registration number of the company is the same as the owner's personal identification number and thus the economy of the company is closely related to the economy of the owner. An *Enskild Firma* is not a legal person and only has to register at the competent Swedish Authority⁵ if it wishes to have its name protected. It does not grant the owner limited liability.

2.2 History of the share capital

The first Swedish law concerning limited corporations came in 1848. In the law was a share capital requirement, but the amount of the share capital was not regulated. Since then, the share capital requirement has been revised a number of times. In 1885, the required minimum share capital was 5.000 SEK and it stayed this way until 1973 when it was raised to 50.000 SEK.⁶

The raise to 50.000 SEK led to demands, especially from smaller businesses, that Swedish law should offer an alternative to the AB. An Inquiry presented its suggestion concerning *Andelsbolag* in 1974 and suggested a special type of AB. The *Andelsbolag* would give limited responsibility to its owners, and have a minimum capital requirement of 20.000 SEK. The Inquiry also suggested that the minimum share capital for an AB would be raised to 125.000 SEK.

² In this case, the Swedish Bolagsverket.

³ BL.

⁴ Lagen om Ekonomiska Föreningar, 1:2, 2:1, 3:1.

⁵ Bolagsverket.

⁶ SOU 2008:49, page 57-58.

However, the suggestion received a lot of negative criticism and was never carried out.⁷

In 1995 it was decided that the limited company would now become two kinds of companies: the *private* limited company and the *public* limited company. For private limited companies, the required amount was raised to 100.000 SEK.⁸ The reason for the split was mainly Sweden's membership in the European Union. Many of EU's Company Directives contained special demands on companies with several small owners, opposed to closely-held companies.⁹

In 2005 a new ABL entered into force, but no changes were made concerning the share capital amount.

During the year 2008 an Inquiry regarding the minimum share capital in private limited companies was commenced and the alternatives the Inquiry should take into consideration were to lower the share capital to 50.000 SEK, 20.000 SEK or remove it completely.¹⁰ It suggested, for reasons described later in this chapter, 50.000 SEK. The reasons behind the Inquiry were, among other things, criticism concerning the difficulty to start an AB and the trend in the EU and the other Member States. The Inquiry writes about a possible competition in the EU after some crucial cases¹¹ that Sweden might have to adjust to.¹²

In 2007, the government gave a directive for an Inquiry concerning a less complicated AB.¹³ The Swedish government recognized the need of a company form with limited responsibility for smaller companies, possibly without a capital requirement. The Inquiry's first task was to analyze the need of a new company form and consider advantages and disadvantages. The Inquiry presented its conclusions in April 2009.¹⁴ A new company form with limited responsibility was however not suggested, primarily because of the suggested SPE company form¹⁵ and that the Inquiry found it better to simplify some rules in ABL instead.¹⁶ It did not discuss the issue of the share capital due to the parallel investigation concerning this issue.

2.3 Functions of the Swedish Share Capital

The shareholders shall pay the share capital when the company is formed. The payment can be in cash or capital contributed in kind, e.g. a machine. Usually, the owners pay when they acquire their shares¹⁷. When payment is made

⁷ SOU 2008:49, page 58.

⁸ For public limited companies, the amount was raised to 500.000 SEK.

⁹ Sandström, page 55.

¹⁰ SOU 2008:49, page 56 ff.

¹¹ We will look at these cases in chapter 3.2

¹² SOU 2008:49, page 61-62.

¹³ Dir. 2007:132.

¹⁴ SOU 2009:34.

¹⁵ See chapter 3.4 about the EU and SPE company form.

¹⁶ SOU 2009:34, page 136 ff.

¹⁷ ABL 2:3.

through contribution in kind, the company's auditor must state that the contribution has been made, that it is of use to the company and that the value of the contribution is not entered into the accounts at a higher value than it should be¹⁸.

In the company's bylaws the share capital shall be defined and Swedish companies can choose to state a minimum and maximum share capital, to be able to enable flexibility without making changes in the bylaws. The number of shares, minimum and maximum, shall also be stated.

The share capital shall be represented by a post in the balance sheet.

2.3.1 Quote value of shares

The quota between an AB's share capital and the number of shares is called the quote value. When an AB is created the share capital as well as the number of shares is decided. When the new ABL was introduced in 2005, one of the news was the quota system that replaced the old system of nominal share value.¹⁹

ABL 1:6 states that every share represents an equal part of the company and that this part is the share's quote value. The system enables the share capital to be increased or decreased without having to give out new shares or take back old ones.²⁰

The share's quote value can be changed without changes to the share capital. The number of shares can be increased or decreased. To expensive shares may be considered impractical and thus divided in two, a so-called split. A too low share value can be a problem for a company, e.g. because of transaction costs. In this case, shares may be fused, so that two earlier shares becomes one new with a higher value.²¹

A share may not be bought at a price lower than its quote value.²²

¹⁸ ABL 2:19.

¹⁹ Nominal value is when every share has a set, nominal value per share (Hamilton, page 176). The nominal value system was motivated by the fact that in older AB:s shares had been given out that did not represent a paid amount, but simply the owner's share in the company and the company's assets. Since the share capital was considered the only base for creditors, legislators found it important to make sure that this base is somewhat consistent. The legislators thought that this could be achieved by settling a required minimum share capital in combination with a lowest nominal value per share. The purpose of the nominal value system was thus to secure a company's non-free capital when the company was created or during an emission. That a decided amount was stated in money and written on the shares probably also made the shareholders feel more secure (NJA II 1895, page 58-59 and Sandström, page 104).

²⁰ Sometimes it is necessary to notify the creditors when decreasing the share capital, ABL 6:1.

²¹ Sandström, page 105f.

²² ABL 2:5 and 13:4.

2.3.2 Shareholder protection and obligations.

The share is the base of the shareholder's rights and obligations concerning the company's economy and management. It symbolizes the shareholder's part of the company.²³ One of the arguments for the share capital is that it makes it easier to gain capital to the company. A lack of legal protection for investors might both decrease the opportunity for the company to get external financing and force the company to pay a higher interest.²⁴

In case law, especially in NJA 1947 page 647, the Swedish Supreme Court decided that when the limited liability gives unreasonable advantages or results, a personal responsibility might be put on the shareholders. There is however no clear definition of when this should happen. It could be when the shareholders run a business that is not separated from one of the shareholders' own businesses. It could be when shareholders in an objectionable way have used the limited company form in order to minimise their own liability or it could be when the company obviously has insufficient funding.²⁵ However, one should be careful when using the above-mentioned possibility.²⁶

2.3.3 Creditor protection

As stated earlier, one of the distinguishing features of a limited company is the limited responsibility for the owners. However, this interest of freedom for shareholders must be considered in the light of the creditors' interests: that the company is able to pay its debts.

There are many types of creditors. Banks, suppliers, and the state (in the form of tax claims) are usual examples but there are also other types. An obligation can be created via non-contractual torts, and the employees are considered a creditor because of their interest that their payment claim is covered.²⁷

The share capital, together with the rest of the shareholders' equity, creates a buffer between the assets and debts of a company to make sure that the company's economic commitments can always be fulfilled.²⁸ However, in its proposition²⁹ the government stated that it is probable that creditors more often look at cash flow or liquidity than the share capital and the government's proposition concluded that the protection of creditors is not the main reason for the minimum share capital requirement.

Traditionally creditor protection is considered one of the reasons for the share capital³⁰ and many of the rules involving the share capital is based on or have

²³ Sandström, page 98-110.

²⁴ SOU 2008:49, page 84.

²⁵ Andersson, page 204 ff.

²⁶ Prop 2004/05:85, page 207 f.

²⁷ SOU 2008:49, page 50

²⁸ Sandström, page 98-110.

²⁹ Prop 2004/05:85, page 10f. The proposition proposed a new ABL.

³⁰ See e.g. chapter 2.2. and Rodhe, Aktiebolagsrätt, page 19 where prof Rodhe (1909-1999) writes that since the creditors only have the company's capital as security, it is necessary

consequences for the protection of creditors. For this reason, the following parts will explain the ABL rules connected to the share capital and creditor protection. The legislation protecting creditors in Sweden today may be divided into three: *the contribution duty*, *the limitations in the company's right to dispose over its capital* and *involuntary liquidation rules*.³¹ In the following, we shall have a short look at the two first protection systems and which kind of protection it gives creditors. In chapter XXX we will go further in to the involuntary liquidation rules, since these rules protects many other interested parties as well as the creditors.

2.3.3.1 The contribution duty

The purpose of the contribution duty is that the capital the company officially have also should be contributed to the company.³² The payment of shares should happen when the company is created and may not be below the share's quote value, ABL 2:15. As seen above, the payment might be made through a contribution in kind.

The contribution duty is not only relevant at the creation of the company but also later on: regarding issuing of new shares or convertibles, ABL 11:1.

2.3.3.2 Limitations to dispose of the shareholders' equity.

The limitation in a company's right to dispose of its shareholders' equity is divided into two principles: *The cover principle*, ABL 17:3, means that an asset transaction is only legitimate if there is full cover for the company's equity after the transaction. The decision shall be based upon the latest balance sheet with consideration to later occurrences. The principle is meant to give the creditors a guarantee that the equity cannot be decreased through asset transactions.

The second principle is the *caution principle*, also found in 17:3 ABL. Even if the asset transaction is compatible with the cover principle, the transaction will still have to be defensible considering demands that the extent, nature and risks of operations puts on equity, liquidity and the company's position in all. The consequence of the caution principle is that a transaction might be smaller than what the cover principle would allow, but never greater. The size of the buffer needed must be determined for each individual company, taking into account e.g. the business cycle and the size of the shareholders' equity. The caution principle further means that a company need to take its current costs into consideration. Asset transactions may not involve a sum so grand that the company deteriorates its ability to fulfil obligations and the company should still have a buffer in case of unexpected events. The caution principle is a standard rule, and there are unfortunately no cases to explain it further.³³

that this capital is actually created when the company is registered and doesn't disappear during the company's operations.

³¹ The same division is used in SOU 2008:49, page 9.

³² Sacklén, page 138

³³ Karnov, comment to 17:3 ABL. NJA 1995 page 742 gives some guidance since it explains that the value the cover principle refers to is the value entered into the accounts, not the market value.

Section 17:3 and its principles can be applied to all kinds of asset transactions.

2.3.4 Control of finances: the special balance sheet

In ABL³⁴ we find the rules concerning the liquidation of an AB, before it has severe financial problems. The main purpose of the rules is to put pressure on the board so that it acts in time. If the board has reason to suspect that half of the share capital is used, they have to create a special balance sheet that is to be audited by the company's auditor, ABL 25:13.

If the special balance sheet shows that half of the company's equity is covered, the board no longer has a duty to act. However, if the special balance sheet shows that half of the share capital is in fact used, then an extra shareholders' meeting is to be summoned. At the shareholders' meeting the shareholders can decide that the company should be liquidated, ABL 25:15. If the meeting does not take a decision, the board will try to gain control over the economy during a maximum time of eight months. During this time the board is busy with plans of reconstruction such as discussing if the shareholders are able to contribute more capital to the company³⁵.

After a maximum eight months, the shareholders shall meet again to discuss a new special balance sheet, produced by the board and/or reconstruction officers, ABL 25:16. If the share capital is not fully covered, the company has to be liquidated, ABL 25:17.

The members of the board might be held personally responsible if they do not act accordingly to what ABL demands of them, presuming they have been neglectful. The responsibility would comprise of the commitments the company has made since the point of time when the board did not follow the rules of ABL. The same responsibility applies to a person who, knowing that the board has not acted properly, acted in the company's name.³⁶ A shareholder might also be responsible together with the company for commitments the company made after he or she participated in a decision that the company should not be liquidated, knowing that according to law the company should be liquidated.³⁷

The rule is based on the idea that a company should not be allowed to be economically unstable during a longer period of time. If the company's economic situation is not improved the company will be liquidated to protect creditors from even more damage.³⁸ Another idea is that the rule should function as a warning and give time to acknowledge and try to sort out the company's problem.³⁹

³⁴ Chapter 25, section 13-20.

³⁵ Sandström, page 325.

³⁶ 25:18 ABL.

³⁷ 25:19 ABL.

³⁸ Skog, *Rodhes Aktiebolagsrätt*, page 83.

³⁹ Nerep, *Aktiebolagsrättslig analys*, page 471.

2.3.5 Transaction costs

A transaction cost is all the costs connected to the main transaction, such as a purchase or loan. The most common transaction costs are the *search- and information costs*, *bargaining costs* and *policing and enforcing costs*.⁴⁰ Obviously, the size of the transaction cost varies greatly depending on the type of transaction.

Transaction costs are relevant to discuss in context of the share capital since the share capital has been seen as a way to decrease these costs. No requirement of share capital might lead to greater transaction costs since the company and creditors would be forced to make individual deals instead of relying on the capital existing in the company. Since individual contracts take more time and demands more research, the costs are greater than for a generalized contract and this might create problems, especially for the smaller businesses⁴¹.

There are two types of creditors that are interesting in the transaction cost context: *the adjusting creditors* and the *non-adjusting creditors*. An adjusting creditor is a creditor that has the opportunity to make individual agreements with the company. It might be a bank considering giving a loan to the company or a supplier wishing to make business. The adjusting creditors are willing to incur the transaction costs necessary to adjust the terms upon which credit is extended so as to compensate them appropriately for the risk they are bearing.⁴² What they have in common is that they may choose whether or not to engage in business with the specific company. Examples of how these creditors protect themselves in Sweden are through keeping the ownership of their goods until full payment has been received, financial leasing and pledges.⁴³ Adjusting creditors might also ask for personal securities from the owners rather than from the company.

Not every creditor has the opportunity to make individual contracts with a company and in that way decrease the risk they are taking concerning their claim towards the company. Tort victims are the most intuitive example of a non-adjusting creditor, but also the state has a claim for taxes and in some cases a wages guarantee can be counted as non-adjustable creditors.⁴⁴ Non-adjusting creditors thus need a greater protection than the adjusting ones, and the rules concerning capital protection of which the share capital is part might be seen as a standard contract for them.⁴⁵

A creditor that cannot be classified as either an adjustable or a non-adjustable creditor are the ones that, due to lack of knowledge, will or information, does not protect its own interests by making an individual contract with the

⁴⁰ A Dictionary of Economics: "Transaction cost".

⁴¹ SOU 2008:49, page 84.

⁴² Armour, page 5.

⁴³ Sacklén, 153ff.

⁴⁴ SOU 2008:49, page 83, Armour page 5.

⁴⁵ SOU 2008:49, page 83-84 Kraakeman et al, page 120.

company. These groups are called *weak creditors* and have to rely on the company's capital.⁴⁶

2.3.6 Seriousness of entrepreneurs

When proposing a new ABL, the government clearly stated that to protect the AB's good reputation as a serious and credible company form is one of the main reasons for the share capital and the amount required.⁴⁷ The government further wished to make the point that an entrepreneur that is not committed enough to the company/business idea to commit capital to it should be referred to other types of corporations.⁴⁸

The share capital might be a way of making sure that the entrepreneur has a well-developed business idea to which he/she is prepared to commit capital. In this aspect, the minimum capital requirement functions as an entrance barrier. It might also work as a first barrier to prevent the limited liability company form from being used for illegitimate purposes.⁴⁹

The Inquiry discussed the risk that an AB might be used for illegitimate purposes, such as different kinds of economic criminality. However, since all lines of business should abide by the same laws it would be difficult to raise the required minimum capital, since such a raise would also affect business branches with little problems concerning crimes. However, the Inquiry concluded that the minimum capital requirement would not put an end to the abuse of the AB company form, but might be a barrier for those persons wishing to use it for unserious purposes.⁵⁰

2.4 The minimum share capital amount

As seen above, a private AB needs at least 50.000 SEK as share capital.

The official Inquiry presented in 2008⁵¹ a thorough discussion concerning the amount required as share capital. According to its directive, the Inquiry should investigate if the share capital requirement should be lowered from 100.000 SEK to 50.000 or 20.000 SEK or to be kept unchanged.

The Inquiry concludes that the share capital requirement should be lowered to make the AB more accessible to all. They discovered that four out of five companies that started in 2006 were within the service sector, where capital is less necessary.

According to the Inquiry, the statutory minimum share capital has the disadvantage that there is no connection between this more or less randomly determined amount and the capital requirements and risks connected to the

⁴⁶ SOU 2008:49 page 83 and Armour, John, pages 15-20.

⁴⁷ Prop 2004/05:85, page 11

⁴⁸ Prop 2004/05:85, page 212

⁴⁹ SOU 2008:49, page 11

⁵⁰ SOU 2008:49, page 86.

⁵¹ SOU 2008:49

individual company. If the statutory minimum requirement was to be removed, the share capital would be determined by the shareholders themselves in proportion to the extent and nature of the operations.

The Inquiry also observed the transaction costs, as we have seen above. The conclusion was that no requirement of share capital might lead to greater transaction costs since the company and creditors would have to make individual deals. These creditors would ask more of the company and maybe demand guarantees from the owners. If the share capital requirement was completely removed, it would likely be replaced by contracts. Since individual contracts take more time and demands more investigations and materials, the costs are greater than for a generalized contract.

The conclusion of the Inquiry was that there was no reason to remove the minimum share capital requirement in Sweden, but that the limited liability company form should be made more accessible by lowering the amount required. The amount of 50.000 SEK was chosen since the Inquiry believed that a reduction to less than 50.000 SEK would increase the demands from creditors for securities, capital contributions and information. The Inquiry also believed that it was an appropriate amount out of the perspective that some creditors cannot make individual deals with the company, that it would function well as a entry barrier to entry and that the lower the capital requirement is, the greater the risk of the company entering into an involuntary liquidation situation which should be avoided.⁵²

⁵² SOU 2008:49, page 22

3 The EU

3.1 Introduction to the EU

Today, the Swedish legislation and case law are obviously much influenced by the European Union. The EU is trying hard to harmonize the European company law and its many Company Directives have had some success in doing this. In order to get a better overview of the EU regulations, this part of the chapter will describe the basic common company law. However, since this thesis does not focus on public companies, large parts of this EU law are irrelevant. In order to be able to analyze the Swedish share capital rules out of an EU and EU Competition perspective later on, I will also write about the interpretation of the freedom of establishment for companies, using some cases. I will then move on to describe the proposed private limited European Company, the SPE.

Share capital rules have traditionally been among the cornerstones of EU company law. Already the Second Company Directive 1976 concerned the formation and maintenance of a share capital. Lately however, these rules, theories and ideas have created a debate among European Scholars. When the Commission set up a High Level Group of Company Law experts in 2001, it recognized the debate and asked the Group to investigate the share capital rules. Since then, the debate has been more vivid than ever.⁵³

The view on the function and purpose of company law differs between the Member States. In the continental company law, it is important to protect the stakeholders in general and the company's creditors especially. In the Anglo-Saxon company law, it is believed that the different parties can protect themselves best through different agreements and the focus is on flexibility and availability.⁵⁴

The two theories deciding a company's nationality are the *real seat theory* and the *incorporation theory* and in Europe we have supporters of both, which explains a large part of the complex of problems regarding freedom of establishment for companies.

The real seat theory is practiced by e.g. Germany, France, Spain and Italy and means that a company must have its real seat in the country where it is also registered. A company is considered to have a legal personality only if this demand is fulfilled. The purpose of the real seat theory is to protect national interests through protecting creditors and other stakeholders, such as employees. The disadvantage of the real seat theory is that it might be uncertain where a company has its real seat. A consequence of the real seat method is that if the company decides to move its real seat to another country, it will no longer have a legal personality. A consequence of this is that the

⁵³ Mulbert and Birke, page 2.

⁵⁴ SOU 2008:49, page 81.

company representatives might be personally responsible for commitments the company made after moving its seat.⁵⁵

The incorporation theory on the other hand is practiced by e.g. Sweden, the UK, Denmark and the Netherlands. It means that a foreign company is considered a legal personality under national law if the company has that status in its country of registration.⁵⁶ There is no uncertainty when considering a company's legal personality.

It is thus often impossible to move a company in itself between the different Member States.⁵⁷ What companies can do is to register in the Member State that suits the company best and uses the incorporation method. The company can then create a branch in the Member State it wishes to operate in.⁵⁸

The fundamental four freedoms⁵⁹ and cases such as *Centros*⁶⁰, *Überseering*⁶¹ and *Inspire Art*⁶² make sure that there is some freedom of establishment in Europe. These cases are interesting in order to understand how a Swedish AB may move within the EU and whether a foreign company may move its business to Sweden. This is important to understand in order to better discuss the future of the Swedish minimum share capital requirement, in regard to a possible EU competition.

3.2 Cases

3.2.1 Daily Mail, 1988⁶³

Daily Mail (UK) is primarily a tax-law case but has some interesting company law issues as well. Daily Mail wished to move its de facto head office (and tax residence) to the Netherlands because of the more favourable tax rules there, while at the same time it planned to remain a company under UK Company Law. The UK Treasury Dep. refused permission for the transfer of seat, which is necessary to receive under UK law. The UK supports the incorporation theory.

Because of the refusal, Daily Mail referred the question to the ECJ: whether the EC Treaty precludes a member state from obstructing the transfer of the de facto head office from a member state.

The ECJ concluded that the freedom of establishment is one of the four freedoms and should also apply to companies. However, a company only exists

⁵⁵ Dotevall, SvJT 2006, page 885.

⁵⁶ Dotevall, SvJT 2006, page 885.

⁵⁷ Pehrson, Kan aktiebolag flytta?, page 89f.

⁵⁸ Dotevall, SvJT 2006 page 886.

⁵⁹ EC Treaty art 3.3

⁶⁰ Case C-212/97 *Centros Ltd v. Erhervs-och Selskabsstyrelsen*.

⁶¹ Case C-208/00 *Überseering BV v. Nordic construction Company Baumanagement GmbH*

⁶² Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*.

⁶³ Case 81/87 1988. All information is from the case text.

according to the national law of the country in which it is registered. Finally, the ECJ states that the EC Treaty does not in itself give company's the right to move its head office. It also stated that this problem needs to be solved through further harmonization.

The principles of Daily Mail were reaffirmed by the ECJ in 2008, in the case *Cartesio*⁶⁴. The court stated that: "As Community law now stands, articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a member state under which a company incorporated under the law of that member state may not transfer its seat to another member state whilst retaining its status as a company governed by the law of the member state of incorporation".

3.2.2 Centros, 1999

Two Danes established Centros Ltd under UK company law, but the company was only active in Denmark. The owners clearly stated that they had established the company under UK company law solely to avoid the minimum capital requirement for Danish limited liability companies. However, the Danish commercial registry considered this to be an unlawful circumvention of Danish law and refused to register the company's branch office in Denmark.⁶⁵

First, the ECJ ruled that when a company exercises its freedom of establishment under the EC Treaty, the Member States are prohibited from discriminating against this company on the grounds that it was formed in accordance with the law of another member state in which it has its registered office but does not carry on any business. Second, a state is not authorized to restrict freedom of establishment on the ground of protecting creditors or preventing fraud if there are other ways of countering fraud or protecting creditors. Besides, the Court points to the availability to member states of the option of adopting EC harmonizing legislation in this area of company law.

Thus, the ECJ concluded that a Member State has to recognize a branch of a company incorporated in another state, even if the local branch is the only part of the company that is actually doing business.

Later, the case *Cadbury Schweppes* from 2006⁶⁶ modifies the principle a little. In this case Cadbury Schweppes had established two subsidiaries in Ireland solely in order to gain from Ireland's more favorable tax rules. The ECJ stated that a restriction of freedom of establishment is possible in cases of a "letterbox" or "front" subsidiary. A company cannot invoke freedom of establishment in another member state for the sole purpose of benefiting from more advantageous legislation unless the establishment in the other member state is intended to carry out genuine economic activity.

⁶⁴ Case C-210/06 *Cartesio Oktató és Szolgáltató* bt.

⁶⁵ C-212/97 *Centros Ltd v. Erhvervs-och Selskabsstyrelsen*. All information is from the case text..

⁶⁶ Case C 196/04 *Cadbury Schweppes plc & Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*.

3.2.3 Überseering, 2002

All the directors of Überseering BV, a limited liability company under Dutch law, were resident in Germany. As a consequence the German courts decided that German corporate law applies to the company, since the location of the head office was in Germany. For this reason Überseering did not have a legal personality in Germany and was dismissed from court proceedings.⁶⁷

The ECJ ruled that it was incompatible with the freedom of establishment to deny legal capacity to a company formed in one member state, which moves its central place of administration to another member state. The ECJ also stated that when a company incorporated in another member state exercised its freedom of establishment in another member state, that other member state is required to recognize the company's legal capacity, which it enjoys under the laws of its state of incorporation.

The conclusion in Überseering was thus that a limited company registered in a country using the incorporation principle shall be recognized also in countries using the real seat theory.

3.2.4 Inspire Art, 2003

A person from the Netherlands established Inspire Art Ltd under UK company law and requested the registration of the company's Dutch branch office in the Netherlands. The registry decided that specific Dutch rules for foreign entities registered in the Netherlands would apply. As a consequence, Inspire Art would have been required to use a company name indicating its foreign origin and comply with the minimum capital requirements for Dutch Limited Liability Company.⁶⁸

The ECJ stated that a foreign company is not only to be respected as a legal entity having the right to be a party to legal proceedings, but rather has to be respected as such. That is, as a company that is subject to the company law of its state of incorporation. Any adjustment to that foreign company law of the host state is hence not compatible with European law.

Inspire Art resulted in that a Member States cannot, through special rules regarding foreign companies, have higher requirements than the country of registration e.g. regarding share capital or the board's responsibility towards creditors.

It is also interesting that in the Inspire Art case, the Court states that creditors primarily must protect its own interests by gathering information about the company it is doing business with. The Court does not however have a standpoint in the question of whether or not the requirement of a share capital is a good construction for creditor protection.

⁶⁷ C-208/00 Überseering BV v. Nordic construction Company Baumanagement GmbH All information is from the case text.

⁶⁸ C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd. All information is from the case text.

3.3 EC Insolvency Law: the EIR

There are strong complementarities between company law and insolvency law, as we will see throughout this thesis.

Independently of other corporate law developments, such as the cases referred to above and other harmonization initiatives, the European Community adopted an important regulation on insolvency proceedings, the European Insolvency Regulation. The EIR mainly aimed to enhance cooperation among EU courts in bankruptcy law by introducing some common rules in an interjurisdictional framework that was, until then, characterized by strictly territorialist solutions. The EIR uses the *centre of main interest*, the COMI standard, to determine which Member State has jurisdiction to open main insolvency proceedings and identifies the law applicable as the law of that State. EIR introduces the principle of mutual recognition of insolvency proceedings, contains rules on information for creditors and on the lodgment of their claims. The law has been criticized for being fuzzy and that it has led to new forum shopping opportunities in bankruptcy law.⁶⁹

Despite COMI's key role in determining jurisdiction and solving conflict of laws in insolvency, there is no definition of COMI in the text. It is presumed that for companies and legal persons the place of the registered office is the centre of main interests in the absence of proof to the contrary.⁷⁰

The conclusion regarding the EIR is that it offers ex post forum shopping opportunities that the different EU bankruptcy systems will have to deal with. Although vague, the COMI standard is here to stay and consequently, forum shopping might hurt some creditors. However, States will probably not actively compete to attract bankruptcies.⁷¹

3.4 The SPE-company

The summer 2008, the European Commission presented a proposal for a Council regulation on the statute for the private European company, a so called SPE company.⁷² In March 2009, the European parliament passed a resolution approving the proposal in an amended version, the EP Draft. Thus, the debate shifted to a Council level. During the Swedish Presidency in December 2009, the Council submitted a compromise proposal⁷³ but unanimity was not reached. The Presidency priorities state that all efforts will be made to reach an agreement on the Regulation.⁷⁴ When referring to the SPE Statute in this thesis, it is the Presidential Compromise that is meant.

⁶⁹ Enriques and Gelter, page 2 and 10.

⁷⁰ Enriques and Gelter, page 10.

⁷¹ Enriques and Gelter, page 16.

⁷² COM/2008/396.

⁷³ The so-called Presidency Compromise.

⁷⁴ Siems et al, page 2.

The new company form will enable small- and medium sized enterprises (SMEs) to do business throughout the EU. The proposal aims to reduce compliance costs on the creation and operation of businesses arising from the disparities between national rules both on the formation and on the operation of companies. It would also reduce the administrative burden for SMEs wishing to operate in several Member States.⁷⁵

The SPE Statute provides a set of company law rules related to the company form. It does not regulate matters related to labour law, tax law, accounting, or the insolvency of the SPE. Nor does it deal with contractual rights and obligations of the SPE or those of its shareholders other than those deriving from the articles of association of the SPE. The Statute and appendix should cover most occurrences; if not the national legislation in the country where the SPE is established will be a complement.⁷⁶ The SPE Statute's approach to leave more and more questions open and let the different Member States decide has been criticized since this means that the SPEs across the EU will be very dissimilar.⁷⁷

In order to facilitate start-ups, the regulation sets the minimum capital requirement at one euro⁷⁸. The proposal departs from the traditional approach that considers the requirement of a high minimum of legal capital as a means of creditor protection. Studies show, the commission says, that creditors nowadays look rather at aspects other than capital, such as cash flow, which are more relevant to solvency. Director-shareholders of small companies often offer personal guarantees to their creditors and suppliers also use other methods to secure their claims, e.g. providing that ownership of goods only passes upon payment. Moreover, companies have different capital needs depending on their activity, and thus it is impossible to determine an appropriate capital for all companies. The shareholders of a company are the best placed to define the capital needs of their business.⁷⁹

Something quite special for the SPE Company is that it has to state its capital on its entire letters, order forms and its website. This guarantees transparency and may also be a positive signal to creditors and others dealing with the company.⁸⁰

One of the main characteristics of the SPE is that the company might be moved between the member states whilst keeping its legal personality. The company may not move if it is subject to liquidation, insolvency or other similar situations. When a move is made, the member state need to, through a special authority, examine whether the move is legal according to the statute. If yes, the company should be registered in the new member state and cease to be

⁷⁵ European Commission homepage on the European Private Company.

⁷⁶ SPE Statute, page 2.

⁷⁷ Siems et al, page 7.

⁷⁸ However, Member States have the freedom to demand up to 8.000 euros for the SPE:s registered in their territory. This had been criticized since the general aim is to establish the SPE in a manner as uniform as possible. See Siems et al, page 7.

⁷⁹ COM/2008/396, page 7 (and article 19.4).

⁸⁰ SPE Statute, art 11 (2)(c), and Siems et al, page 7.

registered in the original state.⁸¹ However, it has been pointed out that the statute might be interpreted as possible for a company to have its registered and real seat in two separate member states.⁸²

The shareholders enjoy a high degree of freedom in determining the internal organization of the SPE and there is no obligation to hold physical general meetings. The method for decision-making is to be described in the article of association. The Regulation ensures two specific minority rights for the shareholders: the right to request a shareholders' resolution and the right to request the competent court or administrative authority to appoint an independent expert, presumably an auditor.⁸³

The Regulation imposes on directors the duty of acting in the best interests of the company. Accordingly, directors' duties are owed to the SPE and may only be enforced by the company. The Regulation does not give individual shareholders or creditors the right to directly sue the members of the management body. It lays down a general standard of care by requiring from directors the care and skill reasonably required in the conduct of business. The Regulation establishes directors' liability for any loss or damage suffered by the SPE due to the breach of their duties deriving from the Regulation, articles of association or a resolution of shareholders. However other aspects of liabilities, e.g. the consequences of the breach of duties or any business judgment rule, are governed by national law.⁸⁴

The SPE Statute prescribes that the amount of a distribution may not exceed the last financial year's profits plus any profits brought forward and reserves available for distribution minus any losses carried forward and restricted reserves.⁸⁵ This essentially limits distributions to the SPE's accumulated profits.⁸⁶ The Statute also allows the Member States to require a solvency statement which the directors need to sign at least 15 days before the shareholders' meeting. The certificate has to be disclosed in accordance with national law.⁸⁷

The name of an SPE shall be followed by the abbreviation SPE.⁸⁸

⁸¹ SPE Statute, art 36

⁸² D.F.M.M. Zaman et al., page 176.

⁸³ COM/2008/396, page 8.

⁸⁴ COM/2008/396, page 9.

⁸⁵ SPE Statute, art 21 (c). In the Commission's Draft, a balance sheet test was necessary: i.e. after the distribution the company's assets fully cover its liabilities. Since a solvency test on dividends only exists in few Member States, the proposal does not make it mandatory for SPE:s. However, it explicitly allows shareholders to provide for a solvency test in the articles, in addition to the balance-sheet test that is required by the regulation. The statute does not define "assets" or "liabilities", in this aspect the relevant accounting provisions apply. COM 2008/396, page 8. The accounting principles are defined in the Fourth Directive (78/660/EEC) or Regulation EC 1606/2002.

⁸⁶ Siems et al, page 8.

⁸⁷ SPE Statute, art XXX, Siems et al, page 8.

⁸⁸ COM/2008/396, page 17 (article 6).

4 Comparisons

When choosing which countries to focus on in this chapter the author tried to find countries based on other legal traditions than Sweden, countries with a somewhat different view of the share capital functions and countries with other types of solutions. The author also wished to use countries that have a great influence on Sweden, e.g. by being a large member of the EU or by doing a lot of trade with Sweden. After researching these criteria the author decided upon the UK, since the Ltd is very common in Sweden and the rest of Europe, France and Germany, since they have different views in many company law aspects. All of these three countries have different requirements regarding the minimum share capital. The author has also chosen to focus on the US. The US have had common company law acts for many years but are still made up of partly independent states. Also, the author finds it impossible to discuss a future “European Delaware” without actually explaining the background and company climate in Delaware today.

4.1 The United Kingdom

The private limited company (Ltd) is a famous form of corporation that brings limited liability to the owners. Both the Ltd and the Plc (Public Limited Company) are regulated in the Companies Act 2006's 1.300 sections. The minimum share capital for an Ltd is one pound. There is little difference between forming a public and a private corporation in the UK and all companies are considered private companies, unless they are registered as public companies.⁸⁹

The first limited liability company was created with the Limited Liability Act 1855. The required minimum capital was 20.000 GBP, a huge amount in 1855. However, already in 1856 the demand for a capital was removed through the Joint Stock Companies Act. The reason was that the capital requirement was believed to be an unnecessary protection, since it only protected large, wealthy companies. In 1907 the private limited liability company form was introduced and a private Ltd had to register as such. This changed in 1980⁹⁰, when the public Plc had to be specifically registered instead. When the EU through the Second Company Directive⁹¹ demanded a minimum capital in public companies, the UK had to comply and from 1980 a Plc requires 50.000 pounds as share capital. From October 1st 2009, CA 2006 applies in the UK. Some changes were made for Ltd:s, but not in relation to the share capital which continued to be one pound.⁹²

The capital rules in CA 2006 are based on a distinction between the *authorized* and the *issued share capital*. The issued share capital is represented by the shares

⁸⁹ Andenas and Woolridge, page 53 and 110.

⁹⁰ Through the CA 1980.

⁹¹ Art 6.

⁹² GLÖM INTE SKRIVA NER KÄLLAN: DET VAR DEN BLÅ BOKEN PÅ STADSIBBL.

that the company has actually given out. The authorized share capital is usually a higher amount than the issued share capital, since this enables the company to extend their capital in the future, without a shareholders' meeting.

The Ltd must have one owner and thus also at least one *share in issue*. It is however not necessary, but quite common⁹³, for an Ltd to state an authorized share capital.⁹⁴

An Ltd may postpone the payment of the share capital and there is no time limit as to when the payments must be made, this is up to the founders. The payment can be made in cash or contributed in kind.⁹⁵

Through the Companies Act 2006, private companies are not required to hold an annual meeting and are thus not required to lay copies of its accounts and reports before such a meeting. The auditor's report on the annual accounts must instead be sent out to the members.⁹⁶

Since UK legislation requires such a small share capital, the protection for the company's creditors is mainly found in the insolvency law.⁹⁷ *Wrongful trading* is one of these insolvency rules⁹⁸ and means that management and so-called shadow directors⁹⁹ can be responsible to pay for those commitments the company has made after the person in question understood "that there was no reasonable prospect that the company would avoid going into insolvent liquidation". For this reason, it is very important that the board and others in a leading position take their responsibility and keep themselves informed about the company's finances (and book-keeping). The rules regarding wrongful trading is also said to make sure, at least in theory, that no companies are created with too little capital.¹⁰⁰

The difficulty with wrongful trading is mostly to determine the time when the management should have understood that the company was insolvent and proving this in court.¹⁰¹ Another difficulty is that it is not demanded that management persons have the same knowledge that an accountant, which might in some cases be necessary in order to understand that the company had financial problems. Thus, it creates problems to decide what a manager can be expected to understand.¹⁰² Following the leading case *Re Continental Assurance Company of London plc, Singer v. Beckett*¹⁰³, a board member does not have to do much to clarify and understand the company's economic situation.

⁹³ E.g. the authorized share capital is set to £1000, with a thousand shares and a nominal value of £1 per share. The issued share capital is set to £1 (SOU 2008:49, page 72).

⁹⁴ SOU 2008:49, page 72.

⁹⁵ SOU 2008:49, page 73.

⁹⁶ Andenas & Woolridge, page 110.

⁹⁷ Dotevall, SvJT 2006, page 888.

⁹⁸ Section 214, Insolvency Act 1986.

⁹⁹ Persons that formally are not directors, but is actually having power in the company, e.g. a larger creditor (Dotevall, SvJT 2006, page 890).

¹⁰⁰ Dotevall, SvJT 2006, page 891.

¹⁰¹ The balance sheet test is used to determine the status of the company, SOU 2008:49, page 74.

¹⁰² Dotevall, SvJT 2006, page 891.

¹⁰³ (2001) BPIR 733. The board understood already in June 1991 that the company had financial problems. During a couple of months, the board worked towards a long-term

The commission has once suggested that the wrongful trading rule should be made into European standard. One of the reasons was that this makes the company management react earlier than if the duty to act is bound to the relation between the company's capital and the share capital as is the case in ABL.¹⁰⁴

Another rule in the UK concerns fraudulent trading¹⁰⁵. The rule is part of the UK company law but also of the insolvency law and means that anyone who is contributing to a fraud towards the company's creditors will be guilty of fraudulent trading. The crime means fines or even prison, and possibly an obligation to pay damages.¹⁰⁶

Always to remember when discussing UK rules are that there are two parallel systems at once: *equity* and *common law*. Wrongful trading and fraudulent trading are both part of equity. Within common law, there is a correspondence to wrongful trading. Creditors may sue the directors of a company if the directors have failed to take the creditor's interest into account when realizing (or when they should have realized) that the company might not be able to pay its debts. The base for the rule is the assumption that a company close to bankruptcy is operated on the creditors' risk, not the company's.¹⁰⁷

The Ltd is a very popular company form in the entire EU.¹⁰⁸ To give an example, between the years 2003 and 2006 approximately 6.000 private companies has been formed every year by entrepreneurs living and doing business in Germany.¹⁰⁹

When giving credit to a smaller new Ltd it is quite common that the banks demand personal securities or an increased share capital.¹¹⁰

4.2 France

In France, there are two types of private limited liability companies¹¹¹: the Société à responsabilité limitée (SARL) and the Entreprise unipersonnelle à

solution and tried to understand whether the company was solvent or not. In December 1991, the board finally concluded that the company was insolvent and applied for liquidation in March 1992. The court judged that even if the company was insolvent already in June, it would take knowledge of accounting not usually demanded from a member of the board in order to understand this. In section 214 IA it is clear that a board member should be aware of those circumstances that can be demanded from a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions.

¹⁰⁴ COM/2003/284, see also MEMO/03/112.

¹⁰⁵ Section 213 Insolvency Act 1986.

¹⁰⁶ 993 CA and section 213 Insolvency Act 1986.

¹⁰⁷ Dotevall, SvJT 2006, page 892.

¹⁰⁸ Dotevall, SvJT 2006, page 886.

¹⁰⁹ Armour, page 12.

¹¹⁰ SOU 2008:49, page 73f.

¹¹¹ The public equivalence is the *Société anonyme* (SA) or the *Société par actions simplifiée* (SAS).

responsabilité limitée (EURL). The difference between the two is that a SARL has two or more owners¹¹² while the EURL has only one. The rules for SARLs and EURLs are quite similar, but of course they are slightly more complicated for SARLs, since more persons are involved.

When it comes to the minimum share capital requirement, it is one euro since 2003. There is no maximum. Before 2003 the minimum share capital requirement was 7.500 euros and it is still quite common to have a share capital between 5.000-8.000 euros. Capital can be entered by cash or assets.¹¹³ At least 20% of the share capital shall be paid when creating the SARL, unless it is contributed in kind, if so the whole transaction shall be completed at once. The share capital shall then be fully paid within five years.¹¹⁴

If the annual balance sheet shows that the share capital is half of what it should be, an extra shareholders' meeting shall be held within four months. This meeting will decide whether to liquidate the company or if the company should continue doing business. The financial situation of the company shall also be made public. If the managing director does not comply with these rules, he or she might be punished with fines and / or prison. If the extra shareholders' meeting decides that the company should continue, the company has two years to make sure that the share capital is restored to at least half. If it isn't, the company has the option to reduce the share capital. Otherwise, stakeholders might request that the company enter into liquidation.

France also has rules regarding personal responsibility for directors if there is missing assets when the company is reconstructed, liquidated or bankrupted. For such a responsibility, *faute de gestion*, the reason of the shortage must be that the management has been careless.¹¹⁵ The responsibility can comprise of the whole or parts of the assets missing and it doesn't matter how careless the management has been. Shadow directors can also be made responsible.¹¹⁶

A general clause can be found in the French Code Civil that might have an impact on the responsibility for managers and others. The clause states that anyone who willfully, carelessly or by not knowing better created an economical damage is responsible for it.¹¹⁷

4.3 Germany

GmbH¹¹⁸ is the German form of private Limited Liability Company.¹¹⁹ It may be formed by one or more natural or legal persons for any lawful purpose.¹²⁰

¹¹² However, a SARL may only have up to 100 members. If it has more members, it must be converted to a SA (Société anonyme) within one year, Andenas & Woolridge, page 62.

¹¹³ L 223-2 Code de Commerce

¹¹⁴ SOU 2008:49, page 77.

¹¹⁵ L 651-2, Code de Commerce.

¹¹⁶ L 651-2 Code de Commerce.

¹¹⁷ Art 1383 Code Civil.

¹¹⁸ Gesellschaft mit beschränkter Haftung.

¹¹⁹ The public equivalence to GmbH is the Aktiengesellschaft, AG.

¹²⁰ Andenas & Woolridge, page 67.

The required minimum share capital is 25.000 euros and half of this amount shall be paid, in cash or contributed in kind, in order to be able to register the company.¹²¹ If the company has one owner; this person has to present the company with a security for the amount that was not paid when the GmbH was created.

The amount of the share capital contribution by different shareholders may be different. The total nominal value of shares must correspond to the capital of the company in formation. Further, each shareholder may only acquire one share on formation.¹²²

There is one exception from the capital demand and this is the UG¹²³, commonly known as the mini-GmbH. The mini-GmbH was introduced in 2008 and can be registered even though the minimum share capital has not been paid if two terms are fulfilled. The first term is that the letter combination “UG” shall be put after “GmbH” in the name of the company. The second is that at least a quarter of the profit every year shall be dedicated to the share capital until the share capital is 25.000 euros. After this, the company can remove UG from its name and is a true GmbH.¹²⁴

An advantage of the mini-GmbH is that the founding is quite inexpensive and non-bureaucratic. The law provides a standard protocol that requires little information apart from the purpose of the company, the management board members and a list of shareholders. A notary must simply confirm the signatures on the protocol. Mini-GmbH:s may only have three shareholders, and cannot accumulate capital in anything but cash. When it comes to taxes there is no difference between GmbH:s and mini-GmbH:s.

The managing director has a large responsibility to react if the company has financial problems. The MD shall call for an extra shareholders’ meeting if half of the share capital is not covered when looking at a balance sheet.¹²⁵ Further, if the company cannot pay its current debts within three weeks, the MD shall apply for liquidation. If the MD does not apply, he or she will be personally liable for the company’s debts.¹²⁶

The management in a mini-GmbH is in principle personally liable for the commitments that arose during a time when the company was insolvent.¹²⁷

4.4 The U.S.

Every State in the U.S. has an interest in making companies register in their state. The reasons are many and probably quite obvious, but I will mention one of them: the so called franchise tax. The franchise tax is a tax based on the

¹²¹ 5§ GmbHG

¹²² Andenas & Woolridge, page 68.

¹²³ Unternehmergesellschaft

¹²⁴ www.mini-gmbh.de and GmbHG

¹²⁵ 49§ GmbHG

¹²⁶ 49§ and 64§ GmbH

¹²⁷ 64§ GmbHG

registered share capital or the number of shares. The tax differs between different states but in e.g. Delaware this tax constitutes 20-25% of the total tax income for the state.¹²⁸ Most states do not require any share capital at all.¹²⁹

In the U.S., company law is regulated in every state and I have chosen to focus on two set of rules. The first is the Revised Model Business Corporation Act (RMBCA), since this Act is a standard act implemented in the majority of the states. The second set of rules is the company law of Delaware, since most American companies are registered in this state because of its company friendly laws and competent courts. Since the rules regarding legal capital often touches insolvency issues, I will mention something about UFTA as well.

The LLC, Limited Liability Company, is a very common company form in the U.S. that brings limited liability to the owners. More than 90% of the American States demands no share capital, based on the opinion that the minimum share capital amount was randomly picked and that it did not have any connection to the different corporations' operations, and the risks connected with them.

4.4.1 RMBCA and UFTA

The Revised Model Business Corporation Act, RMBCA, demands that the company has enough capital, after paying dividends, to be able to pay its current expenses, such as the electrical bill. It also requires that the company have assets that at least correspond to the total debt of the company and demands from high ranked shareholders that may arise if the company is liquidated at the time for dividends.

A shareholder's contribution to the company does not have to be capital. It can also be services performed, contracts for services to be performed, or other securities of the corporation.¹³⁰ The purpose of this is to make it easier to establish new business corporations.¹³¹

Since the basis of U.S. law is that creditors have to protect themselves through their own initiatives, the insolvency rules are very important. The U.S. rules regarding creditor protection is based on a company's possibility to operate in another state than the state it is registered in. Through the federal insolvency law, UFTA, the creditors enjoy the same protection no matter which state's company law that is applicable.¹³²

Where the company law differs from state to state, the Uniform Fraudulent Transfer Act (UFTA) is not exposed to competition in the same way. The

¹²⁸ Dotevall, SvJT 2006, page 887. A franchise tax is forbidden in Europe according to a EU directive from 1969 (69/335/EC)

¹²⁹ Dotevall, SvJT 2006, page 892. Exceptions are few and none of these, except for Texas, are financially important for the US.

¹³⁰ RMBCA 6.21 (c)

¹³¹ Dotevall, SvJT 2006, page 893 and Schön, The Future of Legal Capital, page 429ff.

¹³² Dotevall, SvJT 2006, page 894f.

fraudulent transfers concerns two types of transactions where the management can be personally liable:¹³³

1. Transactions that aim at destroying, delaying or defraud creditors.
2. Transactions that means that one of the parties did not receive a reasonable equivalent value, if at the same time the company in question directly after the transaction has an unreasonable small capital or does not have enough cash to pay its expenses. An example of this is paying dividends.

Since it might be very difficult to present evidence of the above, the UFTA is not a very effective protection for the creditors.¹³⁴

When it comes to transaction costs, banks often enter into financial covenants with corporate borrowers that include provisions on the financial structure of the borrower and, with a view to the investment, may limit the ability of the company to distribute dividend.¹³⁵

4.4.2 Delaware

During more than seventy years, the states in the U.S. have competed over companies. Delaware is the most successful of these states, for many reasons. The legislation is considered very company friendly. Judges and company lawyers are the best regarding company issues and the registration authority in Delaware is very efficient.¹³⁶

Delaware responds fast to embrace the demands of corporate decision makers. Only a few legislative projects rank higher than the amendment of the corporate statute and in order to amend the corporation code the Constitution requires a super-majority of both houses of Delaware's General Assembly. It is a corporate law provider credibly committed to the needs of the business community and Delaware has developed an extensive body of case law, administrative expertise and judicial expertise. The Delaware law is less procedural than other state law in the US and hence it is an attractive state in which to register a company. The majority of US companies listed on the New York Stock Exchange are indeed registered in Delaware.¹³⁷ There are clear taxation advantages to incorporation in Delaware. No tax is charged in Delaware on turnover, provided that the company's business is conducted in another state.

Delaware is generally more shareholder friendly than creditor friendly, but creditors still have a certain protection from the owner-centered construction of the *fiduciary duty*. The fiduciary duty means that primarily the owners demand responsibility from the board and other leaders if gross negligence can be shown, e.g. the board failed to keep themselves informed of important transactions and this led to a negative result for the company or when the

¹³³ Sections 4 and 5, UFTA.

¹³⁴ Dotevall, SvJT 2006, page 893.

¹³⁵ Schön, page 7.

¹³⁶ E.g. Dotevall, SvJT 2006, page 887, Mallin, page 44

¹³⁷ Mallin, page 44.

company has benefitted the owners even though it was close to bankruptcy.¹³⁸ Furthermore, the DLLCA requires that debts are covered in the balance sheet, but it does not require that the company is able to pay its current expenses.

¹³⁸ Kraakman et al., page 84.

5 The many discussions in literature

5.1 Creditor protection and transaction costs

Quite a large part of this essay has been dedicated to the share capital as a means of creditor protection. Some authors mean that this is the most important part of the minimum share capital requirement, while others think that there are other, better, ways of protecting creditors or letting the creditors protect themselves.

Creditor protection is more complex than, e.g. shareholder protection, since it touches on many areas of law such as contracts, property, tort, civil procedure, criminal, company, accounting, securities and insolvency law. A further problem is the various types of creditors, such as adjusting (voluntary) and non-adjusting (involuntary) creditors, or weak and strong creditors.¹³⁹

The distribution rules of the SPE Statute shift the focus notably from flexibility for the shareholders towards protection of creditors, which may or may not be an indicator of the future European legislation.¹⁴⁰

5.1.1 General discussion in literature

As mentioned above¹⁴¹, the European Commission believes that creditors nowadays are more interested in other aspects that are relevant to solvency, such as cash flow, rather than the share capital. Kraakman et al. also writes that *“It seems unlikely that the minimum capital requirements provide any real protection to creditors, as a firm’s initial capital is likely to be long gone if it files for bankruptcy”*¹⁴².

Given that the capital provided can be used up within a short time after the company has been formed, minimum capital requirements might not inform creditors about the assets of the company, except perhaps during a short period of time.¹⁴³

Schön suggests a mixture of the various concepts concerning creditor protection in the share capital point of view. Statutory rules on the provision and maintenance of the company’s capital and individual credit agreement are not mutually exclusive. They can complement each other. By specifying a certain share capital the founders declare that they are willing to provide a certain amount of assets. A first signal of creditworthiness is thus established

¹³⁹ Siems et al, page 3.

¹⁴⁰ Siems et al, page 9.

¹⁴¹ See CHAPTER XXX

¹⁴² Kraakman et al, page 131.

¹⁴³ Schön, page 437.

which might facilitate access to more capital from investors, who then might enter into individual agreements with the company.

The question concerning transaction costs thus sum up with if it should be helped by legislation or handled by the free market. In Sweden, the legislators strive for the legislation to help minimize transaction costs, at least for smaller companies where 50.000 SEK is enough guarantee for a creditor or supplier. In other countries, such as the U.S., the creditors and suppliers are believed to know best themselves what they need in order to give credit or sell goods. The critical question is how well creditors are able to deal with the issue of transaction costs on their own.¹⁴⁴

Mulbert and Birke makes the following remarks when discussing share capital in the aspect of creditor protection:¹⁴⁵

- If share capital rules really did provide benefits to creditors, creditors would presumably pay for them in form of lower risk premiums demanded from corporations.
- If share capital rules does not provide any benefit to creditors, but were costly to firms, one could expect that there would be incentives for firms under the scope of the share capital regimes to minimize the harmful effects by choosing the absolute minimum capital required. However, it has been shown that firms choose share capital figures significantly higher than the minimum requirement.

Disclosure obligations are another way of protecting creditors, since they help creditors to determine the creditworthiness of a company.¹⁴⁶

When discussing Director's duties it is possible that they protect creditors. In continental Europe directors not only have to focus on the interest of the shareholders but also have to balance them with the social and financial interests of employees, consumers and creditors. Also elsewhere, when insolvency threatens, creditor protection comes into the foreground. Directors may be obliged to take creditor interest into account, to file for bankruptcy or to refrain from entering into undervalue transactions or other operations. If directors violate these obligations, they may be personally liable.¹⁴⁷

A large part of creditor protection is the insolvency law of the country. It may give creditors a right to take part in insolvency proceedings, how to deal with the relationship between different creditors and give creditors the right to challenge payments made by the company to other creditors (or shareholders) shortly before the insolvency.¹⁴⁸

Prof. Enriques and Gelter has a very clear view of the minimum capital requirement and writes that:

¹⁴⁴ Enriques and Gelter, page 7.

¹⁴⁵ Mulbert and Birke, page 13-14

¹⁴⁶ Siems et al, page 5.

¹⁴⁷ Siems et al, page 4.

¹⁴⁸ Siems et al, page 5.

“The merits of minimum capital requirements in actually protecting creditors are doubtful (...). Even supporters of the legal capital requirement seem to concede that their function does not lie in protecting creditors from the risk of substantial losses resulting from an unfavorable business development, but rather in signaling seriousness to the market, thus erecting a barrier against the creation of corporations with an unreasonable amount of backing by shareholders.”¹⁴⁹

5.1.2 Adjustable and non-adjustable creditors

Adjustable creditors can make use of the possibilities provided by the applicable contract law in order to protect themselves. Moreover, contractual partners often ask for additional protection but they may also depend on the property law of the country in question. In the latter case, the important thing is that the supplier may retain title of the goods until full payment. When it comes to enforcement, some security interest allows self-enforcement; other cases may be dependent on court proceedings or law enforcement. In some special cases, debtors may also face criminal sanctions, e.g. due to fraudulent behavior.¹⁵⁰

When it comes to weak creditors, maybe these groups are not as helpless as they might appear. It is important to notice that to this group of creditors the liquidity of the debtor is the primary focus of attention, not so much the debtor company's situation according to its balance sheet. In this era of modern technology, reliable information regarding the debtor's history of meeting credit obligations may be quickly obtained. Also, many trade creditors will be able to retain title of the goods they provided to the debtor as collateral for their trade credit. These weak, but by definition adjustable, creditors might further be able to free ride on many of the restrictions that the stronger creditors can impose by way of covenants or credit agreements.¹⁵¹ However, Schön¹⁵² believes that the argument that such creditors are only interested in the present liquidity of the company is unconvincing since in times of crisis, also tradesmen and service-providers have to wait a considerable amount of time before their claims are satisfied. To free ride on stronger creditors might not be a solution, since these creditors often make new individual agreement when the debtor company is in a crisis. Violations of credit covenants typically causes the debt to come due sooner than it otherwise would.

For non-adjustable creditors (primarily torts) the case is a bit different from the weak creditors'. They are not able to take the debtor company's financial situation into account before becoming a creditor. The overriding risk that these creditors face is default and insolvency of the debtor company.¹⁵³ Some authors¹⁵⁴ compare the risk with any risk created when doing business with a natural person, since the assets of a natural person are as finite as those of corporations.

¹⁴⁹ Enriques and Gelter, page 4.

¹⁵⁰ Siems et al, page 3.

¹⁵¹ Mulbert and Birke, page 11.

¹⁵² Schön, page 8.

¹⁵³ Mulbert and Birke, page 12.

¹⁵⁴ Mulbert and Birke, page 12

With regard to these non-adjustable creditors, the minimum share capital requirement might only be of symbolic importance. This is because neither legislator nor the responsible authorities are able to determine the amount of capital necessary to cover a company's future liabilities, at least not in a reliable manner.¹⁵⁵ A solution to this might be that for particularly risky enterprises it should be mandatory to get insurance.¹⁵⁶

Some creditors, the non-adjusting ones, do not have the possibility to judge for themselves whether a company is a quality-company or not. However, if considering the State's tax claims¹⁵⁷, no company is able to finance its commencement of operations solely on unpaid tax claims, since these claims do not arise until taxable events take place in the course of business. Thus, the initial finance will come from adjusting creditors who hopefully have screened the company before financing it. The point when tax claims are used to finance a business may be when the financial difficulties emerge. Unpaid tax money may be used to finance the continuation of operations after the point when the company should have been liquidated. At this stage, most often also the equity capital is lost. Thus, a minimum share capital requirement is irrelevant to the State as a tax creditor.¹⁵⁸

The argument that the creditor protection rules might be seen as a standard contract is also under debate. Some authors mean that today's rules do not affect the contracts since the creditors have a tendency to agree on other protection than the one given through legislation.¹⁵⁹

5.1.3 Transaction costs

An argument in favour of a minimum share capital is that the transaction costs will increase if the requirement is removed. This would be because banks, creditors and suppliers will need some kind of guarantee that the company will be able to pay its debts in the future. Transaction costs will thus increase since these stakeholders will need to examine their business partner and possibly create more elaborate contracts regarding securities and other special terms.

Individual agreements between creditors and the company might however be far better suited to handle the financial needs of individual creditors, than general rules on the provisions and maintenance of capital. When it comes to interest rates, risks, and that fact that figures used are based on the time when the credit is extended, not when the company was formed an individual contract is probably the best one to regulate the specific business transaction.¹⁶⁰

¹⁵⁵ Schön, page 6. As examples Schön mentions liabilities arising from product liability judgments or environmental torts.

¹⁵⁶ Schön, page 6 or Armour, page 8-9.

¹⁵⁷ Since the State's tax claims are often used as an example of a non-adjusting creditor.

¹⁵⁸ Armour, page 9.

¹⁵⁹ Sacklén, page 163f

¹⁶⁰ Schön, page 7.

That U.S. bond covenants contain restrictions on distributions that UK bond covenants do not could possibly mean that firms in the UK are saved transaction costs by the share capital rules. However, some statements from large UK creditors that the legal capital of a debtor does not factor in their credit decision point in the opposite direction.¹⁶¹

5.1.4 The debate in Sweden

In Sweden, the debate concerning the share capital as means of a creditor protection have been active for many years. In 1994, Sacklén concluded that the share capital and capital maintenance rules do have a purpose, however they could be better. He does not however present any suggestions on how to improve the rules.¹⁶² Nerep did not agree with Sacklén in an article also from 1994. He believes that the capital rules have a purpose in protecting weak and non-adjusting creditors and in completing contracts.¹⁶³

Andersson asks himself two questions: The first one is whether the creditors are capable to take care of their own interests and if they are actually doing so. He concludes that they are and for those cases when enough protection is not possible through an individual contract, the rules in ABL are anyway not sufficient. Andersson's second question is what real protection the creditor protection rules in ABL are actually giving. None, Andersson writes and also states that the size of the share capital has no connection to the risks of the business and thus it is pointless as a means of creditor protection.¹⁶⁴ Andersson later suggest that the U.S. model could be applied also in Sweden with good results.¹⁶⁵

In an article from 2006, Skog believes that it is time to remove the minimum share capital requirement for private limited companies. This is because the lack of thorough and substantial analysis concerning these rules. To mean that it functions as an entry barrier in order to stop non-serious entrepreneurs from access to limited responsibility is not an argument since there are other ways of proving seriousness. The share capital must be based upon the shareholders interest, the art and risks of operations and that when giving credit to a company, the share capital is not as important as the company's ability to pay the debt when it is due.¹⁶⁶

The last Swedish author I will mention is Forsebäck who also believes that the minimum share capital rules should be abolished. She also believes that rules similar to the U.S. rules would create a balance between shareholders and creditors. She believes that more disclosure of information on e.g. the company's website would create a fully functional creditor protection system.

¹⁶¹ Mulbert and Birke, page 21.

¹⁶² Sacklén, page 178.

¹⁶³ Nerep, page 553.

¹⁶⁴ Andersson, Kapitalskyddet i aktiebolag, page 21ff.

¹⁶⁵ Andersson, Det nya aktiebolagsrättsliga borgenärsskyddet – rättspolitiska funderingar, page 85.

¹⁶⁶ Skog, page 72.

That way, the creditor would have access to credit ratings and other similar information.¹⁶⁷

5.2 The status of the AB

5.2.1 Introduction

If one find it important that the AB uphold its status as a trustworthy, serious company, there should definitely be ways to ensure that the company is actually serious. The European Commission recognizes this issue in the SPE Statute – The Commission’s Draft. The Commission mentions that SMEs are also hindered in their cross-border development by the lack of trust in certain foreign company forms in other Member States. This problem exists mainly in relation to the less widely known company forms.¹⁶⁸

It has at times been quite hard to find information regarding how other countries look upon the status of their limited liability companies. However, by studying the legislation, explanatory material regarding the different company forms, literature and articles I conclude that most European countries and the EU find it very important that their limited liability company form is perceived as a serious one and is not used for illegitimate purposes.

5.2.2 The share capital as a signaling instrument

As quoted above, professors Enriques and Gelter believes that the merit of the minimal capital requirement is that it is signaling seriousness to the market.¹⁶⁹

Mulbert and Birke are no strangers to the idea that the share capital rules may serve a function by providing a valuable signaling device for corporations to improve their position in the credit markets. They also believe that this explanation might equally apply to the minimum share capital required by law, especially since the founders are free to choose whether to risk the stipulated minimum amount. In this way the founders are signaling that they have a certain degree of optimism for the company’s success, even if they opt for the minimum share capital required. Therefore, when shareholders make their contributions, there is reason to believe that they are convinced that they will get some sort of return on their investment.¹⁷⁰

It is not clear whether creditors actually perceive equity contributions as a signal of confidence or whether they interpret them differently. And while financing the corporation with additional equity still might show that the shareholders are confident about the business prospects, so would debt financing. Debt financing would possibly signal that the firm is doing well is able to repay larger amounts of debt and that the probability of bankruptcy has decreased. By using external debt financing, the company would also signal

¹⁶⁷ Forsebäck, page 215f.

¹⁶⁸ SPE Statute – The Commission’s Draft, page 8.

¹⁶⁹ Enriques and Gelter, page 423-424.

¹⁷⁰ Mulbert and Birke, page 19-20.

that a third party believes in the business. Also to be taken into account is the fact that a shareholders' contribution might simply signal that the company cannot get financing from a third party.¹⁷¹

Facilitating access to limited liability may result in would-be-entrepreneurs coming forward with more marginal projects, in terms of quality. If these companies will be financed depend on the ability of private creditors to determine the prospects of the company in question.¹⁷² Even with a minimum share capital requirement of e.g. one euro, an entrepreneur may always credibly signal the quality of his or her (future) company, e.g. by committing personal funds to the company or by standing guarantor for the company's debts.¹⁷³

Mulbert and Birke summarizes the discussion concerning the share capital rules as a signaling instrument with saying that it is not very likely that the capital raising and maintenance rules offer firms a useful signaling instrument. However, if the share capital rules were to serve as a basis for shareholder signaling by way of choosing a certain amount of legal capital, there might be reasons to believe that they could not be easily replaced by private contracts.¹⁷⁴

5.3 Capital maintenance

The restrictions of distributions imposed on firms are at the core of the share capital rules and the share capital further has some importance when it comes to having control of a company's finances. This control is obviously important for creditors, but also for employees, owners, suppliers and others doing business with the company.

Once a corporation has become insolvent, the share capital rules do not provide any protection to creditors, because in the event of insolvency (at least under the balance sheet test) by definition there is little or no equity capital left. Share capital rules can then only reduce creditor costs from insolvency, if they provide and preserve an "equity cushion".¹⁷⁵

Even in a company with high initial equity capital, there is no guaranty that the capital is available to creditors at any other point in time other than at the time of registration. It cannot insure creditors against the loss of capital because of business reasons or bad management performance.¹⁷⁶

In Sweden, this control is primarily done by a special balance sheet and rules regarding dividend. In other countries, different kinds of balance sheet tests are necessary or the matter is regulated in insolvency law.

When it comes to dividend, no changes in ABL should be necessary. If 17:3 ABL is respected, a company cannot pay dividend unless it is defensible when

¹⁷¹ Mulbert and Birke, page 20.

¹⁷² Armour, page 8.

¹⁷³ Armour, page 8.

¹⁷⁴ Mulbert and Birke, page 21.

¹⁷⁵ Mulbert and Birke, page 14. With the term equity cushion, the authors refer to a buffer.

¹⁷⁶ Mulbert and Birke, page 15.

considering the art, extent and risks of operations. This rule should of course also apply to companies with a very small or no share capital.

Furthermore, we have the construction of wrongful trading to consider. This construction brings a responsibility to owners if they continue to do business knowing that their company is insolvent. “Wrongful trading” is however a bit complicated since it brings difficult evidence situations. When it comes to Sweden, the same problem arises when it comes to deciding the time when the management should have realized that they need to create a special balance sheet.¹⁷⁷ The Swedish rules regarding responsibility at capital losses differs from wrongful trading since it is not related to a test in order to decide if the company risks insolvency or if the capital loss is strictly related to the relationship between the company’s total equity capital and registered share capital. The Swedish rules might mean that the Director’s duty to take the creditors’ interests into account applies later than if the duty is connected to a risk of insolvency.¹⁷⁸

The system of capital maintenance cannot protect the company’s capital against losses incurred in the course of business. However, it can protect the company’s capital against opportunism on the part of shareholders who might be tempted to strip the company of its assets once the company has incurred liabilities towards third parties.¹⁷⁹

I have not earlier mentioned Finland, but when a Finnish company’s share capital is negative, the company has to make a report of this and the status of the company is made public, so that all the affected parties can see it.¹⁸⁰

Because of the small size of the required minimum capital, the creditor protection in regards to distributions is negligible in any but the smallest firms. In larger corporation, using the minimum share capital, shareholders are still able to pay out an amount of assets that leaves only an equity cushion that is very small in relation to the business operations. However, analyses of bond covenants show that creditors prefer to relate the permissibility of distributions to the real (not accounting) earnings of the corporation.¹⁸¹ This brings us to the discussion regarding the balance sheet test versus the suggested solvency test.

5.4 The balance sheet test or the solvency test?

The balance sheet test means that for a distribution to be lawful it must be less than or equal to the surplus of assets over liabilities, treating share capital as a liability. Thus, the company must have assets equal to its share capital when paying dividends. According to the Second Company Directive, there is usually no room for any intermediate managerial appreciation, appraisal or adjustment of the accounting result to take account of prudential judgment. However,

¹⁷⁷ Sandström, page 333.

¹⁷⁸ Dotevall, page 892.

¹⁷⁹ Schön, page 9.

¹⁸⁰ Dotevall, SvJT 2006, page 896.

¹⁸¹ Mulbert and Birke, page 15.

since the Directive sets a minimum requirement only, the Member States may add rules to make sure that dividends are not being paid on the mere basis of a balance sheet.¹⁸²

The balance sheet test has been criticized since the balance sheet, and accounts in general, are not designed to determine the amount appropriate for distributions. Accountants struggle to summarize the infinite diversity of business in a set of comparable numbers. It might be meant to be read with a Director's report and/or cash-flow statements. Accounts are also a single snapshot of a point in time.¹⁸³

The idea of the solvency test is to impose conduct or behavioral standards and procedural hurdles at the time of distribution decisions to ensure that commitments were not entered into without appropriate assurances that they would not unduly endanger solvency. The role of the share capital would not be to ensure that there is enough capital in the company. The security would be achieved by requiring an assurance of ongoing solvency.¹⁸⁴

When discussing the solvency test, three issues should be addressed:¹⁸⁵

- How to guarantee the accurateness of a solvency statement.
- Whether market values or book values should be used.
- Whether one should demand that the relevant values have consistently been used by the company in its financial statements.

In the SPE Statute, a balance test is required and a solvency test voluntary. It is up to the different Member States to decide which system they wish to use.

5.5 The minimum amount

In Europe, there have been an interesting couple of years where many countries have lowered their required minimum share capital. Sweden chose to reduce the share capital from 100 000 SEK to 50 000 SEK in 2008 and it was discussed that it should be lowered to 20 000 SEK or removed completely. The reasons for the chosen amount are stated in the second chapter but were primarily that a reduction to less than 50.000 SEK would increase the demands from creditors for securities, capital contributions and information. The Inquiry also believed that it was an appropriate amount out of the perspective that some creditors cannot make individual deals with the company, that it would function well as a general barrier to entry and that the lower the capital

¹⁸² Rickford, page 4-5.

¹⁸³ Rickford, page 19-20. For a reader very interested in accounting and balance sheet tests, Rickford presents four types of balance sheet tests in his article.

¹⁸⁴ Rickford, page 7. A company is solvent when we can predict with sufficient certainty that it has, or will be able to generate, sufficient cash to meet all its obligations and other losses of value over time, according to Rickford, page 23. Rickford also mentions that there is a natural inclination to define solvency in terms of an excess of assets over liabilities, but that this is a too account-based definition.

¹⁸⁵ Schön, page 10.

requirement is, the greater is the risk of the company entering into an involuntary liquidation situation which should be avoided.¹⁸⁶

Schön firmly states that there is no meaningful link between the financial needs of an individual enterprise and the amount of share capital prescribed by statutory law. Further, this is not due simply to the fact that the diversity of existing corporations necessarily prevents lawmakers from tailoring share capital requirements to fit the financial needs of the individual company. This is also a generally accepted fact that one cannot make any objective statements concerning the extent to which a company should be financed by means of equity rather than debt.¹⁸⁷

Mulbert and Birke write about a seriousness test in regard to the Second Company Directive:

“It can be argued that the requirement to post a legal capital will prevent the formation of corporations whose business lacks any potential for success. In other words, it would make it expensive to form a corporation without a serious business purpose. (...) Thus, the legal capital regime may serve the function of a seriousness-test before the formation of the corporation, but it is not a very tough test.”¹⁸⁸

The mere existence of the corporate form with its prevalent feature of limited shareholder liability may serve as an incentive to carry out dangerous, accident prone activities through a, maybe undercapitalized, corporation. The same risky activity could be carried out by a natural person with insufficient assets to cover potential future liabilities. No matter which, a tort victim would be left with only one debtor unable to repay its debt. The problem is therefore not a problem peculiar to corporations, but simply a general problem of the creditor / debtor relationship.¹⁸⁹

A minimum share capital requirement imposes an entry price for limited liability. The effect of such a restriction is most likely to be felt by small firms. For these firms, usually owner-managed, limited liability is not used to reduce risk bearing costs by permitting shareholders to diversify, as it is for listed companies. Rather, the principal benefit brought by limited liability is probably the reduction in risk it offers to entrepreneurs. The willingness of marginal individuals to engage in entrepreneurial activity appears to be affected by the actual or perceived risks of such endeavor.¹⁹⁰

5.6 The future in Europe

The most traditional and popular justification for harmonization of EU company law is that EU corporate law is needed to avoid the race to the bottom that would be a result of Member States' unchecked freedom to regulate (or not regulate) corporations as they wish.¹⁹¹ However, many

¹⁸⁶ SOU 2008:49, page 22

¹⁸⁷ Schön, page 5.

¹⁸⁸ Mulbert and Birke, page 14.

¹⁸⁹ Mulbert and Birke, page 12.

¹⁹⁰ Armour, page 8.

¹⁹¹ See e.g. Enriques and Gatti, page 947.

opponents of the European share capital rules point to the U.S. and the practical elimination of share capital rules there.¹⁹² If comparing the EU to the U.S. where most of the companies are incorporated in Delaware, scholars seem to disagree whether Delaware's primacy is a good or a bad thing. Those who believe that it is a *race to the top* hold that companies choose to incorporate in states where the rules maximize their value through a mix of shareholder protection and deference to management's business judgment. The *race to the bottom* believers counter that states create company law to accommodate only the interests of those who get to decide where to incorporate and the result is weak shareholder protection.¹⁹³

Enriques and Gatti writes that since it might be impossible to predict what will prove to be attractive for companies, the EU as the harmonizing authority will have to regulate either the potential ones that they can see or try to ban all possible attractive features. This road will probably lead to massive legislation and a high degree of inflexibility.¹⁹⁴ How do you create a legislation that suits all kinds of corporations? The conclusion, according to Enriques and Gatti, is that in order to prevent a race to the bottom, harmonization would decrease the degree of flexibility in management and governance.¹⁹⁵

Possibly the EU has two ways to go. It can either expand the scope of legal capital rules contained in the Second Company directive or move in the opposite direction and propose the complete elimination of legal capital rules, even in regard to public limited companies. The first alternative would mean that the EU could prevent firms from circumventing the legal capital rules of their local jurisdiction by incorporating in another Member State.¹⁹⁶

The public limited European Company is not a success and the comparison of the three SPE drafts¹⁹⁷ shows how difficult it is to harmonize instruments regarding e.g. creditor protection in the area of company law. Many stipulations of the SPE statute which were supposed to be generally applicable in all Member States became more and more diluted during the negotiation process, with the result that in the Presidency Compromise the formerly harmonized issues such as the minimum share capital requirement finally became subject of law in the individual Member State.¹⁹⁸ Further, under all 27 legal systems and countries that are involved in the EU, a domestic form of private limited company exists, which may compete with the SPE. To avoid such a competition, it is possible that each Member State tries to transfer as much of its own law into the national SPE Statute as possible.¹⁹⁹

¹⁹² Mulbert and Birke, page 3.

¹⁹³ Enriques and Gatti, page 941.

¹⁹⁴ Enriques and Gatti, page 951-952.

¹⁹⁵ Enriques and Gatti, page 952.

¹⁹⁶ Schon, page 4.

¹⁹⁷ The Commission's Draft 2008, the EP Draft 2009 and the Presidency Compromise 2009.

¹⁹⁸ Siems et al, page 11-12.

¹⁹⁹ Siems et al, page 12.

However, the EU had managed to harmonize some legislation which affects company's doing business within the EU. Under the regime of Rome I²⁰⁰ the main principle in international contract law is still the autonomous choice of law of the parties involved. If the parties have not included a governing law in their agreement, Rome I provide several options depending on the matter of the contract.²⁰¹ Also Rome II²⁰² set up a unified regime to determine the law applicable to non-contractual claims. Normally, the law of the Member State where the creditor has its residence will be applicable. This unification has strengthened the position of creditors of non-contractual claims by mitigating the problem of conflict-of-law rules in different Member States.²⁰³

Professors Enriques and Gatti concludes that even if harmonization can be justified in theory to correct market failures that the member States are either unwilling or unable to correct themselves, and provided that the new harmonized rules would make society better-off, there is no reason to believe that EC institutions are any better positioned than national lawmakers to tackle market failures.²⁰⁴

²⁰⁰ Council regulation (EC) No 593/2008, for contractual obligations incurred after 17 December 2009.

²⁰¹ Siems et al, page 12.

²⁰² Council Regulation (EC) No 864/2007, for non-contractual claims incurred after 1 January 2009.

²⁰³ Siems et al, page 13.

²⁰⁴ Enriques and Gatti, page 939-940.

6 Final discussion and suggestions

6.1 In general

Should Sweden keep the regulation regarding the minimum share capital requirement as it is or should changes be made?

The above was the question that I asked myself in the introduction and the analysis of this question is at the heart of the purpose with this thesis. Which way should Sweden choose to go? This chapter will primarily discuss the function of the share capital in Sweden using the examples from other countries above. I will also discuss some of the principles in general since this is relevant also in the Swedish context.

When deciding upon this subject to write my essay on, I was sure to find strong and deliberate arguments from the legislators on why we have a minimum share capital requirement in Sweden and why the level is set at 50.000 SEK for a private limited company. However, I have found that this is not the case. Not even the legislators know why the amount 50.000 SEK is the appropriate amount. The Inquiry's comment that creditors will be more likely to demand special securities or contracts if the amount is less than 50.000 SEK is taken from nowhere.

6.2 Seriousness and signals

What is important when making sure that an entrepreneur is serious? According to Swedish legislative history, an entrepreneur is serious when he or she is willing to commit capital to his or her company. I find that I come to think of other ways as well, such as paying taxes on time and properly manage economy and book-keeping. To have a third party, such as an auditor or a bank, saying that everything is according to rules. To disclose important information voluntarily and make it easy to access or to make sure that a serious third party believes in your business idea.

I have a more difficult time accepting that smaller Swedish companies no longer need an auditor than I have accepting a removal of the rules of a minimum share capital and I believe that the abolition of accountant requirement for smaller companies has led to much larger transaction costs than an abolition of a share capital requirement will.

To me, a share capital does not necessary prove that you are a serious businessperson. You are willing to invest 50.000 SEK in your company, but what does that mean? For some people 50.000 SEK is a very large commitment, for others it does not mean much. That a third party, such as a bank, is willing to invest in the company would mean more to me since this bank will have tested the business idea. Obviously, third parties do finance many of the smaller companies already today, but then usually by giving the

loan to the person in question and not to the company. In my view, debt financing would signal a trustworthy company much more than a share capital.

However, none of the countries mentioned in this thesis allows debt financing when forming your company (of course it is allowed that a person takes a loan that is used to finance the company – but this is not the same thing) and probably the market wouldn't be too interested in giving loans to a limited responsibility company with no assets. But as a signaling instrument, I find debt financing very credible.

I am also very interested in the concept of mandatory insurances. For companies dealing with large amount of consumer capital, such as building contractors, this would be an interesting way of protecting the consumer's money. Obviously, it would not encourage more people to start this kind of companies, since the insurance would probably be quite costly. But it is an example where the share capital has no meaning (e.g. 50 000 as share capital when building a private home for three million), where the creditors (in this case the consumer) are adjusting but also mostly very weak and where the consequences of a company not paying its debts (or performing work they have been paid for) might be of a huge consequence for the individual consumer. Let me conclude by stating that this insurance would only be for companies dealing with private consumers and, in relation to private consumers when larger amounts of money are involved.

6.3 Creditor protection – a believable argument?

I believe that the free market protects itself best and that creditors and suppliers should not be too protected by legislation, but be free to themselves decide how a contract should be drawn up. Thus, I also believe that the market operators such as companies, banks and customers are very well suited to decide on their own how to run their business and which risks to take. Consumers should be protected and today we have, at least in Sweden, special laws concerning this consumer protection. Other groups that deserve protection are of course employees that sometimes have a hard time to control or affect the company and their own situation. As we have seen in the US and the UK, creditors are fully able to take care of themselves.

I am also quite sure that no bank gives out loans to a company simply because the company has a share capital. Other markers such as turnover, cash flow or how the bank sees the company's future is of greater importance, which is also the opinion of the European Commission and the Swedish government.

As has been mentioned above, one must differ between adjustable and non-adjustable creditors and weak and strong creditors. But we have also seen that the arguments for protecting these creditors via the share capital are not complete. This since if a company is in a financial crisis, the share capital will be long gone. Personal responsibility for board members only apply if they

have been negligent somewhere in the process and if this is the case the members are still only responsible for debts created after that critical time.

To replace the balance sheet test with a solvency test seems very appropriate. As mentioned by several authors, the book-keeping are not meant to make business decisions, the people are. When using the balance sheet test, the numbers decide about e.g. dividend, when actually companies are hiring experiences professionals to make exactly that type of decisions. With the solvency test, their business judgment would be allowed more sway. It would also allow for more capital protection, since it is not allowed to pay dividends even if the numbers seem to approve of it, if a director should know better.

Sweden should also look at the concept wrongful trading, that was actually suggested as a common standard by the EU once. By using this legal construction, management and others could be responsible for a company's commitments that were made after the person in question understood that there was no reasonable prospect that the company would avoid entering into insolvent liquidation. Because of wrongful trading, it has become very important for managers and others in a leading position to keep themselves informed about the company's finances and book-keeping. The rule has also been said to prevent that no company is created with too little capital. I do not completely buy that argument since the disadvantage of the wrongful trading, as with many other company issues, are to actually provide evidence that wrongful trading is at hand.

To conclude the discussion concerning share capital as a means of protecting creditors, I would say that in theory it would work. If the company actually did not touch the share capital even when in a financial crisis, there would be money to use. However, since there need not be any relation between the amount of the share capital and the risks of operations, the total share capital might not even be sufficient to pay one single creditor. In reality, most companies have already used up the share capital when it is liquidated and sometimes the share capital is gone before even the board understood that the company had serious financial problems. In these cases, the share capital does not work as a creditor protector at all. It is actually quite meaningless.

However, since most authors as well as the Swedish government seem to agree that creditor protection is no longer one of the most important aspects of the share capital, I will leave the discussion at that.

6.4 A price tag on limited liability?

To relate money to seriousness seems completely absurd to me. It would be much better if the company (and the entrepreneur) was controlled in other ways, such as via auditors or the tax declaration. As a suggestion, a company that cannot handle this declaration two times in a row or three times during the same year should not be able to continue to be an AB. If the owners are not able to declare or pay taxes on time, they are not serious enough to deserve protection in the form of limited responsibility. Thus, the owners of such a company should immediately be personally liable for the company's

commitments, e.g. for the entire year. Rules like these are already in existence, both in Sweden and in many other countries, both countries with a share capital requirement and in those without.

The greatest advantage of the AB is that the company's finances are separated from the owners' finances.

I find it very unfair and completely opposite of the goal of the Swedish government, that more companies should be started, that you are actually able to buy limited responsibility. It should be earned.

6.5 Adjusting to the EU

The EU obviously has to be taken into consideration when discussing national Swedish legislation.

What consequences will there be if the SPE company enters into force? As described earlier, it is up to every Member State to decide what the minimum share capital should be, from one euro to 8,000 euros. Sweden, and other European countries thus has a quite interesting choice to make. The national SPE statute may be very similar to the domestic private limited liability companies, thus creating two very similar company forms. Reasons for doing this might be to avoid two competing private company forms. Obviously, if this path is chosen, the SPE company will make a very small impact on the European market. The advantage will be the ability to move between countries but, as we have seen with the SE company, the tax issue needs to be resolved.

If however Sweden were to choose to create two company forms: to keep the AB in its present form and decide that the minimum share capital for a SPE company is one euro, then we might look at an interesting future. The AB could then be primarily for companies wishing to operate within Sweden and the SPE for companies wishing to operate in the EU. That way, there would also be two company forms for entrepreneurs wishing limited responsibility: one with a minimum share capital requirement of 50 000 SEK and another with one euro. However, I find it important not to create a company form which is judged as less serious and the best would be if the share capital requirements were similar, and low, for both companies.

It might be a problem that foreign companies are treated as less serious than Swedish ones in Sweden. To avoid this, there would need to be an information campaign or similar to increase awareness of the SPE and what it stands for.

If there will be a race to the bottom, Sweden will have to make some changes in order to keep up with some other European countries that are much more company-friendly. Sweden has however taken some initiatives by removing the audit obligation for smaller companies and by lowering the share capital requirement. But there is still a long way to go if Sweden wishes to compete with the Ltd in the UK.

6.6 Final remarks

Obviously, the Swedish legal construction becomes quite meaningless if the share capital was lowered to one SEK, and the rules in ABL would need to be changed. It would be quite ridiculous to keep the special balance sheet and be obliged to create such a sheet when the share capital is half on one SEK. Another construction would be necessary and I find the solvency test idea quite appealing. Sweden could also look for guidance in the SPE statute where a balance sheet test is necessary and a solvency test voluntary.

Obviously, the market will not accept to make business, at least not on credit, with companies without a capital. The equity cushion would still be very much relevant, but as a means for business partners to evaluate each other.

I hope that this thesis has presented the reader with other possibilities for gaining real creditor protection, the different attitudes towards transaction costs, other ways of making sure an AB is serious and ways to control a company's finances. I finally hope that the reader of this essay find these ways more reasonable than the minimum share capital requirement and agree that the minimum share capital requirement in Swedish law should be abolished, in the spirit of true entrepreneurship.

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